

The Banking Ombudsman **Annual Report**



06  
07

# 15 years



## About the Banking Ombudsman scheme

- The Banking Ombudsman scheme was established on 1 July 1992
  - the first such scheme in the private sector in New Zealand
- We investigate complaints about banking services supplied by participating banks
- We are independent and impartial
- Our service is free, efficient, and informal
- Banks must comply with awards of compensation made by the Banking Ombudsman



Investments / superannuation

Savings Account

Customer Finance

Credit/Debit Cards

ATM

Current Accounts

Insurance

Payment Systems

# 10,000+

complaints

- 2 From the Chairman
- 4 Report of the Banking Ombudsman
- 14 Snapshots from the everyday work of the Banking Ombudsman
- 20 Facts and figures

# From the Chairman

*This is the last report of the Banking Ombudsman Commission, the independent body that has operated the Banking Ombudsman scheme since its inception in 1992. The Commission will cease to exist after this annual report is received at this year's Annual Meeting, on 15 November 2007.*

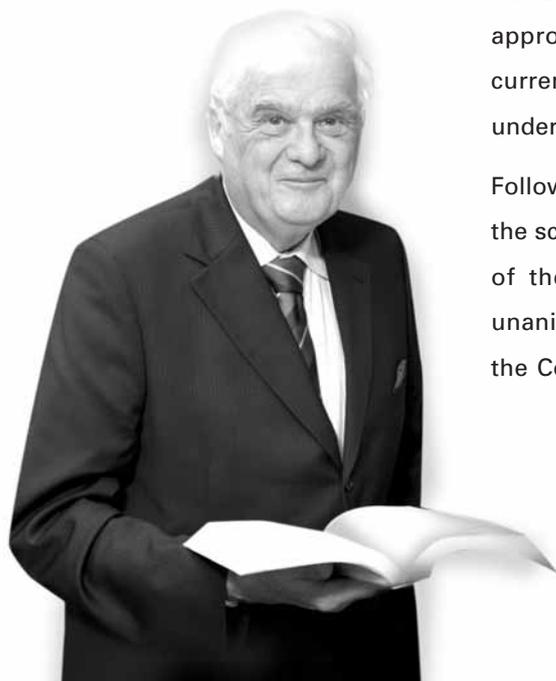
Since 1 July 2007 the Banking Ombudsman scheme has been operated by a new company known as Banking Ombudsman Scheme Ltd. Essentially, the company will run the scheme in a similar manner to its predecessor, the Commission. However, it is noteworthy that the duties and responsibilities of the unincorporated Commission have now been assumed by a separate and incorporated legal entity.

The incorporation of the Banking Ombudsman Scheme was one of the recommendations made last year by the Hon Anand Satyanand PCNZM in his Independent Review of the Scheme. The Reviewer was strongly of the opinion that incorporation would enhance the scheme's perceived independence from the banks.

I express my gratitude to Ms Susan Taylor, the Deputy Banking Ombudsman, for managing the incorporation project and bringing it to a successful conclusion. All participating banks had formally to agree to the necessary documentation, including the new company's constitution and the participation agreement for each individual bank which is a member of the scheme. This was a process which took some time. Ms Taylor was able to address concerns and to achieve a result acceptable to all. I also wish to thank both Mr Alan Yates of the New Zealand Bankers' Association for his help in co-ordinating the responses from various banks, and the new company's legal adviser, Mr John Shaw of Lowndes Associates, Auckland. The company structure deemed most appropriate in the circumstances is one where the current Chair of the company holds its only share, under strict conditions.

Following another recommendation from the Review, the scheme's Terms of Reference and the constitution of the new company may be altered only by a unanimous decision of its board. Previously, under the Commission structure, the power to change the

Sir Ian Barker  
Chairman



**Banking Ombudsman Board**  
(clockwise from top left)

Mr Graham Hodges

Ms Suzanne Chetwin

Ms Helen Walch

Mr Sam Knowles

Terms of Reference was vested solely in the Council of the Bankers' Association. The implementation of this recommendation represents another significant step towards bolstering the independence of the scheme.

The Banking Ombudsman's report which I am privileged to introduce chronicles another busy year for Mrs Liz Brown, the Banking Ombudsman, and her staff. The implementation of the recommendations of the Satyanand Review and participation in the latest Review of the Code of Banking Practice added considerably to the workload of the Banking Ombudsman's office. Her report demonstrates the diversity and complexity of complaints that have had to be considered.

I endorse the Banking Ombudsman's comments about the retirement of Mr David Russell as a member of the Banking Ombudsman Commission consequent upon his retirement as Executive Director of the Consumers' Institute. His wise counsel and huge experience over the whole 15 years of the Scheme's existence have contributed in a major way to its success. We welcome his successor at the Consumers' Institute, Ms Sue Chetwin, as a member of the Board.

Mr Peter Thodey resigned as one of the bank nominees on the Commission after being appointed to an overseas position. He was replaced, initially by Mr Hugh Burrett, and then by Mr Graham Hodges. I am grateful to those Commission members whom I have mentioned above, as well as to Mr Sam Knowles and



Ms Helen Walch, for their dedication and contributions – particularly in a period of transition and change.

As always, the utmost thanks must go to the Banking Ombudsman, Mrs Liz Brown, and all her dedicated staff, who have continued to maintain the highest standards of efficiency and integrity in their work. Without their professionalism, the scheme just could not operate.

# Report of the Banking Ombudsman

*The fifteenth year of the Banking Ombudsman scheme has been a very full one. Towards the beginning of it we received our ten thousandth complaint, and by the end we had received over 800 more. There was a rise of over 40% in disputes that were at least partially investigated, but it is very pleasing to note that this increase was accompanied by a much larger increase in cases resolved quickly and informally without the need for a full investigation. However, much of the year's work has been associated with the wider environment within which the Banking Ombudsman scheme operates.*



The Chairman has commented on the incorporation of the Banking Ombudsman scheme, which sees the former Banking Ombudsman Commission become the Board of Banking Ombudsman Scheme Ltd. The scheme is now established on a sounder legal basis with a greater degree of independence from the banking industry. As recommended by the Hon Anand Satyanand PCNZM after his 2006 review of the Banking Ombudsman scheme, the power to change the constitution of the scheme now lies with the Board, where bank representatives are not a majority, rather than (as previously) with the Council of the New Zealand Bankers' Association.

I look forward to working with the new Board in the same relationship of mutual support as with its predecessor.

