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THE OFFICE OF THE
BANKING OMBUDSMAN:
DISPUTE RESOLUTION THAT CONSUMERS
CAN BANK ON?

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DISPUTE RESOLUTION (LAWS 532)

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*Te Whare Wananga
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INTRODUCTION

The focus of this paper is to examine, in the light of the constantly expanding knowledge of dispute resolution, whether the Banking Ombudsman is a good model of dispute resolution for consumers. In doing this, the paper looks initially at the general field of consumer disputes to determine how the inherent characteristics of consumer disputes impact on the design of any dispute resolution process. The remaining part of the paper focuses solely on the banking industry and an analysis of the Banking Ombudsman, with the final part of the paper returning to a more general comment on issues of access to justice. The paper argues that the Banking Ombudsman meets the majority of the attributes of an effective dispute resolution process, but raises doubts about the consumer awareness of the scheme and discusses how this may affect the scheme.

The text of this paper (excluding contents page, footnotes and bibliography) comprises approximately 13,125 words.

I INTRODUCTION

New Zealand's introduction of a Banking Ombudsman on 1 July 1992 was a significant event for several reasons. First, it was of interest to aggrieved banking customers who previously had no access to a quick, independent and inexpensive means of resolving disputes. For too long, the only options available to consumers involved in a dispute with a bank were to either complain directly to the offending bank or take the matter to court. Neither prospect appeared likely to obtain a satisfactory outcome for the customer, given the banks' significant power advantage in terms of information and financial resources. From the point of view of the banks, the establishment of the office was seen as a way to increase consumer confidence and enhance their public profile.

Secondly, the move was a reflection of the wider trends in dispute resolution that were occurring within New Zealand. These trends recognised that the traditional system of adjudication was failing to provide a satisfactory remedy for many disputants and were reflected in an increased use of techniques such as negotiation, conciliation and mediation to resolve disputes. The move also provided a further illustration of the privatisation of justice in New Zealand.¹

The focus of this paper will be to examine in the light of the constantly expanding knowledge of dispute resolution, whether the Banking Ombudsman is a good model for dispute resolution for consumers. In doing this, the paper will look initially at the general field of consumer disputes to determine how the inherent characteristics of consumer disputes impact on the design of any dispute resolution process. Where possible, the paper will attempt to relate any general comments on consumer disputes to the more specific issues affecting banking consumers. The majority of the paper will focus solely on the banking industry

¹A Farrar "A Banking Ombudsman for New Zealand" (1992) *NZLJ* 320, 326

and an analysis of the Office of the Banking Ombudsman, with the final part of the paper returning to a more general comment on issues of access to justice.

II THE NATURE OF CONSUMER DISPUTES

A Overview

New Zealand consumers have benefited in recent years from various statutes designed to protect their interests. Several pieces of legislation have attempted to redress specific abuses relating to credit contracts, layby sales, motor vehicle sales and door to door sales.² More recent legislation has attempted to redress the inherent power disparity between consumers and traders by granting consumers certain fundamental rights in their dealings with suppliers.

The Consumer Guarantees Act 1993, for example, created substantive *private* rights by guaranteeing consumers a number of rights in relation to the supply of goods and services. This Act has afforded greater protection to consumers of some banking services by guaranteeing that those services will be reasonably fit for their purpose.

Furthermore, the Fair Trading Act 1986 created substantive *public* rights by prohibiting misleading and deceptive conduct by traders. Again, this Act has the potential to limit the number of disputes arising for banking consumers by requiring banks to ensure that misleading statements are not made about their services, including in advertising and promotional material. The Commerce Commission is the public authority charged with enforcing these public rights and has a practice of targeting certain industries to ensure compliance.³

²Credit Contracts Act 1981; Layby Sales Act 1971; Motor Vehicles Securities Act 1989; Door to Door Sales Act 1967.

³Office of the Retirement Commissioner *Review of the Banking Ombudsman and Insurance Ombudsman Schemes* July 1997 6.

Arguably, public rights have limited value for the individual aggrieved consumer.⁴ Such rights undoubtedly fulfil a significant role through the establishment of new trader norms that are more favourable to consumer interests. However, in many cases, the consumer will be more interested in restitution than retribution, focusing on their own private interests as opposed to the public interest that is harmed by deviant traders.⁵

Therefore, effective dispute resolution processes are essential to ensure that the private substantive rights are able to be enforced. As Thomas argues, it is manifestly in the interests of consumers that there should be effective and accessible means of resolving disputes and enforcing rights.⁶ First, the possibility of recourse to such means for resolving a dispute strengthens the consumer's hand at the complaint or negotiation stage. Secondly, such means may have to be used in order to establish or enforce substantive rights.

The limitations of the traditional court system of adjudication have been well documented. The inherent characteristics of consumer disputes means that the limitations of cost, delay and inflexibility are even more pronounced. While the introduction of Disputes Tribunals has gone some way to remedy these problems, the Tribunals still fail to address some important problems, especially in relation to consumers of banking services.

This part of the paper will look initially at the characteristics of consumer disputes and how these impact on dispute resolution processes. It will then examine various dispute resolution mechanisms available to consumers to determine the extent to which they are capable of enforcing substantive private rights.

⁴W Harris "Consumer Disputes and Alternative Dispute Resolution" (1993) 4 (3) Australian Dispute Resolution Journal 238, 239.

⁵Above n 4.

⁶R Thomas "Alternative Dispute Resolution - Consumer Disputes" (1988) 7 *Civil Justice Quarterly* 206.

B Inherent Characteristics Of Consumer Disputes

Inherent characteristics of consumer disputes that have been identified as impacting upon dispute resolution are:⁷

- a gross power disparity between the individual consumer and the institutional seller;
- relative consumer ignorance concerning the technical aspects of the product; and
- stakes that are small in dollar amounts but large in impact on the consumer.

The increasing development of large, bureaucratic institutions exercising monopolistic or oligopolistic economic powers means that the individual in dispute with such institutions is no longer faced with someone in a roughly equivalent position.⁸ At the initial complaint stage, the organisation will almost always have more technical knowledge about its products ensuring that it is in a more powerful position to defend any complaints.

The organisation will also generally feel safe in the knowledge that the consumer is unlikely to take the complaint any further. Studies have shown that only a very small minority of consumer complaints are ever taken to court.⁹ Indeed, the number of consumer complaints that ever reach any form of dispute resolution process may only be considered the tip-of-the-iceberg.¹⁰ The primary reason for this is that consumer disputes almost always involve "small claims". To pursue a small claim through the traditional court system would often outweigh the value of the claim itself.

⁷Above n 4.

⁸Above n 1.

⁹R Thomas "Consumer protection: strategies for dispute resolution" in K Mackie *A Handbook of Dispute Resolution: ADR in action* (Routledge, London, 1991) 160.

¹⁰Best, A & Andreasen, A "Consumer Response to Unsatisfactory Purchases: A Survey of Perceiving Defects, Voicing Complaints and Obtaining Redress" (1977) 11 *Law & Soc Review* 701.

Even where the dispute may be large enough to consider taking litigation proceedings, a large organisation will still have a significant power advantage in terms of technical knowledge, financial resources and experience in litigation. A consumer engaged in legal action as a "once-in-a-lifetime" experience is described as the classic "one-shotter", often engaged in battle against a "repeat-player" who will be more powerful and experienced in litigation, less susceptible to delays and more likely to have the benefit of legal advice and representation.¹¹

Therefore, cost and considerations about the time and energy needed to mount a complaint will serve as a disincentive for many consumers to take action. The lack of time and financial resources is likely to be even more pronounced in the case of shift workers or single parents.¹²

However, the fact that it is often not economically viable to pursue a claim through the courts is merely one of the barriers preventing consumers from seeking redress for their grievances. It has been shown that a person's social position as well as their individual characteristics effects the extent to which they will perceive an experience as an injury, blame someone else, claim redress or get their claims accepted.¹³ Many potential complainants simply do not recognise that they have suffered an injurious experience.¹⁴ Those who do perceive there is a problem may be ignorant of their entitlements.¹⁵

Some people are reluctant to voice their grievances as they fear retribution or loss of social acceptance; some want to avoid entrapment in complex processes,

¹¹ Above n 6, 207.

¹² G McDonald "The Australian Banking Industry Ombudsman- can a level playing field be created?" (1991) 65 *Law Institute Journal* 190.

¹³ Felstiner, W, Abel, R and Sarat, A "The Emergence and Transformation of Disputes: Naming, Blaming and Claiming" (1980-81) 15 *Law & Soc Rev* especially 633-635. See also above n 10.

¹⁴ See above n 13, 636. An injurious experience is any experience that is disvalued by the person to whom it occurs. While most people agree on what is disvalued, such feelings are not universal.

