
CONSUMER REMEDIES AND THE BANKING OMBUDSMAN**DI EVERETT****Professor of Law
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"An appropriately structured industry sponsored independent, intermediate dispute resolution mechanism between the institutions and the Courts, such as the proposal of the Australian Bankers' Association to establish a Banking Ombudsman, would have the advantages of accessibility, informality, impartiality, low cost and speed".¹

The benefits of informality, low cost and speed must be conceded as achievable by the Australian Banking Ombudsman Scheme. The endorsement by the Treasury and the Trade Practices Commission² of the Australian Bankers' Association proposal for an industry-sponsored banking ombudsman was to some extent qualified by the recognition that even if the ombudsman was given the opportunity to receive confidential information and even if powers of investigation were conferred on the ombudsman, the major benefits of the ombudsman scheme could well be limited to ready accessibility and impartiality.³ Accessibility is largely a mechanical benefit to be bestowed by an effective information process and advertising campaign. It is the issue of impartiality or apparent impartiality that is more contentious and the focus of this paper will be on the extent to which this benefit will emerge from the scheme as it is currently structured.

BACKGROUND TO THE SCHEME

The Australian Bankers' Association announced its intention to establish a Banking Ombudsman Scheme on 10 May 1989. By 23 October that year the Association was able to announce the structure of the scheme,⁴ the members⁵ of the council established to oversee the scheme and the terms of reference⁶ pursuant to which the ombudsman will act.

The scheme is based on the United Kingdom Banking Ombudsman scheme which has been in operation since January 1986. Allan Cullen, the Executive Director of the Australian Bankers' Association, commented in June 1989 that the Association considered the British model to be a "fairly good model" and that the conclusions of the Jack Committee Report had been considered by the Association.⁷ While this is manifestly true, a number of

the recommendations of the Jack Committee Report have not found their way into the current Terms of Reference for the Australian scheme. The most fundamental recommendation of the Jack Committee was that the industry sponsored scheme be supplanted by a statutory one. This suggestion was not endorsed in Australia and both the Treasury and the Trade Practices Commission recommended that the industry sponsored scheme mooted by the Australian Bankers' Association be established as soon as possible.⁸

THE STRUCTURE OF THE SCHEME

The scheme has been established with a three tiered structure, comprising a board of directors of a corporation limited by guarantee established by participating banks and known as the Australian Banking Industry Ombudsman. Initially membership of the corporation is limited to banks, although non-bank financial institutions will be eligible to participate in the scheme with respect to electronic fund transfer transactions. Membership of the corporation, however, does not appear to be open to non-banks.

The board of directors is composed of the Executive Committee of the Australian Bankers' Association plus a representative of the Reserve Bank and is responsible for appointing the second tier in the scheme, the council, and for determining the terms of reference of the third tier, the ombudsman.

The board's other principal responsibilities involve determining the membership of the scheme and bearing responsibility for financing it. These latter responsibilities will ultimately be determinative of the viability of the project as lack of either funding or coverage throughout the industry will render it ineffectual. However, especially in the initial stages, the former powers will be crucial. The board has already established terms of reference and has announced the membership of the council. These two aspects will be considered in detail later in this paper in the context of the criticisms raised by the United Kingdom's Jack Committee and by early commentators in Australia.

The council is composed of seven members under an independent chairman with equal representation from the banks and consumer interest groups. Its principal function is to appoint the ombudsman, monitor the work of the ombudsman, approve its budget and make recommendations to the board in the event that the terms of reference require amendment.

Apart from the process of appointing the ombudsman which can clearly be accomplished in a manner that appears independent and fair, the major role for the council is in the process of review of the terms of reference. This extremely important function is crucial to the long-term acceptability of the scheme yet the independent and balanced council holds a recommending power only in this regard. This function will be examined later in this paper when the Jack Committee recommendations are discussed.

The third and operative tier in the scheme is the office of ombudsman. Initially appointed for two year period with annual renewals up to five years, the ombudsman's powers and duties are spelled out in the terms of reference settled by the board of directors of the scheme.

The principal duties of the ombudsman listed in clause 1 of the terms of reference are:

- (i) to consider disputes relating to the provision within Australia of banking services by any bank to any individual; and
- (ii) subject to a number of important exceptions to facilitate the settlement of such disputes by agreement, recommendation or enforceable awards.

These duties, powers, and their limitations are considered in detail later in the paper, but the intended effect of the scheme⁹ is that the ombudsman will provide effective and free dispute resolution for individual customers in banking matters involving no more than \$100,000. Banks are to be bound by the ombudsman's decision but consumers have one month after a decision by the ombudsman in which to decide whether to accept that decision or take legal action through the courts.

CRITIQUE OF THE SCHEME

The Australian Bankers' Association has taken account of some of the criticisms of the United Kingdom industry sponsored banking ombudsman scheme. However it is apparent that a number of the reservations expressed by the Jack Committee in its examination of the United Kingdom scheme have not been, or perhaps cannot be, addressed by the Australian counterpart.

