

# INTERIM PROCESS REVIEW OF THE BANKING OMBUDSMAN SCHEME

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## OVERVIEW

### 1. Introduction

#### *Description of Banking Ombudsman Scheme*

- 1.1 The Banking Ombudsman Scheme was established in 1992 as an independent process to assist people in the resolution of disputes with Participating Banks. The Banking Ombudsman is empowered under the Banking Ombudsman's Terms of Reference to investigate and facilitate the resolution of disputes where Participating Banks and complainants are unable to settle the matter themselves. The Scheme is entirely funded by the Participating Banks and therefore operates at no cost to the complainant customers.
- 1.2 The Scheme is voluntary with no restraints on the complainants withdrawing from the process at any stage to pursue remedies through the judicial system.
- 1.3 The following is a very brief description of the Banking Ombudsman's processes.
- 1.4 The process typically begins when a complainant approaches the Banking Ombudsman's office with a complaint against a Participating Bank. The Banking Ombudsman can only consider a complaint once it has been through the relevant Participating Bank's internal complaints procedures, and cannot be resolved using those procedures. If this has not yet happened, the Participating Bank is notified and asked to consider the complaint.
- 1.5 When the Banking Ombudsman contemplates that there will be an investigation into a complaint, the complainant is asked to sign a waiver of confidentiality. This is forwarded to the Participating Bank before it provides any information to the Banking Ombudsman's office. It is necessary because the relationship between a bank and its client is confidential, and any information cannot be disclosed without consent.
- 1.6 Where a claim is investigated, the complainant and Participating Bank are asked to provide all relevant information to the Banking Ombudsman. This information is passed between all parties so that a full understanding of the facts and positions can be appreciated. Each party is given an opportunity to respond to the other's contentions. If the case is particularly complicated, this process may be repeated several times as new facts and contentions come to light.
- 1.7 If necessary the Banking Ombudsman may seek the advice of third parties, such as an independent solicitor or the Privacy Commissioner. This is typically done with the consent of the parties if confidential information will be disclosed.
- 1.8 Once sufficient information is received, the Banking Ombudsman considers the complaint and provides both parties with an Initial Assessment. The parties are asked to comment on the Initial Assessment, and provide more information if it is relevant. The parties may accept the Initial Assessment, but if not the Ombudsman will again consider the facts and contentions (including any new facts and contentions) and issue a Final Recommendation. The

- 1.9 At any time during the process the Participating Bank and the complainant may agree a settlement between them. Any offer or acceptance of settlement provided to the Ombudsman is passed on to the other party.
- 1.10 The Scheme recently developed parameters for its less formal dispute resolution procedure called facilitation. In October 2006, the Banking Ombudsman issued a Guideline on Facilitations, with the aim of encouraging the facilitation of resolution of complaints before the Banking Ombudsman's resolution process is formally involved.<sup>1</sup> Facilitation can apply either in the case of a deadlock between the complainant and the Participating Bank (dispute facilitations), or when the matter is still going through the Participating Bank's internal complaints process and where one of the parties approaches the Banking Ombudsman for assistance (complaint facilitations). The complainant or the Participating Bank can contact the Banking Ombudsman's office for advice or assistance in the resolution of a claim. It requires the consent of both parties and a waiver from the complainant. The Banking Ombudsman can also initiate the facilitation process. The facilitation process has proven useful in the informal resolution of complaints.

#### ***Purpose of Periodic Reviews***

- 1.11 Since 2000, the processes used by the Banking Ombudsman to investigate and resolve complaints have been subject to regular, independent reviews. These periodic reviews help to ensure that the Banking Ombudsman's processes:
- (a) are fair and impartial;
  - (b) meet commonly accepted standards of natural justice; and
  - (c) comply with the Banking Ombudsman's Terms of Reference.
- 1.12 This is a significant part of the Banking Ombudsman's commitment to continuous monitoring, and where necessary, improvement in the Scheme's processes. In past reviews, where the reviewer has identified matters which could have been done in a way more consistent with the developing expectations of natural justice, there have been advised through recommendations from the reviewer. The Banking Ombudsman has then ensured such recommendations are implemented.

#### ***Scope of this Review***

- 1.13 This Interim Review has been completed by Minter Ellison Rudd Watts. The criteria and scope is the same for previous reviews, with the key difference being a smaller pool of files reviewed. The Banking Ombudsman has scheduled a full review for late 2009.
- 1.14 In this Interim Review, we have reviewed, monitored and reported on the Banking Ombudsman's processes with reference to specific cases that were

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1 See Appendix 1.

closed in the period between 1 January and 30 June 2007. In all, we reviewed 14 cases that were either:

- (a) randomly selected; or
- (b) representative of novel factual circumstances. The Banking Ombudsman has always been keen to ensure that, where possible, such cases are reviewed to ensure that the Scheme's processes and its operational administration remain consistent in the application of the core principles of natural justice.

