



Banking Ombudsman

Banking Ombudsman Scheme Limited

Terms of reference

1 January 2016

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Introduction

The Banking Ombudsman Scheme Limited (“the scheme”) aims to resolve disputes between scheme participants (“banks”)¹ and their customers (“complainants”).^{2 3}

As an approved dispute resolution scheme under the Financial Service Providers (Registration and Dispute Resolution) Act 2008 (“the Act”), it must issue rules about how it operates, including:

- The types of complaints it can consider
- How it investigates complaints and makes decisions
- The types of compensation it can recommend.

Most of the rules are in these terms of reference (“the rules”). The rest are in the scheme’s constitution and participation agreement, which cover such areas as governance, membership and funding. Operational guidelines help the public understand how the rules work.

The Act requires the scheme’s services to be free to complainants. As a result, banks fund the scheme.

Scheme’s powers

1. The scheme can:

1.1 Consider complaints about the financial services a bank has provided, or failed to provide⁴ (*This is subject to the limits set out in these rules.*)

1.2 Help a complainant by giving general information about how to make a complaint and about how banks operate (*The scheme cannot give a complainant specific information about other banks’ products or services, or give any bank information about any other bank.*)

1.3 Help a complainant and a bank to resolve a complaint by encouraging both sides to reach an agreement, by encouraging a complainant to take a complaint no further if it lacks any merit, or by issuing a decision (see *Complaint-handling process*)

¹ A “bank” is any organisation that is a party to the scheme’s participation agreement.

² A complainant may also include an individual, group of individuals or entity guaranteeing, or providing security for, a loan from a bank, as well as an individual, group of individuals or entity receiving a cheque from a customer of a bank.

³ Use of singular (for example, “bank” or “complainant”) can be taken to refer to the plural as well (“banks” and “complainants”) and vice versa.

⁴ Section 5 of the Act defines financial services. In addition, they are services that scheme members ordinarily provide inside and outside New Zealand to individuals, groups (such as partnerships and families), companies and trusts in relation to New Zealand bank accounts and products. These services include the use overseas of credit cards issued by scheme members, and advice and services relating to insurance and investments.

1.4 Refer a complaint to a more appropriate body

1.5 Encourage banks to improve their service and complaint-handling practices

1.6 Promote the scheme.

Preconditions to considering complaints

2. To consider or continue considering a complaint, the scheme must be satisfied:

2.1 The individual, group of individuals or entity making the complaint is the same individual, group or entity to receive or not receive the service that is the subject of the complaint (*The scheme accepts complaints by representatives of such individuals, groups and entities.*)

2.2 The alleged action or inaction happened while the bank concerned was a scheme member

2.3 The complaint is about the bank's breach of a contract, statutory obligation, industry code or principles of good banking practice

2.4 The bank has had a reasonable opportunity to consider the complaint using its internal complaint process, the complaint remains unresolved, and the scheme has received the complaint within the required time limits (see *Time limits*)⁵

2.5 The same complainant, or member of a group of complainants, has not previously made a complaint to the scheme about the same matter (unless the complainant produces relevant new evidence)

2.6 It would not be more appropriate for a court, tribunal, arbitrator, independent or statutory complaints body or regulatory body to consider the complaint.

Outside scheme's powers

3. The scheme cannot consider a complaint about financial services a bank has provided, or failed to provide, if:

3.1 The complainant is claiming, or could reasonably claim, more than \$200,000 for direct loss and direct incidental expenses (see *Claims and compensation*)

⁵ Banks' internal complaints procedures must comply with the New Zealand Bankers' Association's Code of Banking Practice or the scheme's participation agreement.

3.2 The claim is part of a bigger claim or is related to another claim the complainant has made, or could reasonably make, and the total amount of the claims for direct loss and direct incidental expenses is more than \$200,000

3.3 A court, tribunal, arbitrator, independent or statutory complaints body or regulatory body has considered, or is considering, the complaint or any other complaint on the same subject by the same complainant *(The scheme will stop considering any complaint that is also taken to such a body.)*

3.4 The complainant has previously reached a settlement with the bank about the matter.

3.5 The complaint is about a bank's commercial judgement about lending, security or insurance decisions *(But the scheme can consider complaints about the administration of loans or insurance policies, or the administration of applications for loans or insurance policies.)*

3.6 The complaint is about a bank's policies or practices *(But the scheme can consider complaints alleging that a policy or practice breaches a duty or obligation the bank has to the complainant, or that the bank has inappropriately applied or improperly administered a policy or practice.)*