¹⁵ Above n 4, 239.

others believe that they lack sufficient resources to pursue their grievance, while yet others see complaining and confrontation as evidence of moral laxity or lack of independence.¹⁶

A further barrier to pursuing a claim is that it is generally a prerequisite of most dispute resolution schemes that the consumer first try to resolve the issue by contacting the supplier directly. As McDonald argues, this presents no difficulty for the articulate consumer, and even less difficulty for the articulate consumer who has a power relationship with the supplier.¹⁷ However, consumers who are illiterate, who have English as a second language or who live in remote areas without access to support facilities will likely be at a distinct disadvantage in a dispute with a supplier.¹⁸

To begin with, it is difficult for these consumers to obtain information about how, where and with whom complaints should be lodged. If they are able to overcome this, they are still faced with the problem of ensuring that the problem is presented in the most advantageous way. This highlights a disadvantage with informal dispute resolution procedures that is not present within the court system as a consumer would have the benefit of legal representation.

It is possible for a consumer to exert a certain degree of influence in resolving disputes, depending on the nature of the relationship with the "supplier" - be it retailer, financier, insurer or other body. The nature of their relationship is affected by many factors. These include the length of time a consumer has been dealing with a supplier and the degree of trust that has been developed and also the frequency and scope of transactions and the likelihood of further (and larger) transactions.¹⁹ For instance, a consumer engaged in a one-off transaction, such as hiring a video operator for a wedding service, will be able to exercise less

¹⁶D Kolb and S Sibley "Enhancing the Capacity of Organisations to Deal With Disputes" (1990) 6 *Neg Jnl* 297, 300.

¹⁷Above n 12.

¹⁸Above n 12.

¹⁹Above n 12.

influence by virtue of the fact that the consumer is unlikely to use the supplier again, regardless of whether the consumer is satisfied or not with the service.

Other factors include the exclusivity of the consumer's business to the supplier's survival and the power of the consumer, by virtue of his or her occupation. In this respect, a threat from a solicitor to take legal action is likely to have more effect on a supplier than the same threat from a lawn-mowing contractor.²⁰ Where there is legislation or publicly available industry standard codes which support the consumer, the consumer will also be able to exercise a greater degree of influence.²¹

Consumers lacking influence in their relationship with suppliers may seek the assistance of community-based organisations such as the Citizens Advice Bureaus and the Consumers Institute as well as government agencies such as the Ministry of Consumer Affairs or the Commerce Commission. These organisations can help consumers by referring them to, or assisting them in, the appropriate means of dispute resolution.

A recent example of this relates to the issue of odometer fraud in the motor vehicle industry. The Ministry of Consumer Affairs issued guidelines to consumers who had been effected by alleged odometer tampering by motor vehicle dealers. The Ministry provided a fact sheet explaining where aggrieved consumers should go to obtain compensation as well as informing consumers how to gather the evidence necessary to succeed in bringing an action for compensation. This information was also publicised in the media.²²

²⁰Above n 12.

²¹Further factors are discussed in above n 12.

²²See The Dominion September 13 1997, 3.

III HOW CAN CONSUMERS GET ACCESS TO JUSTICE ?

An effective consumer dispute resolution mechanism should accommodate the inherent characteristics of consumer disputes as well as removing the barriers of costs, formality, psychological deterrents and delay. An ideal consumer dispute resolution process should be able to satisfy as many as possible of the following conditions:²³

- enjoy the confidence of both complainants and those complained against;
- be accessible, easy to initiate and easy to use;
- be speedy;
- involve minimum expense to the parties and to the "sponsors" of the scheme;
- be procedurally fair and achieve just results;
- be actually and visibly impartial and independent;
- be adequately resourced and financially secure.

In practice, consumers are limited in the number of dispute resolution processes that they can use to gain redress for their grievances. Their primary means of obtaining resolution is to complain directly to the supplier or organisation concerned. Where problems cannot be resolved at this level, the intervention of a third party is required.²⁴ The third party's role may be that of mediator, investigator or adjudicator.

A discussion of the merits of mediation for the resolution of consumer disputes would widen the scope of the paper too far. Accordingly, the paper will briefly discuss the role the media can play as third-party conciliators and the role of the Disputes Tribunals as adjudicators. The purpose of this is to examine the usefulness of these processes to banking consumers and to present them as a

²³Above n 6, 216.

²⁴Above n 10, 734.

means of comparison with the form of dispute resolution offered by the Banking Ombudsman.

A Self-help

The simplest and least expensive remedy is for the consumer to make a complaint directly to the organisation concerned. An increased consciousness of consumer rights in recent years has resulted in many organisations adopting internal procedures for dealing with complaints. It is likely that a high proportion of consumer complaints could be satisfactorily resolved at this stage if the body concerned took seriously the need to treat those complaints with respect and courtesy.²⁵ However, it is clear that the factors discussed earlier relating to the influence a consumer can exert over a supplier will be significant in determining a satisfactory outcome for the consumer.

A further contributing factor is whether there is an independent body for the consumer to go to if they are not satisfied with the outcome. This is essential for several reasons. First, it will be a significant factor in redressing the power imbalance in the consumers favour at the initial complaint stage. Secondly, it may act as an incentive for the organisation concerned to effect a satisfactory result for the consumer. Thirdly, and perhaps most importantly, a consumer is able to seek redress from a body that does not have a vested interest in the outcome, thus ensuring that the consumer feels that they have been treated justly.

A further factor preventing disputes being resolved at this level stems from the fact that many people prefer to have their complaint heard by a body that is not personally involved in the dispute. As alluded to above, this accords with most peoples idea of justice and also reflects the fact that many people feel uncomfortable in complaining directly to the organisation that has wronged them.

²⁵Above n 4, 241.

B Media

A second alternative is to involve the media through television programmes such as "Fair Go" or "Holmes". In these cases, it is unclear whether the media acts in the role of negotiator on behalf of the consumer, or as a mediator or conciliator.²⁶ It is likely that the role is will change depending on the case and the reporter involved. Disputes may be resolved in this manner by threatening the reputation or economic interests of the business through bad publicity. This publicity may serve to alert other consumers of practices or institutions of which to be wary.

Although this method gives the consumer an effective means of redressing the power imbalance, it is an unstable form of dispute resolution in that it is dependent on the political and economic considerations of the media institution.²⁷ Moreover, the media's agenda is often at variance with the agenda of the parties. While the parties main agenda is to come to some resolution which satisfies the interests of both parties, the media is invariably only interested in the news value of the dispute.²⁸

C Disputes Tribunals

A more formalised process that exists within the traditional court system is the Disputes Tribunals. The Disputes Tribunals Act 1988 was intended to

establish a system of essentially lay justice to deal with claims which having regard to the amount of money at stake are thought to be properly suited to determination in an informal way while always insisting on due observation of the rules of natural justice.

The Tribunals provide a cheap, speedy and relatively informal system of dispute resolution. In hearing a claim, a Tribunal must first determine whether it is

²⁶ Above n 4, 241.

²⁷ Above n 4, 241.

²⁸ Above n 4, 241.

appropriate for it to assist the parties to negotiate an agreed settlement in relation to the claim. If the parties can reach an agreed settlement, the Tribunal may approve it and the settlement takes effect as if it were an order of the Tribunal. If not, the Tribunal is not bound by strict legal forms, rights and obligations, but must determine the dispute according to the substantial merit and justice of the case.

The Disputes Tribunals are open to criticisms in a number of respects. Possibly the most significant, particularly for consumers of banking services, is that the monetary limit is very low. The Tribunals can only deal with claims that do not exceed \$3000 or \$5000 by agreement between the parties. Another drawback relating to disputes involving banks and their customers is the lack of specialist referees acquainted with the intricacies of banking law and practice.²⁹

D Brief Evaluation of the Processes

With respect to accessibility, the processes discussed above are relatively easy to initiate and use. However, this must be qualified by the fact that difficulties still exist for consumers who are illiterate or have English as a second language. Not only are they less likely to know how, where and to whom they should go to when they have a grievance, but they will invariably be hindered by the fact that they will find it difficult to put their case across in the most favourable way.

Accordingly, when complaining directly to an organisation, these consumers are less likely to have their complaint treated seriously and therefore be less likely to obtain a satisfactory outcome. In addition, because the informality of the Disputes Tribunals requires that the parties do not have legal representation, these consumers may also struggle to present their case in the best light. When this is coupled with the fact that the other side is likely to have better resources in terms of time, money, knowledge and the benefits of legal advice, the situation is even more unjust.

²⁹Above n 1, 327.

