

Banking Ombudsman Terms of Reference

July 2010

Introduction to the Terms of Reference

What the Terms of Reference are for

These Terms of Reference set out the rules that the Banking Ombudsman must follow when investigating a complaint against a Participating Bank. The Terms of Reference cover:

- the principal powers and duties of the Banking Ombudsman
- the procedure for investigating a complaint
- settlements, recommendations and awards
- limits on the Banking Ombudsman's powers
- test cases
- other powers and duties of the Banking Ombudsman.

Interpretation of terms used in the Terms of Reference

In these Terms of Reference:

- the term 'banking services' refers to both the provision and the non-provision of banking services
- references to singular things (for example, 'individual', 'Complainant', 'Participating Bank') also refer to their plural form and references to plural things (for example, 'individuals', 'Complainants', 'Participating Banks') also refer to their singular form
- references to paragraphs are to paragraphs of these Terms of Reference
- all dollar amounts are given in New Zealand dollars.

(Also refer to the glossary at the end of the Terms of Reference.)

Principal powers and duties of the Banking Ombudsman

1. The Banking Ombudsman's principal powers and duties are as follows.
 - 1.1 Subject to the limits set out in paragraphs 27 to 31 below, the Banking Ombudsman considers complaints about 'banking services' (see the glossary for a definition of this term) that any Participating Bank has provided within New Zealand to individuals, groups of individuals (such as partnerships or families), companies or trusts.
 - 1.2 The Banking Ombudsman can consider complaints relating to any of the following:
 - breaches of contract by the Participating Bank
 - breaches of statutory obligations by the Participating Bank
 - breaches of industry codes by the Participating Bank
 - any other matters provided for in these Terms of Reference.
 - 1.3 The Banking Ombudsman does not charge a fee to any Complainant to investigate or resolve a complaint.
 - 1.4 The Banking Ombudsman helps Participating Banks and Complainants resolve, settle or withdraw complaints by:
 - encouraging the parties to agree on a resolution, or
 - making a recommendation or award.
 - 1.5 The Banking Ombudsman:
 - promotes and publicises the Banking Ombudsman Scheme
 - encourages and provides advice to Participating Banks on developing and maintaining good complaint-handling practices.
2. The Banking Ombudsman may give general advice to a Complainant on how to make a complaint and on existing banking industry processes and practices. However, the Banking Ombudsman cannot provide information to a Complainant or another Participating Bank about individual Participating Banks or their banking services and products.
3. To provide fair and effective resolution of complaints, and to facilitate the clear identification of the matters in dispute, the Banking Ombudsman may assist Complainants to make complaints by assisting the Complainant to put a complaint in writing (which may include completing a standardised complaint form). This assistance does not extend to advising on the merits of a complaint or advocating for the Complainant.
4. The Banking Ombudsman will determine whether the Banking Ombudsman's Scheme or another dispute resolution scheme is the most appropriate body to consider the complaint. The Banking Ombudsman must consult with the Complainant and/or the relevant Participating Bank on this issue.
5. If the Banking Ombudsman determines the complaint raises issues which should also be determined by another dispute resolution scheme, the Banking Ombudsman will communicate and liaise with the other relevant dispute resolution scheme to determine the best way to resolve the complaint. In these circumstances, the Banking Ombudsman will communicate with the

Participating Bank, the Complainant and the other scheme(s) to ensure that the complaint is dealt with in a consistent and clear manner.

Procedure for investigating a complaint

Deciding whether a complaint falls within the Terms of Reference

6. It is up to the Banking Ombudsman to decide what procedure he or she will use when considering complaints. When deciding on a procedure, the Banking Ombudsman must take these Terms of Reference into account.

The Banking Ombudsman decides whether a complaint falls within the Terms of Reference. When making this decision, the Banking Ombudsman must take these Terms of Reference into account and consider what both the Complainant and the Participating Bank have to say.

The Banking Ombudsman must give reasons for his or her decision on whether a complaint falls within the Terms of Reference. The reasons must be given in writing and within a reasonable time.

