

The Ombudsman as initiator: how the New Zealand Banking Ombudsman approaches systemic issues

Preparedness to tackle and resolve systemic issues is core to an effective Ombudsman service. Although many in this room may agree with me, industry-based dispute resolution scheme involvement in systemic issues is by no means fully accepted in New Zealand.

Under the Financial Service Providers (Registration and Dispute Resolution) Act 2008, all approved dispute resolution providers must refer a matter to the relevant licensing authority if they receive a “series of material complaints”. There is, however, no specific requirement to investigate systemic issues. Nor does the legislation provide any guidance around what might be considered “material”.

Some dispute resolution schemes have been reluctant to interpret the legislation widely to investigate systemic issues, considering them to be outside their terms of reference.

The New Zealand Banking Ombudsman scheme has no express power to investigate systemic issues in our terms of reference. In fact, our participants rejected having such a provision when consulted on changes to our Terms of Reference even though they had always informally co-operated with enquiries. Our board, however, agreed that it was an important part of an Ombudsman’s role and approved the development of a specific protocol.

Today I am going to talk about:

- The development of our protocol and some of the issues we encountered
- The benefits of addressing systemic issues
- Lifting our own ability to identify systemic issues.

Development of the protocol

When consulting on the development of our systemic issues protocol, some participants were initially reluctant to allow us to investigate beyond individual disputes. This appeared to be because they were:

- uncertain about what types of issues we might investigate
- fearful of us interfering in their business – concerned that we might interfere in their systems and processes or their business or commercial policies
- uncertain as to what we might consider sufficiently material to refer a matter to the relevant licensing authority or to a regulator
- fearful of any publicity that might arise, undermining customers’ confidence in their organisation
- unclear about the potential benefits such enquiries would bring for both them and their customers.

Definition

In the first instance, then, our participants lacked clarity about the definition of a systemic issue and the scope of any inquiries we might make.

The level of fear was understandable because people may think of systemic issues as those where a process or system is the root cause of the problem underlying a complaint. This tends to suggest investigating organisations rather than individuals.

We therefore considered moving away from the term “systemic issues” to focus on the legislative phrase “series of material complaints”. Ultimately we continued to use the systemic issues language because it is commonly used in the Ombudsman environment.

Instead, we focused on identifying a simpler, more user-friendly definition and turned to Australia for guidance! We used a definition that was contained in the former Banking and Financial Services Ombudsman’s Terms of Reference (9.2), where systemic issues are:

Issues that will have a material effect for individuals or [small] businesses beyond the parties to the dispute.

In addition to being simpler and less invasive sounding, it was sufficiently broad to be able to include matters that:

- could affect more than the individual complainant at hand
- may affect the customers of one participant or a range of participants
- may or may not be embedded in a particular system or process
- could be industry-wide
- will be material.

Using this definition appeared to appease some of our participants’ anxiety as they ultimately agreed to the protocol. However, one participant remained concerned about definition of materiality.

Definition of materiality

We responded that a matter would be sufficiently material to refer to a more appropriate authority, licensing or regulatory, if participants either/or:

- declined to co-operate with our enquiries
- failed to fully address any harm to customers
- failed to address the underlying causes of the issue and make appropriate changes so that the problem could not recur.

And/or where:

- the matter was a blatant or deliberate breach of the law
- the harm caused was widespread and significant, or where customers have been caused significant stress and inconvenience
- it would undermine public confidence in our Scheme not to refer it to a regulatory agency.

I should note that these criteria have yet to be formally approved by our Board and will be considered at its August meeting.

Benefits of investigating systemic issues

The issue of whether to investigate systemic issues throws up the whole issue of why we exist as Schemes.

A lot of literature is available on this topic, but I think of things this way. At an individual level, Ombudsman schemes help ensure customers are:

- given a fair hearing (that is, level the playing field between large organisations and individuals)
- receive what they are entitled to
- treated well
- put right when things have gone wrong.

And, at a broader level, Ombudsman schemes help:

- improve individuals' well-being (in our case their financial well being)
- lift standards of industry practice (including providing better information about products and services)
- improve customer service
- prevent future problems
- engender public confidence in the organisations and industries or sectors.

In addition to obtaining great results for individual customers, therefore, resolving systemic issues gives us the ability to have even greater influence and impact. Moreover, customers expect us to look more widely. Many customers tell us that they want to prevent others from having a similar experience.

Not to look more widely therefore limits our effectiveness, risks our credibility and ultimately risks undermining public confidence in our Schemes. It is not an option to ignore matters with more widespread impact.

There are also benefits for participants. Being seen to own up to and effectively address more widespread issues gives customers confidence in the organisations they deal with. Most people can accept that mistakes happen: it's the putting right that counts.