The Jack Committee, after its appraisal of the United Kingdom industry sponsored scheme's first year of operation recommended that it be replaced with a statutory scheme. The approach of the Jack Committee was to raise three questions which it then addressed: Is it fair? Is it seen to be fair? Is it efficient?¹⁰

These three questions raise the issues of what are appropriate standards of fairness; does the scheme meet the public's perception of fairness and give credibility to the scheme; and is there an unmet need for coverage of both institutions and types of financial transactions.

(i) Fairness

The Jack Committee concluded that the United Kingdom scheme was "rather weighted in the bank's favour"¹¹ in certain respects both in its structure and in its terms of reference. In reaching this conclusion, the Committee referred to the following aspects of the scheme:

- (a) The United Kingdom ombudsman is required to take into account in making his decision existing standards of good banking practice after consulting banking interests as to what those standards are. The Australian version of the ombudsman's terms of reference¹² require the ombudsman to have regard, *inter alia*, to general "principles of good banking practice" in determining what is "fair in all the circumstances". In deciding what are the relevant principles the ombudsman is required, but only where he considers it appropriate so to do, to consult within the industry.

It appears that those who drafted the Australian Terms of Reference sought to deal with the Jack Committee's criticism of the perpetuation of existing banking practices in the United Kingdom system by not *requiring* industry input into the ombudsman's determination of good banking practices.

The role of the Australian ombudsman is still reactive rather than reformist and while the prime requirement in Australia is that the ombudsman must make a recommendation or award on the basis of what is, in his opinion, fair in all the circumstances, he is still required to take into account good banking practice which can only be ascertained by reference to the industry.¹³

The position could be improved perhaps by the ombudsman being given the power to consult outside the industry to enable the formulation of new, potentially more onerous or more fair principles of good banking practice. As it stands, the Australian ombudsman may well consider himself limited in this area to accepting as good banking practice only those standards that have been formulated by the banking community.

A further major problem identified by the Jack Committee in relation to the United Kingdom scheme was the absence of power in the ombudsman to compel production of relevant documents or information. A scheme cannot be regarded as fair in the absence of such a power. The Australian terms of reference provide¹⁴ that the ombudsman may require the bank involved to provide to the ombudsman any relevant information in its possession as soon as is reasonably practicable. However this power to require production is subject to a number of limitations.

Firstly the basic power to require the provision of information is subject to the unexaminable right of the bank to certify that the supply of the information would be a breach of the bank's duty of confidentiality to a third party whose consent had not been obtained despite the bank's "best endeavours" so to do.¹⁵

Secondly clause 6 of the terms of reference enables any party to a dispute to envelop any information supplied to the ombudsman in a mantle of confidentiality. There is no requirement that the claim for confidentiality under this clause be based on security, third party obligations or otherwise. It provides simply that any request that information be treated as confidential means

that the information may not be disclosed by the ombudsman to any person, party to the dispute or otherwise, without the consent of the supplying party.

While there is a clear justification for non-disclosure to parties of matters relating to a bank's security system¹⁶ or third party confidential material,¹⁷ there is no justification for a general, unfettered power in either party to preclude access to material relevant to the dispute.

The power to compel the production of information by banks is accordingly ineffectual and in fact illusory. Not only should a claim of confidentiality be based on particularised grounds but in order to claim that the system is fair, the scheme should provide for a power in the ombudsman to initiate investigations at least into the availability of information relevant to the dispute. It should also provide that banks are under a positive duty to disclose all relevant information to the ombudsman rather than the duty simply to respond to requests for information.

The existing process places the onus on consumers to identify the required information and convince the ombudsman that the information is relevant to the dispute. This is in contrast to the availability at common law of the procedures for interrogatories and discovery. The ombudsman scheme is designed, of course, to be informal, speedy and cost efficient and it is not suggested that the formalities and delays involved in these procedures be introduced into the scheme, but when assessing the claim of the scheme to be a fair one, the crucial note played by the ombudsman in obtaining relevant information needs to be compared with the existing common law system which enables a party at its own discretion to seek and obtain relevant material.

A third aspect of the United Kingdom scheme that was seen by the Jack Committee to militate against endorsement of that scheme was the ability of the banks to withdraw "test cases" from the jurisdiction of the ombudsman. The Jack Committee recommended that such a power should only be exercised with the concurrence of the ombudsman.¹⁸

The Australian terms of reference reflect this recommendation to the extent that clause 22 provides some limitation on the power given in clause 21 to the banks to withdraw a complaint by lodging a statement (with reasons) that in the opinion of the bank the complaint involves or may involve wither "an issue which may have important consequences for the business of the bank or banks generally" or where it involves or may involve a novel or important point of law.¹⁹

The limitation on this very much unfettered power of withdrawal is that the ombudsman must *concur* in the bank's statement that it holds the opinion that the complaint raises "test case" issues. If the ombudsman does concur, he must cease to consider the complaint and is required to inform the applicant in writing that the bank has lodged the relevant statement and must advise the complainant of the effect of the notice.

