THE COMMONWEALTH OMBUDSMAN: TWENTY FIVE YEARS ON AND NO LONGER ALONE

*Anita Stuhmcke**

Paper presented at ANU Public Law Weekend, Canberra, 2 November 2002.

Introduction

In 1977[1] the office of the Commonwealth Ombudsman was introduced, its primary aim being to investigate complaints against defective administration by the federal government. Today, 25 years on, the framework of government which the Commonwealth Ombudsman investigates has radically altered. In 1977 the role of government was to provide both policy and services. Today, following the privatisation and corporatisation of many government services, government largely manages and makes policy only.[2]

Government withdrawal from public service provision results in the stripping away of public administrative law. Privatisation and corporatisation of formerly government owned services means that the terms of contracts with private providers are no longer accessible under freedom of information legislation and service recipients may lose the right to seek judicial review of decisions which affect them or lose their right to complain to the Ombudsman.[3] If accountability of non-government service providers is to be maintained in a privatised regulatory environment, new private mechanisms of self review must be established.

One such mechanism is private ombudsman. Privatisation and corporatisation of formerly government owned industries has resulted in the Commonwealth Ombudsman no longer being the only national ombudsman.[4] Today this office shares the title ombudsman with other national private industry ombudsman such as the Telecommunications Industry Ombudsman (TIO), the Australian Banking Industry Ombudsman (ABIO) and the Mortgage Industry Ombudsman Scheme (MIOS).

Given the shared title of “ombudsman” and the fact that the Australian public law ombudsman offices were established in the 1970s,[5] well prior to the introduction of the first national private industry ombudsman in 1989, it is unsurprising that comparisons are drawn between public and private ombudsman. Such comparison has drawn a diversity of responses, including:

* *Senior Lecturer, Faculty of Law, University of Technology, Sydney.*

- *unequivocal acceptance* – reflected in the 1991 Annual Report of the South Australian Ombudsman which stated that the four key criteria to use the term "Ombudsman" are independence; effectiveness; fairness and public accountability.[6] The South Australian Ombudsman considered that the industry ombudsman met these standards.

- *cautious welcoming* – in 1997 Philippa Smith, a former Commonwealth Ombudsman, stated[7] "the recognition of specific industry Ombudsman schemes points to both the desirability of the ombudsman concept in more commercial activities, but also the care that is needed to ensure that standards of independence and integrity are maintained before that title can be ascribed."

- *possible threat* - Sir John Robertson, the Chief Ombudsman of New Zealand, speaking in 1993[8] expressed concern that parliamentary ombudsman run the risk of becoming "staid institutions left with the unwanted pickings of the new specialist ombudsman." Sir John felt that some public ombudsman in Australia may have been marginalised by the trend towards specialist ombudsman, finding it hard to command resources and respect for the quality of their recommendations.

It seems inevitable that comparison of public law and private law ombudsman will result in such equivocal outcomes. The reason for this is twofold. Firstly, even though the term "ombudsman" is used internationally, it is difficult to define. There is no one universally accepted definition or format for the office of the ombudsman.[9] Secondly, it is adverse to those of us schooled in liberal democratic theory to accept that there can be anything but a level of differentiation between the public and private sector.

This paper suggests that the starting point for any comparison of public law and private industry ombudsman should begin from the perspective that both ombudsman are true ombudsman. This allows us to view private industry ombudsman as supplementing and enhancing the office of ombudsman rather than detracting from it. This paper presents this argument for the following reasons:

1. The Australia framework of government has changed. It is therefore desirable that mutated government mechanisms of accountability such as industry ombudsman apply to newly privatised industries such as water, electricity, telecommunications, banking and gas, all of which display characteristics of a public nature such as monopolistic tendencies and which provide essential services.

2. Industry ombudsman are similar to public ombudsman. Industry ombudsman clearly use the public model and apply it to the private sphere. Of course apart from having the essential characteristics of ombudsman there is a broader argument beyond the reach of this paper that the traditional distinction between public and private is difficult to define[10] and/or no longer exists.[11]

3. The courts themselves have treated industry ombudsman as subject to judicial review and as having many of the same characteristics as public ombudsman.

