Independent Review of New Zealand Banking Ombudsman Scheme

Anand Satyanand DCNZM

March 2006

Table of Contents

"IT'S THE PUTTING RIGHT THAT COUNTS"

A review of the New Zealand Banking Ombudsman Scheme undertaken by Judge Anand Satyanand at the request of the Banking Ombudsman Commission between May 2005 and March 2006

1. INTRODUCTION

1.1 At a meeting of Australasian and Pacific Ombudsmen in February 2005, a major keynote speaker was Sir Kenneth Keith, then a New Zealand Supreme Court Judge, who subsequently in 2005 was elected to be a member of the International Court of Justice at The Hague. Sir Kenneth, in earlier careers as President of the Law Commission and a Professor of Law at the Victoria University of Wellington, had written extensively on the ombudsman concept. His topic was to do with development of the role of the ombudsman with particular reference to the Pacific and he began his paper with observation of the slogan of a well-known New Zealand home appliance business that says: -

"It's the putting right that counts."

1.2 His paper then reflected on the remedial benefits accruing from an ombudsman operation, in the same way as a retail store can improve its customer base by focusing on ensuring satisfaction. This, of course, means satisfaction for all parties concerned. The paper went on to describe some aspects of the inherent nature of ombudsman work, as compared with the characteristics of other dispute resolution mechanisms, such as the courts or arbitration. The paper referred to ombudsman action being more or less comparable to that of a conscience and of it having, necessarily, both flexibility and discretion. These, the paper said, with suitable application, can result in both a proper result and an enhanced reputation for the office.

1.3 The same notion has a resonance for the present work, for which the writer was engaged in May 2005 - to conduct a review of the New Zealand Banking Ombudsman Scheme which has been in operation for some 13 years. In a nutshell, my enquiries during the succeeding months have resulted in a conclusion that the Scheme is a sound one, which has operated successfully in the New Zealand context

for a number of years, coming to be respected by both consumers and the banking community. There are however a small number of matters relating principally to governance and effectiveness, that would benefit from reconsideration, and the undertaking of a different approach, so as "to put things right".

2. HISTORY OF SCHEME

Development of the Ombudsman Concept

2.1 The term "Ombudsman" has its origin in the 200-year-old office in Sweden of an appointed official able to enquire into actions of the government administration upon either own motion or a complaint of an individual citizen. Progression of the idea, from Scandinavian countries, among other governments arose during the mid-twentieth century and New Zealand, in 1962, was the first English-speaking commonwealth and common law country to enact legislation for a Parliamentary Ombudsman, although there were a number of jurisdictions in which Bills had been introduced or where the idea had been canvassed. In the subsequent forty or so years, Ombudsmen have become installed in office in a great many countries, under a variety of constitutional settings. At the same time there have arisen developments of the concept elsewhere in the public sector, to encompass offices such as Human Rights Commissions and Police Complaints Authorities.

2.2 A major theme of further development has been that into the private sector. A former Ombudsman for Northern Ireland, Dr Maurice Fay, maintained the view that the Ombudsman concept is one of relatively few to have passed from the public sector to the private sector, at a time when the tide of ideas in the last quarter of the twentieth century has generally flowed in the opposite direction. For example, during the 1980's, there arose specific interest in the development of an ombudsman office for the banking industry. Offices for that purpose were established in the United Kingdom in 1986 and in Australia in 1990.

2.3 Proliferation of business community ombudsman schemes arose in a number of ways, leading to such services becoming established for industries such as banking and insurance or gas and water reticulation as well as for individual organisations such as universities and newspaper companies. The latter kind of development is particularly the case in the United States and Canada.

2.4 The New Zealand Bankers' Association adopted a Code of Banking Practice in March 1992 and a Banking Ombudsman Scheme in July of that year. It was at a time during which there was considerable interest in the protection of consumers, and a Consumer Guarantees Bill had been drafted, although it was not to become law until 1993. The Banking Ombudsman Scheme can be seen as a tailor-made response from the Banking Industry to dealing with consumers' issues.

2.5 There are a number of mechanisms enabling disputes to be resolved, including that of ombudsman, ranging from the courts through to informal negotiation and resolution. A useful descriptive passage on this occurs in an article written in 2000 by Dr Howard Gadlin, a leading United States academic, university ombudsman and conflict mediation specialist, as follows: -

> *"A classical ombudsman notion is located for the most part, but with some important deviations, within the tradition of adversarial dispute resolution. The classical ombudsman can compel co-operation with the investigation whereas a mediator, in most instances, depends on the voluntary co-operation of the parties with the mediation process. Also unlike a mediator, the classical ombudsman is an adjudicator. A citizen initiates a complaint about some sort of maladministration and an ombudsman investigates the complaint and renders a judgement about whether the complaint is warranted or not. If the complaint is warranted, the classical ombudsman then makes a recommendation for appropriate remedies. However, the classical ombudsman contains within it some features of the alternative dispute resolution perspective as well. That is, although the classical ombudsman may render a judgement about right and wrong, the classical ombudsman lacks the authority to enforce that judgement."*

2.6 A prolific Canadian writer about the ombudsman concept, Professor Larry Hill, in his book, "The Model Ombudsman" has written: -

> *"...one of the institution's most interesting puzzles is its apparent effectiveness, despite minimal coercive capabilities".*

2.7 In a slightly different but still relevant context, the Fiji Constitution Review Commission in its August 1996 report which was chaired by a New Zealander, Archbishop Sir Paul Reeves, said: -

"The ombudsman is authorised to make a finding generally as to the legality, reasonableness or justice of the matter complained of, and to make recommendations as to the appropriate remedial action which should be taken…The ombudsman's power is therefore rightly described as 'the power to persuade'."

Banking Ombudsman Scheme Particulars

2.8 It is perhaps appropriate to then characterise the essential nature of the Banking Ombudsman Scheme in New Zealand and to examine its outer limits.

2.9 The Banking Ombudsman operates as one of the dispute resolution processes operated by banks. If a customer has a dispute with their bank then those banks engage in a process to resolve that dispute internally. If that is not able to be successful, there can then be reference to the Banking Ombudsman as an external dispute resolution process. The Banking Ombudsman differs from the classical ombudsman model because there is authority to enforce decisions against participating Banks in the Banking Ombudsman Scheme rather than to just recommend actions. As the New Zealand Banking Ombudsman has put it: -

"The process used by the Banking Ombudsman in dispute resolution is unique to ombudsman schemes, combining an independent adjudicator, an inquisitorial method and a focus on the informal resolution and settlements of disputes."

2.10 Funding for the Scheme is provided by the participating banks and: -

"…in the same proportion as the total number of complaints considered by the Banking Ombudsman Commission."

2.11 Given the authority to enforce certain recommendations and the focus on dispute resolution in the relatively confined scope of banking services, one might question the use of the term "ombudsman" for the Scheme. By comparison, the classical ombudsman provides redress with regard to the entire public sector. However, the strength of the term "ombudsman" is that it engages with and empowers consumers. Moreover, the ombudsman notion is, as has been described, in a state of ongoing continuing development, particularly in the private sector. In

New Zealand, in order to protect against proliferation of the name "ombudsman" without guarantee of independence, flexibility and credibility, Parliament passed legislation requiring permission for use of the term from the erstwhile Chief Parliamentary Ombudsman. Guidelines have been issued and permission granted to some industries only, to use the term. The Banking Ombudsman Scheme is one and in my view it has demonstrated its ability to continue to do so.

2.12 The architecture of what is involved may be stated as follows. The major New Zealand Banks belong to the New Zealand Bankers' Association which has a Council. The New Zealand Bankers' Association prepares and maintains a Code of Banking Practice which sets out the minimum standards that members will observe in maintaining good bank/customer relationships and communications. The Council of the New Zealand Bankers' Association also formed the New Zealand Banking Ombudsman Commission. Changes to the Rules of the New Zealand Banking Ombudsman Commission are effected by the Council of the New Zealand Bankers' Association. The Banking Ombudsman Commission publishes the Banking Ombudsman Terms of Reference which make provision for the Banking Ombudsman and there is thus a separation between the Banking Ombudsman and the member Banks. The Banking Ombudsman Commission has a membership comprising an independently appointed chairman, two representatives of participating Banks appointed by the Council of the New Zealand Bankers' Association, one person nominated by the Crown through the Ministry of Consumer Affairs, and another person, ordinarily the executive director, for the time being, of the Consumers' Institute of New Zealand.

