

# Banking Ombudsman Terms of Reference

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# Definitions and Interpretations

In these Terms of Reference: -

- (a) the following expressions have the following meanings: -

“Participating Bank” means a registered bank for the time being and having entered into a participation agreement with Banking Ombudsman Scheme, including all:

- (i) wholly owned subsidiary companies of Participating Banks except those notified by the New Zealand Bankers’ Association to Banking Ombudsman Scheme as exempt from the scheme; and
- (ii) companies within the same corporate group as the Participating Bank (other than wholly owned subsidiaries of the Participating Bank) including subsidiaries in which the Participating Bank has a majority interest, notified by the New Zealand Bankers’ Association to Banking Ombudsman Scheme as participating in the scheme

As at 1 July 2007 the Participating Banks are:

- 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
- TSB Bank Limited
- Westpac

“banking services” means all financial services provided by each of the Participating Banks in New Zealand in the ordinary course of their business to individuals or groups, including the

use overseas of credit or debit cards issued by Participating Banks, and advice and services relating to insurance and investments.

A Participating Bank provides a banking service to an individual or group when it has the benefit of a guarantee or charge given or created by the individual or group in favour of the Bank to guarantee or secure any monies owing to it by another individual or group. It also provides a banking service to the payee of a cheque drawn on the Bank, whether or not the payee is a customer of the paying Bank and to the drawer of a cheque collected by the Bank, whether or not the drawer is a customer of the Bank.

“Banking Ombudsman Scheme” means Banking Ombudsman Scheme Limited registered in Wellington under company number 1952125 at the New Zealand Companies’ Office;

“Board” means the board of directors of the Banking Ombudsman Scheme;

“Chairperson ” means the chairperson of the Board;

“complainant” means an individual or a group making a complaint to the Banking Ombudsman;

“Participating Bank named in the complaint”, or “Participating Bank concerned” means any Participating Bank against which a complaint is made;

“commercial judgement” means assessments of risk, of financial or commercial criteria, or of character;

“decisions about lending or security” include any decision (or the consequence thereof) concerning any advance or similar facility, guarantee or security;

“financial limit” is \$200,000 as at 1 February 2007;

- (b) references to the provision of banking services include, where the context admits, references to their non-provision;

- (c) references to the singular number (including without limitation references to “individual”, “complainant” and “Participating Bank”) include, where the context admits, the plural number and vice versa;
- (d) references to paragraphs are to paragraphs of these Terms of Reference;
- (e) references to dollar amounts are to amounts in New Zealand dollars.

## Principal Powers and Duties of the Banking Ombudsman

1. The Banking Ombudsman’s principal powers and duties are:
  - to consider at no cost to the complainant complaints over claims not exceeding the financial limit arising out of the provision within New Zealand of banking services by any Participating Bank principally to individuals but also to groups of individuals whether incorporated or unincorporated; and
  - subject to paragraphs 18, 19, 20, 21 and 22 to facilitate the satisfaction, settlement or withdrawal of such complaints whether by agreement, by making recommendations or awards or by such other means as seem expedient; and
  - to promote and publicise the Banking Ombudsman Scheme and to encourage, and provide advice to Participating Banks on the development and maintenance of good complaint-handling practices.
2. The Banking Ombudsman may give general advice on the procedure for referring a complaint to him or her and on existing banking industry processes and practices. It is not a function of the Banking Ombudsman to provide information about individual Banks or their banking services and products.

## Procedure

3. Subject to the other provisions of these Terms of Reference, the Banking Ombudsman shall, in his or her own discretion, decide the procedure to be adopted by him or her in considering complaints. He or she shall also decide whether or not a complaint falls within the Terms of Reference, and in reaching this decision shall consider representations from the complainant and from the Participating Bank concerned. When requested, he or she shall give the reasons in writing and within a reasonable time for his or her decision on whether or not a complaint falls within the Terms of Reference.
4. The Banking Ombudsman shall promptly produce to the Participating Bank named in the complaint any waivers of that Participating Bank's duty of confidentiality referred to in paragraph 22(g) that have been received by the Banking Ombudsman.
5. The Banking Ombudsman may require a Participating Bank named in a complaint to provide any information which in the view of the Banking Ombudsman relates to that complaint. If the Participating Bank possesses such information, it shall as soon as is reasonably practicable disclose it to the Banking Ombudsman (unless the Participating Bank certifies to the Banking Ombudsman that the disclosure of such information would place the Participating Bank in breach of its duty of confidentiality to a third party whose consent has been refused after the Bank had used its best endeavours to obtain such consent).
6. If any party to a complaint supplies information to the Banking Ombudsman and requests that he or she treat it as confidential, the Banking Ombudsman shall not disclose that information to any other party to the complaint or any other person, except with the consent of the first-mentioned party.

