Memorandum

Date: 15 February 2012

To: Deborah Battell
Office of the Banking Ombudsman

FROM: Adam Ross
DIRECT: +64 9 357 9023
FAX: +64 9 357 9099
EMAIL: adam.ross@chapmantripp.com
PARTNER: Adam Ross
REF: 092667297/1916821.5

OFFICE OF THE BANKING OMBUDSMAN - FIFTH INTERIM PROCESS REVIEW

1 Chapman Tripp has been asked to conduct the fifth interim process review of the Office of the Banking Ombudsman (*OBO*).

2 This report sets out the findings of that review and our recommendations.

EXECUTIVE SUMMARY

Purpose and Scope of Review

3 The purpose of the review is to ensure that the OBO is operating in accordance with its terms of reference (*Terms of Reference*) and, in particular, the principles of natural justice and effective dispute resolution.

4 We have prepared this report on the basis of a review of 30 files randomly selected and provided by the OBO, applying the criteria adopted in previous reviews (to the extent applicable).

Findings

5 Our principal finding is that the OBO *is* generally complying with the Terms of Reference and with the principles of natural justice and effective dispute resolution.

6 That said, our review identified a limited number of issues:

Timeliness

6.1 Based on the files reviewed, this was the most significant issue.

6.2 The Review Period saw an unusually high level of complaints received due to the collapse of ING's Diversified Yield Fund and Regular Income Fund and the ANZ National Bank's promotion of those funds.

6.3 As a result, the OBO was forced to instigate a waiting list (between the receipt of a complaint and the allocation of an investigator) which was the primary cause of delay.

6.4 However, tardy responses by Complainants and/or Participants were also a cause of delay.

Impartiality

6.5 It is not uncommon for investigators to express their views on the likely outcome of a formal investigation during the facilitation stage.

6.6 This practice may provide a useful guide for Complainants considering settlement proposals.

6.7 However, it also risks creating an appearance of pre-determination and/or pressuring a Complainant to accept a settlement proposal that they otherwise would not accept.

Record-keeping

6.8 In a number of cases, gaps in correspondence were evident and/or activity sheets were incomplete.

Recommendations

7 Following our review, we make the following recommendations:

Timeliness

7.1 We understand that the OBO has now resolved all but two of the ING-related complaints and that a return to normal complaint volumes is projected. As a result, we expect that timeliness issues will largely fall away.

7.2 However, we recommend that the OBO clearly communicate and (absent extraordinary circumstances) strictly enforce response timeframes.

Impartiality

7.3 Investigators should be careful when expressing a view on the likely outcome of a formal investigation. Where available, investigators should refer the Complainant to case notes involving similar complaints, so that the information is directed most towards how similar complaints have been resolved in the past, rather than opining on what the Ombudsman will do with the case in hand. They should continue to make it clear that if they express a view, it is their own, and not that of the Banking Ombudsman.

7.4 Additionally the Banking Ombudsman should not see correspondence which records investigators' opinions on what the likely outcome of the complaint will be.[1]

Record-keeping

7.5 The OBO should have a renewed focus on complete and accurate record-keeping.

8 A more detailed discussion follows in Schedule 1 to this report.

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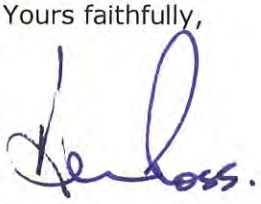
[1] The Banking Ombudsman subsequently sought clarification of this recommendation. We advised that we do not have any material concern with the current practice of investigators routinely giving the entire file to the Banking Ombudsman for determination. A copy of the advice dated 9 November 2011 is available on request from the Office of the Banking Ombudsman.