2.13 A decade or so since the inception of the Banking Ombudsman Scheme has seen a considerable number of changes occur within the industry. The number of banks which were operational in 1992 has changed with organisations such as AMP Bank and Postbank simply having disappeared and mergers between the ANZ Banking Group NZ Limited and the National Bank of New Zealand Limited resulting in the ANZ/National Group being significantly larger than the other three in what used to be called "the big five" – the ASB Bank Limited, the Bank of New Zealand and Westpac Limited. The full list of participating members in the Scheme as at 30 June 2005 comprises ANZ National Bank Ltd, ASB Bank Ltd, Bank of New Zealand, Citibank NA, HSBC Ltd, Kiwibank, Rabobank New Zealand Ltd, Superbank, TSB Bank Ltd, and Westpac.

2.14 In a New Zealand Herald article by columnist Brian Gaynor on 7 May 2005 a number of other observations were made about changes that have occurred during the decade. For example, branch numbers for the main banks have fallen from 1,512 to 1,153. The sector now has 23,548 employees compared with 26,373 ten years ago. There are now 2004 bank-owned automatic teller machines (ATMs) compared with 1,068 in 1994. Total assets of the main banks were said to have grown from $89 billion to $221 billion and net earnings from $800 million to $2.7 billion. A big part of the change is that the major banks have become Australian-owned and that there are changes being made as a result of that affecting both countries - Australia and New Zealand.

2.15 At a higher level, the Closer Economic Relationship between Australia and New Zealand (CER) is moving towards the development of a single economic market (SEM). This means that there are a number of things in the commercial world such as consumer protection, trans-Tasman mutual recognition, investment opportunities, accounting standards, and means of financial reporting which are going to be made similar for both countries.

2.16 A brief excerpt from a speech by Dr Allan Hawke, the Australian High Commissioner to New Zealand on 6 December 2005 to the New Zealand Institute of International Affairs expressed some of this kind of matter as follows: -

> *"On 30 January 2004 Peter Costello and Michael Cullen [Treasurers of Australia and New Zealand] set out an ambitious agenda to strengthen CER by pursuing a genuine single economic market [SEM].*
>
> *With that overriding aim at the forefront of their mind the Ministers decided to focus on five initiatives:*
>
> - *Integration of the Australia and New Zealand competition and consumer protection regimes;*
> - *The trans-Tasman mutual recognition arrangements governing offers of securities and managed investment schemes;*
> - *The trans-Tasman accounting standards advisory group which had started to align the financial reporting requirement between Australia and New Zealand towards*

our ultimate goal of a common set of accounting standards and a joint accounting standard-setting arrangement;

- *Whether an investment component should be added to the CER agreement; and*
- *A joint approach to trans-Tasman banking supervision that delivers a seamless regulatory environment. ...*

Dr Cullen sees the SEM as the way to realizing '...a dream where being a company in one country, will be equivalent to being a company in the other company.'

The aim is to minimize the differences between us through streamlining, harmonization, common standards, mutual recognitions, etc to get the best regulatory regimes that we can."

2.17 A suggestion can be made that those responsible for responding to reviews of the Banking Ombudsman service should be mindful of New Zealand's intention to achieve greater alignment with Australia.

2.18 A final matter in observing the history of the Banking Ombudsman Scheme arises out of the most recently published report of the Banking Ombudsman in 2005. This discloses that there has been during the last immediate period, a drop in numbers of cases being completed. In the first years when records were kept, beginning in 1994, between 450 and 650 cases being completed per year were the norm. By the late 1990's and leading to 2000, that figure had risen to more than 1,000 cases per annum reaching a peak of 1,250 cases completed during 2002. However, since 2002 there has been a decline and during the last reported year 799 cases were recorded as having been completed. There are a number of reasons that can be advanced to underpin this, an example being that the Bank internal resolution procedures have improved to a point that fewer cases need to go to the Banking Ombudsman. Alternatively, that some people at least are more ready to settle their disputes without calling upon the dispute resolution methodology. There is also another possible reason, namely, that insufficient people have become aware of their right to use the recourse to the Banking Ombudsman.

2.19 Thus it can be seen that the Banking Ombudsman works within a New Zealand banking context that has changed markedly since its inception and will continue to do so.

3. BACKGROUND TO REVIEW

3.1 In May 2005, the Banking Ombudsman Commission completed consideration of having a review of its Scheme. Consultation took place with relevant stakeholders such as the New Zealand Bankers' Association, the Ministry of Consumer Affairs and the Retirement Commissioner to bring this about. It was observed that in Australia in 1997, the then Federal Minister for Customs and Consumer Affairs had promulgated six benchmarks for industry-based consumer dispute resolution schemes. These benchmarks were decided by the Banking Ombudsman Commission here to be appropriate for consideration in the course of a review of the New Zealand Scheme. These were, Accessibility, Independence, Fairness, Accountability, Efficiency, and Effectiveness.

3.2 Terms of Reference were drawn up and a set of instructions issued to me as reviewer, making suggestions about those persons I might interview and/or communicate with in written form, both in New Zealand and elsewhere. The Terms of Reference identified particular questions to be answered in relation to each of the benchmark headings and it also set out a number of items which the Commission thought that I might consider.

3.3 In the course of the next succeeding time, I set about my work as follows. First, having analysed the Terms of Reference, I produced a Statement of Essential Issues which provided a succinct list of matters that could be easily referred to people with a viewpoint to offer about the Banking Ombudsman Scheme. I proceeded to communicate in writing with participating Banks in the Banking Ombudsman Commission, with the New Zealand Bankers' Association, with other institutional groups such as the Financial Services Federation, with individual members of the Banking Ombudsman Commission, with the Banking Ombudsman herself, and members of her staff. Likewise, I communicated with a number of other groups and individuals in the community, for example, with companies providing services in the nature of banking. Then there were individuals and groups in the community like the Citizens' Advice Bureaux who had either expressed an interest in contributing to the review or whom it was thought, might have a view to offer – for example, university faculties where studies in banking or consumer issues were on the curriculum.

3.4 Another part of the approach related to the public sector, inclusive of the Ministry of Consumer Affairs, the Ministry of Economic Development and the Human

Rights Commission. Public Notices were issued in a number of metropolitan as well as specialist financial newspapers, and more informal publicity was circulated among Citizens' Advice Bureaux and other community organisations such as Budgeting Advice Centres.

3.5 More widely, I corresponded with relevant organisations in Australia, such as the Banking and Financial Services Ombudsman office there, seeking views on the same issues expressed from a distance. I did likewise with relevant counterpart organisations in the United Kingdom, Canada and South Africa.

3.6 I received a number of written submissions from the above sources and collated them under specific headings. I also received submissions from groups such as the Citizens' Advice Bureaux, some three law firms and ordinary members of the public. Some of these had been previous users of the Banking Ombudsman service, and others still retained a grievance in that regard. I took up suggestions made to me to have discussions with individual members of the Banking Ombudsman Commission (both past and present), the Law Society, the Insurance and Savings Ombudsman, the Retirement Commissioner and the Reviewer of the Code of Banking Practice - all of which was of help in refining my views. An opportunity came for me to make a short visit to Australia in September 2005, in the course of which I managed to have discussions with representatives of the Australian Banking Ombudsman Office and with representatives of two other private sector ombudsman schemes in Melbourne.

3.7 Separately, I engaged myself in Wellington itself, in individual discussions with a number of members of staff of the Banking Ombudsman Office, viewing files selected by them as being representative of both straightforward and difficult work, and talking with those people more generally about the work of the office.

3.8 I then provided a summation of the collected views I had gained to the Banking Ombudsman, seeking her response to these if she wished. I received a detailed response from her in which she indicated those matters which she was able to support, or in which she pointed out shortcomings in suggestions that may have been made, and, where it was appropriate, she registered opposition to submissions that had been made to me, and the reasons for that.

3.9 In November 2005, I issued a preliminary report to the Banking Ombudsman Commission which was discussed by its members at a meeting in mid-November.