Providing that before supplying such information to the Banking Ombudsman, a Participating Bank shall first notify the Banking Ombudsman

of its confidentiality and the reasons for such confidentiality.

7. Where any party to a complaint requests access to any information on the Banking Ombudsman's file, the Banking Ombudsman shall, subject to paragraph 6, make this information available.
8. Where any party to a complaint supplies information to the Banking Ombudsman under paragraph 6, and the Banking Ombudsman facilitates the satisfaction, settlement or withdrawal of the complaint he or she shall return any information supplied by the party to that party as soon as is reasonably practicable.
9. The Banking Ombudsman may take account of a Participating Bank's security measures of which he or she has knowledge notwithstanding that no disclosure of those measures has been or will be made to the complainant.
10. Notwithstanding paragraph 16 the Banking Ombudsman shall not be bound by any legal rule of evidence.
- 10A. While a complaint is under consideration by the Banking Ombudsman, a Participating Bank will not commence legal proceedings against the complainant in connection with the subject matter of the complaint unless it has first:
  - (a) obtained the consent of its chief executive to the commencement of proceedings; and
  - (b) advised the Banking Ombudsman of its intention to commence proceedings (and where practical, give five working days notice of this intention).

## Settlements, Recommendations and Awards

11. At any time that a complaint is under consideration by him or her the Banking Ombudsman may seek to promote a settlement or withdrawal of the complaint by agreement between the complainant and the Participating Bank concerned.

12. If there is no such agreement, the Banking Ombudsman, at the request of the complainant or the Participating Bank concerned, may make a recommendation for settlement or withdrawal of the complaint. He or she shall first however give the complainant and the Participating Bank one month's notice of his or her intention to make such recommendation, and during the period of that notice (or such longer period as the Banking Ombudsman may agree) the complainant and the Participating Bank may make further representations to the Banking Ombudsman in respect of the complaint.

A recommendation shall be in writing and shall include a summary of the Banking Ombudsman's reasons for making his or her recommendations.

13. If:
  - (a) the Banking Ombudsman is minded to:
    - (i) propose that a complaint be settled or withdrawn on terms which appear to him or her to be acceptable to both the complainant and the Participating Bank named in the complaint, or
    - (ii) make a recommendation for the settlement or withdrawal of a complaint; and
  - (b) that settlement or withdrawal would involve the provision by the Participating Bank of valuable consideration (whether in the form of a money payment or otherwise);

then the Banking Ombudsman's proposal or recommendation shall, unless the Participating Bank has otherwise requested or agreed, state that it is open for acceptance by the complainant only if he or she accepts it in full and final settlement of the subject matter of the complaint.

14. If the Banking Ombudsman has made a recommendation which, within one month after it is made, has been accepted by the complainant but not by the Participating Bank named in the complaint, the Banking Ombudsman may make an award against the Participating Bank.

An award shall comprise a money sum not exceeding the financial limit. No award shall be of a greater amount than in the opinion of the Banking Ombudsman is appropriate to compensate the complainant for direct loss or damage suffered by him or her by reason of the acts or omissions of the Participating Bank against which the award is made. The Banking Ombudsman may in addition to the money sum grant to the complainant such additional amount as is in the opinion of the Banking Ombudsman appropriate to reimburse the complainant for direct incidental expenses reasonably incurred by the complainant in making and pursuing the complaint.

- 14A. Notwithstanding the provisions of Paragraph 14 an award by way of compensation not exceeding \$6000 may be made to compensate the complainant for inconvenience suffered by him or her by reason of the acts or omissions of the Participating Bank against which the award is made.
15. An award shall be in writing and shall state the amount awarded and a summary of the Banking Ombudsman's reasons for making the award. The award shall state that, if within one month after its issue the complainant agrees to accept it in full and final settlement of the subject matter of the complaint, the award shall be binding on the complainant and (in accordance with its agreement with Banking Ombudsman Scheme) the Participating Bank against which it is made.

The Banking Ombudsman shall issue a copy of the award to the complainant and the Participating Bank against which it is made and shall issue to the complainant a form (addressed to the Banking Ombudsman and the Participating Bank) to be completed by the complainant whereby he or she may accept the award in full and final settlement of the subject matter of the complaint.