Complaints will be investigated in accordance with the rules of natural justice

7. In determining whether a complaint is to be considered and/or when investigating a complaint, the Banking Ombudsman will comply with the rules of natural justice. This includes, but is not limited to, the following:
- adequate notice is given to both the Complainant and the Participating Bank of important steps and decisions
 - the opportunity is given for both the Complainant and the Participating Bank to express their views and for them to be considered before the decision is made
 - both parties are informed of the reasons for the decision within a reasonable time.

Requesting and providing information about a complaint

8. The Banking Ombudsman can ask a Participating Bank named in a complaint for any information that is relevant to the complaint. If the Participating Bank has the information, it must provide it to the Banking Ombudsman as soon as practicable.

However, the Participating Bank does not have to provide the information where that would cause the Participating Bank to breach a duty of confidentiality and:

- in the case of a Complainant the Banking Ombudsman has not given to the Participating Bank a waiver of confidentiality signed by the Complainant, or
- in any other case, the Participating Bank has used reasonable efforts to get consent from the party to whom the duty of confidentiality is owed to provide the information, but that consent has been refused.

9. A party to a complaint can ask that information they provide to the Banking Ombudsman be kept confidential. If so requested, the Banking Ombudsman must not provide this confidential information to anyone else unless he or she has consent from the party who provided the information.

If a Participating Bank wants to ask the Banking Ombudsman to keep information confidential, it must tell the Banking Ombudsman, before it provides the information, why it needs to keep the information confidential.

Information about a Participating Bank's fraud detection and security measures is deemed confidential under this paragraph.

If a party to a complaint asks for access to any information on the Banking Ombudsman's file, the Banking Ombudsman must give them this information unless the information is confidential information supplied in accordance with this paragraph 9.

10. As soon as possible after a complaint has been resolved or withdrawn, the Banking Ombudsman must return any confidential information supplied in accordance with paragraph 9 to the person who supplied it.

Taking into account a Participating Bank's security measures

11. When considering a complaint, the Banking Ombudsman can take into account a Participating Bank's fraud detection and security measures, even though he or she will not disclose to the Complainant what the fraud detection and security measures are.

Taking into account any legal rules of evidence

12. Notwithstanding the provisions of paragraph 23, the Banking Ombudsman is not bound by any legal rule of evidence.

Taking legal action

13. The Complainant may at any time commence legal proceedings against the Participating Bank that are related to a complaint. If legal proceedings are commenced by the Complainant during the Banking Ombudsman's investigation of a complaint, the Banking Ombudsman will not further consider the complaint and will advise both parties of this in writing.
14. While a complaint is being considered by the Banking Ombudsman, a Participating Bank must not begin legal proceedings against the Complainant that relate to the subject matter of the complaint unless the Participating Bank has first:
 - obtained the consent of its chief executive to begin legal proceedings, and
 - advised the Banking Ombudsman that it intends to begin legal proceedings (and, if practical, has given the Banking Ombudsman at least 5 working days' notice of that intention).
15. If the Banking Ombudsman makes a recommendation or an award and the Complainant commences legal proceedings, then the recommendation or award is deemed to have been withdrawn, and the Complainant is not entitled

to pursue the complaint through the Banking Ombudsman's office and the Banking Ombudsman may not consider the complaint further.

Settlements, recommendations and awards

Agreeing on a settlement or agreeing to withdraw a complaint

16. At any time while the Banking Ombudsman is considering a complaint, he or she can encourage the Complainant and the Participating Bank to agree on a settlement or encourage the Complainant to withdraw the complaint.

Making a recommendation

17. If the Complainant and the Participating Bank do not agree on a settlement or the Complainant does not wish to withdraw a complaint, either of them can ask the Banking Ombudsman to make a recommendation for the settlement or withdrawal of the complaint. Before making the recommendation, the Banking Ombudsman must give the Complainant and the Participating Bank at least 1 month's notice that he or she intends to make this recommendation. During the notice period (or longer if the Banking Ombudsman agrees to this) the Complainant and the Participating Bank can supply more information, evidence or arguments to the Banking Ombudsman about the complaint.