1. A "new" framework of government and a plethora of ombudsman

In Australia, as in most developed countries, the post-World War II expansion of the public sphere was halted and reversed in the 1980s.[12] Publicly owned goods and services have been replaced by private ownership reflecting a movement away from a rights based legislative government interventionist approach towards a belief that market based means of intervention such as guidelines and codes of conduct will provide consumers with a better means of redress.[13]

Under this new framework of government, private dispute resolution schemes such as industry ombudsman have come to play an increasingly central role in resolving disputes. This increased role has occurred both in sheer numbers of schemes available, and in the increase in consumer use of these schemes which has been described as "exponential".[14] For example, it was estimated that in 1997 more than 130,000 consumers relied upon these schemes to resolve disputes; only 4 years later in 2001 just 2 of these schemes – the ABIO and the TIO – were responsible for resolving the same number of disputes.

The key to the introduction and evident success of industry ombudsman lies in the fact that the industries which have been privatised and corporatised lend themselves to the ombudsman model. The uniqueness of the ombudsman concept, of having an institution where a neutral grievance handler is used as a last resort to assist resolution of a dispute, is that it is suited to any situation where administrators make decisions concerning an individual's welfare.[15] Telecommunications and banking are both essential services because they are industries where the interests of the public are capable of being adversely affected by decisions of large corporations.[16] The ombudsman model translates easily into the protection of the consumer against decisions of a powerful industry. Unless there are government requirements placed upon the issuing of the title ombudsman (such as in New Zealand[17]) the key characteristics[18] of the ombudsman institution may be moulded by each country or organisation to suit its unique constitutional, political and social characteristics.[19]

2. Transplantation of public ombudsman to private industry

Given the fact that power is exercised by government over citizens and power is exercised by industry over consumers it is unsurprising that public and private ombudsman are similar. Looked at through a complainant's eyes, the offices bear many common features. They are[20] free; informal; involve little work for the complainant; easily accessible in that complaints can be made for free over the telephone; free of any requirements of pleadings; a good way of finding more out about the decision complained of; faster than other forms of review and may be the only available action for the complainant; not a substitute for the enforcement of rights through the courts.

The similarities extend beyond the complainant's view. Firstly, there is a transplantation of personnel. Former public ombudsman staff the offices of private industry - for example John Pinnock, the current TIO was a former deputy NSW Ombudsman. Deidre O'Donnell, the former Deputy Ombudsman of the TIO is now the Western Australian Ombudsman. Secondly, both public and private ombudsman have a standard setting role. They operate not only to investigate and resolve the

immediate dispute before them but also to improve practices across industry and/or government. Thirdly, ombudsman in both sectors can be seen as acting to legitimate decision-making procedures. The public needs to perceive the decision of government and of industry as legitimate - public ombudsman legitimate government decisions;[21] private industry ombudsman legitimate industry decisions. Additionally, apart from the cross-over of staff and personnel, industry ombudsman share the aims of ombudsman generally - independence, effectiveness, fairness and accountability.[22]

Naturally, the transplantation of public ombudsman to private industry has not occurred without mutation.[23] The most obvious differences are: (1) the limited jurisdiction of the private industry ombudsman; (2) their powers; and (3) the way they are established. With respect to jurisdiction, industry ombudsman have specific jurisdiction over specified areas[24] whereas public law ombudsman are established under an Act that is interpreted broadly by the courts.[25] With respect to powers, the TIO and the ABIO may make binding determinations for payment of monetary amounts upon members[26] whereas the powers of the Commonwealth ombudsman are to report to Parliament. In terms of establishment, industry ombudsman are generally established through a company. The TIO and the ABIO are established through a company limited by guarantee with no share capital. The Memorandum and Articles of Association of the TIO establishes a 3 tier structure - a Council, a Board of Directors and the Telecommunications Industry Ombudsman.[27] The aim is to ensure the Ombudsman is independent from both government and industry interests. It envisages an ombudsman scheme which is an industry funded, non-government and non-profit organization, funded by the industry itself.

3. Judicial review and private ombudsman

Two recent judicial decisions demonstrate the treatment of private ombudsman by courts.