3.7 The complaint is about a bank's charges for financial services or about its interest rates *(But the scheme can consider complaints alleging that a bank failed to disclose, or misrepresented, information about charges or interest rates, or incorrectly applied charges or interest rates, or breached any law or industry code.)*

3.8 The scheme agrees to a bank's test case request (see *Test cases*).

4. The scheme can consider a complaint that would otherwise be outside its rules if both sides agree.

Other grounds for not considering a complaint

5. The scheme can decline to consider, or stop considering, a complaint if satisfied any of the following applies:

5.1 The complaint has no reasonable prospect of success

5.2 The complaint is frivolous or vexatious, or the complainant is not pursuing it in a reasonable way

5.3 The complainant has not suffered, and is unlikely to suffer, direct loss or any significant inconvenience

5.4 The bank has made a reasonable offer to settle the complaint. *(This decision is based on the facts as presented by the complainant.)*

Time limits

6. The scheme can consider a complaint only if:

6.1 It receives the complaint within three months of a bank's written notification to the complainant that it has fully considered the complaint and that the complainant now has the right to take the complaint to the scheme before that deadline. *(In exceptional circumstances, the scheme can consider a complaint received between three and six months after this notice.⁶ Beyond six months, a bank's consent is necessary.)*

or

6.2 The complainant took the complaint to the bank at least three months ago, and the bank has not sent such a written notification

or

6.3 The bank has asked the scheme to consider the complaint.

7. The scheme can decline to consider a complaint if the complainant was aware of a bank's action or inaction for more than 12 months before making the complaint to the scheme.

8. The scheme cannot consider a complaint if the complainant became aware of, or should reasonably have become aware of, a bank's action or inaction more than six years ago.

Decision-making criteria

9. In making any decision, the scheme must be fair in all the circumstances, having regard to the law, any relevant code of practice, and principles of good banking practice. *(The scheme must consult the banking industry in determining these principles.)*

Natural justice

10. In making any decision, including whether to consider, or continue considering, a complaint, the scheme must follow the rules of natural justice, which include giving both sides:

10.1 Adequate notice of important steps and decisions

10.2 The opportunity to provide information, express their views, and to have those views considered, before a decision

10.3 The reasons for the decision in writing and within a reasonable time.

⁶ Exceptional circumstances include a death in the family, a significant incapacity or the onset of a serious illness.

11. The scheme is not bound by legal rules of evidence when arriving at decisions.

Requests for information

12. The scheme can consider any information and make any inquiries about a complaint that it considers relevant.

13. A bank must, as soon as practicable, give the scheme any information relevant to a complaint, if asked. *(A bank can refuse such a request if it would cause the bank to breach its duty to keep information confidential, and the bank has made reasonable efforts to get consent from the individual, group or entity it owes that duty to.)*

14. Either side to a complaint can ask that information given to the scheme be kept confidential. *(If a bank makes such a request, it must give the reason for the request before providing the information.)*

15. The scheme must not pass on information it has agreed to accept in confidence without the sender's consent.

16. A bank, when giving information to the scheme, must identify any parts related to its fraud detection and security measures, which the scheme automatically regards as having been given in confidence. The scheme can take into account such measures in considering a complaint, but cannot disclose details about them to the complainant.

17. The scheme must respond to any request by either side for information about a complaint in accordance with the Privacy Act 1993, any obligation of confidentiality and any other legal obligations.

18. The scheme must destroy or, if asked, return information given in confidence as soon as possible after it has dealt with a complaint.

Legal proceedings and debt recovery action

19. A bank must get the scheme's consent before starting legal proceedings against a complainant over a matter the scheme is considering.⁷ *(The scheme cannot unreasonably withhold consent.)*

20. A complainant does not need the scheme's consent before starting legal proceedings against a bank over a matter the scheme is considering.

21. The scheme must stop considering a complaint once either side begins legal proceedings, and must advise both in writing. *(In the same way, the scheme regards any proposed outcome or compensation as withdrawn if the complainant begins legal proceedings.)*

⁷ Legal proceedings mean proceedings before a court or tribunal.

22. A bank must notify the scheme if it is taking, or intends to take, any action to recover a debt that is the subject of a complaint to the scheme. *(Debt recovery action includes protecting any interest in assets securing the debt and assigning the debt.)*

Complaint-handling process

23. The scheme's complaint-handling procedure is generally to:

23.1 Gather relevant information, including what a complainant and a bank have to say

23.2 Try to facilitate a resolution. *(This may include a complainant taking the complaint no further or both sides reaching an agreement.)*

23.3 Issue a decision, following the rules of natural justice. *(The decision sets out the facts as the scheme sees them, evaluates the matters in dispute and recommends an outcome, which may include the payment of a sum of money and state a deadline for acceptance.)*

24. A scheme decision becomes binding on a bank if accepted by a complainant by the stated deadline as a full and final settlement. If not accepted, the complainant is free to take legal proceedings against the bank.