The Banking Ombudsman's recommendation must:

- be in writing
 - state any remedy the Banking Ombudsman considers appropriate in accordance with these Terms of Reference, and
 - give a summary of the reasons for the recommendation.
18. The Banking Ombudsman may recommend that the Participating Bank undertake any or all of the following remedies:
 - payment of a sum of money up to the financial limit, or
 - not pursue repayment of all or part of a debt up to the financial limit.

However, the Banking Ombudsman must not recommend that the Participating Bank do more than what is appropriate to compensate the Complainant for:

- any direct loss or damage
- any inconvenience suffered by the Complainant because of something the Participating Bank did (or did not do)
- any direct incidental expenses reasonably incurred by the Complainant during the complaint process.

Accepting a proposal or recommendation as a full and final settlement of a complaint

19. When a Complainant accepts a proposal or recommendation, he or she must accept it as a 'full and final settlement of the complaint' (see the glossary for a

definition of this term) unless the Participating Bank has agreed otherwise. The Banking Ombudsman must make it clear in the proposal or recommendation that acceptance is to be full and final.

Making an award against a Participating Bank if it has not accepted a recommendation from the Banking Ombudsman

20. The Banking Ombudsman can make an award of an amount or value up to the financial limit against a Participating Bank if, within 1 month of the recommendation being made, the Complainant has accepted the Banking Ombudsman's recommendation but the Participating Bank has not.

The Banking Ombudsman must not make an award for more than what the Banking Ombudsman considers is appropriate to compensate the Complainant for any direct loss or damage suffered because of something the Participating Bank did (or did not do).

The Banking Ombudsman can also grant the Complainant an additional amount that the Banking Ombudsman considers is appropriate to reimburse any direct incidental expenses the Complainant reasonably incurred during the complaint process.

The Banking Ombudsman does not award punitive, exemplary or aggravated damages.

Making an award against a Participating Bank to compensate a complainant for inconvenience

21. As well as any award under paragraph 20 the Banking Ombudsman can make an award of up to \$6,000 to compensate the Complainant for any inconvenience he or she suffered because of something the Participating Bank did (or did not do).

Making an award

22. All awards must:

- be in writing
- state the remedy awarded in accordance with these Terms of Reference, and
- give a summary of the Banking Ombudsman's reasons for making the award.

If a Complainant accepts an award in full and final settlement of the complaint within 1 month after the award is issued, both the Complainant and the Participating Bank will be bound by the award. The Banking Ombudsman must state in the award that it is binding once accepted by the Complainant.

The Banking Ombudsman must give a copy of the award to both the Complainant and the Participating Bank.

If the Complainant does not accept the award, he or she may bring an action in the Courts, or take any other available action against the Participating Bank.

Requirements for all recommendations and awards

23. When making a recommendation or award under these Terms of Reference, the Banking Ombudsman must:
- be fair in all the circumstances
 - observe the law including any relevant judicial authority, and
 - take into account the general principles of good banking practice and any relevant code of practice that applies to the subject matter of the complaint. The Banking Ombudsman will consult within the industry to determine the principles of good banking practice.

The Banking Ombudsman is not bound by any decision he or she has made previously or by any decision of a former Banking Ombudsman.

24. The Banking Ombudsman must follow paragraphs 17 to 23 when making any recommendation or award.

Limits on the Banking Ombudsman's powers

In what situations are complaints not considered by the Banking Ombudsman?

25. The Banking Ombudsman will not consider a complaint if:

25.1 The Banking Ombudsman concludes that:

- 25.1.1 the amount the Complainant has claimed (or could reasonably claim) is more than the financial limit, or
- 25.1.2 the claim is part of a larger claim the Complainant has made (or could reasonably make), or is related to another claim the Complainant has made (or could reasonably make), and the total amount of the claims is more than the financial limit.

(See paragraph 26 about claims that exceed the financial limit.)

25.2 The complaint relates to a Participating Bank's 'commercial judgement' in decisions about lending or security (see the definitions in the glossary) or insurance. However, the Banking Ombudsman can consider complaints about administration in lending and insurance matters.