The processes are of little assistance, however to banking consumers where the amount of the dispute exceeds the jurisdiction of the Disputes Tribunals and where a complaint has been made to the bank and rejected. In these cases, it is submitted that a third party who is empowered to decide the facts and enforce a remedy is essential. In this respect, the Banking Ombudsman appears, at least on its face, to be an ideal solution for resolving disputes involving banking consumers.

IV CONSUMERS OF BANKING SERVICES

A Overview

That an industry centrally concerned with the handling of a scarce and valuable resource, money, should occasion complaints will come as no surprise.³⁰ In 1988, the then Minister of Consumer of Affairs noted that "of all problems faced by New Zealand consumers, credit problems are perhaps the most severe and widespread."³¹ Accordingly, the introduction of the Office of the Banking Ombudsman in 1992 was a crucial step in ensuring that banking consumers had an accessible, independent and effective body to address these problems.

Before undertaking an examination and analysis of the Banking Ombudsman as a form of dispute resolution, it is necessary to consider the factors that make disputes involving banking consumers so severe and widespread. First, the banking industry is of vital importance to the majority of New Zealanders. Not only are they involved with the banking industry on a day-to-day, personal level, but the prosperity of financial institutions also contributes to the growth of the economy.³²

³⁰ J Birds and C Graham "Complaints Mechanisms in the Financial Services Industry" (1988)

7 *Civil Justice Quarterly* 312.

³¹ New Zealand Law Society Seminar *Banking Law* June - July 1994

³² Above n 30, 313.

Secondly, banks and other financial institutions offer essential services³³ and exercise effective oligopolies over those services. In recent years, they have also broadened the scope of the services they provide. Whether consumers require a simple current account or credit for significant purchases such as a house or car, few will be able to operate their financial affairs without some form of assistance from banks.

Thirdly, the de-regulation of certain government services in New Zealand in the last decade has meant that the customer base of banks has broadened. Beneficiaries of welfare services, for example, who previously received their payments from a state agency became bank customers simply by virtue of the fact that they could not receive payments unless they had a bank account. As a result, banking consumers now encompass a broader cross-section of society, ranging from people who may be considered relatively sophisticated and well-educated to those who are comparatively uneducated and who have a low level of understanding of the banking system.

The final reason why credit problems are so severe and widespread is that disputes involving consumers of banking services may potentially involve significant amounts of money. This is especially apparent when the significant costs of credit involved in property purchases are considered. However, even where the amount involved may seem large, the claim will usually be far more significant to an individual consumer than to the bank concerned. Thus, the inherent characteristics of consumer disputes that impact on dispute resolution processes are equally applicable in the context of banking disputes.

³³M Budnitz "The Arbitration of Disputes between Consumers and Financial Institutions: a Serious Threat to Consumer Protection (1995) 10 Ohio State Journal of Dispute Resolution 267, 320.

B Code of Banking Practice

The Code of Banking Practice ("the Code") sets out "minimum standards of good banking practice to be observed by members of the New Zealand Bankers' Association when dealing with their personal customers in New Zealand".³⁴ While the Code itself is voluntary, membership of the Banking Ombudsman scheme is obligatory to those banks that adhere to the Code.

Although it does not have a statutory basis, the New Zealand courts have used the Code as an aid when dealing with cases under the Fair Trading Act. In *Dungey v ANZ Banking Group*, Doogue J commented that the Code "is a clear guide to good banking practice. A breach of it must always be likely to give rise to misleading conduct."³⁵ The Code is also enforceable through the Ombudsman's office in the sense that any complaints involving a breach of the Code will likely result in a decision and subsequent award of compensation against the bank.

The first Code came into force in 1992, prior to the appointment of the Banking Ombudsman. This meant that the New Zealand Banking Ombudsman did not have any input into the drafting of the initial Code. However, it appears that this did not detrimentally effect the operation of the office. Indeed, it may have been advantageous given the problems experienced by the Banking Ombudsman's Australian counterpart. It has been argued that the differences of opinion between the banks and the Ombudsman over the content of the Code in Australia led to a souring of the relationship between the banks and the Ombudsman from the outset.³⁶

³⁴New Zealand Bankers' Association *Code of Banking Practice* (Second Edition) November 1996 1.

³⁵(1997) 6 NZBLC 102, 194.

³⁶Personal Interview with Banking Ombudsman, Liz Brown, 18 September 1997. See also generally W S Weerasooria "The Australian Banking Ombudsman Scheme: Recent Developments" (1992) 2 *Australian Journal of Corporate Law* 225.

A revised Code was produced in November 1996. It is more comprehensive than the first Code and rests on the key principle of what is fair and reasonable in all circumstances.³⁷ The Banking Ombudsman was given the opportunity to make significant submissions on the draft Code and several of the comments in her Annual Report of 1995-1996 were incorporated into the new Code. While a detailed examination of the Code is beyond the scope of the paper, three issues are worth specific comment.

First, the introduction to the Code contains a new provision requiring the Code to be monitored by the Banking Ombudsman. Discussion between the banks and the Banking Ombudsman has clarified that this provision is intended to be viewed merely as a reflection of existing practice, rather than granting the Banking Ombudsman a new mandate to review general banking practices.³⁸ Accordingly, the practice of the Banking Ombudsman remains primarily as an individual grievance resolution office. However, where complaints that come into the office appear to reveal poor practice or practice that can be improved on the part of banks, the Ombudsman can report back to the banks with suggestions for improvement.³⁹

Secondly, the Ombudsman remains unhappy with the provisions relating to banks' communication with their customers.⁴⁰ Specifically, banks still retain their right to give important information to customers by way of notices in branches and the media. This is particularly concerning in terms of mortgage interest rate changes where customers may be unaware that they should increase their payments to cover the increased rate. Potentially, the actual cost of the credit may be increased by several thousands of dollars without the customer being aware of any detriment.

³⁷ Above n 34, 2.

³⁸ Personal Interview with Banking Ombudsman, 18 September 1997.

³⁹ Above n 38.

⁴⁰ Above n 38.

The third issue that the Banking Ombudsman remains unhappy with is banking practice relating to the unauthorised use of credit and debit-cash cards. Complaints of this nature probably constitute the single largest number of complaints to the Banking Ombudsman.⁴¹ These complaints usually involve banks refusing to reimburse money that has been withdrawn from an account by an unauthorised person who has used the correct "PIN" number. Despite strong submissions from the Ombudsman on this point, the Code still does not make it clear who has the onus of proof of unauthorised use.

In contrast, the counterpart Code in the United Kingdom requires a bank to prove gross negligence on the part of the customer before the customer loses their right to reimbursement. As a result, the Banking Ombudsman in the United Kingdom rarely has to consider these types of disputes.⁴² Presumably, the New Zealand banks are concerned that to adopt such an approach would result in them having to make too many pay-outs.

C Internal Complaints Procedures

Part 14 of the Code requires every bank to offer a free, three-stage complaints review procedure for handling complaints. The first stage involves the bank undertaking an initial review according to its own internal complaints procedure. The Code states that these procedures should be documented, accessible to customers and provide for the speedy resolution of disputes in a fair and equitable manner. The Code also requires banks to be accountable for the procedures which they implement and the results of those procedures.

The second stage occurs only where a customer is dissatisfied with the bank's decision. In such a case, the bank should inform the customer that the complaint may be referred to the Banking Ombudsman for further consideration and inform the customer how to do so. The third and final stage involves the

⁴¹Above n 38.

⁴²Above n 38.

complaint being considered by the Banking Ombudsman. It is a fundamental aspect of the scheme that only complaints which remain unsettled after being fully considered by the bank's internal procedures may be heard by the Banking Ombudsman. In this way, the Banking Ombudsman may be seen as an office of "last resort".

It is essential that a complainant using an internal complaint procedure has recourse to someone who was not involved in the original decision. The usual progression of an internal dispute resolution procedure begins with an initial complaint being made at branch level. If the complaint is too complex to be sorted out at that level or the complainant is not satisfied with the response, the complaint may be referred straight to the complaints-handling division of the Head Office. Alternatively, it may pass through an extra step at regional level before being passed on to the Head Office. Irrespective of which path is taken, the bank will endeavour to reach an agreement and if the complainant is still not satisfied with the response, the bank will refer the dispute to the Banking Ombudsman.

A positive side effect of the scheme is that banks internal complaints procedures have improved since the start of the scheme. In particular, banks are far less inclined to take an adversarial attitude toward the resolution of complaints investigated through the Ombudsman office.⁴³ The Banking Ombudsman has commented that banks that considered complaints to be the province of their legal department have caused the most difficulties.⁴⁴ This is because legal departments tend to be made up of litigators and the Banking Ombudsman is not an appropriate forum for litigation tactics. As an example, the legal departments of some banks have occasionally raised jurisdictional issues on complaints that did not have much merit on their own and could have been disposed of in a short period of time. This led to unnecessary delays in resolving the dispute.