Citipower Pty Ltd v Electricity Industry Ombudsman (Victoria) Ltd[28]

This case concerns a State industry ombudsman. The Supreme Court of Victoria was asked whether determinations made by the Electricity Industry Ombudsman were beyond the contractual power of the Ombudsman under its own Constitution and therefore not binding on the plaintiff. The court in this case found that the plaintiffs had bound themselves voluntarily to the contract constituted by the Constitution and thereby vested jurisdiction of complaints in the Ombudsman.

The court in answering this question likened the Electricity Industry Ombudsman to a tribunal,[29] acknowledging that tribunals are not above the law and stating that it would impose a conclusion which was alternative to the Ombudsman "..only if the determination of the Ombudsman was so aberrant as to be irrational". The court determined that in this case, as the Ombudsman had taken into account the facts, the current law, the legal obligations of the parties and industry practice, the decision she arrived at was not "…so aberrant as to be irrational".

***Australian Communications Authority v Viper Communications Pty Ltd*[30] (Includes Corrigenda dated 1 June 2001)**

This most recent judicial decision concerning a national industry ombudsman resolved constitutional questions concerning the nature of the private industry ombudsman's powers. Sackville J was asked to determine whether s128 and s 246 of the *Telecommunications Act 1997* (Cth) were invalid on constitutional grounds.[31] The primary ground of relevance was whether these sections which required "eligible carriage service providers" to enter into the Telecommunications Industry Ombudsman Scheme were invalid as they purported to confer the judicial power of the Commonwealth on a non-judicial body, the TIO, in contravention of Chapter III of the Constitution.

The respondents, relying upon *Brandy v Human Rights and Equal Opportunity Commission*,[32] argued that, as the TIO scheme was (1) compulsory to join; and (2) could impose binding determinations upon members, it exercised the judicial power of the Commonwealth. The court rejected this argument,[33] determining that there was no judicial power exercised by the TIO as:

1. the determinations of the TIO are not binding in the judicial sense[34] - agreeing with the Australian Communications Authority argument that: [35]

   - the TIO has no power to enforce its determinations. The courts have an opportunity to review the determination, therefore the TIO's determinations are not immediately enforceable nor enforceable in the same sense as those of the Commissioner in *Brandy*. Indeed the discretion of the TIO to refuse to investigate a complaint and the fact that legal proceedings may be instituted by a member to pre-empt the determinations of the TIO and exclude the TIO from hearing the complaint means that the TIO does not exercise judicial power.

   - As service providers are compelled to join the TIO under private not public law instruments (the Memorandum and Articles of TIO Ltd and the TIO Constitution), a determination of the TIO is not the exercise of sovereign power which is a hallmark of judicial power.

2. the TIO is free to create norms to resolve disputes rather than necessarily applying settled legal principles.[36]

Implications and conclusion

Administrative law still applies to private ombudsman

These decisions demonstrate that industry ombudsman come under the supervision of public law and more particularly, administrative law. The legality of the decisions of private ombudsman, like public ombudsman, are subject to review by the courts. Generally, the ramifications of this are on two levels. Narrowly, in terms of the functions of administrative law, the two cases above illustrate that the courts will treat private and public ombudsman as similar for the purposes of ensuring public accountability. Indeed the decisions reflect a movement for industry ombudsman to

increasingly emulate public ombudsman. For example, *ACA v Viper* establishes that the “binding” determinations of the TIO are now identical to powers of the Commonwealth Ombudsman who “…has no power to put her recommendations into action, or compel any action on the part of the relevant individual, department or authority.”[37] More broadly, the application of judicial review to private industry ombudsman may be conceptualised as redefining government power. The courts are clearly prepared to acknowledge that private industry ombudsman, while regulated by private law, belong to a class of private bodies which need to have the legality of their decisions reviewed in the public arena. This tends to lend public law legitimacy to these private dispute resolution schemes, extending the reach of government.