25.3 The complaint relates to a Participating Bank's interest rate policies.

25.4 The Banking Ombudsman concludes that it would be more appropriate for the complaint to be dealt with by one of the following:

- a court, tribunal or arbitrator
- another independent or statutory procedure for complaints or conciliation, including another 'dispute resolution scheme' (see the glossary for a definition of this term)
- a statutory ombudsman.

25.5 The Participating Bank makes a request according to the test case process described in paragraphs 30 and 31.

25.6 The Banking Ombudsman concludes that on the basis of the facts presented by the Complainant, the Participating Bank has made a reasonable offer to settle the complaint.

What about claims that exceed the financial limit or are outside the Banking Ombudsman's usual jurisdiction?

26. If the Participating Bank named in a complaint gives its consent, the Banking Ombudsman can make a recommendation or award on:

26.1 a complaint where the amount being claimed is more than the financial limit, or

26.2 a complaint that would otherwise be outside his or her power to consider according to paragraph 25.

27. The Banking Ombudsman will only consider (or continue to consider) a complaint if he or she is satisfied that each of the subparagraphs below apply:

27.1 The complaint is being made by (or on behalf of) the individual or group of individuals to or for whom the Participating Bank provided (or failed to provide) the services being complained about.

27.2 Either or all of the following apply:

- the Participating Bank named in the complaint has fully considered the complaint using its internal complaint procedures (set up as required by the New Zealand Bankers' Association Code of Banking Practice)
- the Complainant has not accepted any observations the Participating Bank has made or any conditions of settlement or resolution the Participating Bank has offered
- the Participating Bank escalates a complaint to the Banking Ombudsman scheme for facilitation, or
- 3 months after the complaint was formally made, the Participating Bank has not advised the Complainant that deadlock has been reached.

27.3 Where relevant, the complaint was made no later than 2 months after the Participating Bank told the Complainant that:

- deadlock had been reached
- he or she had the right to take the complaint to the Banking Ombudsman
- the Banking Ombudsman will not be able to investigate the complaint if the Complainant does not take the complaint to the Banking Ombudsman within the 2 month time limit.

27.4 The complaint came about from something the Participating Bank did (or did not do) that first occurred not more than six years before the date that the Complainant first became aware, or should have reasonably become aware, of the problem that led to the complaint.

The Banking Ombudsman can decide not to consider (or continue to consider) a complaint if the Complainant knew about the Participating Bank's action (or inaction) that led to the complaint for more than 12 months before he or she made the complaint to the Banking Ombudsman.

- 27.5 The same Complainant (or any one of them) has not previously made a complaint to the Banking Ombudsman on the same subject matter (unless relevant new evidence is available).
- 27.6 The complaint or any other complaint on the same subject matter by the same Complainant (or any one of them) is not, has not been, and does not, during the course of the investigation come:
- before any court, tribunal or arbitrator
 - before any other independent or statutory complaints or conciliation body, including another dispute resolution scheme under the Act (see the glossary for a definition of this term)
 - under investigation by a statutory ombudsman.
- 27.7 The Complainant (and any other person from whom a waiver is required) has provided the Banking Ombudsman with a waiver of confidentiality.
- 27.8 The Complainant is pursuing the complaint in a reasonable way, and not in a frivolous or vexatious way.
28. The Banking Ombudsman cannot make a recommendation or award on a complaint involving a practice or policy of a Participating Bank that does not breach any obligation or duty the Participating Bank owes the Complainant.
29. The Banking Ombudsman may consider a complaint that relates to charges made by a Participating Bank for banking services, but he or she must take into account the scale of charges that Participating Bank generally applies.