The lack of fairness in this procedure is apparent when, for example, the process provided for in clause 3 of the terms of reference is compared with it. Clause 3 provides a power in the ombudsman to determine whether the dispute falls within the terms of reference. However in reaching this conclusion, the ombudsman is directed to consider representations from both the disputant and the relevant bank. Reasons in writing must be given by the ombudsman supporting the decision reached. There appears to be no logical reason why the similar question of withdrawal of test cases from the ombudsman's jurisdiction should not be treated in a similar manner to the preliminary question of jurisdiction, and representations from both parties be received before a decision is made.

The apparent injustice of an arbitrary withdrawal, cloaked under an unchallenged assertion of importance or novelty is not redeemed by the provision of an obligation to pay the complainant's costs if litigation ensues within six months of the bank's "test case" notice. It would simply be necessary for a bank to wait out the time limit and then commence proceedings itself in a more congenial forum.

The power to withdraw "test cases" needs to be subject to challenge by the complainant rather than simply subject to the administrative concurrence of the ombudsman. Further, the obligation to pay the complainant's litigation costs should extend to cover proceedings brought *by the bank* at any time within the general statutory limitations. The six month time limit in clause 21 should remain in place for litigation commenced by the complainant.

A final issue explored by the Jack Committee in this context was the requirement of secrecy that permeates the scheme. The Australian terms of reference also require that no disclosure of information concerning complaints received be made from which either the complainant or the bank could be identified.²⁰ This embargo on information extends to the board and council of the ombudsman scheme and is not limited to confidential material. It is a complete abrogation of the fundamental requirement that justice requires open forums. The possibility of public scrutiny ensures the proper administration of justice.

The scheme amounts to a closed door unreportable dispute resolution process which may well operate against the interest of bank customers in pursuing legitimate grievances. Any party can demand non-disclosure of any information supplied,²¹ the bank involved in a complaint remains anonymous²² and the ombudsman is not bound by any previous decision made by him or by a predecessor.²³ Such a situation may result in arbitrary decisions or a series of similar complaints brought against the same bank by multiple complainants who are unaware of previous successful proceedings. The secrecy provisions benefit no one but errant banks.

(ii) Credibility

Not only must a scheme which promotes itself as a panacea to customers in dispute with their banks *be fair* it must be *seen to be fair*. The inherent structure of both the United Kingdom scheme and the Australian scheme raises some doubts as to their credibility.

The introduction of an independent council between the banks' board of directors and the ombudsman is designed to ensure the independence and credibility of the ombudsman. However, as the Jack Committee reported, the role of the board in determining the terms of reference under which the ombudsman operates and its continuing role in incorporating any amendments to those terms ensures that the banks retain absolute control over the scheme.

Amendments may be proposed in Australia by the independent council²⁴ or to the council by the ombudsman.²⁵ However, the retention of absolute control over the terms of reference by the banking industry's nominees on the board of the corporation may give rise to a perception that the ombudsman is not genuinely impartial, neutral and isolated from the banks. This possible lack of credibility in the United Kingdom scheme was seen by the Jack Committee as a "potentially serious flaw" which warranted its recommendation that the industry sponsored scheme be supplanted by a statutory one in which the terms of reference were established and monitored by an independent body.²⁶

In light of the endorsement by both Treasury and the Trade Practices Commission in Australia of an industry sponsored scheme,²⁷ it may be appropriate for those bodies to provide input into the review process. Amendments to the terms of reference recommended by the ombudsman and/or the council could be effectuated after appraisal by a committee composed of a Treasury representative, a Trade Practices Commission representative and a member of the board of the Australian Banking Industry Ombudsman Scheme. The board could support the credibility of the scheme by either accepting amendments recommended by the independent committee or by publishing its reasons for failing so to do. The independent committee should also be empowered to recommend amendments to the ombudsman's terms of reference to overcome the fragmented nature of complaints reaching the ombudsman through the ad hoc nature of disputation.

(iii) Coverage

The third aspect of the scheme criticised by the Jack Committee was the inefficiency or potential inefficiency of a scheme that was not comprehensive. The possible lack of coverage is three fold. Firstly, not all institutions offering banking style services are covered. Secondly, not all transactions with banks are covered and thirdly, not all customers have access to the scheme.

A voluntary scheme is obviously likely to be troubled by a lack of institutional coverage. The Australian scheme is initially designed to cover only banks and their designated associates and non-bank financial institutions in relation only to electronic funds transactions.²⁸ Participation even for banks is not mandatory and in the absence of a statutory compulsion institutional coverage is likely to remain a problem.