Public and private ombudsman are not identical

Significant differences remain between public and private ombudsman. For example, one is publicity. With respect to public ombudsman an ultimate sanction is to make offenders publicly known. As Phillipa Smith, a former Commonwealth Ombudsman, has said "…the power of an Ombudsman in reality comes from the potential power of embarrassment and the credibility and thoroughness of the work done"[38] and "[A]ll an ombudsman can do then is report the situation and hope the resultant publicity shames the agency into action. Ombudsman have had mixed success with their recommendations - some agencies seem to have no shame."[39] According to Everett this same level of publicity does not happen with the industry ombudsman.[40] Indeed, the annual reports of industry ombudsman are non-identifying in terms of both the complainant and the industry member, whereas the Commonwealth Ombudsman annual report identifies the departments complained about in statistical and descriptive fashion. Clearly, the similarities between private and public ombudsman are finite. Creatures of government policies of privatisation and corporatisation, industry ombudsman must redefine the concept of what an ombudsman means. They are not identical to public ombudsman – however this does not make them something “other” than true ombudsman.

Challenges for the Commonwealth Ombudsman

There is no doubt that the Commonwealth Ombudsman has been affected by the transformation of government and the consequent changes to the public sector. For example, in relation to jurisdiction, the contracting out of government services has raised questions for the office over lack of investigatory powers. While it must be acknowledged that the overall jurisdiction of the Commonwealth Ombudsman has decreased since the introduction of industry ombudsman, this decrease is due to the changing nature of government rather than industry ombudsman themselves. Arguably, the challenges confronting the Commonwealth Ombudsman are not due to industry ombudsman nor the sharing of the title “ombudsman” across a variety of sectors including universities and local councils. Instead, they are the result of larger factors such as government transformation; the lack of funding for the public ombudsman; and the failure of government to act on ombudsman reports.[41]

Traditionally, it has been suggested that classifying industry ombudsman as “ombudsman” will lead to an erosion of the public model. However, there is no reason why the opposite cannot also be true, with the plethora of industry and other ombudsman assisting to raise the profile and public understanding of the

ombudsman office. From this perspective it is possible to conceptualise the private industry ombudsman as reinforcing the success of the Commonwealth Ombudsman through making the concept of ombudsman more widely available and hopefully better understood.

Conclusion

Most public institutions have now been supplemented by non-traditional versions of themselves. For example, in relation to the arms of government, courts are supplemented by tribunals and the legislature is increasingly supplemented by grey letter law,[42] such as codes of conduct. The Commonwealth Ombudsman has proven no exception to this practice.

As Sir Guy Powles, the first New Zealand Ombudsman warned, we should not "…seek too much to measure all Ombudsman by the same yardstick, to form all into the same mould". [43] The last decade in Australia has confirmed that the title and nature of the office of Ombudsman does not fall into one mould. Today in Australia ombudsman exist not only to protect citizens against a government bureaucracy but also to protect consumers against a corporate bureaucracy. This mutation of ombudsman has not always been welcome. However, such an attitude may be largely misplaced as the alternative to private industry ombudsman review of a dispute is usually no review at all. This paper in suggesting that public and private ombudsman be considered true ombudsman is based upon the interests of the individual. In making this suggestion the hope is to promote effective oversight of exercises of bureaucratic discretion (whether it be public government or private industry) for the individual whether they be classified as citizen or consumer. After all this surely is the overriding aim of administrative law irrespective of the existence of a public or private distinction.

Endnotes

1 Created under the *Ombudsman Act* 1976 (Cth).
2 R Creyke & J McMillan (eds), "Introduction: Administrative Law Assumptions…Then and Now" in *The Kerr Visions of Australian Administrative Law - At the Twenty-Five Year Mark* at 22.
3 B Naylor, "Privatisation: a sell-off of public accountability?" <www-pso.adm.monash.edu.au/news/story> (16 April 2002).
4 "Ombudsman have spawned like the frogs in ancient Egypt.": P Birkinshaw, *Grievances, Remedies and the State*, 2nd ed, Sweet & Maxwell, 1994 at 1. This is echoed in Australia see Media release, Commonwealth Attorney-General, 13 June 2001, "Standards for Alternative Dispute Resolution Launched" stating the government's commitment to "…providing alternatives to the Courts, and to providing faster, cheaper, and simpler access to justice".
5 Senate Standing Committee on Finance and Public Administration, *Review of the Office of the Commonwealth Ombudsman*, AGPS, Canberra, December 1991 at 6. This report points out that in the mid 1960s three Australian newspapers had each appointed an ombudsman to review readers' complaints about government agencies, and the Shire of Albert in south-east Queensland also appointed an ombudsman in 1965 (at 7).
6 South Australian Ombudsman (1997) *Twenty-Fifth Annual Report*, Government Printers Adelaide, stating that industry ombudsman meet these criteria at 8; cited in R Douglas, *Douglas and Jones's Administrative Law*, Federation Press, 2002 at 201 fn 19.
7 P Smith "Twenty years of the Ombudsman" in *Twenty years of the Commonwealth Ombudsman 1977-1997*, Commonwealth Ombudsman's Office, Canberra, June 1997 at 1.
8 J Andersen (1995) *The Ombudsman - Some Nuts and Bolts* in RN Douglas and M Jones (1996) *Administrative Law*, 2nd ed, Federation Press, Sydney 146-157 citing D Landa (1994) "The Ombudsman Surviving and Thriving into the 2000's - The Challenge" *Administrative Law: Are the*

