

# New Zealand Law Society

## SUBMISSION ON BANKING OMBUDSMAN CONSULTATION PAPERS – DISPUTE RESOLUTION PROVIDER REGISTRATION

### **Reference to “unfair or unreasonable conduct”: terms of reference paragraphs 1, 23**

- 1 It is not clear what the provision in paragraph 1 for the Banking Ombudsman to consider complaints about “unfair or unreasonable conduct on the part of the Participating Bank” adds to the provision in that paragraph for the Banking Ombudsman to consider complaints about breaches of contract, statutory obligations and industry codes.
- 2 Paragraph 23 provides that the Ombudsman is unable to make a recommendation or award on a complaint relating to a practice or policy that does not breach any obligation or duty owed by the Participating Bank to the complainant. If no statutory or contractual duty is breached then the Ombudsman cannot make a recommendation or award in respect of the unfair or unreasonable conduct.
- 3 The reference to unfair and unreasonable conduct, in addition to breaches of contract/statutory obligation, may therefore mislead complainants by encouraging them to complain about conduct in respect of which the Ombudsman has no power. (If it is intended that complainants should also make complaints about breaches of tortious duties, then it would be desirable to specify this in paragraph 1.)

### ***Recommendation***

- 4 That the reference to unfair or unreasonable conduct be removed from paragraph 1 of the terms of reference.

### **Paying Costs Of Legal Representation – Terms Of Reference paragraph 12**

- 5 Paragraph 12 of the terms of reference requires that a Participating Bank pay the complainants’ reasonable legal costs if the Bank decides to obtain legal advice about a complaint being investigated by the Ombudsman or to communicate with the Banking Ombudsman through a legal representative. Paragraph 12 goes beyond the Ministry of Consumer Affairs Guidelines, which suggest that the scheme rules provide for the member to pay the legal costs of a complainant only where the member seeks to be legally represented.

- 6 The additional requirement that Participating Banks pay the complainant's legal costs if the Bank obtains legal advice is problematic because it may discourage some Participating Banks from taking legal advice at the earliest opportunity or from involving their internal legal counsel in the disputes process, in order to avoid paying what are likely to be significant legal costs relative to the amount at issue in many cases.
- 7 It appears that the Ministry of Consumer Guidelines proceed on the basis that "legal representation" includes representation by an in-house lawyer. The Guidelines recognise that it is difficult to avoid legal representation of members, given the prevalence of in-house legal teams (paragraph 148).
- 8 Presumably the Participating Bank would have to advise the Banking Ombudsman as soon as it decided to obtain legal advice. In many cases this may deter a Participating Bank from obtaining legal advice on a complaint - as a result of not being able to obtain advice without disclosing that it has done so, and without there being an additional financial penalty for obtaining the advice, which in many cases will be larger than the sum at issue. If running a complaint past an in-house lawyer means that a Participating Bank potentially faces paying thousands of dollars for the complainant's legal advice, in many cases Banks may choose not to do so. It is likely that many Participating Banks will have internal legal counsel running or at least heavily involved in the complaints process. For those Banks, paragraph 12 effectively requires that they fund legal advice for all complainants.
- 9 Another issue that arises from this additional requirement is what should happen where the Bank is already being advised on a dispute with a complainant when the complainant refers it to the Banking Ombudsman. Presumably, the complainant automatically becomes entitled to the costs of legal advice at the stage when he or she approaches the Ombudsman.
- 10 It is desirable to encourage Banks to obtain legal advice – good legal advice should lead to earlier resolutions in appropriate cases. It is also not sensible to incentivise them to avoid using their internal legal counsel to assist with complaints to the Banking Ombudsman.
- 11 The obligation to fund legal representation should arise only when the Participating Bank is legally represented in oral hearings or meetings with the Banking Ombudsman, if this requirement is driven by an analogy with Disputes Tribunal process (see paragraph 146 of the Ministry of Consumer Affairs Guidelines). In the Disputes Tribunal context, parties are able to

take legal advice on the dispute. The prohibition on legal representation only applies to the hearing.

***Recommendation***

- 12 That paragraph 12 limit the requirement to fund legal advice to instances where a Participating Bank chooses to be represented by a lawyer in an oral hearing or meeting with the Banking Ombudsman, and clarify that paragraph 12 applies whether the lawyer is in-house or external.

**Disclosure of personal information: terms of reference paragraph 32**

- 13 It would be desirable to provide at paragraph 32 of the terms of reference that the Banking Ombudsman can disclose confidential information about a complaint which has become public. So, for example, where a complainant has gone to the media with information, the Banking Ombudsman should be able to discuss this information with others, including its Board, without any issue arising as to whether it is acting inconsistently with its terms of reference.

**Participation Agreement - Paragraph 5.1.1**

- 14 Paragraph 5.1.1 of the Participation Agreement deems Ms Elizabeth Brown appointed as incumbent Banking Ombudsman. The reference to Ms Elizabeth Brown needs to be replaced with a reference to Ms Deborah Battell.

John Marshall QC  
President  
8.4.10