16. In making any recommendation or award under these Terms of Reference the Banking Ombudsman shall do so by reference to what is, in his or her opinion, fair in all the circumstances, and:

- (a) shall observe any applicable rule of law or relevant judicial authority (including but not limited to any such rule or authority concerning the legal effect of the express or implied terms of any contract between the complainant and any Participating Bank named in the complaint); and
- (b) shall have regard to general principles of good banking practice and any relevant code of practice applicable to the subject matter of the complaint.

The Banking Ombudsman shall not be bound by any previous decision made by him or her or by any predecessor in his or her office. In determining what are the principles of good banking practice he or she shall consult within the industry.

17. The Banking Ombudsman shall not make a recommendation or award except in accordance with the provisions of paragraphs 12 to 16.

## Limits on the Banking Ombudsman's Powers

18. The Banking Ombudsman shall have power to consider a complaint made to him or her except:
- (a) subject to paragraph 19, if at any time it appears to the Banking Ombudsman that:
    - (i) the amount which the complainant has claimed or could claim in respect of the subject matter of the complaint exceeds the financial limit; or
    - (ii) the claim comprised in the complaint is part of a larger claim which the complainant has made or could make, or is related to another claim which the complainant has made or could make, and the aggregate amount of all such claims exceeds the financial limit;
  - (b) to the extent that the complaint relates to a Participating Bank's commercial judgement in decisions about lending or

- security (as defined herein) or insurance, but this shall not preclude the Banking Ombudsman from considering complaints about administration in lending matters;
- (c) to the extent that the complaint relates to a Participating Bank's interest rate policies;
  - (d) if at any time it appears to the Banking Ombudsman that it is more appropriate that the complaint be dealt with by a court, under another independent or statutory complaints or conciliation procedure or under an arbitration procedure;
  - (e) if any Participating Bank named in the complaint gives the Banking Ombudsman a notice of the kind described in paragraph 23; or
  - (f) if it appears to the Banking Ombudsman that on the basis of the facts presented by the complainant the relevant Participating Bank has made a reasonable offer in settlement of the complaint.
19. The Banking Ombudsman shall have the power to make a recommendation or award in respect of a complaint over a claim in excess of the financial limit or in respect of a complaint that would otherwise be outside his or her power to consider by virtue of Paragraph 22 (a), (b), (c), (d), (e) or (h) where the Participating Bank named in the complaint consents to the Banking Ombudsman considering that complaint.
20. The Banking Ombudsman shall have no power to make a recommendation or award in respect of a complaint to the extent that it relates to a practice or policy of a Participating Bank which does not itself give rise to a breach of any obligation or duty owed by the Participating Bank to the complainant.
21. Subject to the other provisions of these Terms of Reference, the Banking Ombudsman may consider a complaint which relates to charges made by a Participating Bank for banking services, but, in doing so, he or she shall have regard to my scale of charges generally applied by that Participating Bank.

22. The Banking Ombudsman shall only consider (or continue to consider) a complaint made to him or her if he or she is satisfied that:

- (a) The complaint is made to him or her by or on behalf of the individual or group of individuals to whom or for whom the Participating Bank's services in question were provided;
- (b) the complaint has been fully considered by the internal complaint procedures of the Participating Bank named in the complaint (set up as required by the New Zealand Bankers' Association Code of Banking Practice) and the complainant has not accepted any observations made or conditions of settlement or satisfaction offered by that Participating Bank and deadlock has been reached, or the Participating Bank has not advised the complainant that deadlock has been reached within 3 months of the complaint being formally made to it;
- (c) the complaint is made to him or her not later than two months after the Participating Bank has informed the complainant that deadlock has been reached, and informed him or her also of the existence of the Banking Ombudsman and of the two months limit;
- (d) the act or omission giving rise to the complaint:
  - (i) first occurred on or after 1 January 1992; or
  - (ii) first occurred not earlier than six months prior to that date, but the complainant did not become aware of it, and could not with reasonable diligence have become aware of it, until on or after that date;

provided that the Banking Ombudsman may in his or her discretion decide not to consider (or continue to consider) a complaint if the complainant has had knowledge of the act or omission giving rise to the complaint for

more than 12 months before the complaint is made to the Banking Ombudsman.

- (e) except where relevant new evidence is available, the subject matter of the complaint was not comprised in a complaint by the same complainant (or any one or more of them) previously considered by the Banking Ombudsman;
- (f) neither the complaint made to him or her nor any other complaint by the same complainant (or any one or more of them) in respect of the same subject matter is, has been or becomes to the knowledge of the Banking Ombudsman the subject of any proceedings in or before any court, tribunal or arbitrator, or any other independent or statutory complaints or conciliation body, or of any investigation by a Statutory Ombudsman;
- (g) the complainant and any other person to whom any Participating Bank named in the complaint owes a duty of confidence in respect of any information which the Banking Ombudsman may request that Participating Bank to produce to him or her for the purpose of his or her consideration of a complaint have waived in writing that duty of confidence;
- (h) the complaint is being pursued reasonably by the complainant and not in a frivolous or vexatious manner.