Test cases

30. At any time before the Banking Ombudsman makes an award, a Participating Bank named in a complaint can request, in writing, that the Banking Ombudsman not consider (or ceases to consider) a complaint on the basis that, in the opinion of the Participating Bank:
- the complaint involves an issue that could have important consequences for the business of the Participating Bank or banks generally, or
 - the complaint involves (or may involve) an important or new point of law.
 - Any request made under this paragraph 30 must also state that, if either the Complainant or the Participating Bank begins court proceedings in New Zealand against the other about the complaint within 6 months of the Banking Ombudsman receiving the request, the Participating Bank will:
 - pay the Complainant's costs and disbursements of the proceedings at first instance and any subsequent appeal proceedings if it is the Participating Bank that begins them

(unless this is through a respondent's notice, a cross-appeal or another similar procedure), and

- make interim payments for these costs if and to the extent that the Participating Bank thinks it is reasonable to do so.

If the amount of the Complainant's costs and disbursements cannot be agreed between the Complainant and the Participating Bank, the Participating Bank will be required to pay such costs on a solicitor and own-client basis.

31. The Banking Ombudsman will no longer consider the complaint if he or she agrees with the Participating Bank's request under paragraph 30. The Banking Ombudsman will then write to the Complainant to say that he or she has received the request, the date the request was received and what effect it has on the Complainant.

Other powers and duties of the Banking Ombudsman

Personal information the Banking Ombudsman collects

32. If the Banking Ombudsman collects personal information while exercising his or her powers, the Banking Ombudsman is subject to the duties outlined in these Terms of Reference.

Personal information:

- may be used in public reports and case notes the Banking Ombudsman prepares only if the reports or notes do not include any information that could identify the person the information relates to, and
- will not be kept any longer than is necessary for the purpose for which it was collected and will be destroyed not later than 7 years after the investigation to which it relates is finished.

33. Subject to the following paragraphs, while the Banking Ombudsman is holding the personal information, he or she cannot disclose to a third party (including a director of Banking Ombudsman Scheme Ltd):

- any information that might identify the Complainant or the Participating Bank named in the complaint, or
- any other confidential information the Banking Ombudsman has obtained in the course of his or her duties.

However, the Banking Ombudsman can disclose this information if:

- he or she is required to by any authority with the legal power to demand the information
- he or she is required to by law
- the information is needed as part of legal proceedings involving Banking Ombudsman Scheme Ltd or any of its directors or officers, or
- he or she needs to consult with any of the bodies or entities listed in paragraph 25.4 above to decide who should consider a complaint, provided that the Banking Ombudsman needs the

Complainant's consent to disclose any information that might identify the Complainant.

(Also see paragraph 34, which outlines who the Banking Ombudsman can disclose information to.)

Who the Banking Ombudsman can disclose information to

34. Paragraph 33 does not prohibit the disclosure of any information to the Complainant and any Participating Bank named in the complaint, or to the Chairperson or any authorised deputy of the Chairperson, or to any director, employee, consultant, independent contractor or agent of or with Banking Ombudsman Scheme Ltd to the extent that such information is reasonably required by that person for the purpose of performing his or her duties to the Banking Ombudsman.

The Banking Ombudsman must tell the Participating Bank if he or she becomes aware of any threats to the Bank's staff or property in the course of his or her duties.

35. At least 28 days before the Annual General Meeting of Banking Ombudsman Scheme Ltd, the Banking Ombudsman must send the Board a report containing a general review of his or her activities during the preceding financial year, and any other information the Board requests.
36. The Banking Ombudsman will publish an Annual Report to inform the community of his or her activities. The Annual Report will be supplied to the Minister of Consumer Affairs by 30 September of each year.
37. The Banking Ombudsman can make recommendations to the Chairperson from time to time about the Terms of Reference or about any relevant codes of practice that may be introduced that affect how he or she does his or her job. The Banking Ombudsman will first consult with the Participating Banks and consumers with respect to such recommendations. The Banking Ombudsman can also make recommendations to the New Zealand Bankers' Association about the Code of Banking Practice.

Sharing of information

38. The Banking Ombudsman may release information about a complaint and/or the Participating Bank complained about to:

- another dispute resolution scheme (as defined in the Act) if the Participating Bank is a member of that scheme
- the Registrar of Financial Service Providers under the Act in accordance with sections 17 and 34 of the Act,

provided that, wherever possible, the Banking Ombudsman must obtain the Complainant's or Participating Bank's consent to disclose any information that might identify the Complainant or Participating Bank.

