

# **Financial Counsellors' Association of Western Australia Annual Conference 2011**

## **'The role of the Energy Ombudsman'**

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### **Introduction**

I am delighted to be here for the Financial Counsellors of Western Australia 2011 Annual Conference. It is a pleasure to have this opportunity to speak to financial counsellors given the very important relationship that industry ombudsmen schemes, like the Energy Ombudsman, have with financial counsellors. For me personally it is a particular pleasure to be here with you today, as I have worked for many years with financial counsellors, commencing first with voluntary work at the Coburg and Brunswick Community Legal and Financial Counselling Centre some fifteen years ago, next working very closely with financial counsellors in Victoria and around Australia during my time as a consumer advocate at the Consumer Law Centre Victoria, particularly on utilities and credit issues, and more recently in my work as an economic regulator and Ombudsman.

The conference program is impressive in its scope and you have a number of busy days ahead of you. Today's program has a particular emphasis on utilities issues and this seems to me to be very appropriate. I need not tell any of you that the importance of utilities issues for consumers continues to grow, and indeed is likely to continue to do so over the coming years and this, for me, makes this opportunity to speak to you all the more timely.

As you know, in this session I am discussing the role of the Energy Ombudsman in resolving complaints and identifying systemic issues. It is my intention, in addition to discussing our principal role, namely resolving consumer complaints, to explore how complaints link to underlying problems and system wide issues, and how the work of various stakeholders, assist to reduce these problems and concomitant consumer detriment. To do so, I propose to touch upon four 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 going on to discuss the role of the Energy Ombudsman in identifying systemic and serious issues and reducing consumer detriment. Finally, I will touch upon how the Energy Ombudsman works with financial counsellors.

At the outset, I want to clarify that each time I refer to Ombudsmen in this presentation, I am referring to industry Ombudsmen such as the Telecommunications Industry Ombudsman or the Energy Ombudsman Western Australian and not Parliamentary Ombudsmen. The role of a Parliamentary Ombudsman shares many characteristics with industry ombudsmen, however, as a parliamentary officer of administrative investigation with the powers of a standing royal commission, the role

of Parliamentary Ombudsmen also differs very significantly to industry Ombudsmen in relation to the capacity to investigate, recommend and achieve, wide ranging improvements to thematic and systemic problems.

## **The history of Ombudsmen in Australia**

As I have just said, 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 is, 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 access to justice in Australia. Ombudsmen now provide the major pathway to access to dispute resolution in a number of the major sectors of the economy, including telecommunications, financial services, energy and water supply and public transport.

There are many reasons for the growth of Ombudsmen, among them privatisation of public services and an increasing reliance on 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 had a number of shortcomings including problems with (1) awareness and 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 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 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 companies and report these issues and outcomes to the industry regulator, the Economic Regulation Authority, and in other relevant forums.

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.

## **The role of the Energy Ombudsman in resolving complaints**

I now want to turn to the first of these things, namely, the role of the Energy Ombudsman in resolving 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, 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 Ombudsman also undertakes the role of Energy Ombudsman and the Commonwealth Ombudsman undertakes an industry Ombudsman function as the Postal Industry Ombudsman. The principal reason for this arrangement is simple - it allows for a small-sized Energy Ombudsman scheme to achieve a level of scale and scope efficiencies, and consequential operational benefits, that would never 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. We do not encourage paid representatives to represent consumers – this, of course, does not include financial counsellors, who often help complainants utilise our service and is strongly valued by us. The matters that can investigate are wide and include provision or supply of electricity or gas, billing, the administration of credit and payment services, disconnection, restriction and refundable advances, the exercise of powers in relation to land, neighbouring land or property, alleged or disputed debts and the recovery of debts, service standard payments and marketing of services.

There are, however, some matters that are not in my jurisdiction, including, the setting of prices or tariffs or determining price structures, commercial activities that are outside a electricity/gas company's licence to supply electricity/gas, the content of Government policies and complaints which are specifically under consideration by any court or tribunal, or which have been considered by any of those bodies previously.

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.

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 any time cost). As famous American 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.

We have wide powers to investigate complaints and when in determining complaints we consider the law, including electricity and gas codes, the new Australian Consumer Law and common law, particularly contract law. It is important to note, though, that the Energy Ombudsman does not just determine cases based on the law, but also considers what would constitute good industry practice and what is fair and reasonable in all of the circumstances.

The Energy Ombudsman, like all Ombudsmen schemes, places a very high emphasis on the early resolution of complaints. We resolve the vast majority of complaints in less than 10 business days from receiving the complaint and do so at a cost that is significantly less than traditional justice mechanisms. Although almost all cases are resolved this way, we do have the power to make, like a court or tribunal, determinative findings. These determinations are capped at \$20,000 (or \$50,000 by the agreement of a member company).

In 2010/11, we anticipate receiving 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.

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 *Water Services Bill 2011*, which is currently being considered by the Western Australian Parliament, 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 2012.

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

Besides 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 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 things.

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. In particular, the Energy Ombudsman informs the Economic Regulation Authority in both quarterly reports, and through a range of ongoing meetings, of serious, systemic and emerging issues in the energy sector. Examples of these issues include problems with 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 for Synergy 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 reporting, and subsequent action on this issue 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.

As much as it is highly valuable to identify problems that are causing consumer detriment, 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 be done to ensure that any remedy for the cause 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.

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. A much more recent example in the Australian context is the Federal Government’s home insulation scheme.

### **Our work with financial counsellors**

Before coming to my concluding remarks, I want to make an observation about our work with financial counsellors.

Engaging effectively with financial counsellors is important for a range of public and private sector organisations and particularly so for Ombudsmen schemes. Financial Counsellors are involved in the governance of Ombudsmen schemes, work very closely with Ombudsmen in terms of community outreach and raising awareness of Ombudsmen services, particularly to low-income and vulnerable communities, and collaborate in other important ways such as the very successful national EDR Forum. Later this week, I see that representatives of both the Financial Ombudsman Service and Credit Ombudsman Service will be presenting at the conference. In short, financial counsellors have played a vital role over the last twenty years in Ombudsmen schemes.

Beyond the work I have just mentioned, we particularly value the work done by financial counsellors in either referring their clients to us or assisting their clients by acting as a representative in making their complaint to our office. This enhances our ability to assist some of the most disadvantaged members of our community in the best possible way.

### **Conclusion**

In conclusion, the Energy Ombudsman deals with disputes between consumers and the energy industry, resolving the vast majority of complaints 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 not only in relation to what the law says, but also what would constitute good industry practice and, ultimately, 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 and 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 through problem identification, referral and follow-up.

Ultimately, transparent, competitive markets, that are both regulated and have access to effective and efficient dispute resolution, will see companies employ a variety of tools to not only minimise the consumer detriment that leads to dissatisfaction and complaint, but maximise benefits for every Western Australian.