There were views expressed by members at that meeting which the Banking Ombudsman conveyed in a response to me. It was suggested that there be further discussions by myself with interested parties, and by interested parties among themselves, and that I attend a meeting of the Banking Ombudsman Commission on 30 January 2006 when the preliminary report would be discussed. Following that time the way would be clear for me to finalise and settle my final report. I attended that meeting with the Banking Ombudsman Commission and engaged in discussions with the group and with a number of members of the Commission individually. In the paragraphs which follow, I proceed to answer the questions posed to me by the Banking Ombudsman Commission in the Terms of Reference in the light of the enquiries I have made and the view reached as a result.

Fundamental Finding

3.10 As a general proposition, I am able to state that the Banking Ombudsman Scheme has operated well, with high standards of professionalism and integrity. With some relatively minor adjustments to its structure and approach, it has a durable future in providing help for the banking industry and its consumers. I advance this by reference to the benchmarks referred to in Paragraph 3.1.

4. ACCESSIBILITY

4.1 To meet this benchmark, an effective complaint service should be easy to use, accessible and well publicised.

4.2 The Terms of Reference ask whether the Banking Ombudsman Scheme is sufficiently accessible to those who may need its services, and, in particular, whether its publicity materials and promotional activities are adequate and appropriate, and whether it is known and understood at all customer contact points and by managers of customer contact staff in member banks and by consumer advisory agencies such as community organisations, legal professionals, relevant government agencies, and financial advisers. It is also asked whether the service is easily accessible to consumers, easy for them to use, regardless of personal circumstances, and whether all complaints are covered by the Scheme.

4.3 The view that I have reached, is one supported by many within the bank community, let alone the consumers, that much more needs to be done. The nature of banking

has changed during the decade, in a sense that there is far more use of electronic technology with a result that the personal relationship between bank and customer tends to be somewhat more remote than may have been the case in the past. An abiding impression I have gleaned is that within the banking community there is something of a fleeting connection with the Banking Ombudsman Scheme, and that generally within the community, there is not nearly enough known about the availability of the Banking Ombudsman Scheme.

4.4 A convenient distillation of that which I have found is expressed in the January/ February 2006 edition (455) of *Consumer* which reports the outcome of a survey of 11,190 persons in part as follows: -

> *"Service standards are improving – except in one vital area. Only four percent of survey respondents who had problems with their bank were told they could complain to the Banking Ombudsman. ...The banks need to do a much better job of informing customers that an independent complaints resolution service exists. The Banking Ombudsman's Office also needs to look at why the message is not getting through to bank staff about the existence of the scheme."*

4.5 In fairness, it needs to be pointed out that, in general, the overall service provided by banks was regarded well and to have improved. It was put this way in the *Consumer* article: -

> *"Overall the ratings have steadily improved from 68 percent of respondents rating their bank "good" or "very good" in 2001 to 81 percent in 2004 and 84 percent in this survey."*

4.6 As discussed in paragraph 2.18, since 2002, there has been a recorded decline in the number of cases processed by the Banking Ombudsman. I retain an impression that insufficient knowledge exists about recourse to the Banking Ombudsman, and that there should be a shift undertaken so that knowledge of availability of recourse to the Ombudsman is more actively promoted.

Recommendations - Accessibility

4.7 I wish to make a number of recommendations for achieving this benchmark, first, that there be more publicity considered about the dispute resolution processes

- both internal within the banks and external through the Banking Ombudsman service. I want to suggest that in addition to the Banking Ombudsman pamphlet, which, in itself, is a fine document, that there should be more publicity of the Scheme by way of poster and that material advertising recourse to the Banking Ombudsman should be sent from time to time with bank material such as statements to customers. In addition, I think that Banking Ombudsman material might be published from time to time on the reverse of receipts from automatic teller machines (ATMs) – say for one month a year. I was also attracted by a submission that banks might be encouraged to have brochures or signs saying: -

> *"This bank is a member of the New Zealand Banking Ombudsman Scheme."*

If this were to happen, it would constitute another way for evidence to be provided to the New Zealand consumer that their bank is committed to the process and that any disputes that customers might have in the future will be dealt with in an appropriate fashion.

4.8 The Ombudsman having a public role and persona seems important to me in achieving both better public access and visibility. In my view the Ombudsman should be encouraged to continue the practice of commenting where appropriate in the public arena.

5. INDEPENDENCE

5.1 To meet this benchmark, the complaint service should be seen to be independent of the organisations that run the services.

5.2 The Terms of Reference conveyed three questions: the first relating to the structure and public perception of independence, the second to what changes might be desirable and the third questioning the appropriateness of the power to change the structure of the Scheme still residing within the banking industry's power. This matter of independence was thus probably the single item that generated most time and space in the course of submissions and discussions with interested parties.

5.3 The Banking Ombudsman Commission is a creature of agreement of the participating Banks and in particular of the New Zealand Bankers' Association through its Council. The Association has agreed that the Banking Ombudsman Commission will be comprised of representatives of the Bankers' Association and consumer groups. It is fair to observe that the New Zealand Bankers' Association has pursued a consistent course regarding husbandry and support of the Banking Ombudsman Scheme.

Recommendations - Independence

5.4 After dealing with a number of arguments to which I shall refer, I have come to the view that the Banking Ombudsman Commission should become an entity separated from the banks by a further step or degree, by being given an individual corporate personality.

5.5 Although a separation of sorts has been achieved by the present arrangement, there are a number of criticisms of that which have been registered. The first is that the separation is a matter revocable at will by a decision of the Bankers' Association. Secondly, to quote the words of an overseas submission received by me: -

> *"Where Rules and Terms of Reference of the Banking Ombudsman scheme are set by a purely industry body, I do not think that would be consistent with international best practice in relation to private sector non statutory ombudsman schemes and it may be useful to consider as part of your review how this could be remedied."*

Thirdly, models in countries similar to our own, such as Australia, have adopted corporate personality for the Banking Ombudsman Commission equivalent. Fourthly, it seems to me that the Banking Ombudsman Commission, as presently constituted by a decision of the Bankers' Association, lacks the legal personality (and therefore power) to be able to do a number of things which are envisaged by the Banking Ombudsman Commission Rules.

5.6 This lack of legal personality could have a number of unfortunate consequences. For just one example, a challenge could be registered against actions purportedly taken by the Banking Ombudsman Commission with a result that personal liability might need to be considered against each of the individual members of the Commission for the time being. This would be entirely unsatisfactory.

5.7 On the other hand, were the Banking Ombudsman Commission to have separate legal personality, the perception of independence would be enhanced so far as the public is concerned. It would follow that the ability of the Banking Ombudsman to act - for example, in negotiating or in making submissions - would be improved. Next, the ability of the Banking Ombudsman Commission to decide upon its own membership would be improved to the extent that the consumer representatives could play a role in this regard. Moreover, a vehicle would be created to provide contracted services of dispute resolution to businesses carrying on bank-like activities which are currently outside the Scheme - such as the Public Service Investment Society, the Southland Building Society and American Express. Lastly, an organisation with the ability to formulate rules or Terms of Reference would be created.

5.8 It may be that the nature and direction of the rules themselves would not change greatly from the present arrangements. However, in the context of an individual organisation with corporate personality, the notion of independence would be made clear to the public. In Australia, the [Federal] Corporations Act 2002 permits the notion of a company limited by guarantee. Although the New Zealand Companies Act 1955 also contained companies of this kind, such has not been allowed for in the present Companies Act 1993. There are three ways in which corporate personality could be achieved using the present companies legislation. First, a company could be formulated issuing one share only - which is the minimum required by law with no liability. The promoters (being the shareholders) could enter into an agreement which need not be public, agreeing that they will, between them, guarantee the obligations of the company. A second approach would be to use section 46A of the Companies Act 1993 which exempts shareholders from liability unless specifically required by the constitution for a pre-incorporation contract. A company could be formed and shares issued but there would be no machinery in the constitution to create liability on shareholders. There would be no right vested in the shareholders or board to issue new shares or to make any calls.

5.9 Thirdly, if a company model was not desired by the New Zealand Bankers' Association or Banking Ombudsman Commission, consideration could be given to the formation of an incorporated society, although there would need to be fifteen persons making application for incorporation. With the benefit of discussion with the Banking Ombudsman Commission, where it was explained to me that there should indeed be consideration now given to the matter of incorporation, I sought

and obtained specific legal advice from a specialist source which can be expressed as follows: -

"Summary of Advice

(a) The Commission should adopt a form of incorporation…

(b) Incorporation of a company under the Companies Act 1993 (Company) is more appropriate to carry out the Commission's objectives than incorporation under the Incorporated Societies Act 1908.

