

Banking and Financial Services Ombudsman Limited

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REVIEW OF THE BANKING AND FINANCIAL SERVICES OMBUDSMAN SCHEME

BACKGROUND PAPER

June 2004



This Paper has been produced by the BFSO. Its purpose is to provide background information for the assistance of the reviewer and for those interested in the review or in the BFSO scheme. Any views expressed are internal views or conclusions and do not necessarily represent the views of the reviewer.

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Chapter 1: Introduction

1.1 *Background to the Review*

- 1.1.1 The Banking and Financial Services Ombudsman scheme (BFSO) is an independent dispute resolution service which considers and seeks to resolve disputes between Australian financial services providers and their individual and small business customers. It is an alternative to litigation and free to individuals and small business.
- 1.1.2 The BFSO is approved by the Australian Securities and Investments Commission (ASIC) as an external dispute resolution scheme for financial services licensees under Part 7 of the *Corporations Act 2001 (Cth)*. ASIC is an independent Australian government body, which regulates companies and financial services providers and enforces the relevant laws. Sections 912A(1) (g) and 912A(2) of the *Corporations Act* require a licensee providing financial services to retail clients, as defined in the Act, to have a dispute resolution system that includes membership of an external dispute resolution scheme approved by ASIC. Policy statements are issued by ASIC to provide guidance on matters relevant to compliance with Part 7 of the *Corporations Act*. Policy Statement 139, 'Approval of External Dispute Resolution Schemes', sets out guidelines for the approval of schemes such as the BFSO.
- 1.1.3 The BFSO was approved by ASIC in September 2001. Its members include Australian banks, Australian subsidiaries of foreign banks, foreign banks with Australian operations and other Australian financial services providers.

1.1.4 Clause 4.3 (c) of the Constitution of Banking and Financial Services Ombudsman Limited, requires the directors to commission an independent review of the operations and procedures of the scheme every three years or more frequently if the Directors consider this to be appropriate.

1.1.5 The requirement of the BFSO Constitution is consistent with ASIC Policy Statement 139, 'Approval of external complaints resolution schemes', paragraph PS 139.92:

'A scheme should commission an independent review of its operations and procedures every three years. This time frame should not preclude a review occurring sooner if appropriate.'

1.1.6 Pursuant to this requirement, the Board of the BFSO has commissioned an independent review of the operations and procedures of the BFSO to take place in 2004. The review follows on from, and supplements, a strategic review of the scheme carried out by the Board of the BFSO in 2003 as part of the Board's overall strategic planning, which included commissioning the Wallis Consulting Group Pty Ltd to undertake a survey of BFSO stakeholders. The Board's strategic review and the outcomes of the stakeholder survey are described in Chapter 9.

1.2 Purpose and Content of the Background Paper

1.2.1 Under PS 139, an ASIC-approved scheme such as the BFSO is required to have certain characteristics. These are:

- accessibility;
- independence;
- fairness;
- accountability;

- efficiency; and
- effectiveness.

1.2.2 The purpose of this Background Paper is to provide information about the operations and procedures of the BFSO for the reviewer and for those interested in the review who may wish to provide comment to the reviewer or otherwise inform themselves about external dispute resolution schemes such as the BFSO.

1.2.3 This Background Paper discusses the context of external dispute resolution schemes in Australia and describes the history, structure, jurisdiction, processes and systems of the BFSO, together with information about reviews previously carried out. It concludes by raising a number of issues relevant to future planning by the Board of the scheme.

1.2.4 The Terms of Reference of the review have been set by the Board. They have been provided to and will be available from the reviewer.