The incorporation of the Banking Ombudsman scheme was a major project for my office and was very ably managed by Susan Taylor. Although slightly outside the time period covered by this report, I would like to record my appreciation of the new Board's recognition of Susan's work and position in the office by appointing her Deputy Banking Ombudsman.

Liz Brown  
Banking Ombudsman



**There have been some significant changes to the Banking Ombudsman's Terms of Reference, also as a result of the review. These are:**

- The financial limitation on claims that may be considered by the Banking Ombudsman has been raised to \$200,000 for direct loss or damage and \$6,000 for inconvenience.
- The Banking Ombudsman's principal powers and duties now include promoting and publicising the Banking Ombudsman scheme, encouraging and providing advice to participating banks on the development and maintenance of good complaint handling practices, and giving general advice to members of the public on existing banking industry processes and practices.
- A requirement that a participating bank give notice to the Banking Ombudsman before supplying information in confidence.

The purpose of requiring notice of a confidentiality request is to provide an opportunity for discussion before the information is supplied. It is hoped that in most cases it will be possible to agree a form of disclosure that will enable significant information to be released to the complainant while at the same time protecting the interests of the bank and of third parties. In cases where this proves impossible, the Banking Ombudsman may ask the bank not to supply the information to her, so that it cannot affect the outcome of the investigation.

Another key recommendation of the Satyanand report was to improve the accessibility of the Banking Ombudsman scheme by ensuring that information about it is more easily available. In accordance with the communications plan drawn up last year, we have increased our community outreach programmes and have also developed input into bank staff training.

Another matter that occupied a good deal of 2006/7 was the review of the **Code of Banking Practice**. I comment on the revised Code at more length later in this report, but in view of some misapprehension among members of the public about the role of the Banking Ombudsman, I would like to

*I would like to make it clear that I have no control or power of veto over the provisions of the Code of Banking Practice*

make it clear that I have no control or power of veto over the provisions of the Code of Banking Practice. Suggestions for additions or amendments should be made to the New Zealand Bankers' Association.

**The Code is a set of minimum standards** which all the signatory banks agree to observe. In working out the individual provisions of the Code, banks reach a consensus on a standard that is acceptable to all of them. Effectively any one standard is the highest standard on which agreement can be reached.

Individual banks are free to observe higher standards in their own practices and policies, but no bank may offer a lower standard. It is sometimes the case that only one or two banks adhere strictly to the Code standard and others offer higher standards to their customers.

We continued to work with Government agencies on plans to extend consumer dispute resolution services to those parts of the financial services sector where they are not already in place. Submissions were made on the discussion paper produced by the Ministry of Economic Development on consumer dispute resolution and redress in the financial services sector, and discussions continue.

Throughout all this activity, I have had the constant support of the (former) Banking Ombudsman Commission and I would like to express my thanks to all members, and especially to the Chairman, Sir Ian Barker QC, whose advice and guidance has been invaluable throughout the year. I would also like to express my appreciation for the long and dedicated service of David Russell, who retired from the Commission early in 2007. As Executive Director of the Consumers' Institute, he had been a Commission member since 1992. His depth of experience and wide knowledge of consumer affairs were always willingly made available, and always contributed to the quality of the discussion.

I have already mentioned Susan Taylor's management of the process of incorporation the Banking

Ombudsman scheme, but she and all staff of this office have continued to maintain the spirit of the Banking Ombudsman scheme in many other ways as well, and particularly by working as a team to ensure that consumers with a complaint against a bank have their complaint fully understood and fairly resolved. My heartfelt thanks go to all of them.

Early in 2007 we were sorry to lose Janet Boag, our administrative assistant. Janet made a substantial contribution to our team and will be very much missed.

### Information about banks' complaints processes

In December 2006, we conducted our annual survey of bank branches.

The results of the exercise were rather mixed. It was disappointing that banks did not sustain the previous year's improvement in the number of branches displaying information about the banks' complaints processes. The relevant leaflet was found in only 62% of branches (72% in 2005).

There was a small improvement in the number of branches displaying the Banking Ombudsman leaflet, up from 48% to 49%. Similarly the Code of Banking Practice was on display in 33% of branches, up from 31% in 2005.

*Now that the new Code of Banking Practice is in place, I would hope to see it much more widely displayed and promoted to customers.*



Now that the new Code of Banking Practice is in place, I would hope to see it much more widely displayed and promoted to customers.

Bank staff were generally rated well on their willingness to help with enquiries about the complaints process. "Very helpful and kind" was typical of the comments recorded on this aspect of the survey. While only 20.5% rated the top score (26% in 2005), scores tended to cluster at the upper end of the scale, with over 80% being rated at the mid-point or above. There was a small decrease, from 4.8% to 4.6%, in scores at the lowest level.

As in previous years, branches did not perform so well when staff were rated on their knowledge of the complaints process and of the Banking Ombudsman. Detailed knowledge of the various steps in the process is not expected, but after 15 years of operations by the Banking Ombudsman, banks should by now have ensured that all branch staff are at the very least aware that there is a complaints process and a Banking Ombudsman, and should know where to find information about them. Too many staff failed to mention the Banking Ombudsman, even when prompted, and we received too many comments similar to the following: "[The bank officer] was very keen to help but admitted she knew nothing about the process or what to do."

The revised Code of Banking Practice makes it absolutely clear that bank branches must display information leaflets about the bank's own internal

complaints process and about the Banking Ombudsman, and that the information must also be available from their websites.

While this is helpful, the experience of our surveys shows that it is not enough, and that more needs to be done to make sure that bank staff are aware of the complaints process, both internally and through the Banking Ombudsman.

We have therefore increased our input into bank staff training, particularly through the production of a DVD as an introduction to the complaints process. I am pleased to report that the DVD has been enthusiastically received by banks and is to be used both as part of the induction process for new staff and as refresher training for others.

I have also done more work directly with bank staff, having presented nine seminars or less formal talks during the year for groups of bankers from individual banks as well as addressing FINSIA (the Financial Services Institute of Australasia) meetings in the main centres.

In August 2006 and February 2007 forums were held for staff of banks' complaints-handling teams, providing a chance to discuss current issues in an informal setting, and to make sure that our own practices and processes are well understood.

*The DVD has been enthusiastically received by banks and is to be used both as part of the induction process for new staff and as refresher training for others.*

## Community outreach

We continued our joint programme with the Insurance & Savings Ombudsman and Electricity and Gas Complaints Commissioner, holding community organisation forums in Central Otago, Invercargill and Dunedin in July 2006, and in the Wellington region in the first half of 2007. These have proved to be very successful in getting information about the three industry-based dispute resolution schemes out to advisory organisations in the community. We now regularly attract audiences of fifty or more, and of a very much more diverse nature than those attending our early forums.