(c) The Companies Act 1993 provides a more comprehensive set of rules for the governance of an incorporated entity which includes a detailed code of the duties and responsibilities of members of the governing body. The incorporated society model is more suited to activities of a non-commercial nature, and there are difficulties posed by statutory requirements as to the minimum number of members required to incorporate and to be maintained.

(d) The company need issue only one share, which can be issued fully paid for a nominal amount or for a larger amount if that would assist to demonstrate financial substance and independence.

(e) The share can be held by a person independent of the NZBA, such as the Chairman of the Commission. Alternatively, the share can be held by the NZBA but on the basis (enshrined in the Company's Constitution) that the Constitution may not be altered in material respects, such as the appointment of directors or the terms of reference of the Banking Ombudsman, without some form of consultation process with interested parties.

(f) The Company's Constitution would adopt those of the Rules which deal with the governance of the Commission, and

would also contain such other provisions as are appropriate to a company of this kind.

(g) *The directors of the Company would take the place of the present members of the Commission and could be appointed in the same way as at present.*

(h) *The funding of the Company would continue to be provided by levies made on Participating Banks. The power of the Company to impose levies and the obligation of Participating Banks to pay could be contained in a contract (Contract) between the Company and each Participating Bank.*

(i) *The contract could also contain other provisions to mirror the Rules in dealing with such matters as the participation of banks, including application for membership of the Scheme, the obligation to comply with the procedures of the Scheme and the requirement to abide by any award made by the Banking Ombudsman against it.*

(j) *The contract can also include a several (not joint) guarantee of the liabilities of the Company by each Participating Bank, subject to a pro rata formula. It could be appropriate to ask the NZBA to provide a separate backup guarantee.*

(k) *This last matter raises the question of mandatory membership of the Scheme by banks, and whether the NZBA should impose sanctions on a bank which declines to join the Scheme, ceases to participate, fails to abide by an award made against it, or is in some other way in breach of the Contract. These matters could be covered by the NZBA membership rules. The NZBA's obligation to enforce the relevant rules could be the subject of an agreement between the Company and the NZBA.*

(l) *There is no need for the Company to be formed as a company limited by guarantee. In fact, no such corporate*

model is recognised by the Companies Act 1993, although it is possible to form a company which relies not on shareholders but on non-shareholder guarantors to meet its liabilities. Essentially, that is the scheme proposed.

(m) Incorporation of the Commission along the lines suggested will achieve the degree of independence that is sought to meet the objectives.

(n) The contract will provide clarity for the responsibilities of Participating Banks and will be a means to ensure continued funding and financial security for the Commission."

5.10 A separate but related point concerning independence is that of how the Banking Ombudsman Scheme Rules and Terms of Reference may be changed. Rule 18 of the Rules of the Banking Ombudsman Commission says that: -

> *"These rules and Terms of Reference may at any time be altered, added to, rescinded or replaced by the Council of the New Zealand Bankers' Association provided that the Council shall give sixty clear days notice of its intention to do so to every member of the Banking Ombudsman Commission."*

5.11 There is provision for a further period of notice, with a suggestion as to change, being made by the Banking Ombudsman Commission. This therefore means that the power to change resides in only the Council of the New Zealand Bankers' Association, with there being no obligation for the Council to consult more widely in making a decision in this regard. It could also be that the Scheme could be wound up by a decision of the Bankers' Association.

5.12 In my view, to have the matter of change residing in only this quarter, is contrary to the notion of independence which should be at the heart of the Scheme. It is correct to say that during the life of the Banking Ombudsman Commission and the Banking Ombudsman operation that the Bankers' Association and Banks have supported continuance of the Scheme. However, there is merit in the submission that was made to me that: -

"There is a proper perception of there being something less than proper independence."

5.13 There must also, of course, be recognition that the Scheme is funded by the Banks and that that reality needs to be recognised. The way that this issue might perhaps be faced, is for the Banking Ombudsman Commission to be given the powers to make changes after it has consulted with the Council of the New Zealand Bankers' Association. It might also be that there be a requirement that the resolution affecting change be something on which there be unanimity on the part of the Banking Ombudsman Commission before change can ensue.

5.14 A third possible solution might be for the Council of the New Zealand Bankers' Association to appoint a committee which would have as its purpose the question of consideration of change. That committee would comprise both Bankers' Association representatives and Banking Ombudsman Commission representatives and this Committee would need to be unanimous in its decision as to the question of change.

5.15 Any of these propositions would, in my view, be substantially better than the present arrangements

6. FAIRNESS

6.1 To meet this benchmark, a complaint service should provide a full and impartial investigation.

6.2 In examining whether this is provided by the Banking Ombudsman service, I looked at a number of working files and discussed them with investigating officers. Secondly, I considered viewpoints made known to me by members of the public, some of whom had had cases taken up by the Banking Ombudsman. A few in this last mentioned grouping were some complainants, who felt that the Banking Ombudsman had not seen the merit of their cases sufficiently and who wished to re-litigate their grievance with their bank - and where appropriate with the Banking Ombudsman. Some people contributing to the discussion of the issue of fairness were law firms and other institutions such as the Law Society.

6.3 In the files that I considered, I found a consistent pattern of thorough referral to the bank in question, clarification of issues, preparation of a preliminary assessment which only became a final view after comment had been sought and obtained - in particular from the adversely affected party. Additionally, there has arisen within the office the practice of engaging an independent law firm to undertake a review of the processes used by the Banking Ombudsman Office and making recommendations in that regard.

Recommendations – Fairness 1

6.4 As a result of considering that material I have a small number of recommendations, only one of which would see considerable change.

6.5 As I read a number of files, I harboured an anxiety which was borne out in some submissions that there is a tendency for the Banking Ombudsman process to take considerable time. Delay, particularly when it might compound a complaint about delay, can compound the sense of grievance. There seemed to be certain examples where banks took considerable time to marshal their side of things to respond. There is use of Clause 6 of the Banking Ombudsman Scheme Terms of Reference which I think should change.

6.6 Clause 6 provides for a difficulty that arises on a number of occasions. If the Banking Ombudsman is called upon to treat information as being confidential, the Terms of Reference say that the Banking Ombudsman shall not disclose that information to any other party, except with the consent of the person providing the information. This means that a Bank can provide a body of information concerning a Complainant to the Banking Ombudsman, saying that it is confidential. The Banking Ombudsman is then precluded from coming to any conclusion within the bounds of natural justice, namely advising the adversely affected party of the reasons for a decision, without disclosing that information.

6.7 This therefore means that a Bank can effectively "sandbag" an investigation by providing the Banking Ombudsman with information that may not be necessarily crucial for a decision in the case. The Banking Ombudsman has suggested that rather than leaving a power for one side to provide information and to say that it is confidential, that that power should be replaced by a power to give notice that it holds information that may be confidential and that it is of a certain category.

The Banking Ombudsman could then make a decision as to whether or not the information is germane to the particular complaint that is being made, and if it is not, the Banking Ombudsman could come to a decision, without having the problem of confidentiality thrust in front of it. I agree with the submission and recommend change.

Recommendations – Fairness 2

6.8 I have made reference to the triennial process review undertaken by an independent law firm. Two of these reviews have been completed in recent times. In my view, the matters canvassed by that review are satisfactory and that a case can properly be made for the review to be conducted more regularly in order to ensure that difficulties encountered are dealt with quickly. It may be that the process review could be more directed and not need to "cover the field" each time. With that last observation the question of cost of the reviews (which is an operative factor) could be more easily constrained.

Recommendations – Fairness 3

6.9 This then leads to the major recommendation I have with regard to the matter of fairness.

6.10 I begin by reiterating, that after examining a number of cases taken up by the Banking Ombudsman, either presently or during the recent past, and backed up with discussions with the relevant investigating officers, I am able to say that even where claimants may remain dissatisfied with the final result, that the Banking Ombudsman Office, led in this regard by the Banking Ombudsman herself, undertakes its work on investigations in a thorough and careful way.

6.11 I do, however, have a recommendation to make in regard to a practice that has arisen, of referring a certain group of cases where the Complainant remains dissatisfied with the recommendation made by the Banking Ombudsman, to the Chairman of the Banking Ombudsman Commission for what is called a "review as to process".