Coverage of transactions is less problematic. While it is clear that the initiating impetus for the scheme was concern over the failure to resolve disputes involving automatic teller machines, the scheme is not so limited. The monetary limitation of \$100,000 appears appropriate in a scheme designed to offer free dispute resolution to customers. The transactions covered involve "all financial services provided by banks in the ordinary course of their business to individuals, including credit card use overseas, and advice and services relating to insurance and investments."²⁹ The limitations on this otherwise wide jurisdiction involve disputes that are within the "test case"³⁰ exception discussed above or those that relate to the bank's commercial judgment in decisions about lending or security. "Commercial judgment" is defined to mean assessments of risk, of financial or commercial criteria, or of character. "Decisions about lending or security" is also defined and includes any decision (or the consequences thereof) concerning any advance or similar facility, guarantee or security.³¹

With the exception of the "test case" provisions, the coverage of transactions and the exclusion of decisions based on commercial judgment appears at this stage to raise few substantive problems although interpretation of the definitions may in the course of time pose some jurisdictional problems for disputants.

The customers covered by the scheme are, however, limited to individuals, including partnerships or other unincorporated bodies not consisting entirely of bodies corporate.³²

The exclusion of incorporated "small business" customers was considered in the United Kingdom context by the Jack Committee which concluded that provided a suitable criterion for eligibility in the definition of "small business" could be established there was no reason of policy to justify their exclusion.³³ The Australian scheme, while limited to unincorporated entities, does not, however, preclude business transactions by sole traders or trading and professional partnerships and is therefore not entirely "consumer" orientated. The definitional problem has not been faced in the Australian scheme but a large number of "small businesses" and even major professional partnerships will have access to the scheme at the expense of the banking industry.

CONCLUSIONS

In assessing the Australian Banking Industry Ombudsman Scheme in the light of the United Kingdom experience the findings of a

recent report by the OECD Committee on Consumer Policy on electronic funds transfers may provide a worthwhile guide. The 1989 report of that Committee concluded that:³⁴

A critical factor in deciding which of these options is preferable is that of independence or impartiality. Consumers might well perceive a scheme operated by one institution, or even by an institution's trade association, to be biased in favour of the institution

Ideally, a complaints system should offer the following facilities:

- (i) Independence
- (ii) Ability to draw, where necessary, on expertise in matters of banking law and practice
- (iii) Accessible to all personal bank customers, and well-publicised (in terms both of availability and of findings)
- (iv) Expeditious in its handling of complaints
- (v) A comprehensive coverage, in terms of institutions and services
- (vi) Able to compel co-operation from those institutions.

In addition, a dispute resolution scheme should be granted concrete powers to handle complaints in an efficient manner, ie.

- (i) Power to investigate any case brought within its terms of reference
- (ii) Power to call for papers and other information from participating banks and ability to request similar details from complainants
- (iii) Ability to promote an agreed solution, through conciliation, arbitration or other means
- (iv) Ultimate power to make an award which is binding against a bank.

On the whole, systems of that type would also help to achieve some wider aims by improving the maintaining public confidence in the banking system, and by providing information about the level and types of complaints with a view to improving service in the future.

The critique undertaken above of the Australian scheme leads to the conclusion that the scheme meets these criteria with two major exceptions: independence or perceived independence and

investigatory powers. It was these two features that both Treasury and the Trade Practices Commission recommended be enshrined in the industry sponsored Australian Banking Ombudsman Scheme. Yet careful appraisal of the terms of reference reveals that independence is not entirely guaranteed and there exists no investigatory function for the ombudsman and the power to require production of information is ineffective or at worst illusory.

The conclusion seems inevitable that while the Australian Banking Industry Scheme has improved on the United Kingdom model there is still room for developments which will not endanger the banks but which will address the crucial issues of independence, fairness and credibility.

FOOTNOTES

1. *Electronic Funds Transfer: Report by the Treasury and Trade Practices Commission on dispute resolution* July 1989, p 45.
2. *Ibid.*
3. *Ibid*
4. See Appendix "A" for a brief description of the scheme released to the Media by the Australian Bankers' Association on 23 October 1989.
5. Inaugural members as announced to the media on 23 October 1989 were:
Chairman: Sir Ninian Stephen
Members: Ms Liza Carver (Solicitor, Consumer Credit (Community) Legal Centre)
Ms Dianne Fingleton (Legal Co-Ordinator, Caxton Legal Centre)
Mr Robin Brown (Director, Aust. Fed. of Consumer Organisations)
Members: Mr Lloyd Smith (Retired Chief General Manager (Banking) NAB)
Mr Bob Bennett (Director Corp. & Com. Services ANZ)
Mr Michael Waterhouse (Chief Manager Retail Strategies Westpac)
6. See Appendix "B" for the Terms of Reference current in March 1990.
7. *Electronic Funds Transfer, Proceedings of Trade Practices Commission Workshop* 15 June 1989, p 40.
8. See note 1 above at p 4, recommendation (4).
9. Media Release 23 October 1989 by Australian Bankers' Association p 2.