Chapter 2: External dispute resolution schemes in context

2.1 The emergence of industry funded ADR schemes

- 2.1.1 Industry funded alternative dispute resolution schemes emerged in Australia in the late 1980s and early 1990s following the development of a Banking Ombudsman model in the United Kingdom. The BFSO, established as the Australian Banking Industry Ombudsman, was the first Australian scheme. Through the 1990s, schemes developed in other industries including life and general insurance, financial planning, electricity, water and telecommunications. Some, such as the Superannuation Complaints Tribunal have developed with a statutory basis.
- 2.1.2 ADR schemes developed in response to two trends – the need for an alternative to legal action for consumers seeking redress against industry members and an increasing policy emphasis by government on self-regulation. Cost was a common factor in both trends – the increasing costs to parties of resolving disputes through the courts and the cost of regulation to government.
- 2.1.3 Voluntary industry codes have been developing over the same period and are part of what might be described as the self-regulation ‘package’. The voluntary code for the banking industry, the Code of Banking Practice (CBP), was published in November 1993 by the Australian Bankers’ Association and developed following a recommendation of the House of Representatives Standing Committee on Finance and Administration, (the Martin Committee) in its 1991 report, *A Pocket Full of Change*, that a code of

banking practice, contractually enforceable by bank customers, be developed on a consultative basis.

2.1.4 The 1993 Code of Banking Practice entrenched ADR schemes in the dispute resolution framework for banks by providing in clause 20.4 that:

‘A Bank shall have available for its Customers free of charge an external impartial process (not being an arbitration), having jurisdiction similar to that which applies to the existing Australian Banking Industry Ombudsman scheme, for resolution of a dispute that comes within that jurisdiction and is not resolved in a manner acceptable to the Customer by the internal process referred to in section 20.1.’

2.1.5 The Code of Banking Practice also entrenched the criteria for decision-making set out in the original terms of reference of the BFSO. Clause 20.5 provided that:

‘the external and impartial process shall apply the law and this Code and also may take into account what is fair to both the Customer and the Bank.’

2.1.6 Alternative dispute resolution (ADR) mechanisms formed the basis of the model because of a growing recognition that ADR processes had the potential to limit costs, preserve relationships and offer more flexibility than formal, adversarial court processes. At the same time, there was recognition that accessing ADR schemes should not preclude consumers from accessing courts and should be voluntary for the consumer.

2.2 *Integration of ADR schemes into the regulatory framework*

2.2.1 By the late 1990s there was an acknowledged recognition by government of the importance of ADR schemes and a desire to incorporate them more formally into the regulatory framework. Releasing the Benchmarks for

Industry-Based Customer Dispute Resolution Schemes, discussed in more detail below, the Minister For Customs and Consumer Affairs, the Honourable Chris Ellison, said in 1997 that:

‘The Government and the courts have recognised that costs and delays have reduced access to the court system by the average consumer. Where possible the courts are using alternative dispute resolution within the court system itself. There is also a place for alternative dispute resolution outside the court system. Dispute schemes have therefore fulfilled a need for cost-free, accessible and effective resolution of disputes.’

2.2.2 ASIC Policy Statement 139.3, which was issued in July 1999, states that:

‘We believe that industry-supported schemes play a vital role in the broader financial services regulatory system. The existence of these schemes has provided:

- (a) a forum for consumers to resolve complaints that is quicker and cheaper than the formal legal system; and
- (b) an opportunity to improve industry standards of conduct and to improve relations between industry participants and consumers.’

2.2.3 As part of what is known as Financial Services Reform (FSR), (following on from the Financial Services Inquiry, known as the Wallis Inquiry) the *Corporations Act* (Cth) was amended in 2001 to require financial services licensees to be members of a scheme or schemes approved by ASIC. Approval guidelines had been developed by ASIC in anticipation of the new regime and were published as Policy Statement 139. The guidelines were intended ‘to promote the harmonisation of minimum standards across complaints schemes operating in the financial system.’

2.2.4 In addition to bringing ADR schemes into the regulatory framework, FSR also introduced requirements for internal dispute resolution (IDR) systems. ADR schemes became known as EDR (external dispute resolution) schemes to distinguish them from internal systems.