9 We would welcome the opportunity to discuss this report with you at a convenient time.

Yours faithfully,



Adam Ross / Simon Elliot
PARTNER / SOLICITOR

DIRECT: +64 9 357 9023 / +64 9 357 9504
EMAIL: adam.ross@chapmantripp.com / simon.elliot@chapmantripp.com

SCHEDULE 1: DETAILED DISCUSSION

PURPOSE AND SCOPE OF REVIEW

Purpose of review

1 In accordance with the Participation Agreement, the OBO is to commission an independent review of its processes at least every three years.[2]

2 The purpose of the review is to ensure that the OBO is operating in accordance with the Terms of Reference,[3] and especially the principles of:

2.1 natural justice;[4] and

2.2 effective dispute resolution.[5]

Scope of review

3 This report and its findings are based on our review of thirty files selected at random, and provided to us, by the OBO.

4 Those files span the period April 2009 to April 2011 (*the Review Period*).

5 Where relevant, we have also taken into account other information provided by the OBO, including contextual factors during the Review Period.

6 In conducting our review, we have adopted the criteria employed by previous review reports.[6] Those criteria are in Schedule 2 annexed to this report.

FINDINGS

Principal Finding

7 Our principal finding is that the OBO is generally complying with its Terms of Reference and, specifically, with the principles of natural justice and effective dispute resolution.

Jurisdiction

8 The Banking Ombudsman is correctly interpreting her jurisdiction and decisions relating to jurisdiction are given in writing and within a reasonable time.[7]

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2 Clause 1.1.1 of the Participation Agreement.

3 The latest version of which are dated April 2011.

4 Now expressly incorporated at paragraph 7 of the Terms of Reference. Natural justice is an elastic concept that we understand to mean (broadly) the right to be heard in respect of decisions affecting a person's rights and to have those decisions made by a fair and impartial decision-maker.

5 Paragraph 3 of the Terms of Reference requires the Banking Ombudsman to "*provide fair and **effective** resolution of complaints*".

6 With the exception of the Performance Standards, which we understand no longer apply.

7 Terms of Reference, paragraph 6.

9 A common reason for declining jurisdiction (at least initially) is that the Complainant had not exhausted the Participant's internal complaint resolution procedures.[8] In such cases, the OBO was careful to refer the Complainant back to the Participant and to the relevant provisions in the Terms of Reference.

10 Additionally, where other jurisdictional issues were apparent from the Complainant's initial correspondence, the OBO clearly signalled that they may prevent investigation of the complaint.[9]

11 Other reasons for declining jurisdiction in the files reviewed included that the complaint concerned a matter of the Participant's commercial judgment in lending and security matters[10] and that the complaint did not allege a breach of any duty or obligation owed by the Participant to the Complainant.[11]

12 In all relevant cases reviewed, the decision to decline jurisdiction was appropriate and communicated in writing within a reasonable timeframe.

Natural justice

13 Investigations are being conducted in accordance with the rules of natural justice. Specifically:

13.1 parties are given adequate opportunity to present their case and adequate time and information to respond to the other party;[12]

13.2 complaints are investigated and/or resolved impartially and on the basis of probative evidence.[13]

Settlement

14 The Banking Ombudsman acts appropriately when encouraging the parties to agree on a settlement.[14]

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8 Terms of Reference, paragraph 27.3. See, for example, cases 011129700 and 021128246.

9 See, for example, cases 011129700 and 021128246.

10 See, for example, cases 021128246 and 031028922.

11 See, for example, cases 061028851, 011129700, 061029067.

12 The OBO was careful to provide parties with adequate opportunities to present their case. In one case involving a number of wide ranging and factually complex complaints against a Participant, the Banking Ombudsman met with the Complainant to ensure she had properly understood the complaints prior to issuing her initial assessment: see case 110927672. The complaints in that case covered a range of matters including the cancellation and retention of the Complainant's credit card, charges for insurance associated with the credit card, term investment products, bank statements, bank fees, and the Participant's fax machines and complaint handling procedures.

13 The OBO based its conclusions on probative evidence. By way of example, the Complainants in one case alleged that the Participant had misrepresented an investment product as low risk when in fact it was moderate: see case 011028424. That allegation, however, was contrary to contemporaneous documents signed by the Complainants acknowledging they had read the investment statement which explicitly identified the investment product as moderate risk. In that case, the Banking Ombudsman declined to make a finding that the Complainants had been misled.