1.15 In summary, we are satisfied that the Banking Ombudsman's processes accord with the Banking Ombudsman's Terms of Reference and the principles of fairness and natural justice. In particular:

- (a) both parties, the Participating Bank and the complainant, were afforded sufficient opportunity to be heard and put forward their point of view;
- (b) the Banking Ombudsman conducted investigations in an impartial manner, and avoided pre-judging matters;
- (c) confidential information was handled appropriately;
- (d) disputes were resolved in a timely manner;
- (e) the Banking Ombudsman's administrative procedures assisted in the fair and timely resolution of complaints; and
- (f) the Banking Ombudsman determined issues relating to the Banking Ombudsman's Terms of Reference accurately and acted in accordance with the Terms of Reference.

1.16 There were some limited aspects of the processes applied during a small number of the investigations we reviewed which could have been undertaken in a way more consistent with the key principles of natural justice. Where appropriate, including where they might appear to be systemic issues, we have made recommendations about improvements to the Scheme's processes. These recommendations are explained in the relevant parts of this Report and summarised in Part 3.

1.17 More specific discussion of the issues and our conclusions are set out below.

## 2. **Criteria for Review**

2.1 The criteria for our review came from two principal sources:

- (a) the Banking Ombudsman's Terms of Reference; and
- (b) common law principles of natural justice and fair process.

### ***Banking Ombudsman's Terms of Reference***

2.2 The Banking Ombudsman may only investigate, and seek to resolve, disputes in accordance with the Banking Ombudsman's Terms of Reference. The Terms of Reference set out a number of details, including:

- (a) the Banking Ombudsman's jurisdiction (when complaints may or may not be investigated);
  - (b) the process that the Banking Ombudsman can use to resolve complaints (such as ensuring impartiality and fairness); and
  - (c) limits on the amount of monetary awards for the complainant's direct loss and inconvenience.
- 2.3 Our review examined whether the Banking Ombudsman's processes in practice were consistent with the Banking Ombudsman's Terms of Reference.
- 2.4 The Banking Ombudsman is sometimes called on to interpret the Terms of Reference as part of an investigation into a dispute. Our review also examined whether this was done appropriately.

***Natural justice and fairness***

- 2.5 The common law has, over many years, developed principles of natural justice and fairness to ensure that decisions and other outcomes are determined in accordance with fair processes.
- 2.6 The Banking Ombudsman is not directly subject to these common law standards as a matter of law. However, these standards provide a benchmark that can be used to assess the Banking Ombudsman's processes.
- 2.7 In some cases, common law notions of natural justice overlap with the requirements in the Banking Ombudsman's Terms of Reference. An example is the requirement that the investigation be conducted in an impartial manner.
- 2.8 The principles of natural justice and fair process that we have examined in the course of this review are:
- (a) the right to be heard;
  - (b) impartiality;
  - (c) protection of confidential information;
  - (d) timely resolution of disputes; and
  - (e) effective administrative procedures, such as the collection and retention of full records, and effective communication with the parties involved in the dispute.

## **SUMMARY OF RECOMMENDATIONS**

### **3. Recommendations**

#### **3.1 We recommend:**

- (a) referring complainants to the Banking Ombudsman's Terms of Reference as a matter of course where a complaint raises issues of the Banking Ombudsman's jurisdiction (see paragraph 4.19);
- (b) that care be taken when providing complainants with information on the chances of success before a complete review of the file is undertaken (see paragraph 6.12);
- (c) amending the Guideline on Facilitations to specifically record the need to appear impartial and set out protocols as to how that might be achieved (see paragraph 6.13);
- (d) the complainant and the Participating Bank should be informed where the Banking Ombudsman believes there is a need to refer information relating to the dispute to another party, and that they are told how this contributes to fair process (see paragraph 7.8);
- (e) The Banking Ombudsman should standardise the communication of expected timeframes to the parties to emphasise, at appropriate stages, that timely responses will aid in the timely resolution of claims (see paragraph 8.13); and
- (f) that care be taken to ensure that full records are consistently kept on file (see paragraph 9.12).

## ANALYSIS

### 4. Terms of Reference

#### *General comments*

- 4.1 The procedure that the Banking Ombudsman must follow when investigating and seeking to resolve complaints is set out in the Banking Ombudsman's Terms of Reference.<sup>2</sup>
- 4.2 Further, paragraph 3 of the Terms of Reference provides that, subject to the other provisions of the Terms of Reference, the Banking Ombudsman may decide the procedure that may be adopted when investigating and seeking to resolve complaints. The Banking Ombudsman has adopted the procedures that are outlined in the Banking Ombudsman Performance Standards, as revised in August 2002.<sup>3</sup>
- 4.3 The procedural requirements of the Terms of Reference help ensure that the Banking Ombudsman's processes are fair and robust. They also create expectations for the parties relating to how their dispute will be resolved, as the Terms of Reference are publicly available.<sup>4</sup> Where the Banking Ombudsman can demonstrate compliance with the Terms of Reference this ensures that the process is open and fair to both parties. If the Banking Ombudsman departs from these requirements then it may impact on both the fairness of an investigation into a complaint and indeed whether the investigation is validly initiated.