6.12 This practice arose years ago because of a viewpoint that a parliamentary ombudsman in conducting an investigation is subject to judicial review for either

inadequate or improper process being adopted in the course of that investigation. Coincidentally because the erstwhile Chairperson of the Banking Ombudsman Commission has been a retired judicial officer, it was apparently thought appropriate that there could be some kind of review undertaken by the Chairperson.

6.13 It seems to me that this practice is unsatisfactory on a number of grounds. First, the Chairman is not able to undertake a review such as would occur in court with the benefit of argument being presented on both sides and where reference can be made to the principles applicable to the matter. Secondly, the Banking Ombudsman has not been engaged in an investigation like one undertaken by a Parliamentary Ombudsman. Thirdly, although the review as to process is conducted by the Chairman on a narrow footing, a dissatisfied Complainant is apt to consider that some form of appeal is being entertained when that is not the case. It seems to me that if there is a complaint to be made about inadequate or improper process on the part of the Banking Ombudsman, then this should be canvassed directly with the Ombudsman. The Banking Ombudsman should then be able to deal with the matter as part of the complaint or as an addendum to it. It is a little like the notion of a rehearing by a court.

6.14 In the event of the complainant being dissatisfied with what the Banking Ombudsman may have done, it remains open to the Complainant to have the matter dealt with before the ordinary courts.

6.15 There is, in my view, a distinction to be drawn between that which is done by a Parliamentary Ombudsman – something which is not able to be redressed by a court – and that which is done by a Banking Ombudsman which is something able to be redressed by a court, but for which an external dispute resolution mechanism has been made available. In short, I do not think it desirable to have the erstwhile Chairman of the Banking Ombudsman Commission involved in the matter of reviews as to process.

6.16 I observe that the Banking Ombudsman herself and the Chairman of the Commission are in agreement with this change on a variety of counts, including confirmation that a proper evaluation envisaged by judicial review is not ever being undertaken. This leads to apparent confusion, particularly in the minds of complainants, between the nature of a review as compared with an appeal. It is

also undesirable for the Banking Ombudsman and the Chairman of the Banking Ombudsman Commission to be placed in conflict.

6.17 I conclude with a view that the practice of referral of certain cases to the Chairman of the Banking Ombudsman Commission for a review as to process, should cease and that this should be replaced by the following things. In the first place, the dissatisfied Complainant can be invited to make submissions to the Banking Ombudsman and the Banking Ombudsman invited to review the position taken in the light of the further argument. This would be akin to applying for a rehearing in a court situation. In the second place, the dissatisfied Complainant can be referred to the courts.

7. ACCOUNTABILITY

7.1 To meet this benchmark, the complaint service ought to be able to render what it has done to the participants, to the consumers and to the stakeholders all in equal measure.

7.2 To reach a conclusion, I have first examined the written output of the Banking Ombudsman Office in regard to individual cases, through a representative sampling of case files presented to me by investigating officers - of the present time as well as of past years. I am satisfied that the office maintained high standards of clarity and fairness to both sides in all instances presented to me.

7.3 Secondly, I had a limited opportunity to examine some overseas material, as a result of which I can say that nothing I saw was of a character that would make it proper to alter the view just expressed.

7.4 Thirdly, I looked at a number of Banking Ombudsman Annual Reports and two Compendiums of Case Notes, each of which demonstrated an admirable quest for explaining decisions that may have been reached in particular cases and where appropriate, the reasons for this.

7.5 Lastly, I read a number of articles in the press and periodicals circulating in New Zealand, in which the Banking Ombudsman had expressed a clear view about issues before her office and to do with the standard of banking services.

Recommendations – Accountability 1

7.6 I am bound to say that some things written by the Banking Ombudsman, or spoken by her on radio and television were, and have been, uncomfortable for some banks and bank officials, some of whom expressed that discomfort to me in their submissions.

7.7 In my view there is a proper educative function associated with a robust ombudsman office and that the balanced and yet direct approach undertaken by the Banking Ombudsman is appropriate and much appreciated by the community. If there be any doubt regarding the power to undertake the educative role to which I have referred, my recommendation is that it be catered for. As discussed this would also enhance the public perception that the Ombudsman is accessible.

Recommendations – Accountability 2

7.8 There is another aspect of accountability which relates to membership of the Banking Ombudsman Commission.

7.9 It will be recalled that in Paragraph 2.11, reference was made to the Banking Ombudsman Commission comprising a Chairman, two representatives of Participating Banks appointed by the Council of the New Zealand Bankers' Association, one person nominated by the Crown through the Ministry of Consumer Affairs and another person ordinarily the executive director for the time being of the Consumers' Institute of New Zealand.

7.10 A number of submissions were received regarding how the time served on the Banking Ombudsman Commission by its members needed to be preserved. The Commission had greatly benefited, it was said, by the ability of some members to serve for a lengthy period. For example, a particular member proffered by the New Zealand Bankers' Association has been a key figure in ensuring continuance and co-operation by Banks in the Scheme. Equally, the executive director, for the time being of the Consumers' Institute, has been a person able to serve on the Banking Ombudsman Commission for a lengthy period.

7.11 As opposed to this there were some difficulties not so easy to deal with. Much change in the banking industry and among executives at a high level during a

decade in which there were many changes of ownership and restructuring to deal with, have meant that a number of members provided from time to time by the New Zealand Bankers' Association for the Banking Ombudsman Commission had only been able to serve in these roles for relatively short terms. The community representative, nominated by the Crown through the Minster of Consumer Affairs has generally been a person who serves for a shorter period of time. In my preliminary report, I had expressed the view that things might be better satisfied if the Banking Ombudsman Commission entertained membership by individuals for two to three years with the possibility of reappointment for a further two to three years when desired.

7.12 Upon reflection, and in the light of later views expressed by the Banking Ombudsman Commission members, I am now satisfied that a three-year term in the case of some people would be too little and that whilst retaining the desirability of three-year terms, with the prospect of further appointment for three years, that this should not apply in total. I think in the end that the matter is best left with the Banking Ombudsman Commission being able to determine the appropriate length of service by individuals and making decisions in that regard.

7.13 There is however one mechanical matter relating to the time which is taken for a Ministerial appointment of one person to go through the processes of solicitation, selection and appointment. It seems to me that it is appropriate to suggest that there be a clause saying that the incumbent member of the Banking Ombudsman Commission can and should remain in office, until his or her replacement comes to take office upon subsequent appointment and I recommend this accordingly.

8. EFFICIENCY

8.1 To meet this standard there should be evidence of a complaint service with a speedy process containing time limits for action and with provision of advice about process.

8.2 I recognise that this call for efficiency is in some ways inimical to the Ombudsman process, because it is only after dissatisfaction has been registered that a person gets to be able to access the Banking Ombudsman service.

Recommendations - Efficiency

8.3 In addition, unravelling a problem can itself be time consuming. In the files which I viewed, I saw no evidence of outright derelict of duty and delay, but I do note again the inherent capacity for things to take a long time. Bearing in mind that the Banking Ombudsman service is an alternative to action in the courts, there is perhaps a good challenge to offer mainly that there be consideration of a commitment by everyone to completion of cases within precisely laid down periods of time. I leave for consideration a recommendation that there be thought given to completion of investigations on average not later than 60 days upon receipt of complaints. As discussed in paragraph 6.6, the banks have an important role in assisting the Ombudsman to process cases efficiently.

8.4 A further advantage would accrue namely that faster processing would generate, in due course, publicity about the timeliness within which complaints were received and dealt with by the Banking Ombudsman service.

8.5 To put this question of timeliness in its context, I refer to the results of a 2001 survey of complainants which asked a sampling of Banking Ombudsman complainants whether they would recommend the scheme to a friend with a similar problem to theirs, as well as being asked to rate the overall performance of the Banking Ombudsman in dealing with their complaints. 73% of the respondents said they would definitely recommend or probably recommend the scheme whilst 18% would probably or definitely not recommend it. The remaining respondents were uncertain. As to overall performance, 50% rated it as very good and 17% as good. Only 6% thought that the overall performance was very poor while 9% thought it poor. The remainder said performance was neither good nor poor. The results of this survey suggest that the Banking Ombudsman's performance is generally considered adequate by users of its service.

9. EFFECTIVENESS

9.1 To meet this benchmark a complaint service should be known for its willingness and ability to address issues raised and to provide suitable outcomes.