14 Terms of reference, paragraph 16.

15 The facilitation process appears to be working well.[15] Of the 30 files reviewed, 12 were settled without proceeding to a formal investigation. Through the process, Complainants provide information about their complaint, hear the Participant's view, and receive realistic assessments of how their complaints might be handled by the Banking Ombudsman during a formal investigation.

16 The facilitation process promotes informed settlement discussion prior to the formal investigation stage and, consequently, the early and informal resolution of complaints.[16]

Recommendations[17]

17 We found that recommendations were:

17.1 in writing, stated an appropriate remedy and gave supporting reasons;[18] and

17.2 fair and observed any relevant judicial authority and/or principles of good banking practice.

18 We found no case in which the Banking Ombudsman's recommendations failed to meet the applicable requirements in the Terms of Reference. Recommendations were reasoned and in line with relevant law.

19 In cases involving allegations that Complainants had been misled in relation to investment products, the Banking Ombudsman enclosed with her recommendations explanations of the relevant provisions of the Fair Trading Act 1986 and, where applicable, the Consumer Guarantees Act 1993.[19]

Confidentiality

20 With one exception, confidentiality waivers were obtained prior to receipt of the Participant's report.[20] In the one case in which this did not occur, the OBO outlined the Participant's error in subsequent correspondence.[21]

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15 For an overview of the various OBO processes, please see Schedule 3 to this report.

16 For example, the Complainant in case 021028662 did not accept the Participant's settlement offer and the matter was referred to a formal investigation. However, the investigator immediately contacted the Complainant and illustrated in detail how the Banking Ombudsman would calculate compensation in the event that the complaint was upheld. The Participant's settlement offer exceeded what the Complainant would receive. As a result, the Complainant accepted the Participant's settlement offer in full and final settlement of the dispute. Although not strictly speaking a facilitation case, this case is an excellent example of proactive and effective dispute resolution. We consider that the OBO investigator acted appropriately in assisting the Complainant to make an informed choice about the Participant's settlement proposal.

17 In no case reviewed, did the Banking Ombudsman proceed to issue an award against a Participant. All recommendations were either accepted as full and final settlement of the complaint or were not accepted by the complainant and were accordingly withdrawn.

18 Terms of Reference, paragraph 17.

19 See, for example, case 110928009.

20 Terms of Reference, paragraph 8.

21 Case 040925948.

21 One request for confidentiality was made.[22] That request and the information in respect of which it was made were handled appropriately.[23]

Issues identified

22 Our review did identify a limited number of issues that would deserve some attention.

Timeliness

23 Complaints were often not resolved in a timely manner.[24] Of the 30 files we assessed, 18 took longer than 120 working days from receipt of the complaint until resolution. Of those, six files took longer than 200 working days and another two files took longer than 300 working days. [25]

24 Primarily, delay occurred between receipt of the complaint and allocation of an investigator (timeframes ranged from one to six months).[26] However, in the majority of cases reviewed, Complainants were told of the likely delay and of the anticipated timeframe within which an investigator would be allocated. Further, the OBO corresponded with Complainants when those timeframes were not met and/or the Complainant queried the continuing delay.[27]

25 Tardy responses by Complainants and/or Participants were also a cause of delay.[28]

26 Additionally, there were occasions when information provided by one party was not promptly passed on to the other[29] and investigators' workloads surpassed their

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22 The Complainant in case 031028879 initially requested that certain information, which had been supplied to the Inland Revenue Department not be disclosed to the Participant. However, the Complainant withdrew the request when the OBO asked the Complainant to specify which documents they did not want disclosed. Therefore, we have not taken this request into account for the purposes of our review.

23 The Participant in case 031028537 requested that information about the valuer of a property, subject to a mortgagee sale by tender, not be disclosed. The Participant wanted the valuer's details to remain confidential because the Complainant was thought to be dangerous (he was, at the time, apparently implicated in the death of the purchaser of the property). In that case, the OBO did not require the Participant to provide the valuation information. Rather, the OBO requested, and accepted, the Participant's undertaking that the valuations were as recorded in its report. We consider this to have been an appropriate course of action in the circumstances. If the fears concerning the Complainant were well-founded, receipt of the valuation information in question could have put OBO staff at risk.