States Overtaking the Commonwealth, 1994 Administrative Law Forum, ed Stephen Argument, 91.

9 Internationally there do however exist Codes of Ethics for various Ombudsman organisations, see for example <http://www.ombuds-toa.org/toa _codestd.html>.

10 J Moon, "The Australian Public Sector and New Governance" (1999) 58(2) *Australian Journal of Public Administration* 112.

11 C Sampford, "Law, Institutions and the Public/Private Divide" (1991) 20 *Fed L Rev* 185 at 187. Sampford "laments" the division between public and private institutions in legal thought.

12 S Edgell, S Walklate, G Williams, *Debating the Future of the Public Sphere*, Avebury, England, 1995 at xvi. For a history of the development of the public/private sphere see MJ Horwitz "The History of the Public/Private Distinction" (1982) 130 *University of Pennsylvania L Rev* 1423 (stating it can be dated to the natural rights liberalism of Locke. However, it is the emergence of the market in the 19th century which brings the public/private distinction into legal discourse).

13 "Going Global: A New Paradigm for Consumer Protection" <www.accc.gov.su/contact/warne/warne0001.htm> accessed 28 March 2002.

14 B Slade & C Mikula, "How to use industry based consumer dispute resolution schemes…and why" *NSW Law Society Journal*, Feb. 1998 at 58.

15 HS Doi (1974). Reply. *Conference of Australian and Pacific Ombudsmen*, Wellington New Zealand, 19-22 November 1974, Office of Ombudsman, Wellington New Zealand, 10.

16 These powers have been described as governmental see PE Morris "The Banking Ombudsman-1" (1987) *Jo of Business Law* 131 at 132. For a useful United Kingdom study of private ombudsman see Rhonda James (1997) *Private Ombudsmen and Public Law*, Dartmouth, Aldershot.

17 In New Zealand since 1991 it is necessary to have the consent of the Chief Ombudsman or to have statutory appointment before using the name.

18 These characteristics may vary, see for example <http://www.bioa.org.uk> (4 key conditions are: independence of the Ombudsman from the organisation the Ombudsman has the power to investigate; effectiveness; fairness; and public accountability) or see P Smith "Twenty years of the Ombudsman" *Twenty years of the Commonwealth Ombudsman 1977-1997*, Canberra, 4-5 (independence, jurisdictional criteria, powers, accountability, statements in the public interest, accessibility).

19 J Robertson (1997) "The Ombudsman and the world" in Commonwealth Ombudsman's Office, *Twenty years of the Commonwealth Ombudsman 1977-1997*, Canberra, 66.

20 J Andersen (1995) *The Ombudsman - Some Nuts and Bolts* in RN Douglas & M Jones (1996) *Administrative Law*, 2nd ed, Federation Press, Sydney 146-157.

21 R Tomasic, "Administrative law reform: Who benefits?" (1987) 12(6) *Administrative Law* 262 at 263.

22 In 1999 the Federal Government funded 437 interviews with consumers covering 11 schemes - 5 State and Territory Consumer and Small Claims Tribunals as well as 6 industry-based customer dispute resolution schemes. This survey was based upon 4 of the key principles (2 could not be measured - independence and accountability) from the Benchmarks - access; fairness; efficiency; effectiveness. The report concluded "…that the industry-based customer dispute resolution schemes are working well. A similar conclusion can also be drawn for the Courts and Tribunals." Report by the Commonwealth Department of the Treasury consumer redress study, June 1999 at 26.