#### *Analysis*

- 4.4 We believe the Banking Ombudsman carried out investigations and sought to resolve disputes in accordance with the requirements of the Banking Ombudsman's Terms of Reference.
- 4.5 The clearest example of a need to consider the Terms of Reference was where the Banking Ombudsman had to consider whether there was jurisdiction to investigate a complaint. Complainants often contacted the Banking Ombudsman to raise a complaint before the dispute had been completely through the Participating Bank's internal complaint procedures. Pursuant to paragraph 22(b) of the Terms of Reference the Banking Ombudsman can only consider a complaint if satisfied that these internal procedures have been exhausted. The Banking Ombudsman identified quickly where this was not the case, and referred the complaint back to the Participating Bank for resolution.
- 4.6 The Banking Ombudsman was also required to consider the limits of her jurisdiction in respect of paragraph 18 of the Terms of Reference. In Case 10241 the complainant alleged that the Participating Bank had refused a loan application on the basis of a personal vendetta the bank manager held against her. The Banking Ombudsman considered that the reasons for the refusal

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2 See Appendix 1. The Terms of Reference were amended in July 2007 when the Banking Ombudsman Scheme was converted into a corporate structure in the form of Banking Ombudsman Scheme Ltd, but none of the amendments had a material impact on this Interim Review.

3 See Appendix 2.

4 <http://www.bankBankingOmbudsman.org.nz/documents/Bank-Ombud-TOR-July-2007.pdf>

were consistent with the Participating Bank's lending criteria. Consequently, the Banking Ombudsman could not investigate the claim pursuant to paragraph 18(b) which prohibits an investigation into a Participating Bank's judgement in relation to lending policies. However, the Banking Ombudsman did consider on a preliminary basis that the Participating Bank's offer to settle the complainant's other complaint about the bank manager's conduct being a breach of the duty of confidentiality was a reasonable one. The Banking Ombudsman therefore demonstrated an ability to establish, on the same set of facts, which parts of the complaint were within her jurisdiction and which parts were not.

- 4.7 In Case 10420 the complainant argued that he had suffered substantial loss when his estranged wife was able to withdraw funds from a joint account that had been frozen. The Participating Bank offered \$250 by way of settlement, which the complainant refused to accept. The Banking Ombudsman determined that there was no jurisdiction to investigate the complaint under paragraph 18(f) of the Terms of Reference as the Participating Bank had made a reasonable offer in settlement of the dispute.
- 4.8 These examples demonstrate that the Banking Ombudsman is aware of the requirements in the Terms of Reference, and in particular the limits on the jurisdiction. On the basis of our review, the Banking Ombudsman competently identified issues relating to jurisdiction and analysed these issues correctly in terms of deciding whether or not there was jurisdiction.
- 4.9 The Banking Ombudsman also demonstrated an awareness of the limits on the amount of awards that the Banking Ombudsman can recommend. These are \$200,000 for direct loss and \$6,000 as compensation for inconvenience. Even where the amount actually in dispute was much less, the Banking Ombudsman was clear to point out the limits on her jurisdiction to the complainant and the Participating Bank. Again in Case 10420, the complainant sought the "maximum amount" he could claim from the Participating Bank for transactions mistakenly authorised by the Participating Bank, totalling \$117.81. The Banking Ombudsman clearly identified in the Initial Assessment that there were limits on the amount that could be sought through the Banking Ombudsman Scheme, and quoted directly from the Terms of Reference in correspondence with the complainant.
- 4.10 There are some other specific examples stemming from the files we have examined that demonstrate that the Banking Ombudsman is familiar with the Banking Ombudsman's Terms of Reference and has operated in a manner consistent with its requirements.
- 4.11 Case 9418 involved a novel case of fraud where the complainant was used as a "mule" in the removal of money from the accounts of third parties. The fraud involved the transfer of funds into the complainant's bank account. The complainant was then to keep 5% of the money and transmit the remaining amount to another account in a foreign country. The complainant was not aware, however, that the money was stolen out of innocent customers' accounts. The Participating Bank claimed from the complainant the amount lost by the third parties as a result of the fraud.
- 4.12 The legal position in the case was unclear, as the novel fact situation meant it was uncertain whether the Participating Bank or the complainant was liable at