25. The scheme has the right to make and change its complaint-handling procedure.

26. The scheme is not bound by any of its previous decisions.

Claims and compensation

27. The scheme can consider claims up to \$200,000 for direct loss and any direct incidental expenses a complainant reasonably had to meet in taking a complaint to a bank.

28. Compensation for direct loss and direct incidental expenses can include payment of an amount up to \$200,000 or forgiving debt up to that amount (or a combination of the two up to that amount).

29. The scheme can also award compensation for any inconvenience a complainant suffered as a result of a bank's action or inaction up to a maximum of \$9,000.

30. The combined value of compensation for direct loss, direct incidental expenses and inconvenience cannot exceed \$209,000.

31. The scheme cannot award punitive or aggravated damages.

Test cases

32. A bank can, at any time before a decision is issued, ask in writing that the scheme not consider, or stop considering, a complaint because it believes:

32.1 The complaint involves a matter with potentially important consequences for the bank's business, or for banks generally

or

32.2 The complaint involves, or may involve, an important or new point of law.

33. Such a request must also state that the bank will begin legal proceedings in New Zealand against the complainant within six months of the request, and that it will:

33.1 Pay the complainant's reasonable costs in the test case (unless the costs arise through a complainant's counterclaim, cross-appeal or similar procedure)

33.2 Make interim payments for these costs if it thinks it reasonable and to the extent it thinks it reasonable.

34. The scheme will not consider, or will stop considering, a complaint if it agrees with a bank's request. The scheme will notify the complainant in writing of the request, the date of receiving it and its effect on the complainant.

Delegation of powers

35. The scheme authorises the Banking Ombudsman to exercise all the powers and discretions set out in the scheme rules.

36. The scheme permits the Banking Ombudsman to delegate any of those powers and discretions to any employee or contractor, consistent with a delegation framework approved by the board.

Personal and other information

37. Personal information collected by the scheme can be:

37.1 Used in its public reports and case notes after removing identifying details

37.2 Kept only as long as is necessary in accordance with the Privacy Act 1993.

38. The scheme must not disclose to a third party any personal information that may identify either side in a complaint, or is confidential and has been obtained in the course of performing its work.

39. The scheme can disclose identifying and confidential information if any of the following applies:

39.1 An authority with the legal power to do so demands it

39.2 The law requires it

39.3 The scheme or any of its directors or employees needs it as part of legal proceedings

39.4 The scheme needs to consult with a court, tribunal, arbitrator, independent or statutory complaints body or regulatory body to decide on the most appropriate body to consider a complaint. *(The complainant's consent is necessary before the scheme can disclose any potentially identifying information.)*

40. The scheme can disclose information to a complainant or a bank named in a complaint. (But see *Requests for information* for limitations.)

41. The scheme can disclose information to its chair or the chair's authorised deputy, or to the Banking Ombudsman, or to any scheme director, employee, consultant or agent who reasonably needs the information to carry out his or her work.

42. The scheme must tell a bank if it becomes aware of any threat to the bank's staff or property in the course of its work.

43. The scheme must, within 28 days of its annual general meeting, send its board an annual report for the preceding financial year, along with any other information the board requests. *(The report must be published and reach the Commerce and Consumer Affairs Minister by 30 September each year.)*

44. The scheme can make recommendations to:

44.1 The chair about rule changes or about any new or revised codes of practice that may affect its work

44.2 The New Zealand Bankers' Association about its Code of Banking Practice.

45. The scheme can release information about a complaint and/or the bank concerned to:

45.1 Another dispute resolution scheme (if the bank is a member and the scheme is approved under the Act)

45.2 The Registrar of Financial Service Providers (in accordance with sections 17 and 34 of the Act).

46. Before doing so, the scheme must, wherever possible, get a complainant's or a bank's consent to release any information that may identify either side.

Series of material complaints

47. The scheme must report any series of material complaints about a bank to the relevant regulatory body in accordance with its obligations under the Act.

Records

48. The scheme must keep comprehensive records and statistics of complaints, including:

48.1 The number of complaints

48.2 The complaints the scheme did not consider, and why

48.3 The outcome of complaints the scheme handled

48.4 The current caseload, including how long unresolved cases have been open

48.5 The time taken to resolve complaints

48.6 A profile of complaints that identifies the type of service the bank offered, the cause of the complaint and any industry issues or trends.