⁴³Above n 38.

⁴⁴Above n 38.

V OFFICE OF THE BANKING OMBUDSMAN

A *Origins of the Office*

The Ombudsman concept is not new to New Zealand. In 1962, New Zealand became the first English-speaking, common law, commonwealth country to adopt the unique system of dispute resolution that originated in Sweden. The term "Ombudsman" is derived from the Swedish word for "legal representative". The dictionary definition of the term centres on the concept of an official appointed to investigate the complaints of individual citizens or subjects against public authorities.⁴⁵

Accordingly, the Ombudsman has traditionally been a Parliamentary office whose purpose is to provide individuals aggrieved by a decision of Government with a means of redress. The Ombudsman is viewed as an impartial person who is able to examine complaints about matters of administration, can access all the relevant facts and documents and decide whether the decision or act complained of was deficient according to a list of statutory criteria.⁴⁶

The importation of the Ombudsman model of dispute resolution into the private sector is a new concept to New Zealand. Traditionally, it was thought that such remedies were unnecessary in the private sector because customers could "exit", that is take their custom elsewhere, if they were dissatisfied with the standard of service.⁴⁷ It was only in the public sector, where choice was limited, that such intervention was necessary.⁴⁸

However, it has been argued for some time that the growth of large, bureaucratic institutions in the private sector has blurred the formal distinction between what

⁴⁵G Burton "A Banking Ombudsman for Australia" (1990) 1 *JBFLP* 29, 30.

⁴⁶N Tollemache "Banking Ombudsman in New Zealand" (1996) 26 *VUWLR* 233.

⁴⁷M Seneviratne, R James and C Graham "The Banks, the Ombudsman and Complaints Procedures" (1994) 13 *Civil Justice Quarterly* 253, 255.

⁴⁸P McAuslan "Public Law and Public Choice" (1988) *Modern Law Review* 681 cited in above n 2.

is public and what is private.⁴⁹ The exercise by these institutions of monopolistic or oligopolistic economic powers are regarded as essentially governmental.⁵⁰ Therefore, it has been agreed that such institutions should be subject to greater accountability through mechanisms like the Ombudsman.

Unlike the United Kingdom, New Zealand moved to protect the use of the name "Ombudsman" by the passing of an amendment to the Ombudsman Act 1975. This amendment gave the Chief Ombudsman control over who could use the name and in what circumstances. The purpose of this was essentially to prevent the use of the name in such situations as internally appointed newspaper and college Ombudsmen who are little more than complaints advisers with no real independence.⁵¹ It was considered that the use of the name "Ombudsman" by these officers could lead to a diminution of respect for the office and damage the credibility of "real" Ombudsmen.⁵²

Accordingly, the Chief Ombudsman has specified a number of criteria to apply to those seeking approval to use the name "Ombudsman" in New Zealand.⁵³ First, the "Ombudsman" must be appointed and funded in a way that enables him or her to operate effectively and independently of the organisation over which they have jurisdiction. Independence and impartiality is seen as fundamental to any Ombudsman scheme and as such the "Ombudsman" should not be seen to be a counsel or advocate for special interest groups. Furthermore, the systems and procedures used by the Ombudsman must ensure fair and impartial decision making.

Secondly, the "Ombudsman" is required to carry out impartial investigations of complaints free of charge, to make a conclusion based on that investigation and to achieve a remedy where appropriate. Thirdly, the Ombudsman is required to have a plain language charter that is available and accessible to the public and

⁴⁹ Above n 1, 326.

⁵⁰ See P E Morris "The Banking Ombudsman" Pt 1 (1987) *JBL* 131, 132.

⁵¹ Above n 46, 239.

⁵² Above n 46, 239.

⁵³ Chief Ombudsman *New Zealand Criteria for the Use of the Name "Ombudsman"* May 1997.

subject to periodic public review to assess its effectiveness and credibility. The Ombudsman is also required to produce a publicly available annual report. Finally, there must be an assurance of continuing and future resources to guarantee tenure to the Ombudsman and to ensure the effective and efficient administration of complaint handling.

The Office of the Banking Ombudsman was the first scheme to be permitted to use the name "Ombudsman" and is one of only two such offices in New Zealand. Under the Retirement Income Act 1993, the Retirement Commissioner, Colin Blair is required to review the "effectiveness of private sector Ombudsman handling complaints in the savings/investments markets". In his most recent report, he concludes that the Banking Ombudsman scheme meets substantially all of the benchmarks required of the scheme in terms of accessibility, independence, fairness, accountability, efficiency and effectiveness.⁵⁴

B Institutional Structure

Unlike the United Kingdom and Australian schemes that have a tripartite, corporate structure, the New Zealand scheme is a simpler, unincorporated form consisting of a Banking Ombudsman Commission ("Commission") and the Office of the Banking Ombudsman. The Office of the Banking Ombudsman is comprised of the Banking Ombudsman, Liz Brown, two full time investigators and two part time staff who carry out the initial complaints screening, as well as two administrative staff.

The Commission consists of an independent chair (currently a retired senior High Court Judge) together with two consumer and two banking representatives. The Commission has the responsibility for appointing the Banking Ombudsman

⁵⁴Office of the Retirement Commissioner *Review of Banking Ombudsman and Insurance and Savings Ombudsman Scheme and Consideration of the Need for a Statutory Ombudsman* July 1997, 12. These benchmarks were developed in Australia by a Working Group chaired by the Federal Bureau of Consumer Affairs and were used by the Retirement Commissioner in the absence of any similar New Zealand material.

as well as considering and approving the Banking Ombudsman's budget. It also has the responsibility for levying and collecting the necessary funding from the Participating Banks⁵⁵ in accordance with the Rules of the scheme.

In addition, the Commission collaborates with Government or any corporations on any matters affecting banking and receives and considers recommendations from the Banking Ombudsman for changes to the Terms of Reference. The Commission can recommend to the New Zealand Bankers' Association such amendments to the Terms of Reference as it sees fit. In 1996, following recommendations by the Banking Ombudsman to the Commission, the Commission recommended and the Council of the New Zealand Bankers' Association accepted seven amendments to the Terms of Reference. These came into effect in November 1996. Although many of these amendments related to general administrative matters, an amendment providing for the award of compensation for "inconvenience" suffered by reason of the acts or omissions of a bank was a significant development for the bank customer.⁵⁶

Funding for the scheme is obtained through levies on the Participating Banks. Half of this levy is determined on the basis of market share while the remainder is based on the proportion of claims made against the individual bank in the preceding year.⁵⁷ Although this may be cynically viewed as a disincentive for banks to inform their customers of the existence of the Banking Ombudsman, in practice this acts as an incentive for banks to resolve complaints internally, especially those which are low value.⁵⁸

Another effect of the operation of the funding system is that banks have frequently argued with the Banking Ombudsman over the point at which a

⁵⁵As at 1 December 1996, the Participating Banks are: ANZ Banking Group (New Zealand) Limited (incorporating Postbank); ASB Bank Limited; Bank of New Zealand; BNZ Finance Limited; Citibank NA; Countrywide Banking Corporation Limited; Hongkong and Shanghai Banking Corporation Limited; The National Bank of New Zealand Limited; TSB Bank Limited; WestpacTrust.

⁵⁶Office of the Banking Ombudsman *Terms of Reference* paragraph 14A.

⁵⁷Rules of the New Zealand Banking Ombudsman Commission: rule 10.3

⁵⁸Above n 38.

"complaint" has become a "dispute" for funding purposes.⁵⁹ However, since the Banking Ombudsman's release of guidelines on this issue last year, it appears to have become less contentious.

Clearly, it is the strength and credibility of the Commission that guarantees the independence of the Banking Ombudsman.⁶⁰ Actual and perceived independence of the Banking Ombudsman is essential for the credibility of the scheme. It has been argued that the independence of the Ombudsman's office can only be truly guaranteed by placing the scheme on a statutory basis.

In the United Kingdom, the Jack Report⁶¹ on the Banking Ombudsman was of the opinion that the scheme should be statutorily based. This opinion was based on what it perceived as a fundamental flaw in the institutional structure of the scheme in that banks retained the ultimate responsibility for the Banking Ombudsman's Terms of Reference.

The Jack Report concluded that despite the "jealous safeguarding" of the independence of the scheme by the Council and Chairman (the equivalent of New Zealand's Commission), and having a structure that "eliminated the possibility of interference" by the Participating Banks in the scheme's day-to-day operations, there was still the possibility that the scheme could be perceived as not genuinely independent of the banks. Burton refers to this colloquially as the "no smoke without fire" argument.⁶² This point is more fully discussed below in the assessment of the independence of the office.