- 4.13 Due to the legal uncertainty the Banking Ombudsman commissioned an opinion from a law firm experienced in commercial and banking matters outlining the legal issues. The Banking Ombudsman referred to the findings in the legal opinion in the final recommendation to the parties. This was consistent with paragraph 16(a) which provides that in making recommendations the Banking Ombudsman shall consider any applicable rule of law.
- 4.14 In Case 9969, the Banking Ombudsman concluded that the complaint should be withdrawn. The Bank allowed a thief to bank the complainant's cheque into an account of someone other than the named payee. The complainant sought reimbursement of the full amount of the cheque. The complainant did not cross the cheque, but did cross out the words "or bearer". The cheque was presented at the Bank. The name of the payee had been altered to a name similar to that of the proper payee. The Bank took the view that as the cheque was not crossed "not transferable", in accordance with standard banking law, the liability for the loss rested with the complainant. The Banking Ombudsman determined that there were some deficiencies in the information that the Bank made available to its customers in its terms and conditions and on the inside of its chequebooks to minimise such fraud. She recommended that the Bank address these communication issues. However, she considered that the deficiencies in the information supplied by the Bank did not appear to have impacted on the complainant. She agreed with the Bank's reliance on the Cheques Act defence. In reaching these conclusions, she followed paragraph 16 of the Terms of Reference to decide what was fair having regard to the law and any relevant judicial authority and to good banking practice and any relevant code of practice. In accordance with the Terms of Reference, the dispute was withdrawn.
- 4.15 Case 10018 involved an ongoing fraud where the complainant's partner had removed money from the complainant's accounts. The complainant's partner had forged correspondence from the Participating Bank, so the fraud was not discovered by the complainant until several years after the complainant's partner gained access to the account. Several months after the Banking Ombudsman commenced her investigation, the Participating Bank contended that the Banking Ombudsman should not investigate under paragraph 22(d) of the Terms of Reference, as more than twelve months had elapsed since the act giving rise to the complaint.
- 4.16 The Banking Ombudsman dismissed the Participating Bank's contention. Paragraph 22(d) of the Terms of Reference gives her the power to decide not to consider a complaint if the complainant knew of the act or omission giving rise to the complaint for more than 12 months before making the complaint to the Banking Ombudsman. The Banking Ombudsman decided that the complainant did not know of the fraud until relatively recently, so the paragraph 22(d) proviso did not apply. She advised the Participating Bank of this and the complainant was able to continue with his complaint.
- 4.17 This example demonstrates that Participating Banks are aware of the Banking Ombudsman's Terms of Reference, and will seek to rely on the limitations on the Banking Ombudsman's jurisdiction where this may be to their advantage in resolving the dispute. The example also shows that the Banking

- 4.18 It is also clear from the files examined that many complainants do not have the same level of familiarity with the Banking Ombudsman's Terms of Reference, especially where there were limits on the Banking Ombudsman's jurisdiction. While not a criticism of the way the Banking Ombudsman has applied the Terms of Reference, it may assist complainants in making their case to the Banking Ombudsman if they are aware of these requirements.

### ***Recommendation***

- 4.19 We recommend referring complainants to the Banking Ombudsman's Terms of Reference as a matter of course where a complaint raises issues of the Banking Ombudsman's jurisdiction. This will help ensure complainants understand their position and how the Banking Ombudsman Scheme may or may not apply to them.

## **5. The Right to Be Heard**

### ***General Comments***

- 5.1 The right to be heard is a fundamental principle of natural justice. It implies a requirement to provide people with an opportunity to express themselves freely and make their views known where they have a material interest in a matter. Disputes cannot be resolved in a fair and unbiased manner unless all parties to the dispute are given an adequate opportunity to present their submissions and respond to the other party's arguments. A dispute resolution process that does not provide parties with such an opportunity will necessarily lack impartiality and fairness. Without the right to be heard, parties will be subjected to a fundamentally unjust process and face the potential of an arbitrary outcome to the dispute.
- 5.2 In independent dispute resolution processes like the Scheme, it is important that the lower level of formality which makes the Scheme attractive both to complainants and Participant Banks does not become inconsistent or unpredictable. The Terms of Reference are deliberately structured to avoid this, and it is clear that the Banking Ombudsman strives in every case to meet these expectations.
- 5.3 Based on the files we have reviewed, we believe that the Banking Ombudsman ensured that every party was able to exercise their right to be heard. Parties were given an adequate opportunity to make their own submissions and respond to the other party's representations. This applies equally to the complainant and the Participating Banks.
- 5.4 The process that is used to investigate complaints is based on gathering all the facts, arguments and other information that is relevant to the case. Parties are asked to give an account of the dispute at the beginning of the complaint process and are invited to respond to the Banking Ombudsman's letters or the other party's arguments throughout the investigation. Parties were generally given 10 to 14 days to respond to communications from the Banking Ombudsman. In circumstances where this was difficult to adhere to for good reason, timeframes were extended.

## ***Analysis***

- 5.5 With one possible exception, the Banking Ombudsman passed on information that was received during the complaint process, enabling both parties to respond effectively.
- 5.6 Representative of the general operation of the Scheme was Case 9759, where both the Participating Bank and the complainant were kept informed of the other party's position throughout the investigation.
- 5.7 Case 10241 represents an exception to the standard obligation of the Banking Ombudsman to share information provided by one party to the other. In that case, the complainant alleged that the Participating Bank had disclosed personal information about her to a third party. In the course of the Banking Ombudsman's investigation, it became clear that the Participating Bank had carried out its own investigations into the conduct of the relevant employee. The Banking Ombudsman suggested, and the Bank agreed, to provide copies of its internal reports to the Banking Ombudsman on a confidential basis under paragraph 6 of the Terms of Reference. Although the complainant did not see this internal information, and it was not on the file when we reviewed it (presumably having been returned to the Bank or destroyed), the process was valuable as it allowed the Banking Ombudsman to follow up with relevant third parties who had been interviewed in the course of the Bank's investigation. This led to the Banking Ombudsman proposing to the Participating Bank that it settle the privacy complaint.
- 5.8 Parties were also given a reasonable time to respond. Communications that were received after the stipulated deadlines were still given consideration in all of the cases under review. Timeframes were approached with sufficient flexibility to make allowances for parties in personally difficult circumstances so as not to put them at a disadvantage. In Case 9843, the complainant's health problems and her partner's illiteracy rendered them incapable of adhering to the stipulated deadlines. To accommodate these difficulties, the Banking Ombudsman extended the timeframes given by up to two weeks. The Banking Ombudsman consulted with the Participating Banks where there was a possibility that their interests would be prejudiced by the delay.
- 5.9 In addition to fixing reasonable timeframes, the Banking Ombudsman dealt well with complainants who had linguistic problems or faced any other difficulties in communicating adequately. In Case 9418, the Banking Ombudsman arranged a meeting with an interpreter to mitigate the complainant's poor English skills. This appeared to be effective and helped the parties to resolve the matter more efficiently. Similarly, in Case 9843 the Banking Ombudsman agreed to conduct as much as possible of the investigation via telephone because the complainant's disability impacted heavily on her ability to write. As this option also presented difficulties for the complainant, the Banking Ombudsman arranged a visit to the complainant's home. After the complainant received the Initial Assessment, which she was not happy with, she claimed that her requests for the complaint to be done verbally were initially ignored. However, it is clear from our review of the file that while the complainant talked about the difficulties of always engaging in writing, she never insisted only on verbal communications. Many letters were exchanged. The Banking Ombudsman had not been aware that the complainant wished the whole complaint to be conducted verbally, and also believed that a written response was often the only way to communicate