9.2 The first aspect in this heading is jurisdiction. One of the matters for my consideration was whether or not the financial limits presently prevailing on

complaints - $120,000 arising out of the provision of banking services in New Zealand, or $150,000 in the case of banking services relating to insurance were appropriate. In my preliminary report, I said that I did not find there to be any compelling case made out for change. I had said this because it was not clear from the submissions made to me that sufficient basecourse existed for me to properly suggest change. With the benefit of later discussions arising out of my meeting with the Banking Ombudsman Commission, I am now willing to modify this view as follows. I now see that without any application being made for any change to Terms of Reference a number of parties have agreed, over time, for the Banking Ombudsman to deal with the matter even though the amount in issue may have been more than the $120,000 limit. This is, of course, a compliment to the efficacy of what the Banking Ombudsman provides and evidence too of both reliance and credibility.

Recommendations – Effectiveness 1

9.3 The Banking Ombudsman has made a submission that it might be desirable for the limit to be raised from $120,000 or $150,000 to $200,000, in her view, on the basis that this equates to the upper limit of ordinary home loans, this last mentioned item being one of the main sources of cases coming to the Ombudsman for attention. There would also be the ancillary coincidence of a new limit of $200,000 according with civil jurisdiction limit of the District Court for which the Banking Ombudsman is, as has been stated earlier in this review, an alternative. I therefore recommend that the financial limit be extended and increased to $200,000 for both the provision of banking services and provision of banking services relating to insurance.

Recommendations – Effectiveness 2

9.4 In a similar way, I have reviewed the approach which I took in my preliminary report to the Banking Ombudsman's ability pursuant to Clause 14A of the Banking Ombudsman Terms of Reference to make an award of not more than $4,000. This is to compensate a Complainant for inconvenience suffered by him or her by reason of the acts or omissions of the Participating Bank against which the recommendation is made. In my preliminary report, I had not been able to come to any clear conclusion about this for similar reasons as above. The Banking Ombudsman has responded to this saying that, in her view, there is: -

"...a stronger case for an increase in the $4,000 ceiling for awards of compensation for inconvenience."

She referred to the published Case Notes and said that: -

"Although the maximum of $4,000 is not very often recommended there had been some cases where the distress and disruption suffered by a Complainant would merit a more substantial award."

9.5 In this light and bearing in mind the relatively low number of instances in which an award either approaching or exceeding $4,000 would be made; I accept the submission that the limit should also be increased to a figure of $10,000.

9.6 A second aspect of effectiveness relates to whether the Banking Ombudsman is properly limited to dealing with the cases that come to attention. Should there be the capacity to provide advice as well. At present, the Terms of Reference describe the Banking Ombudsman powers as being: -

"To consider certain complaints and to facilitate the conclusion of those complaints along with the ability to give advice on the procedure for referral of a complaint to the Banking Ombudsman."

The Terms of Reference say in particular: -

"It is not a function of the Banking Ombudsman to provide information about Banks or banking services."

9.7 In my view, the passage of time has established this restriction to be somewhat too narrow, given the roles that the community has come to expect the Banking Ombudsman to play. In recognition of this a major Bank made a submission which I think is acceptable in its entirety, that the role of the Banking Ombudsman definition should be broadened to include the ability to promote and publicise the Banking Ombudsman Scheme, to encourage and assist in the development of good complaint handling practices in member banks and lastly to give general advice to the public on existing banking processes and practices. I recommend this be added to the powers of the Banking Ombudsman in the Terms of Reference.

9.8 The next matter to be dealt with under the heading of effectiveness relates to the relationship between the three major players (the Banks, the New Zealand Bankers' Association and the Banking Ombudsman Commission) and their connection with the Code of Banking Practice.

Recommendation – Effectiveness 3

9.9 The Code of Banking Practice is something prepared by member banks of the New Zealand Bankers' Association and has been in operation since 1996 - that is after the Banking Ombudsman Commission and the Banking Ombudsman service came into operation. The Code has been amended twice and is currently in the process of being reviewed again. There are a number of issues in the Code of Banking Practice that need reconsideration and change because of the increase and amount of banking involving electronic means. The Code of Banking Practice has in its initial stages statements such as: -

"This Code records good banking practices."

9.10 It is agreed that banks will observe these practices as a minimum standard and that banks will ensure their staff are aware both of the Code and the minimum standards of good banking practice. It also says that the Code will be monitored by the Banking Ombudsman through complaint investigation. This has a practical effect to it. Many complaints where it is appropriate, involve the Banking Ombudsman coming to an assessment of whether the standard imposed by the Code of Banking Practice has been followed in the individual instance by the Bank involved.

9.11 There is however a gap, namely, that whilst the Banking Ombudsman has the role of ensuring compliance with the Code of Banking Practice, there is no prescribed role in seeking or making changes which may be desirable to the Code of Banking Practice itself. This, it seems to me, is an oversight and should be addressed in forthcoming engagements between the Banking Ombudsman Commission and the Council of the New Zealand Bankers' Association.

Recommendation – Effectiveness 4

9.12 This then leads to consideration of the final aspect of effectiveness which is concerned with reading of the Banking Ombudsman Terms of Reference. In

the course of my enquiries and discussions, particularly with members of the Banking Ombudsman Commission and certain bank officials, it became clear that this review will result in change of various kinds. Whilst that is being undertaken I have come to an abiding view regarding the Terms of Reference themselves, my view being able to be expressed as follows. When the Scheme was commenced, it arose as a result of an initiative by the banks. It was therefore natural that the Terms of Reference as to what would be made available would be expressed from the bank's standpoint. The Terms of Reference read in that way. Now that the Scheme has been operational for 13 years and is regarded as being a success, there is a case to be made, in my view, for the wording to be altered so that the Terms of Reference document is written from a more centrist viewpoint. A convenient precedent is provided by the current formulation of the Australian Banking Ombudsman Office Terms of Reference, and I set out below two examples of points that I recommend.

9.13 The headings in the New Zealand Banking Ombudsman Terms of Reference are: -

"Definitions and Interpretation
Principal Powers and Duties of the Banking Ombudsman
Procedure
Settlements, Recommendations and Awards
Limits on the Banking Ombudsman's Powers
"Test Cases"
Other Powers and Duties"

The headings in the Australian Banking and Financial Services Ombudsman Terms of Reference are: -

"What is the Banking and Financial Services Ombudsman Scheme?
Overview
Aim of Scheme
How is Independence Maintained?
What is the Effect of a Determination by the Ombudsman?
What is the Cost of the Service?
Who can be a Disputant?
What Sort of Disputes can the Ombudsman consider?

What Other Roles Does the Ombudsman Have?
Are There any Limits on the Types of Disputes the Ombudsman can Consider?
What Determination, Recommendation, or Settlement can the Ombudsman make?
How Does the Test Case Notice Work?
Systemic Issues and Serious Misconduct
What Information Must the Ombudsman Collect?
How is the Scheme Promoted?
What Other Powers and Duties Does the Ombudsman Have?
Annual Business Plan and Budget
Changes to Terms of Reference and Guidelines
Interpretation"

9.14 The Principal Powers and Duties of the [New Zealand] Banking Ombudsman are expressed as follows: -

- *"To consider at no cost to the complainant complaints over claims not exceeding $120,000 arising out of the provision within New Zealand of banking services, or $150,000 in the case of banking services relating to insurance, 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.*

2. The Banking Ombudsman may give advice on the procedure for referring a complaint to him or her. It is not a function of the Banking Ombudsman to provide information about Banks or banking services."

The concomitant powers of the Australian Banking Ombudsman are expressed as follows: -

"What Kinds of Disputes can the Ombudsman consider?

3.1 The Ombudsman can, subject to these terms of reference consider a dispute which relates to:

(a) any act or omission by a financial services provider in relation to a financial service in Australia;

(b) any act or omission by a financial service provider relating to confidentiality and in the case of an individual disputant, privacy.

3.2 There is more information about the types of dispute the Ombudsman can and cannot consider in [5] below."

9.15 Given that there is a broader context in which New Zealand is seeking to align with Australian best practice, it seems that the New Zealand Banking Ombudsman Terms of Reference could benefit from a close analysis in light of the Australian counterpart.

10. CONCLUSION

10.1 It seems that the Banking Ombudsman and those responsible for its office, have every reason to think positively about its place in future arrangements. In order to do this, there will need to be regard to some, at least, of the following trends in the New Zealand community, which are not expressed in any order of importance.