Individual presentations were also made to regional meetings of Family Budget Service advisors, to groups of electorate workers and to a variety of community organisations.

*We now regularly attract audiences of fifty or more, and of a very much more diverse nature than those attending our early forums.*

## Systemic issues

A systemic issue is one that will or may affect bank customers (or other persons entitled to complain) in addition to the complainant who has made a complaint to the Banking Ombudsman. It may be an issue specific to one bank, to several banks or to the entire banking industry.

Most systemic issues are resolved quickly once they are brought to the bank's attention. However, some take time to resolve, and in some cases the bank is reluctant to address them, especially if much time and expense is required. Recently, there was a re-emergence of two systemic issues that were thought to have been resolved some years ago. As a result we reviewed the way we handle systemic issues to ensure that there is a more robust follow-up process, especially in those cases where the individual complaint is resolved, but the systemic issue remains outstanding.

While I may award compensation against a bank, the powers given by my Terms of Reference do not extend to allow me to require a bank to take specific action or to change its practices and processes. For this reason, if a bank does not accept any suggestions made for resolution of a systemic issue and I remain of the view that the suggestions (or amended suggestions) are necessary to resolve the issue, the Chief Executive of the bank will be notified. If the issue is one that affects more than one bank, I will also notify the Chief Executives of all participating banks and the Chair of the Council of the New Zealand Bankers' Association.

Cases involving systemic issues will continue to be monitored until I am satisfied that the systemic issue has been resolved and the resolution has been implemented.



## Complaint issues

### Internet banking

#### Internet “mule” cases

I described these cases in my annual report for 2005/6 and noted that we were beginning to develop an approach to them. A legal opinion on the issues has been obtained and a consistent approach is now in place.

**The complaints came from bank customers who had been approached through internet chat rooms or advertisements and persuaded to accept funds into their accounts, supposedly by way of payment for goods or services supplied by an overseas enterprise to New Zealand residents, and to send the funds overseas after deducting a commission.**

In fact, with similarities to the drug carriers after which they were named, the “mules” were being used to send illegally obtained money out of the country. The funds were being transferred to the “mule” account by overseas fraudsters who had obtained passwords and account details of New Zealand account holders by “phishing” or by the use of keystroke logging devices or software.

In all the cases seen in this office, the bank had either reversed the transfers made into the “mule” account or was otherwise seeking to recover from the “mule”. We have not had any cases where the complaint was that the bank was holding the original account holder wholly or partially responsible for poor internet security practices.

Our advice is that so far as the “mule” is concerned, the transfers into his/her account should be treated as payments made by mistake – the transfers were made by the bank in the mistaken belief that there was a valid instruction from the customer. The “mule” may therefore benefit from the law on payments by mistake, which states that there is a defence to claims for reimbursement where the recipient has received the payment in good faith, has changed his or her position in reliance on the validity of the transaction, and it would be inequitable to require repayment.

In almost all cases, the “mules” will have altered their position in reliance on the validity of the transaction. They have paid out the funds and by the time the fraud comes to light, the funds are usually irrecoverable.

Equally, in all the cases I have seen, the “mules” have been negligent to a greater or lesser extent in failing to make independent enquiries about the enterprise for which they are supposedly working. While this does not necessarily mean that they have not acted in good faith, it may well mean that it is inequitable to allow them to escape all responsibility for the losses caused by the fraud.

The approach to a standard case of this kind is first to ascertain whether the “mule” has acted in good faith, ie neither fraudulently nor recklessly. If there has been fraud (which requires fraudulent intent) or recklessness on the part of the “mule”, then the “mule” is obliged to repay the amount fraudulently taken.

If the “mule” has acted in good faith, it is then necessary to consider all the circumstances of the case to determine whether it would be inequitable to require repayment. A “mule” who has not made any enquiries of independent sources about the legitimacy of the organisation or person offering the employment will almost certainly be judged to have been careless to the point where it would not be inequitable to require some repayment.

A case note on a “mule” case will be found in the compendium that accompanies this report.

### Customer errors in transferring funds

**As more customers take up internet banking services, we are beginning to receive complaints arising out of a customer’s error in entering the details of the account to which a funds transfer or bill payment is to be made. To date we have seen cases where there was a keying error consisting of transposed or wrongly entered digits, cases where the wrong payee was selected from a list and an occasional case where the intended payee had given the wrong number to the payer.**

I hope it goes without saying that all banks involved in a case of this kind should attempt to assist the payer by contacting the payee and requesting the return of the funds. Difficulties arise, however, when the payee cannot be contacted or refuses to return the funds. We are still working our way through possible means of resolving these cases, but one option that banks may wish to consider if the payee account is dormant or appears to have been abandoned is to refund the payment on receipt of an indemnity.

## Cross-border transactions

### Telegraphic transfers

Telegraphic transfers are sometimes used within New Zealand, but their main use is to transfer funds speedily to and from other parts of the world. Difficulties arise when the funds are delayed, or fail to arrive at all, or when unexpected bank charges are deducted. We have always had a few complaints involving these issues, but there has been a recent increase, probably attributable to the increasing diversity of New Zealand’s population. Certainly the main group of customers affected appears to be first-generation immigrants with economic and family ties to their countries of origin.

When a New Zealand bank sends funds overseas by telegraphic transfer, they go in the first instance to the bank with which the New Zealand bank has a correspondent relationship. If the intended recipient of the funds has an account with that bank, then no further transfer is required. In most cases, however, the correspondent bank has to send the funds on to the bank where the recipient has an account, and sometimes the funds have to pass through two or more banks before they reach their ultimate destination. In countries where the banking system is inefficient or corrupt, this provides opportunities for delay and for the imposition of extra charges.



New Zealand banks have no control of, and only limited responsibility for, a transfer after it leaves New Zealand, and none at all after it leaves the correspondent bank. The terms on which the transfer is sent are usually set out on the form which the customer completes when instructing the bank to send the transfer, but they are not always in plain language, nor are the more important terms always emphasised. In view of the increasing level of complaints, I would like to see banks reviewing their forms to make sure that they are easily understood by customers who may not have English as a first language. I would also like to see frontline staff encouraged to warn customers about the potential problems with transfers to certain overseas destinations.

Similar problems arise with incoming transfers when unexpected fees are deducted. Customers are often surprised to find that an incoming transfer has passed through another bank in New Zealand before reaching the one where their account is held, and that a fee may have been charged by that bank. A correspondent bank may charge a fee for its services, but if the arrangement between the transferor and transferee was that all fees would be paid by the transferor, then this is a matter the transferee should take up with the transferor or the overseas bank.