- 5.10 The Banking Ombudsman thus made allowances for people's individual circumstances where necessary. Due to obvious resource constraints this did not necessarily happen at the earliest opportunity. In Case 9843, the meeting between the Banking Ombudsman and the complainant took place seven to eight months after the initial complaint was lodged. The meeting between the Banking Ombudsman and the complainant appears to have been a temporary 'circuit breaker' in terms of the complainant's acceptance of the process and aspects of the Initial Assessment. The Banking Ombudsman was able to take away further information from that meeting to the Participating Bank, which resulted in a larger settlement offer from the Bank that what was recommended in the Initial Assessment.
- 5.11 Although delays of this nature are unfortunate, the Banking Ombudsman's office cannot be expected to treat meetings of such a nature as a priority or arrange them on a regular basis.

### ***Recommendations***

- 5.12 Managing the right to be heard was done well by the Banking Ombudsman's office, and the degree of flexibility employed in individual cases seemed to be appropriate. We have no specific recommendations on how this process could be improved based on the files we have examined.

## **6. Impartiality**

### ***General Comments***

- 6.1 Impartiality is a principle of natural justice and describes decision-making that is based on objective criteria rather than on prejudice or personal preferences. An impartial decision-maker does not favour one side over another and is also free from any personal interest in the outcome of the case. In order to do justice between parties, and uphold confidence in the administration of justice, impartiality is thus a key requirement in any process of dispute resolution.
- 6.2 Equally important is the appearance of impartiality. Parties to a dispute can easily develop misconceived impressions of both the other party's bona fides and of an investigator's objectivity. It is therefore necessary to consider all implications of investigation practices so as not to minimise the potential for misconceptions to develop.
- 6.3 The Banking Ombudsman conducted the investigations in an impartial and unbiased manner. Recommendations were well-founded and based on objective criteria. Overall, decision-making reflected a balanced consideration of all relevant arguments, rules of law, principles of banking practice and caselaw. Parties' submissions were processed with equal care and attention.
- 6.4 The standard practice that was demonstrated in this sample of reviewed cases supports the conclusion that the Banking Ombudsman's process to investigate complaints is consistent with impartial decision-making. By inviting

## ***Analysis***

- 6.5 Case 9418 demonstrates the Banking Ombudsman's impartiality well. As the case involved an uncertain area of law and a new fact pattern, the Banking Ombudsman decided to obtain a legal opinion from an independent law firm. This followed a detailed response from the Participating Bank to the Initial Assessment which engaged significantly with the Banking Ombudsman's assessment of the relevant legal principles. Seeking external legal advice was a sensible step in the circumstances and the Banking Ombudsman therefore ensured that the recommendation was based on objective criteria.
- 6.6 An area that less formal dispute resolution schemes encounter is how to reconcile the lower level of formality (and the corresponding flexibility) with the need to not just be impartial, but to appear impartial. Two cases illustrate this.
- 6.7 Case 10379 involved the application of the new dispute resolution procedure available to the Banking Ombudsman, facilitations. The procedure is summarised in paragraph 1.10 above, and the Banking Ombudsman's Guideline on Facilitations is annexed as Appendix 1. In this case, the complainant approached the Banking Ombudsman after the Participating Bank refused to provide cover under her insurance policy with the complainant backdated to the date of her original work injury. After an initial determination that the matter was deadlocked such that the Banking Ombudsman could consider the claim, the way in which the Banking Ombudsman handled the matter shows the value of the dispute facilitation process, as it was resolved within 13 working days. The process also allowed the Banking Ombudsman to express some robust and fair views to both parties about the nature of their positions, testing them. It is however a fine line to maintain. The complainant was told in a phone conversation by the investigating officer that the Banking Ombudsman might not find in her favour, possibly convincing her to accept the Participating Bank's settlement offer. Such advice could suggest some lack of impartiality and could raise in a complainant's mind whether the Banking Ombudsman had already judged the merits of the case. On the other hand, this could be seen as a positive aspect of the Banking Ombudsman Scheme as it enables the parties to make an informed decision and helps guide them through the complaint process. It is important to strive for a balance in providing assistance to parties and preserving complete neutrality. Overall, we consider that neither the complainant nor the Participating Bank had any concerns about the process, and that combined with the speedy resolution of the dispute, proved the Facilitation process' value.
- 6.8 In Case 9843, the Banking Ombudsman advised the complainant that a formal recommendation would be unlikely to exceed the Participating Bank's settlement offer. Complainants in particular will occasionally misunderstand the nature of such exchanges as indicating that the Banking Ombudsman has sided with the Participating Bank. This is probably unavoidable with some participants in the process.