2.3 *Interrelationship with the court system*

2.3.1 EDR schemes, like other ADR processes, provide a useful alternative to a court where the consumer does not have the financial means for legal proceedings; the amount of the claim would be outweighed by legal costs; the preservation of the relationship is important to one or both parties; or the dispute would benefit from flexibility in its resolution. EDR schemes may have an advantage over other ADR processes such as pure mediation where the issue involved may be a systemic one and thus efficiently addressed by the scheme using its systemic issues powers (see chapter 7 for further information about systemic issues powers). And an important feature of EDR schemes is that if the dispute is not otherwise resolved the consumer is able to obtain a decision that is binding on the industry member. Unlike the decision of an arbitrator, however, the decision is not binding on both parties; instead it is binding only on the member of the scheme and the consumer is free to reject the decision– its legal status is more in the nature of an expert opinion which one party, the member, has agreed to accept.

2.3.2 EDR schemes are an alternative to and not a substitute for the court and tribunal system. A fundamental principle of such schemes is that they are voluntary for consumers entitled to access them. The consumer must not be required to use the scheme or be bound by any decision made by the

scheme and may at any time withdraw from the process and take their dispute to court.

2.3.3 Most scheme rules provide that if it appears that a court or other forum is more appropriate for the resolution or determination of the dispute, then the dispute should not be considered further by the scheme (eg. BFSO Terms of Reference 5.1(d)). Similarly, the BFSO cannot consider a dispute if it has already been the subject of court proceedings (Terms of Reference clause 5.1(c)).

2.3.4 A court may be a more appropriate forum for a dispute for a number of reasons, including that:

- Evidence from a third party not willing to cooperate in the process is essential to the resolution of the dispute;
- The dispute is brought as a 'fishing expedition' to prepare for contemplated court proceedings and not as a good faith attempt to resolve the dispute;
- The decision turns solely on an issue of credit and it is more appropriate that the evidence be given on oath and tested by cross-examination;
- Resolution depends upon an inquiry as to whether criminal conduct has taken place; or
- The dispute is more efficiently brought in conjunction with existing or contemplated proceedings involving third parties.

- 2.3.5 It is an open question whether the court will be a more appropriate forum if an important question of law is involved and it is desirable to have an authoritative determination of that question. This issue has been canvassed in the context of ADR generally [see K Mack, Court Referral to ADR: Criteria and Research, NADRAC and AIJA 2003, p60].
- 2.3.6 In the context of EDR schemes, provisions such as clause 8 of the BFSO Terms of Reference, which sets out a 'test-case' procedure, deal with the possibility that an authoritative and publicly binding determination may be desirable. A financial services provider member may give notice to the Ombudsman that the dispute involves an important or novel point of law or an issue which may have important consequences for the business of the member or financial services providers generally. The member must undertake to pay the disputant's costs of any proceedings issued within six months of the notice and seek to resolve the dispute expeditiously. On receipt of the notice and undertakings, the Ombudsman must cease consideration of the dispute. In practice such test case provisions are infrequently used - in the case of the BFSO the provision has only been used once and not in the last ten years - and difficult questions of law are regularly addressed in BFSO Findings but it remains an important safeguard for industry members who are otherwise bound by determinations of the scheme.
- 2.3.7 It is probable that EDR schemes relieve the courts of some of their potential workload but it is also likely that many of the cases brought to EDR schemes by consumers would not be brought to court for financial reasons. In that sense EDR schemes complement the work of courts by providing an alternative forum for the airing and resolution of a legal dispute that might not otherwise be brought before a court.

2.3.8 The schemes are designed so that parties need not be legally represented and most disputants are not. The processes of the BFSO, for example, are inquisitorial and informal and so a party is not required to articulate a dispute in the form of pleadings or refer to the relevant law. The legal issues and the required questions for investigation are identified by the case manager responsible for investigating a dispute, with the assistance and advice of internal legal counsel. This is in contrast to court processes, which are based on the adversarial system and are designed to function at their most effective when parties are represented by lawyers conversant with the principles, procedures and protocols of litigation.