### Foreign cheques

We continue to receive complaints from customers who have banked a foreign cheque and waited to draw on the funds until they understood the cheque to have been cleared, only to find the cheque dishonoured at a later date. Such complaints are often associated with a scam whereby an overseas purchaser makes a good offer for goods or services advertised over the internet and pays for them with a cheque that later proves to be stolen or forged. In the meantime, the seller has been asked (with a plausible reason) to return or send elsewhere part of the funds.

Foreign cheques can take a long time to clear, although in a very high proportion of cases it will be apparent within three to four weeks whether a cheque is likely to be dishonoured. It is normal bank practice to put a hold, usually of 21 days but sometimes longer, on the proceeds of a foreign cheque, after which they will be released to the customer. It is important that either at this point or when the original deposit is made, there is a clear explanation that the funds are released at the customer's risk. Too often I see cases where the customer is told that the funds will be "clear" at the end of the hold period, acts on the understanding that this means the transaction is irreversible, and then finds the cheque dishonoured and a consequent overdraft on the account.

## Code of Banking Practice

The fourth edition of the Code of Banking Practice was issued shortly before the end of the reporting year, and came into effect on 1 July 2007. It has a completely new section on internet banking, a few other changes of some substance, and some amplification and clarification of the existing provisions.

Some concern has been expressed about some of the internet banking provisions so far as they concern bank liability for unauthorised transactions. While only experience will show how the provisions will apply in practice, the underlying principle appears to be the same as that underlying the Code provisions about other types of remote access to banking services. That is, provided the customer takes reasonable care of the means of access and reports promptly any compromise of it, then the bank will carry the risk of unauthorised transactions. It is in this context that an approach will be developed to complaints about unauthorised internet banking transactions.

The commitment to enhance access to banking services for the elderly and disabled is a welcome one. I understand that the New Zealand Bankers' Association is working on a set of voluntary guidelines to assist banks to meet this commitment.

*Some parts use technical or legalistic language and do not sit well with the commitment to "provide you with timely information, using plain language where we can,..."*

It is also good to see that banks have agreed to explain to potential guarantors that they may request the amount of their liability to be limited, although it would have been better to commit to offering limited liability in appropriate cases, especially those involving family borrowing for residential housing. I continue to receive complaints from guarantors, often elderly parents, who have found themselves held liable for debts that they never intended to guarantee.

The size of the Code has grown steadily, and from a slim volume of 21 pages (admittedly in rather smaller print) in 1992 it has now more than doubled in size. The current edition has 56 pages. Much has been added over the years, but very little has been removed. Some of it is repetitious, and its content is not limited to a record of good banking practices, but includes advice to customers and other extraneous material. Some parts use technical or legalistic language and do not sit well with the commitment in clause 1.2 to "provide you with timely information, using plain language where we can, to help you understand how your accounts and products or services operate . . ."



The period before the next review of the Code content would be a good opportunity for the New Zealand Bankers' Association to review the format of the Code with a view to making it easier to understand and more accessible to the public.



## Complaint-handling in banks

We have maintained a very good working relationship with all banks' complaint-handling teams. This is evidenced by the large number of cases where it has been possible to facilitate an agreement between the bank and the complainant.

I am satisfied that all banks now have effective internal complaint resolution processes where the great majority of complaints are sensitively handled and resolved.

The challenge that now faces banks lies in ensuring that complaints are recognised as complaints when they are first expressed and are then speedily referred to the internal complaints system if they cannot be resolved at the point of first contact.

My Terms of Reference provide that a complaint that has been formally made to a bank becomes "deadlocked" and may be investigated as a dispute if three months have passed and the complaint has not been resolved, nor has the bank referred the complainant to my office (see paragraph 22(b) of the Terms of Reference for the full reference).

"Formally" does not mean that the complaint must be made in writing. It is enough that the complainant has expressed dissatisfaction with the service (or lack of service) provided by the bank and has made it clear that he or she expects action to be taken to remedy that dissatisfaction.

Too many complainants are approaching the Banking Ombudsman with complaints that were made a considerable time previously, but did not reach the bank's internal complaints process. There may have been an unsuccessful attempt to resolve the complaint when it was first made, or it may not have been recognised as a complaint at all. The complainant then hears about the Banking Ombudsman and makes an approach to my office. If more than three months have passed since the complaint was made, it will have become a dispute.

While such complaints can often be resolved through facilitation, it is clearly preferable that the bank either resolves them or declares them "deadlocked" through its own processes as soon as possible. The longer it takes to resolve a complaint, the more likely it is that the complainant's dissatisfaction will increase to the point where an amicable resolution is no longer possible.

# Snapshots from the everyday work of the Banking Ombudsman

*There was such a positive response to the publication, in last year's annual report, of a selection of case notes reflecting something of the diversity and interest of our everyday investigative work that we have decided to make this chapter a feature of our annual reports.*

*We would actively encourage those who are interested or intrigued by this sample to read our complete published collection of case notes, available in the companion volume to this annual report, and also on our website.*

Because many of the complex everyday situations investigated by the Banking Ombudsman are not specifically addressed by either legislation or the Code of Banking Practice, our conclusions have to be formed on the basis of a meticulous consideration of all relevant facts, guided by a sense of impartiality and fairness.

Until now our resource of case notes has been available to bank staff and others wishing to research them only in hard copy form, in successive annual publications. This meant that banks' complaints handling teams have to undertake a laborious manual search for cases that may be relevant to complaints under consideration. For community organisations advising potential complainants, the case notes are even less accessible than for banks, whose resources are somewhat greater. To the best of our knowledge, the case notes in hard copy form are rarely referred to and even more rarely used by potential complainants.

We are now planning to make our historical resource of case notes readily accessible to potential users through a search engine in our revamped website. While our case notes are not legal precedents, they demonstrate the established approach to common types of complaints, accurately reflect the outcome of our investigations into the relatively few cases deemed suitable for publication, and convey a lively sense of the challenge, complexity and importance of our work.

The allegation that a bank had mislaid large amounts of cash deposited into an ATM ultimately uncovered possible criminal activity on the part of the complainant's – now former – partner.

#### **CASE 1** Funds missing from ATM

Ms Z had decided to sell her car to a particular buyer. Her partner arranged the sale and agreed to receive the payments from the purchaser in the form of cheques made out to cash. He undertook to deposit them into her account, using her Eftpos card at one of her bank's ATMs. The funds were paid over a six day period in three separate deposits totalling \$16,500. The last deposit was on 25 January of the year in question.