10.2 The first is that the New Zealand consumer is "rights conscious" and in world terms, relatively well educated. This means that complaint procedures with regard to organisations such as Banks must be robust and able to deal with things efficiently, and in the least time possible. Secondly, there should be an organisation like the Banking Ombudsman to deal with the merits of the individual case that has been presented by a complainant and also able to deal with similar cases which might arise in the future. This can occur by information regarding the case at hand being disseminated by means of guidelines or other publicity. The Banking Ombudsman commendably publishes on a regular basis, a compendium of Case

Notes, giving both bank employees as well as members of the public, some idea of how the Banking Ombudsman will operate, having regard to particular facts. There was some anxiety expressed by some banking quarters that there was a degree of uncertainty if the Banking Ombudsman could not be guaranteed to find in a particular way, every time.

10.3 It seems to me that there must be a degree of flexibility vested, in order to give the Banking Ombudsman the notion of being able to act as a kind of conscience, albeit when what has occurred may be inconsistent to a certain degree with the particular facts of an earlier case.

10.4 Lastly, the Banking Ombudsman is able, by reason of doing work in a particular case, to have an educative role more generally. This can be achieved by making sure that what has been recommended in a particular instance is proper, and that it can be presented in the form of publicity to interested persons such as bank employees, members of Citizens' Advice Bureaux, and lawyers advising clients.

10.5 I have enjoyed working on this assignment presented to me by the Banking Ombudsman Commission, and have met with cooperation from a great many people ranging from the Office of the Banking Ombudsman itself, the New Zealand Bankers' Association, many banks, many professional people and a considerable number in government departments and organisations as well as members of the public. To each, I express gratitude and the hope that this review will assist in providing New Zealanders with the service they deserve. The challenge registered by New Zealand's foremost jurist Sir Kenneth Keith, to continue working at "putting things right" is a considerable one.

Anand Satyanand DCNZM
Reviewer
March 2006

Summary of Findings and Recommendations

FUNDAMENTAL FINDING

The Banking Ombudsman scheme has operated well with high standards of professionalism and integrity. With some relatively minor adjustments to its structure and approach, it has a durable future in providing help for the banking industry and its consumers.

ACCESSIBILITY

Finding

More needs to be done to ensure that the Banking Ombudsman's services are easily accessible to consumers. There is insufficient knowledge about recourse to the Banking Ombudsman and there should be a shift undertaken so that knowledge of availability of recourse to the Banking Ombudsman is more actively promoted.

Recommendations

There should be more and better publicity for the scheme by various means.

The Banking Ombudsman should be encouraged to continue the practice of commenting where appropriate in the public arena.

INDEPENDENCE

Findings

There is an insufficient degree of separation between the Banking Ombudsman Commission and the banks.

The Banking Ombudsman Commission as presently constituted lacks the legal personality (and therefore power) to do a number of things which are envisaged by the Banking Ombudsman Commission rules.

A vehicle should be created to provide contracted services of dispute resolution to businesses carrying on bank-like activities which are currently outside the scheme.

There is a suitable form of incorporation which could be achieved using the present companies legislation.

To have the power to change the Terms of Reference of the Banking Ombudsman and the rules of the Banking Ombudsman Commission residing only in the Council of the New Zealand Bankers' Association is contrary to the notion of independence which should be at the heart of the Banking Ombudsman scheme.

Recommendations

The Banking Ombudsman Commission should be invited to consider incorporation.

There should an improved process for changes to be made to the Banking Ombudsman's Terms of Reference and the rules of the Banking Ombudsman Commission.

FAIRNESS

Findings

There are difficulties with the current provision for banks to request confidentiality for information required by the Banking Ombudsman.

The practice of retaining an independent law firm to conduct periodic process reviews is satisfactory and to be encouraged.

At present there is a practice of referring to the Chairman of the Banking Ombudsman Commission files where a complainant has expressed concern about the process of investigation. This practice is unsatisfactory on a number of grounds.

Recommendations

The declaration of confidentiality should be replaced by the giving of notice in that regard.

There should be more and different kinds of review of work completed by the Banking Ombudsman.

The practice of referring dissatisfied complainants to the Chairman of the Banking Ombudsman Commission should cease.

ACCOUNTABILITY

Findings

The office has maintained high standards of clarity and fairness to both sides in all case files presented to me.

There is a proper educative function associated with a robust ombudsman office and the balanced and yet direct approach undertaken by the Banking Ombudsman in making public comment is appropriate and much appreciated by the community.

On considering the terms served by members of the Banking Ombudsman Commission I am satisfied that a three-year term in the case of some people would be too little and that while retaining the desirability of three year terms with the prospect of further appointment for three years, this should not apply in total.

There are problems with the time taken for the ministerial appointment of one Commission member to go through the appointment process.

Recommendations

The Banking Ombudsman should be encouraged in having a public education role.

The desirable length of term served by members of the Banking Ombudsman Commission should be determined by the Commission.

Banking Ombudsman Commission members should serve until replaced.

EFFICIENCY

Finding

There is an inherent capacity in the Banking Ombudsman process for investigations to take a long time.

Recommendation

The Banking Ombudsman should be encouraged to adopt time targets for the completion of cases.

EFFECTIVENESS

Findings

There is a case for extending the financial limits presently applicable to the Banking Ombudsman's power to award compensation.

Consideration should be given to submissions made by a major bank that the role of the Banking Ombudsman should be broadened to include the power to promote and publicise the Banking Ombudsman scheme, to encourage and assist in the development of good complaint handling practices in member banks and to give general advice to the public on existing banking processes and practices.

There is no prescribed role for the Banking Ombudsman in seeking or making changes which may be desirable to the Code of Banking Practice.

There is a case to be made for the wording of the Banking Ombudsman's Terms of Reference to be changed so that the document is written from a more centrist viewpoint.

Recommendations

The Banking Ombudsman's jurisdiction should be increased to $200,000 as to the amount in dispute and to $10,000 as to inconvenience.

The Banking Ombudsman's role should be better aligned with the Code of Banking Practice particularly in regard to changes.

The Banking Ombudsman's Terms of Reference should be rewritten in a more appropriate contemporary style of expression.

Appendix A

TERMS OF REFERENCE FOR THE REVIEW OF THE BANKING OMBUDSMAN SCHEME

The Banking Ombudsman Commission has decided to arrange for a review of the Banking Ombudsman scheme. After consultation with the New Zealand Bankers' Association, the Ministry of Consumer Affairs and the Retirement Commissioner, and with the approval of the New Zealand Bankers' Association, it was agreed that the scheme should be reviewed against the six benchmarks established in 1997 by the Australian Department of Industry Science and Tourism in its publication "Benchmarks for Industry-Based Customer Dispute Resolution Schemes". These are:

- Accessibility
- Independence
- Fairness
- Accountability
- Efficiency
- Effectiveness

The review will not cover every item specified as a "key practice" in the benchmark document. While the review should be as comprehensive as possible, there are some elements of the scheme that may not need to be reviewed, and also some that may need particular attention.

Overall, the two main questions for the reviewer are whether the scheme is meeting internationally recognised standards of best practice and whether it is meeting the needs of New Zealanders and their banks for a demonstrably independent and effective resolution process for banking disputes. Breaking those questions down into the categories of the ASIC benchmarks, the main questions the review should answer as follows:

1. Accessibility

Is the Banking Ombudsman scheme sufficiently accessible to those who may need its services? In particular:

a) Are its publicity materials and promotional activities adequate and appropriate?

b) Is it known and understood at all customer contact points and by managers of customer contact staff in member banks, and by consumer advisory agencies such as community organisations, legal professionals, relevant government agencies, financial advisers etc

c) Is it easily accessible to, and easy to use for, consumers regardless of their location, resources (intellectual and material), literacy, language skills, health status and other personal circumstances?

d) Does it cover all types of complaint that recipients of banking services are likely to make?

2. Independence

Is the existing structure of the scheme sufficient to ensure both the independence of the Banking Ombudsman and public perception of that independence? If not, what changes should be made, and if so, what can be done to enhance perceptions of independence? In particular, is it still appropriate that the power to change the structure of the scheme resides in a body that consists entirely of representatives of the banking industry?