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10. *Banking Services: Law and Practice Report by the Review Committee* Professor RB Jack (Chairman) HMSO Cm 622 para 15.09, p 132.
 11. *Ibid* para 15.10, p 132.
 12. See Appendix "B" cl 15.
 13. He is also required to observe any applicable rule of law (except as to evidence cl 9) or judicial authority and to have regard to any relevant code of practice.
 14. See Appendix "B" cl 5.
 15. Appendix "B" cl 5 and cl 20(i).
 16. See for example Appendix "B" cl 8.
 17. See note 15 above.
 18. See note 10 above at Recommendation 15(1), p 138.
 19. See Appendix "B" cl 21.
 20. *Ibid* cl 27.
 21. *Ibid* cl 6; also cl 5, cls 7-8.
 22. *Ibid* cl 27.
 23. *Ibid* cl 9.
 24. See Appendix "A" p 2
 25. See Appendix "B" cl 30.
 26. *Ibid* cls 15-17; see also para 15.21 and para 15.24.
 27. See note 2 above.
 28. Press release 23 October 1989 by Australian Bankers' Association, p 2. See also Appendix "B" cl 1 and cl 31(a).
 29. See Appendix "B" cl 1 and cl 31(a) definition of "banking services".
 30. *Ibid* cls 21, 22.
 31. *Ibid* cl 31(a).
 32. *Ibid* cl 1 and cl 31(a).
 33. See note 1 above at paras 15.27-15.30, p 136.

34. *Organisation for Economic Co-operation and Development*
'Electronic Funds Transfer: Plastic Cards and the Consumer'
(1989) p 77 quoted in *Electronic Funds Transfer Report* by
the Treasury and Trade Practices Commission on Dispute
Resolution July 1989 p 46.

APPENDIX "A"**BANKING OMBUDSMAN****BRIEF DESCRIPTION OF THE SCHEME**

The self-regulatory scheme will comprise three elements, the Board of Directors, the Council and the Ombudsman.

The scheme will be established through a corporation limited by guarantee. The initial members of the scheme will be the participating banks. The Board of Directors of the corporation ("the Board") will appoint a council ("the Council") which will in turn appoint the Ombudsman. The Board will set the Terms of Reference pursuant to which the Ombudsman may act. The Council may make recommendations to the Board for amendments to the Terms of Reference as they relate to the scheme and will advise the Board on a budget for the scheme.

Membership

The members of the scheme will initially comprise the banks and will also be open to NBFIs for EFT transactions. Banks' nominated subsidiaries may be embraced in the scheme at a later date.

On joining the scheme, the members agree to be bound by the Terms of Reference, which set out the jurisdiction and powers of the Ombudsman.

The Board

The Board will comprise ABA Executive Committee and a Reserve Bank representative. Its powers and duties will be:

- . to determine industry membership of the scheme;
- . to appoint a chairman of Council and the Council members;
- . responsibility for financing the scheme;
- . approval and amendments of the Ombudsman's Terms of Reference.

The Council

Interposed between the Board and the Ombudsman is an independent Council. The Council will comprise seven members, three of them bank representatives, three public interest/consumer representatives and an independent chairman. Members will initially be appointed for two years, thereafter annually, but hold office for no longer than five years. No Board member may form part of the Council.

Its principal powers and duties will be:

- . to appoint the Ombudsman;
- . to monitor the Ombudsman's Terms of Reference and from time to time make recommendations to the Board for amendments to the Terms of Reference as it relates to the scheme;
- . to receive the Ombudsman's annual report and itself report to the Board;
- . to approve a financial budget for recommendation to the Board.

The Ombudsman

The Ombudsman will be appointed by the Council initially for a two year period, thereafter the position will be renewable annually, up to a maximum of five years. He/she may not be an employee, ex-employee etcetera of a member or other financial institution or of a Council member.

The powers and duties of the Ombudsman are governed by the Terms of Reference which are determined by the Board, with Council power to make recommendations for changes as they relate to the scheme. In the light of his/her experience, the Ombudsman may also make recommendations for changes to the Terms of Reference as they relate to the scheme to Council.

Terms of Reference

The Terms of Reference are directed chiefly to investigations leading to individual redress. It is proposed that the service would be free of charge. The Ombudsman will deal with disputes concerned with members' normal banking business including credit card use overseas.

Before the Ombudsman can deal with a dispute between a bank and its customer the complaint must have reached deadlock between the bank and its customer at the highest level of the bank's dispute resolution process. However, if the bank has not advised the customer that deadlock has been reached within 3 months, the Ombudsman may deal with it.

The Ombudsman may seek to promote a settlement or withdrawal of the complaint by agreement between the customer and the bank and if no such agreement is reached he may make a recommendation for settlement or withdrawal of the complaint. He would firstly however give the customer and the bank at least one month's notice of his intention to make a recommendation during which time both parties can make further representations to him. He would then make a recommendation in writing including his reasons for the recommendation. If the proposal involves provision by the bank of valuable consideration then the Ombudsman's proposal or recommendation shall state it is only open for acceptance by

the applicant if he accepts it in full and final settlement of the dispute. If after that month has passed the customer accepts the recommendation and the bank does not then the Ombudsman may make an award against the bank of a sum not exceeding \$100,000 based on what is appropriate to compensate the applicant for direct loss or damage to him.