⁵⁹ A "complaint" is a case that appears to fall within the Terms of Reference in all respects except that it has not been through the bank's internal complaints processes. A "dispute" is a case that falls within the Terms of Reference and has been fully considered by the bank's internal complaints procedures without reaching a solution acceptable to all parties.

⁶⁰ Above n 46, 238.

⁶¹ This refers to *Banking Services: Law and Practice* (Dec 1988), the Report of the Committee to review banking services in the United Kingdom. It was chaired by Professor Jack of Glasgow and hence is usually referred to as the "Jack Report"

⁶² Above n 45, 35.

C *Jurisdiction*

The Banking Ombudsman has, in theory, an extremely broad jurisdiction. Clause 1 of the Terms of Reference states that the Ombudsman's principal powers and duties are:

- to consider complaints arising out of the provision within New Zealand of banking services by any Participating Bank principally to individuals, but also to groups of individuals, whether incorporated or not; and
- subject to certain limitations⁶³ to facilitate the satisfaction, settlement or withdrawal of such complaints whether by agreement, by making recommendations or awards or by such other means as seem expedient.

Several points in relation to these provisions should be raised immediately. First, the Ombudsman is to consider the complaints at no cost to the complainant. This provision is essential in ensuring accessibility of the scheme to consumers. Secondly, the Ombudsman may give advice on the procedure for referring a dispute to her, but it is not to be her function to provide general information about Participating Banks or banking services.⁶⁴

Thirdly, the Ombudsman cannot consider complaints relating to claims over \$100,000. While the Terms of Reference explicitly prevent the splitting of claims and deliberate under-claiming to attract jurisdiction, there is some flexibility for the Banking Ombudsman to consider claims in excess of \$100,000 where the bank concerned consents to her doing so.⁶⁵ This consent provision is also applicable to other claims that may fall outside the Terms of Reference, indicating the flexibility of the scheme and its desire to ensure that complaints

⁶³Terms of Reference paragraphs 18, 19, 20, 21 and 22.

⁶⁴Terms of Reference paragraph 2.

⁶⁵Terms of Reference paragraph 19.

are able to be considered where the banks and Banking Ombudsman agree that they should be.

Fourthly, "banking services" are defined as all financial services provided to individuals or groups by each of the Participating Banks in New Zealand in the ordinary course of their business. The use overseas of credit cards issued by Participating Banks and advice and services relating to insurance and investments are also included in this definition. The Terms of Reference also makes it clear that a complainant does not have to be a customer of the bank to be able to bring a complaint against it.

The use of the word "financial services" as opposed to "banking services" not only avoids circularity in the definition, but also circumvents debate over what is encompassed in the ordinary or general law meaning of "banking business".⁶⁶ It would appear that any transaction under which a Participating Bank receives, provides or transmits any form of finance would be encompassed in the definition, even if the transaction is novel or unique to one Participating Bank, provided that bank gives the service as part of the ordinary course of its business.⁶⁷

In addition to the limitations discussed above, the jurisdiction of the Banking Ombudsman is fettered in several ways. The most obvious fetter is that the Ombudsman can only investigate those matters specified in the Terms of Reference. Accordingly, she is prevented from investigating complaints that relate to a bank's commercial judgement in decisions relating to lending, security or general interest rates.⁶⁸ She will, however, still have a residual power to deal with cases of maladministration in lending matters. She is also prohibited from investigating banking practice or policy that does not itself give rise to a breach of any obligation or duty owed by the bank to the complainant.⁶⁹

⁶⁶Above n 45, 37.

⁶⁷Above n 45, 37.

⁶⁸Terms of Reference paragraph 18(b).

⁶⁹Terms of Reference paragraph 20.

Arguably two of the most contentious fetters on the Ombudsman's power concern the potential for the banks to remove a complaint from the Ombudsman's jurisdiction by commencing legal action against the complainant. In the first place, the Terms of Reference preclude the Banking Ombudsman from considering a complaint when its subject matter is also the subject matter of a court or tribunal proceedings. Thus, a bank may remove a complaint from the Ombudsman's jurisdiction by taking legal action against the complainant. However, the Ombudsman has commented that this would be clearly contrary to the spirit and purposes of the scheme and that she is satisfied that no bank would deliberately seek to withdraw a complaint from her jurisdiction in this way.⁷⁰

Secondly, the concept of "test cases" permits a Participating Bank, at any time before an award is made, to give notice to the Ombudsman containing a reasoned statement that the complaint involves a novel point of law or a question that may have important consequences for the bank concerned or for banks generally. Providing that the Banking Ombudsman concurs with the bank's statement, the investigation must then be discontinued.

In doing this, the bank must give its reasons for nominating a complaint as a "test case". Significantly for the consumer, the bank must also give an undertaking that if either the complainant or the bank institutes court proceedings against the other party within six months of receipt of the notice, the bank will pay the applicant's costs and disbursements of the hearing and any appeal by the bank. There is also provision for the bank to make interim payments on account if the bank considers it reasonable to do so.

In both the United Kingdom and Australia, this provision has been widely criticised for granting the banks too much power to remove a complaint from the Ombudsman's jurisdiction when it does not suit their interests. Arguably, the

⁷⁰Office of the Banking Ombudsman *Annual Report 1996-1997*, 29.

generous fees undertaking that is a prerequisite for the exercise of the provision, together with fact that the Ombudsman's concurrence is required makes it doubtful that this provision could be abused.⁷¹

Moreover, Burton argues that the test case and related provisions are important for both the efficiency and fairness of the system.⁷² Clearly, where there are a number of complaints on a single product or policy, the bank may wish to get legal ruling and the Banking Ombudsman will be favourable to such a request.

Although the test case provision has not been used in New Zealand to date, it is under consideration at the moment in a case which the Ombudsman considers to be entirely appropriate for the test case process.⁷³ Literature about a new product introduced by a Participating Bank has been considered by the Banking Ombudsman and found to be misleading. The Banking Ombudsman has upheld several complaints on the matter and the bank has paid out compensation in all cases. Accordingly, the bank and the Ombudsman have agreed that if the office gets a further run of complaints, the bank will seek a firm legal ruling as to whether the information is misleading under the Fair Trading Act.⁷⁴

D Complaint to Resolution: How the Scheme Works

1 Procedure

Subject to specific requirements in the Terms of Reference, the Ombudsman may use her discretion and control the procedure as she sees fit.⁷⁵ This flexibility enables the Ombudsman to vary the processes used, depending on the circumstances of each case. Accordingly, it is possible to view the Office of the Banking Ombudsman as comprising a formal inquisitorial or adjudicative framework within which a variety of other dispute resolution techniques such as

⁷¹Above n 46, 242. See also above n 45, 39.

⁷²Above n 45, 39.

⁷³Above n 38.

⁷⁴Above n 38.

⁷⁵Terms of Reference paragraph 3.

mediation, facilitation negotiation and conciliation may be used. Burton describes this as a "novel marriage of characteristics of dispute resolution structures".⁷⁶

For example, mediation may be appropriate in a case where there are good grounds for settlement but the extremely strong sense of grievance that the complainant has, or the bank's attitude toward the complainant means that neither party is prepared to settle. The mediation may be seen as a way for the parties to "let off steam" and as a result be more willing to negotiate a settlement.⁷⁷

This flexibility of process has also resulted in innovative ways of disputes. In one case involving racial discrimination, the Banking Ombudsman made a recommendation that the bank should apologise to the complainant. In the circumstances, it was considered appropriate for the bank to make the apology on the marae in front of the complainant's whanau.⁷⁸ The result was an apology that had more significance for the complainant.

A complaint that comes into the office is initially screened to see whether it falls within the Banking Ombudsman's jurisdiction and whether it has been through the banks internal complaints process. Where a matter appears to fall within the Ombudsman's jurisdiction but has not been fully considered by a banks' internal complaints processes, the office will refer the matter back to the bank concerned. At this stage the matter will be referred to as a "complaint". In the most recent annual report, 68 per cent of all cases received fell into this category.⁷⁹ The other 30 per cent of cases that are within the Ombudsman's jurisdiction and have been fully considered by the banks internal complaint procedures are referred to as "disputes".

⁷⁶ Above n 45, 48.

⁷⁷ Above n 38.

⁷⁸ Above n 38.

⁷⁹ Above n 70, 8.

Every dispute that comes into the office is allocated to an investigator who will take responsibility for the file. Assuming that the investigator is clear on what the dispute is about and does not need to gather more facts from the complainant, the investigator will notify the dispute to the bank concerned and ask for the bank's report on it. At this stage, the investigator may also seek information relating to the dispute. This may include the bank's file, police reports, videotapes or information from third parties such as accountants.