23 Each scheme has its own particular, although not unique, style of operation see PAD Bean "A guide to the Private Alternative Dispute Resolution Scheme" (1994) 5(3) *ADJR* 200-203 at 200.

24 For example the TIO receives, investigates and facilitates the resolution of complaints regarding standard telephone and mobile services, directory assistance, billing inconsistent with tariff, (this is consistently the largest area of complaint, in 1999-2000 26.4% of all telephone complaints concerned billing) privacy, fault reporting. There are some aspects of telecommunications that the TIO is not given jurisdiction to deal with, including: content of telecommunications services; systemic issues or telecommunications policy; emergency services; tariff setting; cabling beyond network termination point; complaints between industry members; requests for Freedom of Information; anti-competitive behaviour.

25 *Botany Council v Ombudsman* (1995) 37 NSWLR 357 at 367-8 (Kirby P with Sheller and Powell JJA agreeing).

26 The TIO may make binding determinations of up to $10,000 upon members to pay compensation or to take corrective action and may also make recommendations of up to $50,000.

27 • The Ombudsman maintains independence from government and industry interests through the structure of its board and council. The Ombudsman is responsible for complaint handling and the day to day administration of the scheme. The Ombudsman may only deal with complaints that are within its jurisdiction as set out in the Constitution of the TIO and the Terms of Reference of the ABIO.
- The TIO Board is comprised of up to 8 representatives from companies that contribute funding to the TIO in the form of complaint handling fees. The Board is responsible for the financial management of the TIO but has no influence over TIO complaint handling policies or investigations.
- The reason for the Board's lack of influence is the Council. The Council sits between the Board and the Ombudsman. It is made up of an equal number of representatives from the industry and consumer groups (4 from each group for the TIO and 3 from each group for the ABIO) and one independent chairperson. The Council is responsible for forming TIO complaint handling policy. The equal representation of industry and consumer interests attempts to ensure the ABIO and TIO adopt a fair, balanced and reasonable approach to complaint investigations.

28 [1999] VSC 275.
29 Citing Tadgell JA in *AFL v Carlton Football Club* [1998] 2 VR 546 at 549 stating…"the courts will not discourage private organizations from ordering their own affairs within acceptable limits" .
30 [2001] FCA 637.
31 The respondents argued that they were not obliged to join the TIO Scheme because the sections were invalid as they:
- conferred judicial power of the Commonwealth on a non-judicial body - the TIO
- imposed taxation otherwise than in conformity with s 55 of the Constitution
- acquired property otherwise than on just terms contrary to s51(xxxi) of the Constitution.

32 (1995) VSC 275.
33 The ACA conceded that the "…determinations made by the TIO fell into the 'grey area' of powers that are judicial if entrusted to a court but non-judicial if entrusted to a non-judicial body, such as the TIO". *Australian Communications Authority v Viper Communications Pty Ltd* [2001] FCA 637 at [101].
34 [2001] FCA 637 at [101].
35 The court rejected the ACA argument that the power of the TIO to decline to make a decision indicated non-judicial power. [2001] FCA 637 at [104-105].
36 [2001] FCA 637 at [102].
37 *Chairperson, Aboriginal and Torres Strait Island Commission v Commonwealth Ombudsman* (1995) 134 ALR 238 at 243 (Einfeld J).
38 P Smith, "Red tape and the Ombudsman" (1998) 88 *Canberra Bulletin of Public Administration*, 18 at 21.
39 A Smith, "Why Ombudsman are better than lawyers" (1999) 26(11) *Brief* 42 at 43.
40 D Everett, "Editorial" (1990) 5(10) *Banking Law Bulletin* 213.
41 R Tomasic, "Administrative law reform: Who benefits?" (1987) 12(6) *Administrative Law* 262 at 264.
42 Report of the Commonwealth Interdepartmental Committee on Quasi-regulation *Grey-Letter Law*, 9 September 1999 at xiii-xiv.
43 *Proceedings of the Second International Ombudsman Conference*, Jerusalem, October 1980 p 21 cited in W Haller, "The Place of the Ombudsman in the world community", Fourth International Ombudsman Conference, Canberra 1988, Papers, Commonwealth Ombudsman, Canberra, Australia at 32.