Once deposited into Ms Z's account, the funds were immediately available for her use. Ms Z used more than \$8,000 of the transferred funds. On 26 January – one day after the third and final deposit – the bank reversed the \$16,500 credit, leaving Ms Z's account \$8,557 overdrawn. According to the bank, the envelopes deposited in the bank's ATM had contained neither cheques nor cash.

Ms Z maintained that her partner had deposited the funds into the ATM, and that the bank had lost them. When the bank would not accept this claim, she drew her complaint to the attention of my office.

To help establish the factual basis of the complaint, the bank made use of security camera footage, and was able to establish beyond reasonable doubt that the envelopes had contained neither cash nor cheques. This information was included in a report prepared by the bank, which was sent to Ms Z for comment. Ms Z eventually contacted my investigator, and explained that she now accepted that her partner had invented the entire story about the sale of the car. She was satisfied that he had deceived her in this way to gain possession of her car and to make use of the funds deposited into her account.

Ms Z apologised for the inconvenience she had caused, and withdrew her complaint.

A bank imposed a substantial fee when a customer withdrew from a loan arrangement – had the customer been given due notice of this?

**CASE 2**

**Substantial fee for withdrawing from loan**

Mr S approached the bank for finance to purchase an investment property. Interest rates were expected to rise and, after discussion with the bank, and even though the property purchase was still conditional, he signed a loan offer letter fixing the interest rate for two years. The bank knew that the property purchase was conditional.

A couple of weeks later Mr S advised the bank that he would not go through with the purchase. The bank then charged him nearly \$6,000 as an exit fee, being the bank's estimate of the cost to it of breaking the loan agreement. The bank based this charge on a statement in the loan offer that all costs and expenses associated with the establishment and maintenance of the facility would be the responsibility of the borrower. The bank also said that the staff member advising Mr S had orally informed him that, should the contract not proceed, a cost would be associated with this. Mr S disagreed, and said that he had no idea that the cancellation of the fixed interest rate contract carried a penalty. He complained to the bank, but, when unable to resolve the matter to his satisfaction, referred the complaint to me.

I formed the view that the bank had not adequately informed Mr S that an exit fee would be charged if the agreement set out in the loan offer was broken. This stated that the borrower was obliged to pay all costs associated with the establishment and maintenance of the facility, but did not specify that any costs would be payable if it was terminated. I was also satisfied that, if Mr S had been told that a penalty might apply under such circumstances, he would probably have been reluctant to fix the interest rate for a two year period. Moreover, emails between Mr S and the bank after the contract was broken seemed to confirm that he had not been previously warned of the exit fee.

I proposed, and both parties agreed, that the bank should reimburse the exit fee charged in this case.

When a grandson “shoulder-surfed” his grandmother’s Eftpos PIN, the bank argued that she had breached the card’s conditions of use, whereas we asked ourselves whether she had reason to doubt his honesty.

### CASE 3 EFTPOS Pin number observed

Mr and Mrs P had a credit card with a bank. In January 2007 Mrs P was shopping with her sixteen year old grandson when she used the card to make a purchase. She entered her PIN into the Eftpos key pad, which did not have a shield, and was in a fixed position on the counter. Unbeknown to Mrs P, her grandson, who was 25cm taller than her, observed the entry of the PIN. On the following two days a number of unauthorised transactions totalling \$3,700 were made on the card. Mr and Mrs P soon realised that their card was missing, and immediately requested that it be stopped.

The couple made a claim to the bank for reimbursement of the unauthorised transactions. The bank denied the claim, on the grounds that adequate security protections had not been taken to prevent the disclosure of the PIN, thus breaching the card’s terms and conditions of use. The bank offered a goodwill payment of \$738.15.

Mr and Mrs P did not believe that they had breached the terms and conditions of use. Mrs P stated that she was totally unaware that her grandson was standing behind her while she was keying in her PIN. She kept her card in her wallet in her bag. Her bag was usually kept in her bedroom when she was at home, and the couple did not have any reason to believe that their grandson, who had no history of dishonesty, would steal from them. The PIN was not written down anywhere, and was neither a sequential number nor easily identifiable in any other way.

I found that Mrs P’s grandson had almost certainly “shoulder surfed” her PIN. The bank was essentially arguing that the fact that the PIN had become known to the thief was conclusive evidence that Mrs G had not taken reasonable care to shield the PIN entry. However, I am of the view that, while a customer must take reasonable care to avoid disclosure when keying in a PIN, this will not always prevent it from being seen by someone who is determined to find out what it is. There is a limit to what customers can reasonably be expected to do to protect their PIN, particularly when using an unshielded Eftpos keypad. The standard of care required in such circumstances is reasonable care, not extreme care or the use of every possible precaution.

Mrs P had no reason to suspect either that her grandson was watching her PIN entry, or that he might steal from her. It is not unreasonable for people to trust close family members and friends, in the absence of evidence that they may be untrustworthy. Customers may not take the same precautions to shield the entry of their PIN in the presence of a close family member as they would around strangers. Given that the grandson was considerably taller than his grandmother, it would not have been difficult for him to overlook the PIN entry.

Accordingly, I found that Mrs P had not breached her card’s terms and conditions of use. Mr and Mrs P were entitled to reimbursement of the amount of their loss, less the standard \$50 maximum customer liability sum, a total of \$3,650. Mr and Mrs P and the bank accepted my recommendation.

A couple with a reading disability did not notice that their former bank had failed to stop the deduction of insurance payments from their credit card account, until they were jolted into action by being listed with a debt collection agency.

**CASE 4**

**Substantial fee for withdrawing from loan**

In 2005 Mr and Mrs G obtained a bank loan to purchase a business. The loan was conditional on their transferring all existing bank accounts and insurance policies to the bank providing the loan.

They did so, and took that to mark the end of their relationship with their original bank. Unfortunately, their cancellation of that bank's insurance policies was by telephone, and the associated direct debit arrangement was not cancelled. Consequently their "closed" credit card account went into debit, as unpaid direct debits for ongoing insurance premiums mounted throughout 2006.

Both Mr and Mrs G are reading disabled, and simply disregarded warnings from their former bank because they believed that all their links with it had been severed in October 2005. The discovery that their debt had been listed with a collection agency came as an unpleasant surprise.

When the bank realised why Mr and Mrs G had not understood what had gone wrong, it agreed to forego charges and interest on the debt, and to reduce their remaining liability by 50%. The bank also ensured that their debt listing with a collection agency was removed.