The Ombudsman's jurisdiction does not extend to disputes relating to a bank's commercial judgment in decisions about lending or security or that relates to a bank's general interest rate policies. In addition, "test cases" ie. disputes involving an issue which may have important consequences for the business of the bank or banks generally or an important or novel point of law may with the Ombudsman's concurrence be withdrawn by a member. If a dispute is withdrawn on this basis the bank gives an undertaking to pay the customer's court costs if the matter is taken to court within the following six months.

In making any recommendation or award, the Ombudsman shall do so by reference to what is, in his/her opinion, fair in all the circumstances and shall observe legal principles and good banking practice. Both the customer and the bank will be required to make any information relevant to the dispute available to the Ombudsman (subject to issues of confidentiality). In fact, before the Ombudsman undertakes an investigation of a dispute he will require the customer to waive in writing the duty of confidence relating to information the bank may be required to produce to the Ombudsman in respect of the customer in the course of his investigations.

The Ombudsman's jurisdiction to investigate a dispute will be backdated to the announcement of the scheme ie. the 10th May 1989.

APPENDIX "B"**BANKING OMBUDSMAN****THE OMBUDSMAN SCHEME TERMS OF REFERENCE**

These Terms of Reference have been adopted by the Australian Banking Industry Ombudsman in accordance with its Articles of Association.

Certain expressions used in this document are defined in paragraph 31 below.

The Ombudsman's Principal Powers and Duties

1. The Ombudsman's principal powers and duties will be:
 - to consider disputes relating to the provision within Australia of banking services by any Bank (ie. a Member or a Designated Associate) to any individual;
 - subject to paragraphs 17, 18, 19 and 20, to facilitate the satisfaction, settlement or withdrawal of such disputes whether by agreement, by making recommendations or awards or by such other means as seem expedient.
2. The Ombudsman may give advice on the procedure for referring a dispute to him. It is not a function of the Ombudsman to provide general information about Banks or banking services.

Procedure

3. Subject to the other provisions of these Terms of Reference, the Ombudsman shall, in his own discretion, decide the procedure to be adopted by him in considering disputes. He shall also decide whether or not a dispute falls within the Terms of Reference, and in reaching this decision shall consider representations from the disputant and from the Bank concerned. When requested, he shall give the reasons for his decision of whether or not a dispute falls within the Terms of Reference, in writing, within a reasonable time.
4. The Ombudsman shall promptly produce to the Bank named in the complaint any waivers of the kind referred to in paragraph 20(i) received by the Ombudsman.
5. The Ombudsman may require a Bank named in the complaint to provide any information relating to that dispute the subject of the complaint, which is, or is alleged to be, in its possession. If the Bank possesses such information, it shall as soon as is reasonably practicable disclose it to the Ombudsman (unless the Bank certifies to the Ombudsman

that the disclosure of such information would place the Bank in breach of its duty of confidentiality to a third party whose consent it had used its best endeavours to obtain).

6. If any party to a dispute supplies information to the Ombudsman and requests that he treat it as confidential, the Ombudsman shall not disclose that information to any other party to the dispute or any other person, except with the consent of the first-mentioned party.
7. Where any party to a dispute requests access to any information on the Ombudsman's file, the Ombudsman shall, subject to paragraph 6, make this information available.
- 7A. Where any party to a dispute supplies information to the Ombudsman under Paragraph 6, and the Ombudsman facilitates the satisfaction, settlement or withdrawal of the dispute he shall return any information supplied by the party to that party as soon as is reasonably practicable.
8. The Ombudsman may take account of a Bank's security measures of which he has knowledge notwithstanding that no disclosure of those measures has been or will be made to the applicant.
9. Notwithstanding paragraph 15 the Ombudsman shall not be bound by any legal rule of evidence.

Settlements, Recommendations and Awards

10. At any time that a dispute is under consideration by him the Ombudsman may seek to promote a settlement or withdrawal of the complaint by agreement between the applicant and the Bank concerned.
11. If there is no such agreement, the Ombudsman, at the request of the applicant or the Bank concerned, may make a recommendation for settlement or withdrawal of the complaint. However, he shall first give the applicant and the Bank at least one month's notice of his intention to make a recommendation; and during the period of that notice (or such longer period as the Ombudsman may agree) the applicant and the Bank may make further representations to the Ombudsman in respect of the complaint.

A recommendation shall be in writing and shall include a summary of the Ombudsman's reasons for making his recommendation.

12. If:
 - (a) the Ombudsman is minded to (i) propose that a dispute be settled or withdrawn on terms which appear to him to be acceptable to both the applicant and the Bank named in the complaint, or (ii) make a recommendation for the settlement or withdrawal of a complaint; and

(b) that settlement or withdrawal would involve the provision by the Bank of valuable consideration (whether in the form of a money payment or otherwise);

then the Ombudsman's proposal or recommendation shall, unless the Bank has otherwise requested or agreed, state that it is open for acceptance by the applicant only if he accepts it in full and final settlement of the subject matter of the complaint.

13. If the Ombudsman has made a recommendation which, within one month after it is made, has been accepted by the applicant but not by the Bank named in the complaint, the Ombudsman may make an award against any Bank named in the complaint.