2.4 Principles and Benchmarks

2.4.1 Given the role of EDR schemes, it is important that consumers, industry and other observers be reassured that appropriate standards are in place. In August 1997, the Minister for Customs and Consumer Affairs, the Honourable Chris Ellison, released the Benchmarks for Industry-based Customer Dispute Resolution Schemes. The Benchmarks, which were voluntary, were developed in consultation with EDR schemes, consumer groups, government and regulatory authorities. The purpose of the Benchmarks was to provide guidance to industry sectors setting up a scheme, to existing schemes and to consumers.

2.4.2 The Benchmarks and their underlying principles formed the basis of ASIC Policy Statement 139, which sets out the guidelines for approval of an EDR scheme and directly relates to s 912A of the *Corporations Act* and the relevant regulation in the *Corporations Regulations*, 7.6.02. PS 139 states that:

'We are satisfied that the approval guidelines encompass the key principles contained in the DIST Benchmarks. These key principles are:

- (a) accessibility;
- (b) independence;
- (c) fairness;
- (d) accountability;
- (e) efficiency; and
- (f) effectiveness.'

A summary of the principles underlying the Benchmarks is set out at PS 139.151 and is annexed.

Chapter 3: The history and development of the BFSO

3.1 A history of the BFSO

- 3.1.1 On 10 May 1989, the Australian Bankers Association announced that an Australian Banking Industry Ombudsman scheme would be established. The scheme commenced operations in 1990. In the first Annual Report the Chairman of Council described it as involving ‘the creation of the most far-reaching alternative dispute resolution mechanism yet instituted by any industry in Australia’.
- 3.1.2 The impetus for the establishment of an Australian scheme came from a number of places. Banks were experiencing complaints about ATM and EFTPOS transactions. There were calls for a Banking Ombudsman to be established coming from academics, such as Alan Tyree, Professor of Law at Sydney University; from consumer advocates, such as Liza Carver, a public interest lawyer and member of the first Council; and from Federal and State government. In the Federal sphere, Senator Nick Bolkus stated publicly, in April 1989, that as a result of major changes in banking services in Australia and increased competition in the finance sector, there was an increased need for an independent ombudsman. Westpac had, in April 1989, announced that it intended to appoint its own independent Ombudsman. [Source: Michael Waterhouse, former Chief Manager, Retail Strategies, Westpac and a member of the first Council, and contemporaneous press releases and news items. A history of the first ten years of the scheme also appears in the 2000 Annual Report].

- 3.1.3 The scheme was established through a corporation limited by guarantee and had three elements: a Board of Directors comprising ABA executive Committee members and a Reserve Bank representative; a Council with an independent Chairman and equal numbers of bank and consumer representatives; and the Ombudsman, appointed by the Council. The scheme had 17 founding bank members, a monetary limit of \$100,000 and was available to individual bank customers, which included businesses which were owner operated and partnerships. The staff in the first year numbered sixteen, of whom three are still members of the Ombudsman's staff.
- 3.1.4 The first Ombudsman, Mr Graham McDonald, was a West Australian lawyer who had been given leave from his position as Presidential Member of the Federal Administrative Appeals Tribunal to establish the scheme. He had previously served as Commissioner for Corporate Affairs, Deputy Commissioner to the WA Aboriginal Land Inquiry and principal member of the Social Security Appeals Tribunal. The first Chairman of Council, The Rt Hon Sir Ninian Stephen, KG, AK, GCMG, GCVO, KBE was a former Justice of the High Court of Australia and Governor-General of Australia.
- 3.1.5 The themes of the first annual report reflect issues which have remained important to the BFSO and are mirrored in the later Benchmarks for EDR schemes: building independence; achieving redress; ensuring access; ensuring fairness; and promoting change. Under 'Building Independence', the Council articulated the conditions considered essential for achieving and maintaining independence. They included the following:
- The Ombudsman and staff must be appointed independently of the banks and possess personal qualities that will enable them to think independently and foster an impartial state of mind;

- There must be an assurance of continuing and future resources to guarantee tenure for the Ombudsman (who appoints his own staff) so that he can exercise his independent judgments without fear of the consequences;
- Resources must be sufficient so as not to impede or frustrate the effective and efficient administration of the scheme;
- The Ombudsman's systems and procedures must ensure fair, efficient and consistent decision-making; and
- It must have a sense of accountability to the broader public.