Mr and Mrs G welcomed the bank's forgiveness of part of the outstanding debt, and were particularly pleased to recover their good credit rating.

Mr R deposited the cheque using the bank's standard foreign cheque deposit form. The bank in accordance with its standard practice, put the funds on hold for 30 days. Six weeks later the bank was notified that the cheque was counterfeit.

**CASE 5** If it sounds too good...

Mr R advertised his limited edition car for sale on an internet website. He received an expression of interest from a Mr X in England, who said that he would like to buy the car for a client in Nigeria. The price that Mr X offered was €8,000 (NZ\$15,822). As the car would have been expected to sell for approximately \$9,500 in New Zealand, Mr R decided to accept the offer. Mr X sent a cheque, and it was agreed that the car would be shipped once the bank had cleared the funds.

Mr R deposited the cheque using the bank's standard foreign cheque deposit form. The bank gave him a copy of the form to take with him and, in accordance with its standard practice, put the funds on hold for 30 days. When the holding period expired, Mr R proceeded to draw down the funds and spend the money. Six weeks later the bank was notified that the cheque was counterfeit. It accordingly dishonoured the cheque and notified Mr R, whose account was placed in overdraft for the amount of \$15,492. He advised the bank that he was unable to pay this debt.

A complaint was brought to me by Mr R on the basis that, when he had deposited the foreign cheque, the bank had not advised him that it might be dishonoured at a date beyond the 30 day holding period. He assumed that once he was able to draw on the funds they were

clear funds. He claimed that he was not specifically told by the bank to read the terms and conditions on the foreign cheque deposit form he had signed. He also expressed concern that two months had elapsed between the deposit date and the date on which he became aware that the cheque was invalid.

The bank accepted that Mr R had been the target of an international scam and felt sympathetic towards him, but it was of the opinion that he bore the risk of any dishonour of the cheque. It said Mr R should have read the terms and conditions when he signed the foreign cheque deposit form. On the other hand Mr R felt that that the bank officer ought to have warned him, when he deposited the cheque, that it could still be dishonoured after the 30 day hold period and that if it was dishonoured, he would be liable to repay the amount of the funds withdrawn.

It seemed to me that there was a degree of merit in Mr R's case. As the bank was prepared to discuss the possibility of a negotiated settlement, I spoke with both parties. As Mr R still had the car, we eventually agreed that he should sell it in New Zealand and pay the proceeds to the bank, in return for which the bank would write off the remaining debt.

# Facts and figures



*All banks have experienced an increase in the number of complaints coming to the Banking Ombudsman, and most of them have had an increase in the number of complaints becoming deadlocked and requiring some investigation as disputes. Certainly the increase in “disputes” far outweighs the increase in “complaints.” The reasons for this are not necessarily obvious.*

A small part of the increase is more apparent than real, and relates to a change in the way we classify complaints. However, this change was made during the 2005/6 year, and its effect should have been exhausted before the end of the 2006/7 year.

It is likely that the increase is in part due to our higher public profile as we make greater efforts to make sure the Banking Ombudsman is as accessible as possible to those who may have a banking complaint. This leads to the receipt of complaints under the “three month rule” described above. However, I also think it likely that we are seeing an increase in debt-related complaints as consumers struggle with increasing interest rates.

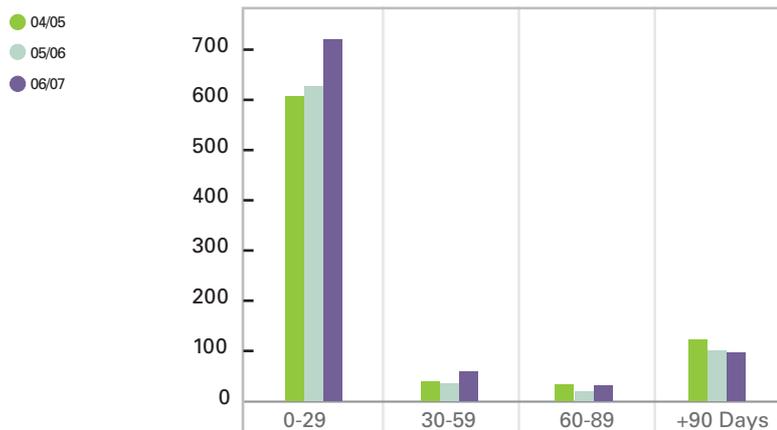
( continued overleaf )

## Cases received by bank

A	2005/06				2006/07			
	enquiry	complaint	dispute	Total	enquiry	complaint	dispute	Total
<b>ANZ</b>	12	82	19	113	21	95	18	<b>134</b>
<b>ASB</b>	8	73	30	111	11	91	40	<b>142</b>
<b>BNZ</b>	4	100	29	133	9	92	46	<b>147</b>
<b>HSBC</b>	1	11	6	18	2	11	9	<b>22</b>
<b>Kiwibank</b>	8	50	5	63	6	58	11	<b>75</b>
<b>NBNZ</b>	13	102	31	146	10	101	45	<b>156</b>
<b>Rabobank</b>	0	2	1	3	2	3	0	<b>5</b>
<b>Superbank</b>	0	1	0	1	0	5	2	<b>7</b>
<b>TSB</b>	1	2	1	4	1	12	3	<b>16</b>
<b>Westpac</b>	11	134	37	182	22	133	54	<b>209</b>
<b>Total</b>	58	557	159	<b>774</b>	84	601	228	<b>913</b>

[Superbank ceased its business in New Zealand and withdrew from the Banking Ombudsman scheme during the year. Under the Rules of the scheme, we continue to investigate any complaints that were under investigation at the date of withdrawal.]

## All cases - time taken (3 year comparison)



## Telephone enquiries 1997-2007

1997-98	1998-99	1999-00	2000-01	2001-02	2002-03	2003-04	2004-05	2005-06	2006-07
2417	2512	3091	3079	2920	2720	2173	1884	1918	<b>1963</b>

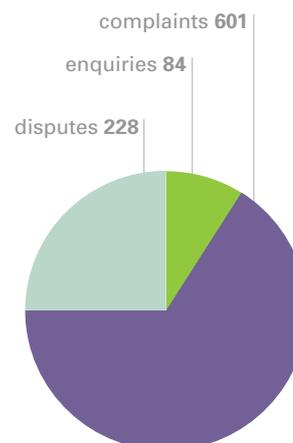
Although the number of telephone enquiries has been lower in the last three years, this reflects a shift to email communication rather than a genuine decline in enquiries. In addition to the telephone enquiries noted during 2006/7 we received 677 email enquiries that were not recorded as complaints or disputes.

