

## Energy in WA Conference 2012

### The role of the Energy Ombudsman and its relationship with regulators, industry and consumers

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#### Introduction

I am delighted to be here today for the 2012 Energy in Western Australia conference. Can I express my thanks to the conference organising committee, and particularly Peter Kolf, for the kind invitation to speak to you. The Australian Institute of Energy Perth Branch, the new Public Utilities Office and the committee should be congratulated on the calibre of program that has been organised.

In this session I am discussing the role of the Energy Ombudsman and its relationship with regulators, industry and consumers. It is my intention, in addition to discussing our principal role, namely resolving consumer complaints, to explore how complaints link to underlying problems and serious or system wide issues, and how the work of various stakeholders assists to reduce these problems and concomitant consumer detriment.

To do so, I propose to examine three issues. The first is to set out a short history of the development of Ombudsmen. Second, I will consider the role of the Energy Ombudsman in resolving complaints before finally going on to discuss the role of the Energy Ombudsman in identifying systemic and serious issues and reducing consumer detriment.

At the outset, I want to clarify that each time I refer to Ombudsmen in this paper, unless otherwise noted, I am referring to industry Ombudsmen such as the Telecommunications Industry Ombudsman, Financial Ombudsman Service or, indeed, Energy and Water Ombudsman and not Parliamentary Ombudsmen. The role of a Parliamentary Ombudsman shares many characteristics with industry ombudsmen. As an officer of the Parliament, however, whose role it is to investigate the administration of the laws of the Parliament utilising the powers of a standing royal commission, the role of Parliamentary Ombudsmen also differs very significantly to industry Ombudsmen, particularly in relation to the capacity to investigate, recommend and achieve, of its own-motion, wide ranging improvements to thematic and systemic problems.

#### The history of Ombudsmen in Australia

I want to start today by setting out a very short history of the development of Ombudsmen in Australia. I do so because the reasons that underpin the establishment of Ombudsmen are, I think, very instructive in understanding their current role.

The history of Ombudsmen is short, but significant in activity. Ombudsmen began operation in Australia just over twenty years ago, with the establishment of the (then) Banking Ombudsman in 1990 and have developed at a remarkable pace since. In fact it would not, in my view, be overstating the case that the institution of the Ombudsman has revolutionised dispute resolution in Australia. Ombudsmen now provide the principal pathway to access to consumer dispute resolution in a number of the major sectors of the Australian economy, including telecommunications, financial services and energy and water supply.

There are many reasons for the growth of Ombudsmen, among them privatisation of public services and a desire to promote industry self-regulatory mechanisms, including industry being encouraged to take responsibility for their own complaint handling.

The growth of Ombudsmen, however, has also paralleled the growth in concern for access to justice and interest in alternative dispute resolution. It is clear that Ombudsmen were conceived, developed (and have flourished) in no small part because of a recognition that traditional justice mechanisms, despite their fundamentally important role in contributing to the maintenance of the rule of law and the provision of high quality resolution of disputes, also had shortcomings for consumers, and particularly low-income consumers, including problems with (1) accessibility, and in particular the cost of dispute resolution; (2) the time taken to have disputes resolved; and (3) the extent to which courts and tribunals were not equipped, or able, to identify thematic or system-wide problems arising from complaints and then refer those problems to agencies such as departments of consumer affairs or regulators who might be in a position to encourage resolution of those problems.

Following directly from this history, we can readily pinpoint the core functions of Ombudsmen, including the Energy Ombudsman Western Australia. We exist principally to do two things:

1. Resolve complaints for residential and small business consumers about energy providers that have not otherwise been able to be resolved between providers and consumers; and
2. From these complaints, to identify serious, systemic and emerging issues (incorporating trends and themes), as well as monitor the outcomes of complaints, discuss these issues with industry and report these issues and outcomes to the industry regulator, the Economic Regulation Authority, and to other relevant regulators as appropriate.