It is important to note here that paragraph 11 of the Terms of Reference provides that at any time that a complaint is under consideration by the Banking Ombudsman, she may seek to promote a settlement or withdrawal of the complaint by agreement between the parties. Accordingly, if there is the possibility of settlement at any time within the initial investigation or the subsequent formal process, the Ombudsman will make every attempt to encourage this.

Where there does not appear to be any likelihood of a settlement and the investigator is satisfied that he or she has obtained all the information necessary or available concerning the dispute, the investigator will draw up an "initial assessment". The initial assessment will often resemble a judgment in that it sets out the complaint; states what both sides have said about it; discusses the investigation that has been carried out; and mentions any applicable law as well as the relevant provisions of the Code and any industry surveys⁸⁰ that have been done. Finally, it will conclude with the Banking Ombudsman's assessment of the dispute and her proposed recommendation for settlement. The statistics provided in the Ombudsman's most recent Annual Report clearly show that the vast majority of complaints are dealt with at this stage.⁸¹ It is complainants, rather than banks who are less likely to accept recommendations at this stage.

⁸⁰Where the Code is silent on a particular policy or practice, the Banking Ombudsman will conduct a survey of some or all of the Participating Banks. This is in keeping with paragraph 16(b) of the Terms of Reference that provides for the Banking Ombudsman to consult within the industry when determining the principles of good banking practice.

⁸¹Above n 70, 8-9.

If either the complainant or the bank do not accept the initial assessment and make further submissions on it, the Banking Ombudsman will consider those submissions and pass them across to the other party for consideration. If the submissions reveal any new information, the Banking Ombudsman may carry out further investigation into the complaint and, if appropriate, issue a further initial assessment.

If the matter is not settled at this stage, the Ombudsman moves on to a "formal recommendation". If this recommendation is unfavourable to the bank, then the bank is expected, in keeping with its membership of the scheme to act on such a recommendation. If a negotiated or recommended settlement or withdrawal requires the bank to pay money or provide other valuable consideration, then unless the bank otherwise requests or agrees, it will only be open for acceptance by the complainant "if he or she accepts it in full and final settlement of the subject matter of the complaint".⁸² Unless the complainant chooses to accept it, he or she is not bound by the process or the Ombudsman's decision and is left to pursue other means of resolution.

If within one month after the Ombudsman has made a recommendation it is accepted by the applicant but not the bank, the Ombudsman may make a formal award against the bank.⁸³ Paragraph 14 of the Terms of Reference states that the award "shall comprise a money sum not exceeding \$100,000". Paragraph 14 also states that award is not to be

of a greater amount than in the opinion of the Banking Ombudsman is appropriate to compensate the complainant for direct loss or damage suffered by him or her by reason of the acts or omissions of the Participating Banks against which the award is made.

Although the Ombudsman has dealt with several cases close to the monetary limit, the average amount of compensation is less than \$1000.00.⁸⁴ It is also important to note that the award provision has only been used once in the history

⁸²Terms of Reference Paragraph 13(b).

⁸³Terms of Reference Paragraph 14.

⁸⁴Above n 38.

of the office in New Zealand. As the scheme has progressed, it is now comparatively rare to make a recommendation.⁸⁵

As discussed earlier, a recent amendment to the Terms of Reference provided for the award of a sum not exceeding \$1000 to compensate a complainant for "inconvenience" suffered by reason of the acts or omissions of a bank. Following the wording used in parallel Ombudsman schemes overseas, "inconvenience" is intended to include stress, embarrassment, humiliation, distress and other detrimental effects that could not be considered under the provision to award direct loss.

While the provision for indirect loss is an important addition to the powers of the Banking Ombudsman, the comparatively low monetary limit has lessened its significance. There does not appear to be any genuine reason for there to be such a disproportion between the sums awarded for direct and indirect loss, other than perhaps the banks' fears that any greater amount would result in consistently larger awards.

However, this fear is probably unfounded given that the average sum for compensation is between \$250 and \$400 and that the Ombudsman has recommended the maximum sum in only one case in the past year. In that particular case, an extremely serious breach of privacy resulted in the ex-husband of an abused woman gaining access to his wife's bank statements.⁸⁶ Fortunately, the breach was discovered before the husband was able to discover the whereabouts of his ex-wife. While the complainant in this case was rightly awarded the maximum sum, the Ombudsman considered that a more substantial award was warranted.

A case in the United Kingdom highlights a different issue which may warrant a larger award for indirect loss. In that case, the bank wrongly listed the customer

⁸⁵Above n 38.

⁸⁶Above n 70, 12

as a bad debt with a credit reference agency.⁸⁷ As the direct financial loss suffered by the customer was almost impossible to work out, the Banking Ombudsman awarded the equivalent of NZ\$25,000 for indirect losses.

2 *Access to and Disclosure of Information*

To achieve fairness in dealing with disputes, both sides must be able to put their case forward. However, often the complainant will not be aware of information about the dispute that could help his or her case. In most cases, the bank concerned will have the critical information and documents within their exclusive possession. Accordingly, the Banking Ombudsman should ideally have a power to require mandatory production of this information.

While the Parliamentary Ombudsman has the backing of statutory powers to obtain information from any person, the Banking Ombudsman may only rely on the Terms of Reference that require the defendant bank to provide any information relating to the complaint which is, or is alleged to be in the bank's possession. However, the Terms of Reference are only a contractual undertaking to the Commission and are unenforceable by the Banking Ombudsman except through the influence of the Commission. Tollemache argues that there is a big difference between having full statutory powers backed up by sanctions on the one hand and relying on the respondent bank to honour its commitment on the other.⁸⁸ However, as Burton argues the incentive of enlightened self-interest is probably sufficient to for the information to be disclosed.⁸⁹

In practice, the Banking Ombudsman notes that there are less problems with obtaining information now than when the scheme began.⁹⁰ Most difficulties encountered now relate to the investigation of incidents that occurred several

⁸⁷Above n 38.

⁸⁸Above n 46, 241.

⁸⁹Above n 45, 41.

⁹⁰Above n 38.

years ago. In some cases, the bank files may have been destroyed or lost. These difficulties are even more pronounced when the Ombudsman is dealing with a bank that no longer exists.

3 *Criteria for Decision-making*

The Banking Ombudsman scheme allows disputes to be solved on a broader equitable basis than would be possible in the courts, since the Terms of Reference explicitly require the Banking Ombudsman, in making any recommendation or award, to do so by reference to what is, in her opinion, fair in all the circumstances.⁹¹ Any applicable rule of law is to be observed, and regard must be had to the general principles of good banking practice and any relevant code of practice.

The Australian Banking Ombudsman has identified a number of factors that he will take into account when determining what is fair in all the circumstances. These include the circumstances of the customer, the way in which the complaint has been handled by the bank and the capacity of the bank to control the systems which may be the subject of the complaint.⁹²

It is important to note that the Ombudsman is not bound by previous decisions of the Office. This is significant as it removes the possibility of a bank arguing that it cannot make allowances for a particular customer as it would be forced to do the same for all other customers in similar situations.⁹³

E *Effect on Banking Practice*

The Banking Ombudsman is empowered to make recommendations to the Chair of the Banking Ombudsman Commission from time to time in relation to the

⁹¹ Terms of Reference Paragraph 16.

⁹² Above n 1, 326.

⁹³ Above n 46, 240.

Terms of Reference or any relevant Codes of Practice that have a bearing on the discharge of her responsibilities. She will also make general comments about banking practice or policy in her annual reports and in her six-monthly reports to the Chief Executives of each of the Participating Banks.

The six monthly reports set out the number of complaints against the banks for the previous six month period and also comment on any issues that have come up within that period. These may be issues that are generally applicable to the banking industry or are specific to a particular bank such as where a bank has had a number of complaints about a specific product.⁹⁴ The Banking Ombudsman will also comment on anything to do with administration of the scheme. This is viewed as a means of contributing to the bank's policy making process and, as such, has been effective at bringing about a change in policy in some situations.⁹⁵ The Banking Ombudsman also has the opportunity to effect policy when banks approach her to comment on a new product or information leaflet in light of the sort of complaints that have been coming through the office.

However, in contrast to the Parliamentary Ombudsman, the Banking Ombudsman is not able to initiate investigations of her "own motion". Significantly, the Banking Ombudsman does not consider this 'watchdog' role would be an appropriate function of her office given the framework that an industry sector Ombudsman works in.⁹⁶ She maintains that the proper function of the Office is to resolve individual disputes between consumers and banks and to comment on banking policies and practice only to the extent that those complaints reveal a serious defect.⁹⁷

⁹⁴ Above n 38.

⁹⁵ Above n 38.

⁹⁶ Above n 38.

⁹⁷ Above n 38.