3.2 *Changes to jurisdiction, structure and decision-making criteria*

3.2.1 In its 14 years of operation the BFSO has made a number of changes to its jurisdiction and its structure. In 1996 the monetary limit increased to \$150,000. In 1998 the terms of reference were extended to allow incorporated small businesses to lodge disputes. In 2001 the decision was made to change the governing structure of the scheme to replace the Council and Board structure with a new single Board having as its members an independent Chairman and equal numbers of consumer/small business and bank representatives. The Hon Sir Edward Woodward, AC, OBE, QC became the inaugural Chair of the new Board. Sir Edward was Chair of the Council from 1997, following on from The Hon Sir James Gobbo, AC, CVO and The Rt Hon Sir Ninian Stephen, KG, AK, GCMG, GCVO, KBE. In 2001, the scheme also took part in an ASIC assessment process and was approved as an EDR scheme in the financial services sector on 21 September 2001.

- 3.2.2 In 2002 the terms of reference were further extended to allow the Ombudsman to consider disputes about banks' related entities and about breaches of the National Privacy Principles. The eligibility test for small business was simplified to a single test based on the type of business and the number of employees. The decision-making criteria were extended and amended from law, good banking practice and fairness to law, good industry practice, relevant industry codes and fairness.
- 3.2.3 In 2003 the Constitution was amended to allow non-bank financial services providers to become members and the name of the scheme was changed to the Banking and Financial Services Ombudsman scheme to reflect the growing divergence in services provided by financial institutions and the extended membership of the scheme.

3.3 *The BFSO model in an international and Australian context.*

3.3.1 Including the BFSO, there are currently seven ASIC approved EDR schemes in the financial services sector:

- **Credit Ombudsman Service Limited (COSL, formerly the Mortgage Industry Ombudsman Service, MIOS),**
- for people who have unresolved complaints against mortgage originators and finance brokers and others that are members of the scheme.
- **Credit Union Dispute Resolution Centre (CUDRC)**
- complaints about those Australian credit unions that are members of that scheme.

- **Financial Industry Complaints Service (FICS)**
- complaints about financial services providers including life insurers, funds managers, investment advisers and planners, stockbrokers and some superannuation providers.
- **Financial Co-operative Dispute Resolution Scheme (FCDRS)**
- complaints from consumers about those Australian credit unions and building societies that are members of the scheme.
- **Insurance Brokers Disputes Limited (IBD)**
- complaints about general or life insurance brokers.
- **Insurance Enquiries and Complaints (IEC)**
- complaints about general insurance companies.

3.3.2 The BFSO model is that of a scheme headed by a single Ombudsman who is the ultimate decision-maker, CEO of the organisation and has a public profile as the decision-maker. Both the Financial Industry Complaints Service and Insurance Enquiries and Complaints operate on a panel and an adjudicator model – cases not resolved at the ‘case manager’ level are referred to an adjudicator if the dispute is over a relatively small amount or otherwise to a Panel with three members – a consumer representative, an industry representative and a panel chair. The CEO of the organisation also acts as adjudicator. The Credit Ombudsman Service Limited, formerly the Mortgage Industry Ombudsman Scheme, has four Ombudsmen. Insurance Brokers Disputes Limited has a Referee.

3.3.3 In the BFSO model, industry and legal expertise are provided to the Ombudsman and his staff through internal legal counsel, of whom there are three, and a banking adviser who is a senior retail banker, seconded on a revolving annual basis from one of the banks. If a case is not resolved after the referral to member stage it is investigated by a case manager who may issue a Finding – a written decision with reasons based on an assessment of the law, good practice, any relevant industry code and fairness. This

decision may be 'appealed' by either party with reasons and the case then goes to the Ombudsman for review and a Recommendation – again a written decision with reasons. It is only if the Recommendation is rejected by the bank but accepted by the disputant that a Determination, binding only on the bank, is made. Both the relevant case manager and the Ombudsman may at any time facilitate a settlement, including by holding a conciliation conference.