To ensure we are able to do both of these functions effectively, we also undertake outreach, education, liaison and other activities to ensure awareness and accessibility to the Energy Ombudsman. In particular, five years ago we commenced a program to raise awareness of, and access to, the services of the Western Australian Ombudsman and Energy Ombudsman for regional and Indigenous Western Australians. As part of the Program we visit regional and remote communities at least once per year, with our most recent visit in August to the Pilbara. These visits have redressed an historic underrepresentation in complaints for regional and indigenous Western Australians.

## The role of the Energy Ombudsman in resolving complaints

I now want to turn to the first of our principal roles and our principal interaction with consumers, namely, the receiving, investigating and resolving of complaints. The Energy Ombudsman Western Australia is structured in a very typical way for an Ombudsman, in that it is a company limited by guarantee owned by its members, who are the utilities providers, with a Constitution, Charter, Board, Ombudsman and staff. Once again, like most other Ombudsmen schemes, the Board consists of an independent Chair and equal numbers of consumer and industry representatives. In Western Australia, however, the Energy Ombudsman role is undertaken by the Parliamentary Ombudsman, which can be contrasted with other jurisdictions, such as Victoria and New South Wales, where the Energy Ombudsman is a stand alone organisation.

This model is not entirely unique, however, as, for example, the Tasmanian Parliamentary Ombudsman also undertakes the role of Energy Ombudsman and the Commonwealth Parliamentary Ombudsman undertakes an industry Ombudsman function as the Postal Industry Ombudsman. The principal reason for this arrangement is simple - it allows for a relatively small Ombudsman scheme to draw upon expertise across a range of relevant areas and achieve a level of scale and scope efficiencies that would not be achievable if it was a stand alone organisation.

The Energy Ombudsman can receive complaints from residential consumers and small business consumers about both electricity and gas providers. An informal process is a key part of our accessibility and complaints do not need to be in writing and are typically made by phone call. The matters that we can investigate are wide and include the provision or supply of (or the failure to provide or supply) gas or electricity services, billing disputes, the administration of credit and payment services in the circumstances of a particular customer, the recovery of debts owed or allegedly owed by customers whether by Members, their agents or factors, disconnection and restriction, payments to customers for breaches of prescribed electricity service standards, marketing of gas or electricity, the way in which a Member has exercised its statutory powers in relation to land or other property or in relation to neighbouring land or other property.

There are, however, some matters that are not in my jurisdiction, namely, the setting of prices or tariffs or determining price structures, commercial activities outside the company's licence to supply energy, the content of Government policies and complaints under consideration by any court or tribunal.

Prior to the Energy Ombudsman considering a complaint we generally require a consumer to have first allowed the member company an opportunity to resolve the complaint. This is the case for virtually all Ombudsman schemes. There are a range of reasons for this, including, that it achieves early resolution of cases at least cost, helps to preserve company/customer relationships which are generally of an ongoing nature and encourages industry responsibility for complaints management.

We have wide powers to investigate complaints and when determining complaints we consider the law, including the new Australian Consumer Law, industry specific regulation, including licenses, electricity and gas codes, as well as common law and particularly contract law. It is important to note, though, that the Energy Ombudsman

does not determine cases based on the law alone, but also considers what constitutes good industry practice and what is just, fair and reasonable in all of the circumstances. We also consider whether matters were within, or beyond, the reasonable control of members.

The Energy Ombudsman, like all Ombudsmen schemes, places a very high emphasis on the early resolution of complaints, which is, as I have said earlier, very much a reflection of the reasons in part why Ombudsmen were established in the first place. We resolve more than three quarters of the complaints we receive in less than 10 business days and do so at a cost that is significantly less than traditional justice mechanisms.

It is important to acknowledge that these rates of early resolution would not be possible without the strong cooperation and active involvement in complaint resolution of member companies. Energy companies are the members and owners of the Energy Ombudsman scheme, provide it with its funding and are involved in its governance through membership of its Board. Energy companies are, first and foremost however, critical to the resolution of complaints.

Beyond the goodwill that is evident to both avoid and resolve disputes from member companies, and the commercial good sense of early complaint resolution, the Energy Ombudsman Western Australia, like most Ombudsmen schemes, has an escalating pricing structure for the handling of complaints. As complaints age, they advance through stages, each stage of the complaint priced higher than the previous. This structure introduces efficiencies by ensuring that the true costs of complaint handling are reflected and directed towards the member responsible for those costs and also creates an incentive structure for member companies to resolve complaints as early as possible.