3. Fairness

The triennial process review covers questions of procedural fairness, and it is not intended to duplicate the terms of reference of that review here. The review should therefore consider:

a) Whether the triennial process review is an adequate assurance of procedural fairness.

b) Whether the terms of reference for the triennial process review are appropriate.

c) Whether the provisions in the Banking Ombudsman's Terms of Reference about the supply of information in confidence affect the fairness of the investigation process.

d) Whether the mechanisms for changing the Rules of the Banking Ombudsman Commission and the Terms of Reference for the Banking Ombudsman are fair and effective.

4. Accountability

Does the scheme through its constitution or through its policies and practices provide adequate accountability by its constituent parts (NZBA Council, Banking Ombudsman Commission and Banking Ombudsman) to each other, to scheme members and to users and potential users of the Banking Ombudsman's services? In particular:

a) Does the "Chairman's review" process provide an adequate remedy for complainants who consider there were defects in the process by which their complaints were investigated?

b) Is there adequate statistical and other reporting by the Banking Ombudsman to:

   (i) The Banking Ombudsman Commission; and

   (ii) Scheme members: and

   (iii) The general public.

c) Should there be a periodic public review of the scheme?

5. Efficiency

The efficiency of the investigation process is considered by the triennial process review. Other aspects of efficiency include:

a) Whether the organisational structure of the Banking Ombudsman's office is efficient, especially in view of the fluctuating nature of the caseload.

b) Whether there are sufficient mechanisms to ensure efficient referral of

complaints

(i) By the Banking Ombudsman to member banks.

(ii) By member banks to the Banking Ombudsman.

c) Whether staff are appropriately qualified and trained for their roles within the organisation

6. Effectiveness

Again, the triennial process review covers the effectiveness of the investigation process. The proposed review should be more concerned with general issues such as:

a) Are the current limitations on the powers of the Banking Ombudsman (including the financial limits to jurisdiction) still appropriate or do they require amendment to make the scheme more effective?

b) Is the scope of the scheme appropriate or should it offer membership to providers of banking services other than registered banks? If the eligibility criteria are to be extended, what other changes to the constitution of the scheme would be required? Could or should the scheme offer dispute resolution services on a basis other than scheme membership?

c) Is the role of the Banking Ombudsman adequately defined in the Terms of Reference? Should the definition include:

- Monitoring the Code of Banking Practice:
- Promoting and publicising the scheme:
- Encouraging and assisting in the development of good complaint-handling practices in member banks:
- The prevention of complaints:
- General advice to the public on banking processes and practices (retaining the existing prohibition on giving advice on specific products and services):
- Any other functions.

Review process

It is expected that the reviewer will consider:

- Investigation files
- Administrative files
- Commission reports
- Internal policy and process documentation
- Publicity and information material
- Process review reports
- Complainant and bank survey reports
- Constitution, structure and processes of similar dispute resolution schemes

It is also expected that the reviewer will consult with the following persons and organisations. In this respect it may be desirable to set up one or more reference groups to assist in the review.

- Members of the Banking Ombudsman Commission
- Members of the Council of the New Zealand Bankers' Association and staff of the Association
- Other scheme members (Rabobank)
- Suppliers of banking services who are not scheme members
- The Banking Ombudsman and senior staff
- Relevant Government departments and agencies, including but not limited to the Ministry of Consumer Affairs, the Retirement Commissioner and the Commerce Commission.
- Consumer and special interest groups
- Similar dispute resolution schemes in New Zealand and overseas

Nature of report

It is expected that the reviewer will report on the criteria set out above and in doing so will:

- Critically analyse issues raised by those consulted during the review process
- Test assertions made by those consulted by seeking reasoning and evidence in support
- Provide a balanced analysis of the key issues identified during the review

- Make recommendations that are in keeping with the fundamental nature of an ombudsman scheme
- Provide a record of issues raised that were not covered by the criteria set out in the terms of reference.

The review will commence on or about 1 July 2005. The reviewer will present a provisional report to the Banking Ombudsman Commission before its annual meeting to be held on or about 16 November 2005 and a final report to the Banking Ombudsman Commission no later than 3 February 2006.

Sir Ian Barker QC
Chairman
Banking Ombudsman Commission

Appendix B

STATEMENT OF ESSENTIAL ISSUES

Accessibility

(a) How effectively is information about the Banking Ombudsman scheme made known to the public?
(b) Is the Banking Ombudsman scheme made sufficiently well known to staff of banks and to the public?
(c) Is recourse to the Banking Ombudsman scheme readily accessible to consumers?

Independence

(a) Is the Banking Ombudsman scheme both independent and perceived as independent of the banks which support it?
(b) What should the legal nature of the Banking Ombudsman Commission be – an entity produced by agreement, an incorporated society, a company, a charitable trust or another alternative? In any event, what rule making or rule amending power should the Banking Ombudsman Commission have?

Fairness

(a) Does the Banking Ombudsman scheme have sufficient procedures to ensure fairness in the investigation process?
(b) Are adequate standards of confidentiality observed by the Banking Ombudsman scheme in its dealings with complainants and banks? Have any problems in relation to confidentiality been identified since the Office of the Banking Ombudsman was established?

Accountability

(a) Are there satisfactory processes for the Banking Ombudsman to report to the Banking Ombudsman Commission, the banking community and the public?
(b) When the Banking Ombudsman completes a case, should this be a final disposition of the matter?

Effectiveness

(a) Does the Banking Ombudsman scheme presently encompass all banking activities in New Zealand and, if not, should it do so?
(b) Is the role of the Banking Ombudsman adequately addressed in the Terms of Reference and Rules of the Banking Ombudsman Commission?

Efficiency

(a) Is the organisational structure of the Office of the Banking Ombudsman efficient in terms of relationships with banks and with the public?
(b) Are the staff of the Office of the Banking Ombudsman appropriately qualified and trained for their roles?

PUBLIC NOTICE

INVITATION TO PARTICIPATE IN
AN INDEPENDENT REVIEW
OF THE BANKING OMBUDSMAN SCHEME

Judge Anand Satyanand DCNZM, a former Parliamentary Ombudsman and District Court Judge, has been commissioned to conduct an independent review of the New Zealand Banking Ombudsman Scheme.

The Office of the Banking Ombudsman provides for the investigation of complaints about banking services. The Banking Ombudsman may investigate complaints about a range of matters which have been through a bank's internal complaints process, without satisfying the client. This scheme, which has been in place since 1992, will now be reviewed in relation to the following broad headings:

Accessibility; Independence; Fairness; Accountability; Efficiency; and Effectiveness.

Information relevant to the review, including its detailed terms of reference, is available at www.bankombudsman.org.nz or from the reviewer at the address below.

Interested members of the public, community organisations, and others are invited to make their views known in writing by Friday 16 September 2005.

Submissions should be sent to:

Judge Anand Satyanand
Reviewer, New Zealand Banking Ombudsman Scheme 2005
PO Box 10-764
WELLINGTON 6036

Appendix C

LIST OF SUBMISSIONS AND CONSULTATIONS

Participating Banks

ANZ National
ASB Bank
Bank of New Zealand
Rabobank
Westpac

New Zealand Institutions

Chen Palmer & Partners
Commerce Commission
Consumers' Institute
Eden/Albert Citizens Advice Bureau
Financial Services Federation
General Finance Ltd
Human Rights Commission
Insurance & Savings Ombudsman
Investment Savings & Insurance Association of New Zealand Inc
Manawatu Community Law Centre
Massey University Centre for Banking Studies
Minister of Consumer Affairs
Ministry of Consumer Affairs
MinterEllisonRuddWatts
New Zealand Association of Citizens Advice Bureau Inc
New Zealand Bankers' Association
New Zealand Federation of Family Budgeting Services (Inc)
New Zealand Law Society
Nga Ture Kaitiaki Ki Waikato
Parliamentary Ombudsman
Reserve Bank of New Zealand
Upper Hutt Citizens Advice Bureau
Victoria University of Wellington Law School
Wellington District Law Society (Alternative Dispute Resolution Committee)
Whitireia Community Law Centre

New Zealand Individuals

ND Bacon
Fraser Farm Finance Ltd
Jean H Fuller
Genevieve Gill

Ralph Norris
Neville Pomare
Graeme Reid & Associates
John Rust & Associates
Nicola Schaab
Susan Taylor
Helen Walch

Overseas Submissions

Banking & Financial Services Ombudsman Limited (Australia)
British & Irish Ombudsman Association
Financial Ombudsman Service (UK)
Ombudsman for Banking Services (South Africa)