## Disputes by bank

B	Jurisdiction Declined		Abandoned		Settled		Withdrawn		Not Upheld		Partially Upheld		Upheld	
	05/6	06/7	05/6	06/7	05/6	06/7	05/6	06/7	05/6	06/7	05/6	06/7	05/6	06/7
	ANZ	3	3	2	3	8	8	0	3	4	1	2	4	0
ASB	4	5	7	7	8	19	4	3	4	5	1	5	1	2
BNZ	6	8	5	5	17	8	2	6	3	2	2	2	0	0
HSBC	1	0	0	1	3	7	0	1	0	0	1	0	0	0
Kiwibank	0	1	0	1	4	6	1	1	1	0	1	0	0	0
NBNZ	5	12	3	2	13	13	1	2	5	4	4	7	0	0
Rabobank	0	0	0	0	0	0	0	0	0	1	0	0	0	0
Superbank	0	0	0	1	1	0	0	0	0	0	0	0	0	0
TSB	0	0	0	0	0	1	0	0	0	1	0	0	0	0
Westpac	4	6	2	8	15	24	1	5	8	4	4	9	0	1
<b>Total</b>	<b>23</b>	<b>35</b>	<b>19</b>	<b>28</b>	<b>69</b>	<b>86</b>	<b>9</b>	<b>21</b>	<b>25</b>	<b>18</b>	<b>15</b>	<b>27</b>	<b>1</b>	<b>5</b>

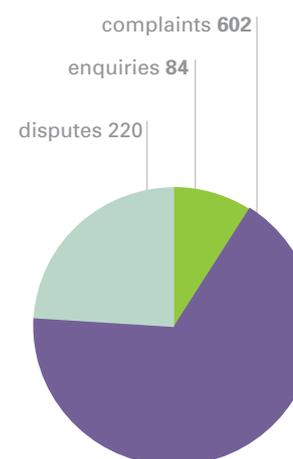
## Cases received 06/07

913

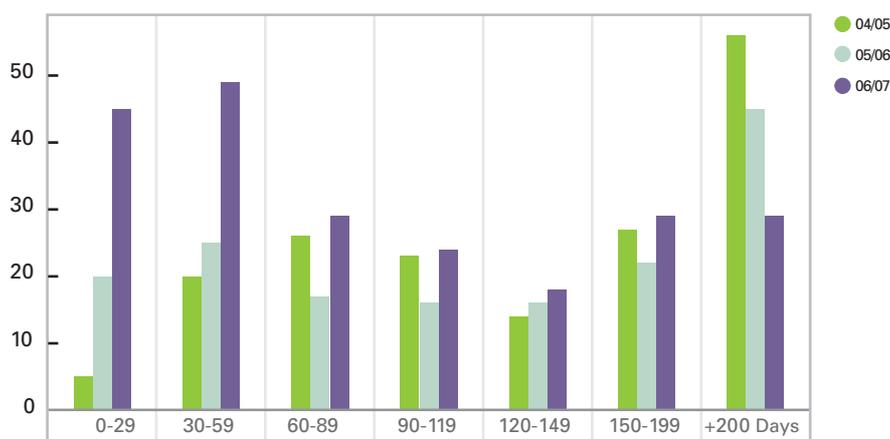


## Cases completed 06/07

906



## Disputes - time taken (3 year comparison)



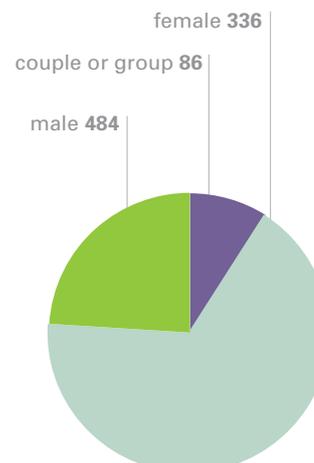
With few exceptions, the number of complaints made about each bank is consistent with the bank's share of the market. The ratio of complaints to disputes, however, varies considerably.

It is now very unusual for a complaint to progress to the point where a formal recommendation is necessary. Of the 906 cases completed during the year, most were resolved by banks through their internal complaints process; just under a quarter were investigated to some extent; but only in 5% of cases was it necessary to issue a recommendation.

Of the cases where a recommendation was issued, 32 were upheld in whole or in part and 18 were not upheld. It should be noted that the cases partially upheld were often those where there was little dispute about the bank's responsibilities, but some disagreement on the appropriate level of compensation.

## Cases by complainant 06/07

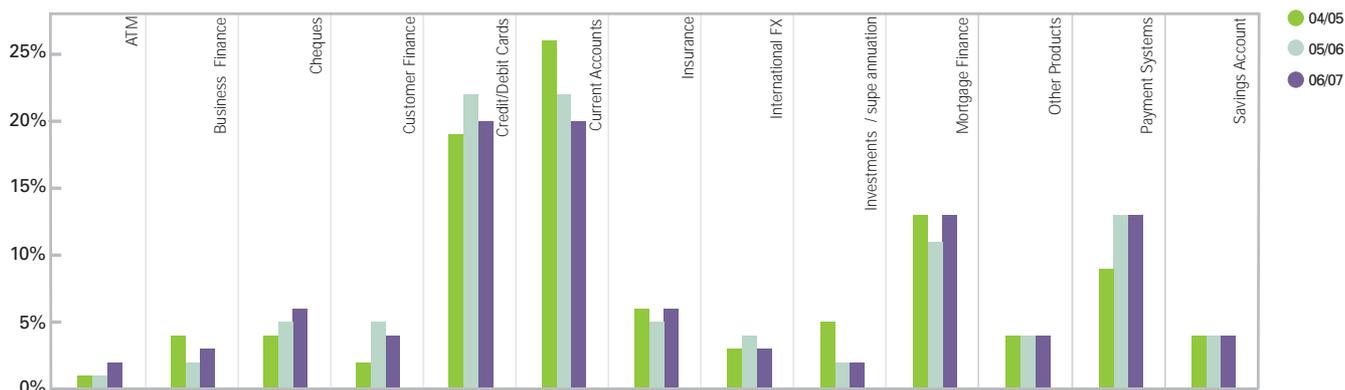
906



## Annual complaints statistics by number of cases 1996-2007

	1996-97	1997-98	1998-99	1999-00	2000-01	2001-02	2002-03	2003-04	2004-05	2005-06	2006-07
Received	705	801	1061	1113	1112	1102	1228	997	766	774	<b>913</b>
Completed	663	779	1006	1093	1118	1103	1250	1080	799	780	<b>906</b>
Carried over	143	165	220	240	234	233	211	128	95	89	<b>96</b>

### Completed cases - by area of business



### Definitions

**Enquiries** are complaints made in writing that clearly fall outside the Banking Ombudsman's Terms of Reference.

**Complaints** are complaints made in writing that appear to fall within the Banking Ombudsman's Terms of Reference but have not been through the bank's internal complaints process.