Series of material complaints

39. If there is a series of material complaints about a Participating Bank, the Banking Ombudsman will communicate that fact to the Reserve Bank of New Zealand.

Records

40. The Banking Ombudsman must keep comprehensive records and statistics relating to complaints, for example:
- the number of disputes, complaints and enquiries
 - details of complaints which were not considered by the Banking Ombudsman and why
 - the outcome of complaints that were resolved by the Banking Ombudsman
 - the current case load, including the age and status of open cases
 - the time taken to resolve complaints
 - a profile of complaints that identifies:
 - the type and purpose of the service provided by the Participating Bank
 - the cause of the complaint
 - any industry issues or other trends.

Glossary

Act	the Financial Service Providers (Registration and Dispute Resolution) Act 2008
Banking Ombudsman Scheme Ltd	Banking Ombudsman Scheme Limited is registered in Wellington under company number 1952125 at the New Zealand Companies Office
Banking services	<p>all financial services provided by each of the Participating Banks in New Zealand in the ordinary course of their business. These services are provided to individuals or groups and include:</p> <ul style="list-style-type: none">• the use overseas of credit or debit cards issued by Participating Banks• advice and services relating to insurance and investments. <p><i>Guarantors and security holders</i></p> <p>A Participating Bank provides a banking service to an individual or group who gives the Bank a guarantee or other security to secure lending of another person, even if that individual or group is not a customer of a Participating Bank.</p> <p><i>Payees and writers of cheques</i></p> <p>A Participating Bank also provides a banking service to:</p> <ul style="list-style-type: none">• someone who is the payee of a cheque that is drawn on the Participating Bank, even if that person is not a customer of that bank• someone who writes a cheque that is then collected by the Participating Bank, even if the person writing the cheque is not a customer of that bank
Board	the board of directors of Banking Ombudsman Scheme Ltd
Chairperson	the chairperson of the Board
Commercial judgement	assessments of risk, of financial or commercial criteria, or of character
Complainant	an individual or a group or a company or a trust making a complaint to the Banking Ombudsman, excluding Complainants who are outside the scope of the Financial Advisers Act 2008
Deadlock	when a Participating Bank and a Complainant cannot agree on a solution to a complaint
Decisions about lending or security	any decisions (or the consequence of any decisions) about lending, or about a guarantee or security including the risk a Participating Bank is prepared to take on in providing services for its customers

Dispute resolution scheme	the reserve scheme or an approved dispute resolution scheme, in each case as defined in the Act
Duty of confidentiality	when a Participating Bank named in a complaint is legally obliged to keep information about a Complainant or another person confidential
Financial limit	\$200,000 as at 1 July 2010
Full and final settlement of a complaint	the recommendation or award covers and finalises all aspects of the complaint and, once the recommendation or award is accepted, the complaint cannot be re-opened in any forum
Participating Bank	<p>a registered bank that has entered into a participation agreement with Banking Ombudsman Scheme Ltd. Participating Banks include all:</p> <ul style="list-style-type: none"> • wholly owned subsidiary companies of Participating Banks, except those notified by the New Zealand Bankers' Association to Banking Ombudsman Scheme Ltd as exempt from the Scheme • companies that are not wholly owned subsidiaries but are within the same corporate group as the Participating Bank. This may include companies in which the Participating Bank has a majority interest. These companies are only included if the New Zealand Bankers' Association has notified them to Banking Ombudsman Scheme Ltd as participating in the Scheme. <p>As at 1 July 2010 the Participating Banks are:</p> <ul style="list-style-type: none"> • ANZ National Bank Limited • ASB Bank Limited • Bank of New Zealand • Citibank N.A. • The Hongkong and Shanghai Banking Corporation Limited • Kiwibank Ltd • Rabobank New Zealand Ltd • SBS Bank • TSB Bank Limited • Westpac
Waiver of confidentiality	a document waiving a Participating Bank's duty of confidentiality. A waiver can be from a Complainant or from a third party that the Bank has a duty of confidentiality to