- 6.9 Some complainants voiced concerns about a lack of impartiality in the dispute resolution process. However, these concerns were not supported by the evidence available on file. The Banking Ombudsman addressed concerns of such a nature by providing a more detailed explanation of the investigation process.
- 6.10 An example was Case 9843 mentioned above. The complainant questioned the Banking Ombudsman's impartiality, claiming that she had to repeat herself unnecessarily during the complaint process and that, in contrast, the Banking Ombudsman did not sufficiently insist on receiving adequate responses from the Participating Bank. The complainant also felt that the Banking Ombudsman had not kept to earlier representations, that the case had not been properly investigated and that the Banking Ombudsman was unable to make an unbiased decision because of a failure to gather relevant information. The Banking Ombudsman investigated these allegations by reviewing the file, but was unable to find any fault with the investigator's approach to the matter, and responded to the complainant's main concerns. The Banking Ombudsman also invited the complainant to specify how, in her opinion, the process of the case had differed from the one set out on the information sheet that had been provided earlier. This was a robust and fair handling of the complainant's concerns.
- 6.11 In Case 10156, the Banking Ombudsman declined to investigate the complaint further because she considered, on the basis of the information submitted by the complainant, that the Bank had made a reasonable settlement offer. She sent him an acceptance form, noting that if she did not receive the form by a particular date she would assume that the complainant did not wish to accept the Bank's offer and she would close the complaint file. The complainant responded in extravagant terms that he felt compelled to sign the acceptance form and that he was concerned about the process of the investigation. The Banking Ombudsman responded by outlining alternatives to the Banking Ombudsman procedure, informing him of his rights and reiterating that he was free to accept the offer or not. The complainant replied to the Banking Ombudsman that he had misunderstood the nature of the acceptance form, and he chose to accept the Bank's offer as full and final settlement of the relevant part of his complaint. The parties directly settled the remaining component of the claim between themselves shortly afterwards.

### ***Recommendations***

- 6.12 We recommend that care be taken when providing complainants with information on the chances of success before a complete review of the file is undertaken. While it is important to offer complainants flexibility in resolving disputes, particularly if the dispute is in the facilitation phase, words should be chosen carefully so as to avoid any appearance of bias or prejudice. A possible approach is to indicate potential difficulties with their expectations when compared to the Terms of Reference and previous decisions of the Banking Ombudsman as summarised in her Case Notes, and note that a selection of these are available on-line.
- 6.13 We also recommend amending the Guideline on Facilitations to specifically record the need to appear impartial and set out protocols as to how that might be achieved (as for example is done in paragraph 9 of the Guideline regarding anonymised case scenarios).

## 7. Protection of Confidential Information

### *General comments*

- 7.1 Protection of confidentiality is an important concept in the context of dispute resolution. It is related to the right of privacy and aims to preserve people's personal interests. Without adequate safeguards that ensure the protection of confidential information, parties to a dispute might be exposed to public embarrassment or humiliation, or might be harmed in their use of commercially sensitive information.
- 7.2 Confidential information was generally handled appropriately. As banks have a legal duty to keep a customer's information confidential, complainants are required to consent to the release of this information in the form of a waiver of confidentiality. Based on the files that we reviewed, waivers of confidentiality were obtained where necessary, and reports from Participating Banks were only disclosed to the Banking Ombudsman's office upon receipt of the waiver.

### *Analysis*

- 7.3 An example of the Banking Ombudsman handling confidential information appropriately came in Case 8641. Some months after the dispute was resolved, the Banking Ombudsman received a request from the complainant's accountants seeking clarification of the legal status of the compensation which the complainant received, so that accountants could establish if it was taxable. The Banking Ombudsman advised the accountants that she could not reveal details of the compensation as this was confidential to the complainants. The Office proposed a pragmatic solution to the accountants, suggesting that they ask their clients for a copy of the Banking Ombudsman's Final Recommendation which detailed the nature of the compensation.
- 7.4 In Case 10241 confidential information was obtained pursuant to paragraph 6 of the Terms of Reference. Paragraph 6 states that if a party requests information to be treated as confidential and does not explicitly consent to its release, the Banking Ombudsman cannot disclose that information to any other party. Paragraph 8 provides for confidential information obtained under paragraph 6 to be returned to the party at the end of the dispute. The standard coversheet included with the file records that all confidential information was destroyed.
- 7.5 There were some minor shortcomings concerning the management of confidential information.
- 7.6 In Case 10203, the Complainant raised concerns about correspondence being forwarded to the Participating Bank without his consent or knowledge. The complaint had not yet been through the Participating Bank's internal complaints processes, and the complainant's letter of complaint was forwarded to the Participating Bank, probably to assist its assessment. The Complainant had not stated that he considered the correspondence to the Banking Ombudsman confidential. This is not the usual process where the Participating Bank is already considering a complaint, and the complainant was not informed that the information was being passed on. While the complainant decided not to pursue a claim through the Banking Ombudsman Scheme, the Banking Ombudsman acknowledged his concerns and conducted an internal review. The Banking Ombudsman determined as a