**Disputes** are complaints that appear to fall within the Banking Ombudsman's Terms of Reference and have been considered by the bank's internal complaints process without being resolved.

**Telephone enquiries** are complaints made by telephone that would be classified as enquiries or complaints if they were made in writing.

**Jurisdiction declined** These are cases where the complaint was not obviously outside the Terms of Reference but proved to be so once some enquiries were made.

**Abandoned** The complainant has failed to respond to correspondence after reminders.

**Settled** The bank and the complainant have agreed to mutually acceptable settlement of the complaint either at an early stage or after considering the initial findings.

**Withdrawn** The complainant decided not to pursue the complaint further.

**Recommendation - not upheld** That the complainant withdraw the complaint.

**Recommendation - partially upheld** I uphold some aspects of the complaint, but not others.

**Recommendation - upheld** The complaint is fully upheld.

There has been little change in the areas of business from which complaints come; the increase seems to be fairly evenly spread over all areas of banking business. Slightly larger than average increases in complaints about both home loans and business finance tend to support the view that we are seeing an increase in debt-related complaints, while the complexity and changing nature of payment systems is probably behind the increase in that area.

When considering those complaints actually investigated, complaints about credit and debit cards were the largest single category. Some of these complaints related to debt incurred on credit cards, but the majority had a background in fraud.

In most areas of business, the number of disputes investigated was too small to be of statistical significance, but it may be worth noting a consistent upwards trend in disputes about consumer finance (mostly unsecured lending by way of personal loan or overdraft), which tends to reinforce the view that there is a rise in complaints about debt.

## Timeliness

Over the past year we have been steadily bringing down the time taken to resolve the average dispute. Timeliness has been a consistent concern of ours and of our reviewers since the heavy caseloads of 1998-2003, but we are now very close to achieving the standards set in agreement with the Banking Ombudsman Commission that:

**40% of cases** (*disputes plus complaint facilitations*) should be resolved within 60 working days.  
**Achieved 49%.**

**65% of disputes** should be resolved or have an initial assessment issued within 120 working days of commencing an investigation.  
**Achieved 85%.**

**95% of disputes** should be resolved or have an initial assessment issued within 200 working days of commencement of the investigation.  
**Achieved 93%.**

**95% of disputes** should be resolved within 300 working days of commencement of the investigation, to include all less complex disputes.  
**Achieved 94%.**

*It is pleasing to reflect that the average complainant can expect to have their complaint resolved within three months of bringing it to us.*

In fact, as the time count includes time taken over case administration after agreement has been reached on a resolution, the actual time taken from the complainant's point of view is shorter. Where we are not quite meeting the targets is in the area of our more difficult and complex cases. Often the delay is caused by factors outside our control, such as the time taken to communicate with complainants living overseas or the need to suspend the investigation while the complainant's health improves. Now that the greater part of the caseload is progressing satisfactorily we will review a selection of older cases to determine where improvements can be made.



## Facilitations

A third of all disputes completed this year were resolved by facilitation, a considerable advance on the 16% resolved in this way last year. Taking complaint facilitations into account as well, the proportion rises to 23% of cases completed after some work has been done by this office. Facilitation takes place either before or concurrently with the commencement of a formal investigation and involves discussions with the bank and the complainant in an attempt to find some common ground on which to base an agreed settlement of the complaint, either by the payment of compensation, or by some other action on the part of the bank, or by the complainant withdrawing the complaint.

	no.	outcome	time taken ( days)		
			1-20	20 - 40	40+
<b>Facilitated Disputes</b>	72	51 Settled	18	18	15
		11 abandoned	1		10
		10 withdrawn	2	1	7
<b>Facilitated Complaints</b>	17	15 settled	9	6	
		2 abandoned	0	0	2

Some complaints are not suitable for facilitation, particularly those where either or both parties have taken up entrenched positions or where there is a new and difficult issue to determine, but the facilitation process has been increasingly used to achieve a speedy resolution of complaints. As can be seen from the table above, most facilitated cases are resolved within less

settlement is reached which is acceptable to both the bank and the complainant. A few result in the complainant agreeing to withdraw the complaint, usually after either my office or the bank has supplied a full explanation of the events that led to the problem, and others were abandoned. Abandoned cases necessarily take longer than most, as my staff make considerable efforts over at least a month to contact the complainant before closing the case.

## Compensation paid

During the course of the year we identified a systems error which had caused us consistently to under-report the amount of compensation paid by banks to those who had complained to the Banking Ombudsman. The table below shows accurate figures for the past three years. It should be noted that the figure for 2006/7 is unusually high because, at the request of a bank, we facilitated an early resolution of a claim where about \$550,000 was paid in settlement.

	2004/5	2005/6	2006/7
<b>Amount Paid</b>	\$791,501.31	\$895,387.25	\$1,489,445.16

While the total figure is quite large, and there were some payments of compensation in the \$40,000 to \$90,000 range, most payments were very much smaller, the majority being less than \$3,000.

## **Banks participating in the scheme**

*as at 30 June 2007*

ANZ National Bank Ltd  
(ANZ and the National Bank of New Zealand)

ASB Bank Limited

Bank of New Zealand

Citibank NA

HSBC Limited

Kiwibank

Rabobank New Zealand Limited

TSB Bank Limited

Westpac

## **Staff**

*as at 30 June 2007*

**Liz Brown** Banking Ombudsman

**Susan Taylor** Chief Investigator

**Pat Caughley** Investigator

**Meryn Gates** Investigator

**Jane Ireland** Investigator

**Katrina McLaughlin** Senior Administrator

**Ross Miller** Investigator

**Bob Rigg** Communications Adviser

**Rhonda Singleton** Enquiries Officer

**Bob Welsh** Investigator

**Alan Westbury** Finance and Administration Manager



**The Office of the Banking Ombudsman**

PO Box 10-573, Wellington 6143

Freephone 0800 805 950

Email [help@bankombudsman.org.nz](mailto:help@bankombudsman.org.nz)

Website [www.bankombudsman.org.nz](http://www.bankombudsman.org.nz)