- 3.3.4 The current Ombudsman has not yet had to make a Determination. This does not mean, however, that he has not made any decisions, rather his decisions have been in the form of Recommendations, which have been accepted by the member without the need to issue a Determination.
- 3.3.5 In the FICS and IEC model, if the case is not resolved at case manager level, it is referred to the Panel or adjudicator, as appropriate. The role of the Panel is, principally, to make a decision in the form of a final Determination.
- 3.3.6 In the United Kingdom, the former Banking Ombudsman, on which model the Australian scheme was partly based, has been merged into the Financial Ombudsman Service, together with the Insurance Ombudsman, Building Societies Ombudsman and a number of other similar organisations. The Financial Services Ombudsman has a statutory basis, reporting to the regulatory authority, the Financial Services Authority, which has a role similar to ASIC and APRA (the Australian Prudential Regulation Authority) combined.
- 3.3.7 The Canadian Ombudsman for Banking Services and Investments (OBSI) was established in 1996 as the Canadian Banking Ombudsman and has, since June 2002, also provided services to non-bank investment dealers, mutual fund dealers and mutual fund companies. Each bank in Canada

has its own internal Ombudsman. Other Banking Ombudsman-type services are established in New Zealand, Greece, Switzerland , South Africa and elsewhere.

3.4 Other roles of an EDR scheme

- 3.4.1 The principal role of the BFSO is dispute resolution and this is performed through referral, facilitation, conciliation, investigation and decision making. The Ombudsman and his staff have, however, inevitably gained expertise in financial services law and practice as a result of specialising in financial services - related disputes and have developed relationships with government, industry and consumer representatives as a result of the work. This means that the BFSO also has a number of important ancillary roles. These are discussed in greater detail in Chapter 7.
- 3.4.2 Through its communication with members in the context of individual cases, systemic issues and the emerging issues discussed in quarterly Bulletins, the BFSO has an educative role and contributes to raising standards, not only in financial services practice but also in internal dispute resolution. Because of its expertise and awareness of emerging issues for customers as observed through patterns of disputes, the BFSO also has the ability to contribute to policy-formation by providing submissions to law reform and legislative discussion papers on issues within its expertise. These other roles are consistent with the principal function of dispute resolution – they are an important contribution to dispute minimisation and management.

3.4.3 The Purpose and Values of the BFSO as articulated by BFSO staff at the staff planning day in 2003 and approved by the Board are as follows:

Our Purpose

Our primary function is dispute resolution. We contribute to raising industry standards, increasing the financial literacy of consumers and better informed policy outcomes for government, industry and the community.

Workplace Values

Excellence in decision-making, respect for all users of the scheme, a cooperative work environment and staff development.

Knowledge, skills, initiative.

Chapter 4: The structure of the BFSO

4.1 *The powers and role of the Ombudsman*

- 4.1.1 The Ombudsman is appointed by the Board according to the Constitution of the BFSO. To ensure independence, the Constitution requires the Ombudsman not to be a member or a director of the company, nor be an employee of a member or director, hold any position of profit under a member of the scheme or act in a professional capacity for the company.
- 4.1.2 The Ombudsman's powers are set out in the Terms of Reference of the scheme. Under clause 1.2 of the Terms of Reference the Ombudsman's principal powers and duties are to consider disputes within the terms of reference and to facilitate the satisfaction, settlement or resolution of such disputes whether by agreement, by making recommendations or determinations or by such other means as may seem expedient.
- 4.1.3 The Ombudsman's role is further informed by the aim of the scheme, described in clause 1.3 to be to provide an independent and prompt resolution of the disputes described in clause 3 of the Terms of Reference having regard to law, applicable industry codes or guidelines, good industry practice and fairness in all the circumstances.
- 4.1.4 The role of the Ombudsman requires a number of personal skills and qualities. Independence of mind and personal integrity are the central qualities. In addition, because the efficient resolution of disputes requires the cooperation and trust of both members and disputants, excellent communication skills and demonstrated integrity in decision-making are vital. Finally because the workload is large and demanding, the Ombudsman needs to be an effective leader to the staff of the scheme.