- 7.7 In Case 9418, which was a novel case involving an ‘internet mule’, the Banking Ombudsman’s Initial Assessment was provided to an independent solicitor without the knowledge of the parties. The motivation for seeking the opinion was to obtain a summary of a particular area of law. Although the Initial Assessment was not confidential as such, it contained information given in confidence. The Banking Ombudsman is not required to obtain the parties’ consent under paragraph 30 of the Terms of Reference if disclosure to a third party is reasonably necessary for the purpose of the Banking Ombudsman performing her duties. However, we consider that it is helpful to inform the parties of any disclosure to a third party for assistance, as that helps the parties understand the process and also why more time may be taken for analysis. .

### ***Recommendations***

- 7.8 While there is no need for the parties’ consent, the complainant and the Participating Bank should be informed where the Banking Ombudsman believes there is a need to refer information relating to the dispute to another party, and that they are told how this contributes to fair process.

## **8. Timely Resolution of Disputes**

### ***General Comments***

- 8.1 Timeliness is a particularly important part of less formal, self-regulated dispute resolution processes like the Scheme. This is because one of the benefits of the Scheme is that it offers a quicker route to resolution of difficulties than the standard, formal court process.
- 8.2 To resolve a dispute in a timely manner, the complaint process should not involve any major delays that could have been avoided without compromising a party’s right to be heard. Investigations that are not conducted in a timely fashion are at risk of the dispute not being resolved meaningfully. Delays might exacerbate wrongs that have been suffered or even deny justice to the parties involved.
- 8.3 In terms of communicating timeframes, the Banking Ombudsman’s experience is that the Participating Banks understand the standard response timeframes. By contrast, because complainants will almost inevitably be new to the Banking Ombudsman process, the Banking Ombudsman’s standard practice is to mention timeframes for their initial responses in her first communication to them. After that, she does not mention timeframes, in order encourage responses from complainants without undue pressure. If there are delays in receiving responses after that, deadlines are communicated to the complainants. However, the Banking Ombudsman seeks to remain as flexible to the needs of complainants as possible, without compromising fair process.
- 8.4 The Banking Ombudsman generally succeeded in resolving disputes in a timely manner. In most cases parties were made aware of the timeframes

## ***Analysis***

- 8.5 The Banking Ombudsman mitigated excessive delays by fast-tracking certain complaints. This allowed the complaint to be concluded in a relatively short amount of time. In Case 8641, the complaint spanned a long period of time due to the Participating Bank's internal complaints procedure. As the original dispute had arisen two years before the dispute file was opened, the Banking Ombudsman fast-tracked the complaint and resolved it within 117 working days.
- 8.6 In Case 10420, the Banking Ombudsman assessed and made a decision on a complaint within 15 working days, on the basis that the Banking Ombudsman did not have a jurisdiction to consider the complaint. We consider this represents an excellent approach to such issues as it allowed the parties to speedily resolve the differences between themselves without the Ombudsman's further assistance.
- 8.7 The Banking Ombudsman did not compromise the parties' right to be heard to ensure a fast resolution of disputes. Where parties had difficulties in responding within stipulated timeframes, the Banking Ombudsman generally gave generous but reasonable extensions. In Case 9843, although the Banking Ombudsman tried to avoid undue delays, considerable flexibility was necessary to accommodate the complainant's poor health. The resolution of the complaint was also held up because some events relevant to the dispute occurred after the commencement of the investigation.
- 8.8 Parties were usually informed of extensions that had been given to the other party. In Case 9843 for example, the Participating Bank was consulted on the possibility of further delays due to the complainant's health and accepted longer timeframes.
- 8.9 Although expected timeframes were usually communicated to the parties after initial delays, we recommend a consistent approach. Raising the parties' (particularly complainants') awareness of timeframes would certainly enhance the timeliness of the complaint process. In Case 9843, expected timeframes were not always communicated to the parties when information was requested, which contributed to the delays in resolving the dispute. For example, in letters dated 30 June 2006 and 6 September 2006, the Banking Ombudsman asked the complainant to provide comments or additional information relating to the dispute, but did not specify the timeframe within which this was to take place. This case took 273 working days to resolve and was significantly delayed by late responses from the complainant. We feel that the dispute could have been resolved in a more timely manner if the parties had been given timeframes at all times.
- 8.10 In Case 9759, dates for responses were communicated initially, but not later on in the correspondence. The Office was then required to follow up on issues that had not been replied to. An example of this is a letter dated 2 June 2006 to the complainant which did not specify a timeframe for response. This letter then had to be followed up twice until a response was received. While the complainant was largely responsible for the length of time it took to resolve the dispute, and the Office was persistent in seeking his responses, the