VI ASSESSMENT OF THE BANKING OMBUDSMAN SCHEME

Four criteria have been put forward by which to measure the performance of various dispute resolution schemes: independence; openness; accessibility and fair and effective procedures. As discussed earlier, the Retirement Commissioner has concluded that the Banking Ombudsman scheme meets the benchmarks set out for these criteria.⁹⁸ Although these benchmarks relate to the Australian environment, thereby casting some doubt on their application to the New Zealand context, it would be repetitive and of little use to restate these findings. Rather, this part of the paper will use these four criteria as convenient headings under which it will discuss matters that it considers significant to the central issue of access to justice for consumers.

A *Independence*

One of the fundamental problems facing any industry-run and funded scheme is undoubtedly the actual and perceived independence of the scheme. We can safely assume that after five years of operation in New Zealand, the Banking Ombudsman scheme has proven that it is *actually* independent from the institutions that established it. This is supported by the fact that it meets the benchmarks of the Retirement Commissioner. The question is, therefore, to what extent the *perceived* lack of independence prevents a consumer obtaining justice.

The proposition usually put forward to resolve this issue of independence is to place the scheme on a statutory basis. This reflects the belief that a statute-based scheme is inherently more independent and therefore more credible than

⁹⁸The Retirement Commissioner's report deals with the issue of openness under the heading of accountability. However, this paper will use the term openness because it encompasses a wider range of issues.

a private alternative because a public authority is assumed to be less self-interested or better able to balance competing vested interests.⁹⁹

However, it would be both undesirable and unnecessary to place the Banking Ombudsman scheme on a statutory basis for several reasons. First, to do so would mean relinquishing two important aspects of the scheme, namely its flexibility and its ability to make an award binding on the bank. A statutory scheme would inevitably entail the loss of flexibility that is of crucial importance in the fast changing world of modern retail banking.¹⁰⁰ Under a voluntary scheme, the Terms of Reference can be more liberally interpreted and if necessary, rapidly changed if exposed as defective or outdated in some respect than legislation.¹⁰¹

Moreover, the Banking Ombudsman's power to make an award binding on the bank would be lost under a statutory scheme because of the "constitutional" principle that legislation should not block an individual's right of access to court for determination as to his or her legal position.¹⁰² This would create the risk that banks could choose to defy awards with which they are unhappy and also remove a key psychological factor that the Banking Ombudsman uses to promote an informal settlement between the complainant and the bank.¹⁰³

Secondly, the banks clearly perceive commercial and other advantages in terms of credibility and image in establishing and participating in an efficient, cost-effective, quick, just and transparently independent dispute resolution mechanism for their smaller customers.¹⁰⁴ Since the schemes inception, the banks have become more co-operative with the Banking Ombudsman, presumably as their faith in her ability to act impartially has increased and as they become accustomed to a less adversarial means of resolving disputes.

⁹⁹Above n 45, 46.

¹⁰⁰Morris, P E "The Banking Ombudsman - 5 Years On" (1992) *Lloyds Maritime and Commercial Law Quarterly* 227, 232.

¹⁰¹Above n 100, 232.

¹⁰²Above n 100, 232.

¹⁰³Above n 100, 232

¹⁰⁴Above n 45, 47

Accordingly, there would appear to be no reason why they would jeopardise the credibility of the scheme by being perceived to diminish the independence of the Ombudsman.

Thirdly, the arguments put forward in favour of a statutory scheme fail to recognise that the notion of independence does not mean that the Ombudsman should act in isolation from the institutions it supervises: liaison and communication are both necessary and helpful.¹⁰⁵ As the paper has discussed, the Ombudsman has successfully been able to effect changes to banking policy and practice, albeit generally on a small scale.

Finally, it is submitted that the benefit gained by consumers in having a scheme that grants them easy access to a free, informal, quick and just means of dispute resolution significantly outweighs the potential lack of perceived independence by consumers. Given that empirical evidence has shown the scheme to be fair and impartial, the scheme is credible as it stands and consumers would not obtain better access to justice if the scheme was placed on a statutory basis.

B Openness

Clearly, one of the major tenets of our justice system is that it is "open", that is decisions are available to the public. This serves to inform people what the law regards as appropriate behaviour. In the context of consumer law, there is limited precedent because consumers have traditionally not been able to use the courts to gain redress for their grievances. This lack of precedent removes the potential leverage consumers would receive from precedents that are beneficial to them and deprives both organisations and consumers of clear rules to guide future conduct.¹⁰⁶

¹⁰⁵ Above n 30, 316.

¹⁰⁶ Above n 33, 287.

Publication of individual cases in the Ombudsman's annual report is therefore an essential element of ensuring openness. Publication allows outsiders to assess, to some extent, how the scheme is working. This serves the function of educating the Participating Banks and consumers as well as demonstrating consistency and fairness in decision-making. In keeping with the confidentiality requirements of alternative dispute resolution processes, the written reports of the cases in the annual report do not name the parties involved.

It has been argued that the confidentiality of alternative dispute resolution processes increases the power of financial institutions because it allows the institution to control information and thereby present a positive image of themselves.¹⁰⁷ The private nature of informal justice undoubtedly favours banks which would prefer that disputes with consumers not be made public. Adverse publicity may decrease consumers' trust and confidence in their financial institutions and may disclose practices and procedures which, even if perfectly legal, the institutions would prefer remain private.¹⁰⁸

However, while the confidentiality requirements of the scheme may mean that the public remains uninformed about offending banks, it is essential for the credibility of the scheme, and ultimately in the best interests of the consumer, that both parties names are kept confidential.

C *Accessibility*

The principle of accessibility requires that consumers must first be aware of the existence of the scheme as a means of third party redress and secondly that the procedures must be reasonably easy to use. Clearly, the procedures of the Banking Ombudsman scheme are easy to use. Once the complaint has been fully considered by the bank's internal complaints procedures and a deadlock

¹⁰⁷ Above n 33, 328.

¹⁰⁸ Above n 33, 285.

has been reached, the complainant may contact the Banking Ombudsman who will investigate the dispute at no charge and attempt to achieve resolution.

It is possible that complainants may be frustrated by the fact that they cannot make a complaint directly to the Ombudsman. However, it is a legitimate function of the Banking Ombudsman to refer complaints back to the bank concerned for both resource reasons and to enable the banks to attempt to resolve the dispute. In this way, banks can be aware of the type of complaints that are being made against them and adapt policy or practice accordingly. It also gives the banks the opportunity and incentive to improve their internal complaints procedures.

However, it is submitted that there is a serious problem with consumer awareness of the scheme. This has the potential to have significant consequences beyond merely disadvantaging individual aggrieved consumers who are not aware they may gain redress from a third party. Although there is little empirical research in New Zealand about consumer awareness of the scheme, a survey by the Australian Banking Ombudsman showed that only approximately 17 per cent of consumers knew of the existence of the office.¹⁰⁹ The New Zealand Banking Ombudsman estimates that this percentage would be approximately the same in New Zealand.¹¹⁰ Given the number of consumers using banking services, this is undoubtedly a concerning result.

It is submitted that the reason for this is that the Banking Ombudsman relies almost solely on the banks to inform their customers about the scheme.¹¹¹ As discussed earlier, the Code requires banks to display information in their branches about their own internal complaints procedures. The staff of the Banking Ombudsman's office who occasionally carry out "spot-checks" of banks

¹⁰⁹Derived from personal interview with Banking Ombudsman above n 38.

¹¹⁰Above n 38.

¹¹¹Information about the Ombudsman is also available at Citizen's Advice Bureaux, Community Law Centres and Family Budgeting Centres.

have estimated that only half of the time the banks have any leaflets on display concerning complaints procedures.¹¹²

More importantly, while banks are "encouraged" by the Banking Ombudsman to have information about the Banking Ombudsman's office and the Code on display, there is no obligation for them to do so and indeed many banks appear reluctant to display the information.¹¹³ While bank staff seem generally aware of the need to tell customers who make direct inquiries of the existence of the Banking Ombudsman, the majority of problems arise where a staff member does not recognise that a problem is a complaint. Because of this, the complainant may be turned away without a resolution of the matter and not informed about the existence of the Ombudsman. In many cases, more effective staff training would remove this problem, especially in the light of the fact that banks are taking on more part time and casual front-line staff.

Thus, the principal way that aggrieved consumers will find out about the scheme is when a deadlock has been reached with the bank and the bank refers the complaint to the Banking Ombudsman. The fundamental flaw with this is that if consumers are only made aware of the existence of the scheme once they have made a complaint, the scheme is only being directed at those who would have complained anyway. In colloquial terms, the bank is "preaching to the converted".