An award shall comprise a money sum not exceeding \$100,000. No award shall be of a greater amount than in the opinion of the Ombudsman is appropriate to compensate the applicant for direct loss or damage suffered by him by reason of the acts of omissions of the Bank against which the award is made.

14. An award shall be in writing and shall state the amount awarded and a summary of the Ombudsman's reasons for making the award. The award shall state that, if within one month after its issue the applicant agrees to accept it in full and final settlement of the subject matter of the complaint, the award shall be binding on the applicant and (in accordance with its undertaking to the Australian Banking Industry Ombudsman) the Bank against which it is made.

The Ombudsman shall issue a copy of the award to the applicant and the Bank against which it is made and shall issue to the applicant a form (addressed to the Ombudsman and the Bank) to be completed by the applicant whereby he may accept the award in full and final settlement of the subject matter of the complaint.

15. In making any recommendation or award under these Terms of Reference the Ombudsman shall do so by reference to what is, in his opinion, fair in all the circumstances, and:
- (a) shall observe any applicable rule of law or relevant judicial authority (including but not limited to any such rule or authority concerning the legal effect of the express or implied terms of any contract between the applicant and any Bank named in the complaint); and
 - (b) shall have regard to general principles of good banking practice and any relevant code of practice applicable to the subject matter of the complaint.

The ombudsman shall not be bound by any previous decision made by him or by any predecessor in his office. In determining what are the principles of good banking practice he shall, where he considers it appropriate, consult within the industry.

16. The Ombudsman shall not make a recommendation or award except in accordance with the provisions of paragraphs 11 to 15.

Limits on the Ombudsman's Powers

17. The Ombudsman shall have power to consider a complaint made to him except:
- (a) to the extent that the dispute relates to a Bank's commercial judgement in decisions about lending or security (as defined in paragraph 31) but shall not preclude the Ombudsman from considering disputes about maladministration in lending matters;
 - (b) to the extent that the dispute relates to a Bank's general interest rate policies;
 - (c) if at any time it appears to the Ombudsman that it is more appropriate that the dispute be dealt with by a court, under another independent complaints or conciliation procedure or under an arbitration procedure;
 - (d) if at any time it appears to the Ombudsman that (i) the amount which the applicant(s) has claimed or could claim in respect of the subject matter of the dispute exceeds \$100,000, or (ii) the claim comprised in the complaint is part of a larger claim which the applicant(s) has made or could make, or is related to another claim which the applicant(s) has made or could make, and the aggregate amount of all such claims exceeds \$100,000;
 - (e) if any Bank named in the complaint duly gives the Ombudsman a notice of the kind described in paragraph 21.
18. The Ombudsman shall have no power to make a recommendation or award in respect of a dispute to the extent that it relates to a practice or policy of a Bank which does not itself give rise to a breach of any obligation or duty owed by the Bank to the applicant.
19. Subject to the other provisions of these Terms of Reference the Ombudsman may consider a complaint which relates to charges made by a Bank for banking services, but, in doing so, he shall have regard to any scale of charges generally applied by that Bank.
20. The Ombudsman shall only consider (or, continue to consider) a complaint made to him if he is satisfied that:
- (a) the complaint is made to him by or on behalf of the individual to whom or for whom the banking services in

question were provided, or the personal representatives of that individual;

- (b) the senior management of the Bank named in the complaint (at the management level notified to the Ombudsman) have had the opportunity to consider the complaint, but the applicant has not accepted any observations made or conditions of settlement or satisfaction offered by the Bank and deadlock has been reached; or the Bank has not advised the applicant that deadlock has been reached within 3 months of the complaint being formally made to it;
- (c) the complaint is made to him not later than two months after the Bank has informed the complainant that deadlock has been reached, and informed him also of the existence of the Ombudsman and of the two months limit;
- (d) subject to subparagraph (f), the act or omission giving rise to the complaint first occurred not more than six years before the applicant first made the complaint in writing to the Bank concerned;
- (e) the act or omission giving rise to the complaint (i) first occurred on or after 10th May 1989 or (ii) first occurred before that date, but the applicant did not become aware of it, and could not with reasonable diligence have become aware of it, until on or after that date;
- (f) except where relevant new evidence is available, the subject matter of the complaint was not comprised in a complaint by the same applicant (or any one or more of them) previously considered by the Ombudsman;
- (g) except where both parties to the dispute consent in writing to the Ombudsman's considering it, neither the complaint made to him nor any other complaint by the same applicant (or any one or more of them) in respect of the same subject matter is or becomes to the knowledge of the Ombudsman the subject of any proceedings in or before any court, tribunal or arbitrator, or any other independent conciliation body; or of any other investigation by a statutory Ombudsman of any State;
- (h) the dispute was not the subject of proceedings in a court or tribunal and a judgement or decision on the merits has been given; or of a completed investigation by a statutory Ombudsman of any State;
- (i) the applicant and any other person to whom any Bank named in the complaint owes a duty of confidence in respect of any information which the Ombudsman may request that Bank to produce to him for the purpose of

his consideration of a complaint have waived in writing that duty of confidence;

- (j) the complaint is being pursued reasonably by the applicant and not in a frivolous or vexatious manner.