- 8.11 The high workload of the Office of the Banking Ombudsman contributed to delay in Case 9915. The complaint was resolved within 169 working days, but almost 5 months passed between the last communication from the parties and the issuing of the Banking Ombudsman's Initial Assessment, even though the Office advised the parties that that Assessment was expected in approximately 7 weeks. The Christmas season which fell in the middle of this period may account for some of the delay. Although neither party asked the Office for a timing update, it would have been helpful if one had been offered. This was particularly the case given that the dispute was small in financial terms and the factual background was not complicated.
- 8.12 Based on our review of the files, we consider that a statement by the Banking Ombudsman at the outset of an investigation into a complaint that timely responses help facilitate the timely resolution of complaints is worthwhile, even if this seems obvious. When initial responses are timely but subsequent responses are delayed for good reasons on the part of the complainants, we nevertheless consider the Banking Ombudsman should communicate the impact of such delays on the overall dispute resolution process. This will ensure that the parties understand their responsibility for the timeliness of the process. The overall effect would be to support the ongoing recognition of the Scheme's value as an efficient and speedy alternative to standard dispute resolution processes.

### ***Recommendation***

- 8.13 The Banking Ombudsman should standardise the communication of expected timeframes to the parties to emphasise that timely responses will aid in the timely resolution of claims.

## **9. Effective Administrative Procedures**

- 9.1 Two important components of fairness may be regarded as more administrative in nature:
- (a) the collection and retention of full records; and
  - (b) effective communication.
- 9.2 The effective administration of disputes is an essential feature of procedural fairness. Complete records have to be collected and retained to ensure that all submissions are well documented and can be considered adequately in decision-making. Correct record keeping also encourages good practice and reinforces the value of following standard processes. Effective communication with parties is equally important. As well as gathering all relevant information at the beginning of the investigation, the Banking Ombudsman should keep parties up to date with the complaint's progress throughout the investigation. Without effective communication processes, a party's right to be heard is likely to be compromised.
- 9.3 Based on the cases we reviewed, we believe that the Banking Ombudsman has adopted and demonstrated effective administrative procedures.

### ***Collection and retention of full records***

- 9.4 In most of the reviewed files, full records were collected and retained. An example is Case 10156, which was a reasonably long case (taking 81 working days) and appears to be complete.
- 9.5 In addition to the formal written correspondence between the Banking Ombudsman and the complainants and Participating Banks, communication takes place in the form of telephone conversations. In the past, files we have reviewed were occasionally variable in the way they approached telephone conversations. Sometimes these were separately file noted. The files now consistently have a document entitled "Activity Sheet" at the beginning of each file which records these less formal exchanges. We consider this is a very sensible way to ensure a complete record of all of the Office's dealings with the parties.
- 9.6 We noted an issue with the recording and filing of a phone conversation in Case 9759. There is no record on the file of a phone conversation that seems to have taken place. While this particular conversation might not have been of great importance, it is important to retain a full record of all communications that pass between the Banking Ombudsman's office and the parties. Phone conversations are often an effective means of communication, especially for complainants. It is therefore essential to record and summarise phone calls to ensure a full understanding of the complaint process.
- 9.7 In Case 9843, the complainant claimed that she had to resend some of the documents because the Banking Ombudsman's office had lost them. The Banking Ombudsman had checked the situation and confirmed that she had not had to resend them. The issue was more about the complainant's understanding of the process, which the Banking Ombudsman addressed by meeting with her.

### ***Effective communication***

- 9.8 The Banking Ombudsman appeared to communicate effectively with all relevant parties. Parties were given the opportunity to call the Banking Ombudsman's office if they had questions or sought clarification of particular points. The main means of communication in the files under review, however, was by mail, email and fax.
- 9.9 Great care was taken in cases involving complex fact patterns or confusing arguments. Written statements were generally preferred in such situations. Where a party was more comfortable to communicate via telephone than mail, the Banking Ombudsman recorded the conversation and asked the party to confirm or alter the written summary. Particularly complex or ambiguous letters were also followed up with either requests for more information or concise summaries of the issues involved.
- 9.10 The Banking Ombudsman kept parties informed of the process of the complaint, provided a clear outline of the investigation process in all

9.11 Specific concerns about the complaint process were also followed up. In Case 9843, the complainant criticised the fact that she had never received a comprehensive report giving dates and summarising amounts of money taken, and that some parts of the complaint had still been left unaddressed. The Banking Ombudsman advised the complainant that the role of the Banking Ombudsman's office is to investigate and determine identified complaints against banks, and not to carry out an audit of customers' accounts. While she was not aware of any complaints that had not been considered, she assured the complainant that all complaints would be reviewed as part of the Final Recommendation.

***Recommendation***

9.12 It is important that full records are consistently kept of all documents and communications.

**APPENDIX 1**  
**GUIDELINE ON FACILITATIONS**

**APPENDIX 2**  
**TERMS OF REFERENCE**

**APPENDIX 3**  
**PERFORMANCE STANDARDS**