Moreover, from a participant perspective, it must be preferable to deal with a self-regulatory agency than to face a regulator's investigation, with its intrusive powers and potentially serious financial and reputational consequences.

There are also benefits for the regulators. By and large, regulatory agencies have many more issues to investigate than they can resource. Effective Ombudsman schemes provide another avenue for resolution and give assurance that problems are being dealt with.

Investigating systemic issues

To illustrate, some examples of systemic issues in which we have recently been involved and their benefits are:

- *Better informed customers*; clearer terms and conditions of credit cards, in particular when interest begins to accrue; clearer information about when Kiwisaver retirement savings can be withdrawn to purchase a first home; improved information about the costs of electronic transfer of money overseas

- *Compensation*: refunds to customers who have been over-charged interest on mortgages (withdrawal of promised “shaded” or discounted rates); and compensation in the ING investment fund failures (more than \$26.4 million)
- *Confidence*: determining that the failure of an ATM to deliver up-to-date balances on investments at the start of the GFC had not had a material impact for customers; confirming that all customers affected by a participant staff member’s fraud had been identified and compensated appropriately
- *Improved protection*: customers no longer have to opt out of unauthorised increased credit card limits; and in one recent case customers did not have to opt out of a change to their mortgage repayments that automatically lowered these repayment amounts to meet the term of their loan, cancelling any benefits from having made lump sum or larger than required amounts

Implementing the protocol

When investigating, we seek the following information of our participants:

- Confirmation or clarification of the nature of the problem
- How it arose
- Over what timeframe the problem has existed
- How many customers could have been affected
- Whether the affected customers have all been identified and put right and if not, what the proposed timetable is
- Whether the participant(s) have addressed the underlying causes and can provide assurance that the same problem would not arise again
- Whether the problem may be industry-wide.

In all cases to date we have received good co-operation from participants. We have not come across problems that have required referral to a regulatory or licensing authority.

Rather, our key challenge has been in ensuring we recognise potential issues. It is very easy to focus purely on the individual complaint – and we must help the individual who has brought the matter to our attention – but we also owe the wider public a duty to find out whether others may have been affected.

Systemic issues need to be picked up when customers are making initial enquiries or complaints. To assist the process, we get our enquiries and investigative staff to ask themselves two questions:

- Could other customers have been affected
- Could the same thing happen again?

If the answer to either of these two questions is yes, we escalate the complaint to a senior level to determine whether we need to initiate a systemic issues inquiry.

Conclusion

Investigating systemic issues is integral to an effective Ombudsman scheme. The public expects everyone affected by a problem to be identified and put right. And they expect that

organisations will learn from their mistakes and do their best to prevent them from happening again.

Not to investigate risks consumer confidence in our Schemes, and risks bringing us into disrepute. But more importantly, investigating systemic issues gives us the ability to extend our influence and increase the benefits we bring to the public.

Appendix 1 : Systemic Issues Protocol

1. *Notice (how we will notify participants of a potential issue)*

Banking Ombudsman staff will notify the relevant participant/s of a possible systemic issue and invite the participant/s to respond within 20 working days unless greater urgency suggests a response is required sooner. The Banking Ombudsman may ask for any information that is relevant to the issue.

2. *Assessment*

The Banking Ombudsman will assess the response, determine whether the matter is systemic in nature and consider its materiality.

If the Banking Ombudsman decides that the issue is not systemic in nature, then the matter will be resolved in the same way as other complaints not covered by the protocol.

If the Banking Ombudsman decides that it is a systemic issue, then the Banking Ombudsman will work with the participant to resolve it.

If the Banking Ombudsman considers that there has been a series of material complaints, the matter will be referred to the licensing authority. The Banking Ombudsman may also conclude that it would be more appropriate for the complaint to be dealt with by another body (see para 25.4 of the Terms of Reference). In both cases, participants are consulted before any referral is made.

3. *Resolution*

When resolving the issue, the participant may be asked to:

- Ensure all affected customers have been identified
- Compensate the affected customers fairly for any financial loss and/or inconvenience
- Review and revise any relevant policies or procedures to prevent the issue from recurring.

The Banking Ombudsman can ask for information about the resolution of the issue.

4. *Reporting*

If the Banking Ombudsman is satisfied that the matter is resolved, then the Ombudsman will conclude the matter. Systemic issues are usually reported in the annual report. Participants are not identified in the report.

If the Banking Ombudsman is not satisfied that the matter is resolved within a reasonable time, the Banking Ombudsman may identify the participant in the annual report.

The Banking Ombudsman will allow 10 working days for the participant to comment on the proposal to report the participant in the annual report and/or to the relevant authority.