24 The Terms of Reference contain general provisions as to timeliness: see paragraphs 6, 7 and 8. In addition, there are a number of specific requirements as to timeliness which appear to have been complied with in all cases where applicable: see paragraphs 14, 20, 22, 27.2, 27.4, 30, 32 and 35.

25 In both cases in which the file was open for more than 300 days, the delay was due to factors outside the OBO's control: one involved the temporary suspension of the investigation so the participant could assess its position on additional compensation arising out of the failure of ING's Diversified Yield Fund, and the other involved a complainant's failure to respond within the stipulated timeframes.

26 See cases 031028537, 110928009, 021028601, 021028662, 011028424, 081029359, 021028681, 011129918, 061029067, 071029216 and 021130603.

27 See, for example, cases 031028537, 021028662, 041029047 and 031028922.

28 See, for example, cases 011028424 and 031028922.

29 See case 031078922 in which the Complainant's response to the Participant's report was received on 27 September 2010 but was not passed on until 16 October 2010. There was no apparent reason for the delay other than oversight.

capacity affecting turnaround times.[30] However, these issues do not appear to be systemic.

Impartiality: appearance of pre-determination

27 In a number of cases, the investigator expressed to the Complainant a view on how the complaint would be decided by the Banking Ombudsman if the matter proceeded to a formal investigation.[31]

28 Of itself, we do not consider this practice objectionable. Indeed, having the benefit of an investigator's experience and insight can provide Complainants with an appropriate basis on which to assess settlement proposals.

29 However, absent appropriate safeguards, this practice could give rise to an appearance of pre-determination and/or could result in a Complainant feeling pressured to accept a settlement proposal that they otherwise would not accept.

Record keeping

30 In a number of cases, complete records do not appear to have been kept: gaps in correspondence were evident and/or activity sheets were incomplete.[32]

RECOMMENDATIONS

Timeliness

31 We are aware, generally and from information provided by the OBO, that the Review Period was somewhat anomalous. Due to the collapse of ING's Diversified Yield Fund and Regular Income Fund and complaints against the ANZ National Bank as a result of its promotion of those funds, the OBO experienced a sharp spike in the number of complaints received.

32 We understand that:

32.1 the sudden rise in the number of complaints received was the primary catalyst for the waiting list that the OBO instituted (on which Complainants were placed pending allocation of an investigator); but

32.2 the waiting list has now been cleared and a return to "normal" complaint levels is projected.

33 For that reason, we make no specific recommendations about how to manage complaint volumes better. That said, the anomalous nature of the Review Period should not obscure any lessons that may be learnt.

34 Primary among which, in our view, is the need to eliminate (to the extent consistent with natural justice) delays caused by Complainants and Participants.

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[30] In case 031028879, the investigator assigned worked part-time and informed the Complainant by email on 21 May 2010 that she was unable to progress the investigation further because other urgent files had been waiting longer.

[31] See, for example, cases 040925984, 021028662 and 021028601.

[32] See, for example, cases 110928009, 021028662 and 021028611.

35 To that end, we recommend that timeframes for parties' responses be communicated clearly at the outset and strictly enforced, unless the particular circumstances are extraordinary and justify an extension of time. Parties who do not respond within the prescribed timeframe should be given a further, shortened period within which they must provide their response or their complaint be deemed abandoned.[33]

36 In our view, such a practice would not be inconsistent with the principles of natural justice. Provided that parties know the timeframes for their response and the consequences that follow non-compliance, the OBO should not be fearful of enforcing response timeframes unless extraordinary circumstances justify an extension.

37 Moreover, we note that requiring compliance with response timeframes would promote certain other values that the OBO is duty-bound to pursue: namely, timeliness and efficacy.

Impartiality/Pre-determination

38 We repeat and endorse earlier reports' recommendations that investigators exercise caution when expressing their views on the likely outcome of complaints.[34] Straightforward descriptions of the outcomes of similar cases are not likely to attract any criticism. But investigators' opinions on the Ombudsman's likely decision in the case in hand, if placed before the Ombudsman, could most readily give rise to concerns of predetermination or bias.