"Test Cases"

21. At any time before the Ombudsman has made an award a Bank named in the complaint may give to the Ombudsman a notice in writing containing:

- (a) a statement, with reasons that, in the opinion of the Bank, the complaint involves or may involve (i) an issue which may have important consequences for the business of the Bank or Banks generally or (ii) an important or novel point of law; and

- (b) an undertaking that, if within six months after the Ombudsman's receipt of the notice either the applicant or the Bank institutes in any Court in Australia proceedings against the other in respect of the complaint, the Bank will (1) pay the applicant's costs and disbursements (to be taxed, if not agreed, on a solicitor and own client basis) of the proceedings at first instance and any subsequent appeal proceedings commenced by the Bank (except by way of respondent's notice, cross-appeal or other similar procedure) and (2) make interim payments on account of such costs if and to the extent that it appears reasonable to the Bank to do so.

22. Providing the Ombudsman concurs with the Bank's statement, he shall cease to consider the complaint and he shall inform the applicant in writing of the receipt of the notice, the date of its receipt and the effect of the notice upon the complaint.

Other Powers and Duties

23. The Ombudsman shall be responsible for the day to day administration and conduct of the business of the Australian Banking Industry Ombudsman. He shall have power to incur expenditure on behalf of the Australian Banking Industry Ombudsman in accordance with the current financial budget approved by the Board.

24. The Ombudsman shall not exercise any power which the Articles of Association of the Office expressly assign to the Board, the Council or any other person.

25. In consultation with the Chairman of the Council and subject to his approval, the Ombudsman shall have power on behalf of the Australian Banking Industry Ombudsman to appoint and dismiss employees, consultants, independent contractors and

- agents, and to determine their terms of employment or engagement.
26. The Ombudsman shall endeavour to attend each meeting of the Council and shall give the Council any information and assistance (including general information about any reference) which they reasonably request.
27. Save as mentioned in paragraph 28 or as required by any competent authority or as otherwise required by law or as properly and reasonably required in connection with any legal proceedings instituted by or against the Australian Banking Industry Ombudsman or any of its officers, the Ombudsman shall not disclose to any person (including a Board Member or Council Member) any information concerning a complaint considered by him from which it would or might be possible to identify the applicant or any Bank named in the complaint or any other information of a confidential nature which he has obtained in the course of his duties.
28. Paragraph 27 shall not prohibit the disclosure of any information to the applicant and any Bank named in the complaint or to the Chairman of the Council or any authorised deputy of the Chairman, or to any employee, consultant, independent contractor or agent of or with the Australian Banking Industry Ombudsman to the extent that such information is reasonably required by that person for the purpose of performing his duties to the Australian Banking Industry Ombudsman. And the Ombudsman shall report to the Bank concerned any threat to bank staff or property of which he becomes aware in the course of his duties.
29. At least twenty-eight days before the Annual Meeting of the Council the Ombudsman shall send to Council members (and also to Board members) a report containing, in relation to the preceding financial year of the Australian Banking Industry Ombudsman, a general review of his activities during that year and such other information as the Council may reasonably direct.
- 29A. To inform the community of his activities the Ombudsman shall publish an Annual Report.
30. The Ombudsman may make recommendations to Council from time to time in relation to the Terms of Reference as they relate to the scheme or any relevant Code(s) of banking practice which may be introduced and which have a bearing on the discharge of his responsibilities.

Interpretation

31. In these Terms of Reference:
- (a) the following expressions have the following meanings:

"Australia" includes the external Territories;

"Designated Associate" has the meaning ascribed by the Articles of Association;

"Bank" means a Member of the Australian Banking Industry Ombudsman or a Designated Associate;

"banking services" means all financial services provided by Banks in the ordinary course of their business to individuals, including credit card use overseas, and advice and services relating to insurance and investments;

"individual" includes a partnership or other unincorporated body of persons not consisting entirely or bodies corporate;

"applicant" means an individual making a complaint to the Ombudsman;

"Bank named in the complaint", or "Bank concerned" means any Bank against which a complaint is made;

"commercial judgement" means assessments of risk, of financial or commercial criteria, or of character;

"decisions about lending or security" include any decision (or the consequences thereof) concerning any advance or similar facility, guarantee or security;

"dispute" means a complaint over which a deadlock has been reached with senior management of the Bank as described in paragraph 20(c);

"maladministration" means an act (or omission) contrary to or not in accordance with a duty of care owed at law or pursuant to the terms (express or implied) of the contract between the Bank and the disputant;

- (b) references to the provision of banking services include, where the context admits, references to their non-provision;
- (c) references to the singular number (including without limitation references to "individual" "applicant" and "Bank") include, where the context admits, the plural number and vice versa;
- (d) references to the masculine gender include the feminine;
- (e) references to paragraphs are to paragraphs of these Terms of Reference.