As previously mentioned, those who are most likely to complain are those from higher income, well-educated and consumer conscious backgrounds. Given the fact that banking customers now represent a broader cross-section of society, it is clear that those who are potentially the most disadvantaged are probably not being made aware of their right to take a grievance to the Ombudsman. The problem becomes even more pronounced when it is coupled with the fact that

¹¹²Above n 38. These spot-checks are usually carried out in the "vicinity of the office" meaning the banks along Lambton Quay, Wellington.

¹¹³Above n 38.

the information brochures on the scheme and the Code are only produced in English.

The consequences of this extend beyond merely disadvantaging those who have an unresolved grievance. If banks are basing their principles and policy on the type of complaints that are received by the Banking Ombudsman, it is clear that they may potentially be ignoring significant problems facing particular groups within society who, for some reason, do not voice their complaints.

A suggested solution is for the Banking Ombudsman to either attract more complaints from a broader cross section of society by increasing the publicity of the scheme, or to have the power to investigate matters of her own motion. This is clearly a resource issue. The banks would need to commit to a greater level of funding if either of these solutions were to be realised. Until this is done, the banks and the Ombudsman are wrong to believe that dealing with voiced complaints fairly discharges their responsibilities towards the public as a whole.¹¹⁴

D Fairness

Informal justice is often criticised for its lack of procedural safeguards. It is argued that when measured against formal legal criteria of justice, the processes are not seen as just.¹¹⁵ However, proponents of informal justice argue that people's conceptions of fair procedures do not always equate with the formal structure of fair procedure in the traditional courts system.¹¹⁶ Four issues have been identified as dominating disputant assessments of procedural fairness: representation; ethical appropriateness or interpersonal respect; neutrality, and outcome quality.¹¹⁷

¹¹⁴ Above n 10, 702.

¹¹⁵ T Tyler "Procedure or result: what do disputants want from legal authorities?" in K Mackie *A Handbook of Dispute Resolution: ADR in action* (Routledge, London, 1991) 19.

¹¹⁶ Above n 115, 25.

¹¹⁷ Above n 115, 22.

It is submitted that the Banking Ombudsman scheme is capable of meeting these criteria more adequately than the courts in the context of consumer disputes. However, before discussing these criteria further, it should be noted that fairness is a two way process. These criteria apply equally to an aggrieved consumer as they do to an alleged offending bank.

The first element in feeling fairly treated is that a person feels they have had the opportunity to participate in the settlement procedure.¹¹⁸ This includes having the opportunity to present their side of the case, being listened to, and having their opinions considered by the third parties involved.¹¹⁹ In short, the opportunity to complain to a third party is only valuable if people believe that what they say has been considered by that third party. In this respect, the flexibility of the Ombudsman scheme is essential. Its ability to use different methods of resolution depending on the needs of the case ensures that the parties are more likely to feel they have had the opportunity of participation than if their case was heard in court.

Secondly, people have been found to place great weight on being treated politely and having respect shown for their rights and themselves as people.¹²⁰ Although it is difficult to assess the extent to which the Ombudsman scheme achieves this, the example discussed earlier about the bank apologising to a customer on a marae indicates a willingness by the Banking Ombudsman to treat the parties with respect and ethnic appropriateness.

The third issue of neutrality has already been discussed above. While it is clear that the Banking Ombudsman scheme achieves actual independence, the issue of the perception of independence may never be fully removed unless the scheme is placed on a statutory basis. For the reasons already mentioned, this would be undesirable.

¹¹⁸ Above n 115, 22.

¹¹⁹ Above n 115, 22.

¹²⁰ Above n 115, 23

Finally, people feel more fairly treated if they receive a fair outcome.¹²¹ Clearly, disputes before the Banking Ombudsman may be resolved on a broader equitable basis than would be possible in the courts since the Terms of Reference explicitly require her to have reference to what is, in her opinion, fair in all the circumstances. Thus, she can more easily tailor a fair remedy to the specific case.

It is also worthy to note that fairness demands a "level playing field".¹²² To do this, it is essential that the Banking Ombudsman redresses the inherent inequality of power that exists between an individual and a wealthy and powerful bank. This paper has shown that the scheme gone a long way in achieving this, despite its shortcomings. In the words of the inaugural Australian Banking Ombudsman, at the very least, the scheme has managed to "get the earthmoving equipment onto that field".¹²³

VII CONSUMERS AND "JUSTICE": A WIDER PERSPECTIVE

This paper has shown that while the rights of consumers have been legislatively recognised, consumers have traditionally been unable to gain access to a public forum to enforce those rights. The increased use of alternative dispute resolution processes has undoubtedly given consumers a cheaper, easier and faster means of resolving their individual grievances. In short, consumers have been given "access to resolution".

However, it remains doubtful whether these processes are capable of achieving "access to justice" for consumers in a wider sense because informal justice does not try to change behaviour or act in a judgmental manner. Its focus on process

¹²¹ Above n 115, 23

¹²² Above n 46, 240 and see also above n 12, 191.

¹²³ Above n 12, 191.

and not outcome means that it does nothing to solve the underlying problem that is the cause of many consumer complaints.¹²⁴

Commentators examining areas of the law other than consumer law make the distinction between public and private disputes. In a private dispute, only the interests and behaviour of the immediate parties to the dispute are at issue.¹²⁵ Because of the "localised" nature of the dispute, the privacy of informal justice does not conflict with the interests of society in having public decision-making forums.¹²⁶

In contrast, a public dispute has been defined as one involving laws intended to protect the "public at large" and the enforcement of "society-wide norms".¹²⁷ These disputes are arguably inappropriate for alternative dispute resolution processes because the public's interest in enforcing the norms embodied in the laws is not represented.¹²⁸

The case for distinguishing public and private disputes is especially strong where the norms are in statutes enacted by the legislature to protect a disadvantaged segment of the public from the documented abuses of a specific industry.¹²⁹ Clearly, consumer protection laws fit within this category. It is therefore argued that only the enforcement of these laws through the courts can effectively solve the problem.¹³⁰

Certainly, individual complaints handling can also perform the role of quality control: the raising of standards and performances.¹³¹ However, given that only a small minority of consumers complain and that those complainants are more likely to be from better educated, higher income backgrounds, it may be that

¹²⁴Abel, R "The Contradictions of Informal Justice" in Abel (ed) *The Politics of Informal Justice* (Academic Press, New York, 1982) 267-311, 294.

¹²⁵Above n 33, 322.

¹²⁶Above n 33, 322.

¹²⁷Above n 33, 322.

¹²⁸Above n 33, 322.

¹²⁹Above n 33, 322.

¹³⁰Above n 33, 342.

¹³¹Above n 30, 325.

those standards and performances are only "raised" in a way that suits the needs of those groups. Accordingly, there remains a need for some means of ensuring that wider policy issues affecting society as a whole are addressed.

VIII CONCLUSION

The Banking Ombudsman scheme is a prime illustration of the trend toward the privatisation of justice in core areas such as banking. There should be no doubt that the Banking Ombudsman offers an effective alternative for individual consumers of banking services who have a dispute with a Participating Bank. As the report by the Retirement Commissioner shows, it fulfils all the requirements of an ideal dispute resolution process discussed in Part III of this paper. However, the Banking Ombudsman scheme arguably falls down in its promotion of awareness of the scheme. As it currently stands, reliance on the banks to disseminate information about the scheme means that it is primarily only those consumers who have already made a complaint that are informed about the scheme. This has a number of flow-on effects.

In the first place, consumers with a justified grievance may simply be denied access to justice. Moreover, given the over-representation of higher-income consumers in the numbers of voiced complaints, there is the potential for a distortion of the types of problems experienced by banking consumers in favour of this sector of society. It is trite to point out that lower-income or less consumer conscious people will encounter probably as many "injurious experiences" with banks that could be voiced as grievances. However, it cannot be assumed that the subject matter of these grievances will be the same as those who may have a higher income or are more consumer conscious.

When these factors are combined with the fact that the banks look to the types of complaints received by the Banking Ombudsman as an aid in determining banking policy and practice, it is clear that classes of problems that deserve

attention may be completely overlooked. As suggested in the paper, to remedy this, banks will have to commit to a greater level of funding so that the Banking Ombudsman can promote the scheme more effectively. If this was to occur, the funding would also need to accommodate the potentially significant increase in complaints to the Office. An increase in complaints should be viewed as a positive step for the banks as it would give them a more accurate description of their customer base. This, in turn would allow them to adjust their policies accordingly and to improve their public profile and credibility with a wider range of consumers.

An alternative remedy is for the Banking Ombudsman to be able to initiate investigations of her own motion. In this way, consultation with consumer groups from a wide range of affected groups in society would enable her to determine the specific problems facing those consumers. This alternative would also require a greater level of funding to ensure that the "watchdog" role did not eliminate the equally important function of individual grievance resolution.

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