39 In the interest of avoiding an appearance of predetermination or bias, we recommend that correspondence with Complainants in which investigators give their opinions about the likely outcome are not seen by the Banking Ombudsman in the course of her review. That correspondence could be removed from the file, or kept in a sealed envelope.

40 Additionally, where preliminary views on the outcome of particular complaints are expressed, we recommend that investigators:

40.1 continue to emphasise the fact that their view is a personal one only and not that of the Banking Ombudsman who can and does reach differing conclusions; and

40.2 where available, refer Complainants to case notes involving similar complaints so that they have an opportunity to assess for themselves how the Banking Ombudsman might resolve their complaint.

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[33] We note that this is not the first time a recommendation of this kind has been made: see The Third Interim Process Review Report at paragraphs 43(e) and (f).

[34] See the Third Interim Process Review Report at paragraph 43(b) and the Fourth Interim Process Review Report at paragraph 3.1(b).

Record-keeping

41 Finally, we recommend that there be a renewed focus on complete and accurate record-keeping by investigators (including recording details of telephone conversations on activity sheets).[35]

[35] Again, this is not the first time this recommendation has been made: see the Third Interim Process Review Report at paragraph 43(r) and the Fourth Interim Process Review Report at paragraph 3.1(f).

SCHEDULE 2: CRITERIA FOR THE FIFTH INTERIM PROCESS REVIEW OF THE BANKING OMBUDSMAN

Natural Justice

Right to be Heard

1 Were parties given an adequate opportunity to present their case and respond to the other party's submissions?

2 Were parties given adequate information to be able to make an informed response?

3 Were parties given a reasonable time to respond?

4 Were adequate allowances made for and explanations supplied to parties who had linguistic or conceptual problems, were disabled, or were otherwise disadvantaged by their personal circumstances in their dealings with the Banking Ombudsman and her staff?

Impartiality

5 Was the Banking Ombudsman impartial in carrying out the investigations?

6 Was anything said or done during the course of the investigation which may have given the impression of bias on the part of the Banking Ombudsman?

7 Were Complainants who expressed concern about the process of investigation supplied with a response to their concerns?

8 Did the Banking Ombudsman adequately consider the response from all the parties prior to making any final decision?

9 Where the Banking Ombudsman has made a finding in a particular case, was that finding based on probative evidence?

10 Was the Banking Ombudsman impartial in her decision making?

Settlements, Recommendations, Awards and Jurisdictional Decisions

11 Did the Banking Ombudsman act within her powers as set out in the Terms of Reference (in particular did the Banking Ombudsman respect the requirements and limitations in paragraphs 6, and 25-29 of the Terms of Reference)?

12 Were the procedural requirements of the Terms of Reference met?

13 Were the parties given adequate written reasons for the decision, and within what time frame?

14 In making any award or recommendation against a participating bank did the Banking Ombudsman comply with paragraphs 17 to 23 of the Terms of Reference?

Protection of Confidentiality

15 Was a waiver of confidentiality sought and obtained from the Complainant?

16 If confidential information was necessary for the other party to make an informed response, was this matter handled in an appropriate manner – for example was the information summarised in such a way as to preserve commercial sensitivity?

17 Was information subject to a request for confidentiality:

(a) Returned to the providing party as soon as possible; and

(b) Not disclosed to another party without consent?

Effective Dispute Administration

Timeliness

18 Were both parties advised of the timeliness standards which apply?

19 Within what timeframes were the various steps completed?

Administrative Efficiency

20 Was all relevant information sought from the parties at the outset of the investigation?

21 Were parties kept informed of the progress of the inquiry, complaint or dispute?

22 Were appropriate and complete records kept at each stage of the investigation?

23 Were complaints or disputes where a response was not received from the Complainant followed up on?

Previous reviews

24 Has the Banking Ombudsman implemented previous reviews/recommendations?

SCHEDULE 3: PROCESSES OF THE OFFICE OF THE BANKING OMBUDSMAN

Facilitation

Facilitation is a means of resolving a complaint or dispute prior to a formal investigation. The OBO assists the Participant to find a solution if the complaint remains unresolved after being considered by the Participant's internal complaints process. As facilitator, the OBO:

(a) receives information from both parties to the complaint or dispute and forwards that information to each side;

(b) remains in contact with the parties;

(c) assesses if common ground exists; and

(d) if required, refers the parties to relevant provisions of the Terms of Reference.