Although the majority of cases are resolved at a very early stage, we do have the power to make, like a court or tribunal, a determinative finding that is binding on the member company if a dispute is unable to be resolved. The Ombudsman can, among things, order the payment of compensation, the provision of services, the amendment of charges, corrective or other work to be undertaken, correcting records or, generally, to direct a Member to do, or cease to do, an act.

These determinative findings do not, however, bind the consumer, who can elect to reject the determination and pursue the matter in court.

In no small part a reflection of the positive approach taken by the member companies of the Energy Ombudsman Western Australia, I have not been required to make a single determination during my term as Energy Ombudsman. If made, these determinations are capped at \$20,000 (or \$50,000 by the agreement of a member company).

In 2010/11 we received more than 4000 complaints, the bulk of these relating to electricity. As is the case for most Ombudsman schemes, the majority of complaint issues relate to billing. In all cases, the Ombudsman has the discretionary power to decline to investigate a complaint if in the opinion of the Ombudsman the complaint is frivolous or vexatious or was not made in good faith, the complainant does not have a sufficient interest in the subject matter of the complaint, further investigation is not

warranted or the dispute is more appropriately or effectively dealt with by any other body. Generally, a complaint must have arisen from events which became known to the Complainant less than one (1) year prior to the complaint being lodged.

Finally, it would also be typical to describe the Energy Ombudsman as free and, indeed, for a consumer using our services there is no direct cost, discounting, of course, any time cost. As preeminent economist Milton Friedman reminded us, however, there is no such thing as a free lunch, and it is important to remember that there is no such thing as a free Ombudsman! The cost of any Ombudsmen scheme is, of course, passed through to consumers. It is for this reason, among others, that Ombudsmen have an obligation to operate at least cost for the services they provide.

Before turning to consider systemic and serious issues I pause to mention one matter of jurisdiction that may be of interest to conference delegates. The recent *Water Services Act 2012*, will create a new office of Water Services Ombudsman. It is proposed that this function will be undertaken by my office such that we would become the Energy and Water Ombudsman. It is currently anticipated that the Water Ombudsman function will commence in 2013.

### **The role of the Energy Ombudsman in identifying systemic and serious issues**

Beyond resolving disputes, our second role is to identify the issues that lead to these disputes. Complaints made to an Ombudsman scheme become, over time, a rich evidence base of potential underlying and/or system wide problems. At any given time complaints to an Ombudsman might also reveal issues that are not systemic in their nature, but are so sufficiently serious that they warrant further consideration of their cause to avoid similar detriment to other consumers in the future. It is important that the Energy Ombudsman works with energy companies to bring these issues to their attention and assist, where appropriate, to facilitate their resolution. Of course, energy companies should, and do, become aware of problems through their own service delivery, quality assurance, audit and complaint handling, among other mechanisms.

In addition to informing companies of problems that appear to underlie complaints, the Energy Ombudsman has an important role in informing relevant government agencies and regulators of these problems, including the Department of Commerce, the Australian Energy Regulator and the Australian Competition and Consumer Commission. In particular, the Energy Ombudsman informs the Economic Regulation Authority in both quarterly reports, and through regular meetings, of serious, systemic and emerging issues in the energy sector. Examples of these issues include problems with meter readings, payment arrangements, debt collection and payment difficulties, the application of concessions, credit ratings, alleged poor customer service, the quality and reliability of electricity supply, connection issues, regulated payments for poor service, information provided on bills, delays in issuing and reissuing bills, and problems with bills based on estimated consumption.

Beyond this reporting and referral, is an important statutory obligation that requires the Ombudsman to report to the Economic Regulation Authority substantial breaches of either the *Code of Conduct for the Supply of Electricity to Small Use Customers* or the licence conditions of energy companies. An example of a substantial breach reported by the Energy Ombudsman related to the requirement to issue bills “no

more than once a month and no less than once every three months, unless the retailer has obtained a customer's verifiable consent to issue bills less frequently." The public reporting, and subsequent action, was very much the sort of effective regulatory cooperation for the benefit of consumers that was envisaged when Ombudsmen were first created some two decades ago.