## “Test Cases”

- 23. At any time before the Banking Ombudsman has made an award a Participating Bank named in the complaint may give to the Banking Ombudsman a notice in writing containing:
  - (a) a statement, with reasons, that in the opinion of the Participating Bank the complaint involves or may involve:
    - (i) an issue which may have important consequences for the business of the Participating Bank or Banks generally or

- (ii) an important or novel point of law; and
  - (b) an undertaking that, if within six months after the Banking Ombudsman's receipt of the notice either the complainant or the Participating Bank institutes in any Court in New Zealand proceedings against the other in respect of the complaint, the Participating Bank will:
    - (i) pay the complainant's costs and disbursements (to be taxed, if not agreed, on a solicitor and own client basis) of the proceedings at first instance and any subsequent appeal proceedings commenced by the Participating Bank (except by way of respondent's notice, cross-appeal or other similar procedure) and
    - (ii) make interim payments on account of such costs if and to the extent that it appears reasonable to the Participating Bank to do so.
24. Providing the Banking Ombudsman concurs with the Participating Bank's statement, he or she shall cease to consider the complaint and he or she shall inform the complainant in writing of the receipt of the notice, the date of its receipt and the effect of the notice upon the complaint.

## Other Powers and Duties

25. The Banking Ombudsman shall be responsible for the day to day administration and conduct of the business of the Banking Ombudsman. He or she shall have power to incur expenditure on behalf of Banking Ombudsman Scheme in accordance with the current financial budget approved by the Board.
26. The Banking Ombudsman shall not exercise any power which the Constitution of Banking Ombudsman Scheme expressly gives to the Chairperson, the Board or any other person.
27. In consultation with the Chairperson and subject to his or her approval, the Banking

Ombudsman shall have power on behalf of Banking Ombudsman Scheme to appoint and dismiss employees, consultants, independent contractors and agents, and to determine their terms of employment or engagement.

28. Except as agreed between the Banking Ombudsman and the Banking Ombudsman Scheme the Banking Ombudsman shall attend each meeting of the Board and shall give the Board any information and assistance (including general information about any reference) which they reasonably request.
- 28A. Personal information collected by the Banking Ombudsman in the exercise of the powers described in these Terms of Reference shall be used solely for the purpose of carrying out his or her duties under these Terms of Reference. Such information may be used in public reports and case notes prepared by the Banking Ombudsman only if they do not include any information from which it might be possible to identify the person to whom the information relates. Personal information will not be retained longer than is necessary for the purpose for which it was collected and will in any event be destroyed not later than seven years after the discontinuation of the investigation to which it relates.
29. Except as provided in paragraph 30 or as required by any competent authority or as otherwise required by law or as properly and reasonably required in connection with any legal proceedings instituted by or against Banking Ombudsman Scheme or any of its directors or officers or for the purpose of consultation with the Insurance and Savings Ombudsman when a question arises as to which Ombudsman should consider a complaint, the Banking Ombudsman shall not disclose to any person (including a director of Banking Ombudsman Scheme) any information concerning a complaint considered by him or her from which it would or might be possible to identify the complainant or any Participating Bank named in the complaint or any other information of a confidential nature which he or she has obtained in the course of his or her duties. Provided that the Banking Ombudsman should obtain the consent of

the complainant before disclosing potentially identifying information about him or her to the Insurance and Savings Ombudsman.

30. Paragraph 29 shall 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 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 shall report to the Participating Bank concerned any threat to Participating Bank staff or property of which he or she becomes aware in the course of his or her duties.
31. At least twenty-eight days before the Annual General Meeting of Banking Ombudsman Scheme the Banking Ombudsman shall send to the Board a report containing, in relation to the preceding financial year of the Banking Ombudsman, a general review of his or her activities during that year and such other information as the Board may reasonably direct.
32. To inform the community of his or her activities the Banking Ombudsman shall publish an Annual Report.
33. The Banking Ombudsman may make recommendations to the Chairperson from time to time in relation to the Terms of Reference or any relevant codes of practice which may be introduced and which have a bearing on the discharge of his or her responsibilities. The Banking Ombudsman may also make recommendations to the New Zealand Bankers' Association in relation to the Code of Banking Practice.