The Banking Ombudsman cannot express an opinion on the merits of the dispute at the facilitation stage. However, OBO investigators often express an opinion as to the chances of success if the complaint was to continue to the stage of a formal investigation. Typically investigators are careful to stress that the opinion is not that of the Banking Ombudsman and the parties are free to pursue a full investigation if they wish.

Facilitation appears to work best when the Participant is prepared to make a settlement offer to the Complainant and the Complainant is realistic in his or her expectations of any settlement. To manage unrealistic expectations, investigators sometimes provide information about how the Banking Ombudsman would calculate compensation for direct loss and/or inconvenience. Such information may also encourage acceptance of any settlement offer from the participant bank.

If it is obvious that settling before a full investigation or conciliation is not possible, the facilitation process ceases.

Conciliation

If facilitation cannot or does not resolve the dispute between the Complainant and the Participant, the parties can choose conciliation. In essence, a conciliation is a mediated settlement discussion that allows parties to:

(a) hear directly from each other; and

(b) fully understand why the complaint arose, and the impact of those issues.

If the parties choose conciliation, a neutral conciliator is appointed who is an OBO employee, who is specifically trained and is not otherwise involved in the complaint, and whose role it is to mediate between the parties in reaching their own resolution. That may involve informing parties as to what the Banking Ombudsman would consider to be a fair and reasonable resolution in the circumstances.

Conciliations can be conducted by teleconference or in person. Each party has the opportunity to speak privately with the conciliator if they wish.

The conciliator records any agreement reached during the conciliation. The conciliator cannot however provide legal advice to any of the parties about the agreement. The conciliator subsequently drafts a more formal settlement document. The dispute is considered resolved once parties have signed the formal settlement document. If the parties do not reach an agreement on the dispute during the conciliation, the file is transferred to a new investigator, and the complaint moves to the formal investigation stage.

Formal investigation
If agreement between the parties is not reached either through facilitation or conciliation, a formal investigation is commenced.

The Banking Ombudsman reviews the file and issues an initial assessment. The initial assessment outlines:

(a) the facts of the complaint;

(b) what each of the parties has informed the OBO about the complaint;

(c) any relevant law;

(d) any relevant sections of the Code of Banking Practice;

(e) the Banking Ombudsman's findings on the complaint;

(f) the Banking Ombudsman's recommendation for the proper resolution of the complaint.

If both parties agree with the proposed resolution (which may be that the participant pays the Complainant compensation or that the complaint is withdrawn), the Banking Ombudsman will action this proposal and the complaint is resolved.

The parties are not obliged to accept the initial assessment. The parties may comment on the initial assessment, or provide further information regarding the complaint. This is the last opportunity for parties to provide more information to the Banking Ombudsman.

If either party does not accept the initial assessment, the Banking Ombudsman will review the complaint again. She will take into account any additional comments or information that either party has given. She will then make her formal recommendation. The recommendation may be that the dispute is upheld, the dispute is partially upheld, or the dispute is not upheld.

Once the Banking Ombudsman has made her formal recommendation, the investigation is complete. The Complainant can only accept a formal recommendation if he or she accepts it in full and final settlement of the complaint.

If the Complainant does not accept the formal recommendation, they are able to pursue other remedies (n which case, the complaint will be deemed to be withdrawn).

If the Participant does not accept the formal recommendation, the Banking Ombudsman may issue an award specifying the amount the bank must pay to the Complainant (within the financial limits set out in the terms of reference).

The Banking Ombudsman (or the Chief Investigator acting under delegation) must authorise the closure of each file. Both parties must be informed that the investigation has been discontinued and the file will be closed. After the file is closed, the Banking Ombudsman may prepare an anonymised case note about the complaint.