It is important to note that information on serious, systemic and emerging issues is based on allegations made to the Energy Ombudsman by complainants and not necessarily determinations of fact made by the Energy Ombudsman. Furthermore, the allegations to the Energy Ombudsman represent a non-random sample of approximately 4000 customers compared to the total customer base for gas and electricity in Western Australia. Balanced against this, however, it is important to note that most complaint handling agencies (including Ombudsmen) work on the basis that, for every complaint they receive, it is likely that there are other customers experiencing similar problems that do not make complaints.

Before making my concluding remarks, I want to consider one other matter relevant to the identification and resolution of systemic issues. Reflecting on the Chinese heritage of the concept of a fourth or integrity branch of government to join the traditional judicial, executive and legislative branches, former Chief Justice of the New South Wales Supreme Court, James Spigelman observed that:

[O]f course, like any other branch of government the [Chinese] censorate was liable to develop institutional interests of its own. There is a natural tendency in any surveillance mechanism to come to believe that the administration of government exists for the purposes of being investigated.

Ultimately, energy markets exist for the singular purpose of advancing the long term interests of consumers. Institutions such as the Energy Ombudsman only fulfil their mandate when they ensure that energy markets are not, in the widest sense of the word, misdirected in achieving that singular purpose. Energy Ombudsmen do this, as I have said, in two principal ways – by ensuring that consumers have an accessible mechanism for their complaints to be resolved in a timely and effective way and second that these complaints, inasmuch as they reveal systemic business or market problems, can be brought to the attention of relevant government agencies, industry and regulators and addressed.

As much as it is highly valuable to identify problems that cause consumer detriment, report on these and help facilitate their resolution, it is important to keep in mind that the resolution of problems must be undertaken with great rigour and care. Even when problems have been identified, further evidence-based work must generally be undertaken to ensure that any remedy will actually:

- (1) solve the problem identified;
- (2) have no unintended undesirable consequences; and
- (3) the remedy proposed will not be so costly (including its opportunity cost) as to outweigh the benefits it will deliver.

Simply put, designing solutions with perfectly good intentions is easier than implementing those intentions perfectly. For anyone who does not think that a perfectly well-intentioned, but imperfectly considered cure can be worse than a

cause, I simply point to American prohibition which was a perfectly well-intentioned idea with, unfortunately, spectacularly bad results.

## **Conclusion**

In conclusion, the Energy Ombudsman's principal interaction is with consumers as it deals with their disputes with the energy industry, resolving the vast majority of disputes in less than 10 business days and does so at a cost that is significantly less than traditional justice mechanisms. The Ombudsman is independent of all parties, completely impartial and never an advocate. In considering complaints we do so in relation to the law but also what constitutes good industry practice and what is fair and reasonable in all of the circumstances.

Our second role is to identify the issues that lead to those disputes. The Energy Ombudsman is only delivering on one half of its mission, and the mission envisaged twenty years ago for Ombudsmen generally, if it resolves cases alone. It is vital that we identify issues of a system-wide or serious nature that are directly or indirectly causing consumer detriment. In this second role our principal interaction is with industry and regulators, although of course this interaction is undertaken to advance the interest of energy consumers. In identifying issues of system-wide and/or of a serious nature it is important to inform energy companies of these issues. It is also the case that it is our role to inform relevant government departments or regulators, most centrally the Economic Regulation Authority, of these issues. While it is not the role of the Energy Ombudsman to resolve these issues directly (this being a critical point of difference to Parliamentary Ombudsmen who do have that role), it is most certainly the role of the Energy Ombudsman to be a facilitator of this resolution, including through problem identification, referral, reporting, follow-up and stakeholder engagement.

As the father of modern economics Adam Smith wrote "consumption is the sole end and purpose of all production". Effective dispute resolution, both that undertaken internally by energy companies and externally by the Energy Ombudsman, serves to increase integrity, transparency, efficiency and confidence in energy markets and, ultimately, is an important contributor to our collective sole end and purpose - advancing the long term interests of Western Australian consumers.