4.2 The structure and role of the Board

4.2.1 The corporate structure of the BFSO is a public company limited by guarantee, Banking and Financial Services Ombudsman Limited ABN 48 050 070 034. The scheme is overseen by a Board of Directors which has three industry representatives, known as Members' Directors, three public interest representatives, known as Consumers' Directors, and an independent Chairman. The three public interest representatives include two consumer representatives and one small business representative. The balancing of member and consumer directors assists in ensuring the independence of the Board from members.

4.2.2 The Constitution requires two of the Members' Directors to be appointed by major banks (which means Australia and New Zealand Banking Group Limited, the Commonwealth Bank of Australia, National Bank of Australia Limited and Westpac Banking Corporation) and one to be appointed by a bank which is not a major bank. Consumers' Directors are required to be persons interested in and knowledgeable about consumers' interests relevant to the scheme appointed after a call for nominations, by advertisement in a newspaper with national circulation, and appropriate consultation. Directors hold office for three years and are eligible for re-appointment once.

4.2.3 The Board is not involved in considering or reviewing disputes. Its principal roles are to:

- appoint the Ombudsman and preserve his impartiality and independence from the members;
- manage the business of the company;

- recommend and promote consultation about proposed changes to the terms of reference;
- consider and agree the budget (submitted by the Ombudsman); and
- commission an independent review of the operations and procedures of the scheme every three years or more frequently.

The Board also has a role in receiving and considering complaints about the operation of the scheme, although this must not involve reviewing disputes or decisions made by the Ombudsman or his staff. This role is currently under consideration by the Board and is included in a number of other issues for Board consideration set out in Chapter 10.

4.2.4 The current Board members are:

Chair:

Jillian Segal

Members' Directors:

Jill Lester, Commonwealth Bank of Australia, Deborah Batten, National Australia Bank, Jeremy Griffith, St George Bank.

Consumers' Directors:

Carolyn Bond, Consumer Credit Legal Service, Melbourne, Su Mahalingham, Consumer Credit Legal Service, Perth and Roger Du Blêt AM, small business representative

4.3 Membership of the BFSO

- 4.3.1 There are two classes of members, Bank members and Non-Bank members. A bank is eligible to be a member if it is a recognised bank, has completed and signed an application to become a member and has been approved by

the directors as a member. A non-bank member must be an Australian Financial Services (AFS) provider, must complete and sign an application form and be approved as a non-bank member. The BFSO has stringent criteria for non-bank membership, which includes the commitment of adequate internal dispute resolution processes and a demonstrated commitment to quality dispute resolution.

- 4.3.2 A current list of bank and non-bank members is available on www.bfso.org.au

4.4 *The funding of the scheme*

- 4.4.1 The total funding for the BFSO is based on an annual budget, which must be approved by the Board. The budget forecasts the amount of funding the scheme needs to operate in the financial year, 1 April to 31 March. The total budget is the amount to be provided by the members.
- 4.4.2 The budget is allocated and charged to members on a quarterly basis. A participation fee is charged, with the balance being allocated pro-rata between the members using a formula which takes into account the number of telephone calls and cases closed, and the amount of time and work involved in closing those cases (using a weighting system for each level of case closure). The formula is designed to charge each member the proportion of the budget equal to the proportion of the work done on cases involving the member.
- 4.4.3 A further amount may be added to the cost of a case if a face to face conference is involved in the finalisation of the case. Members are also charged an additional amount if work is performed by the scheme to

resolve a systemic issue relating to a financial service provided by a member.

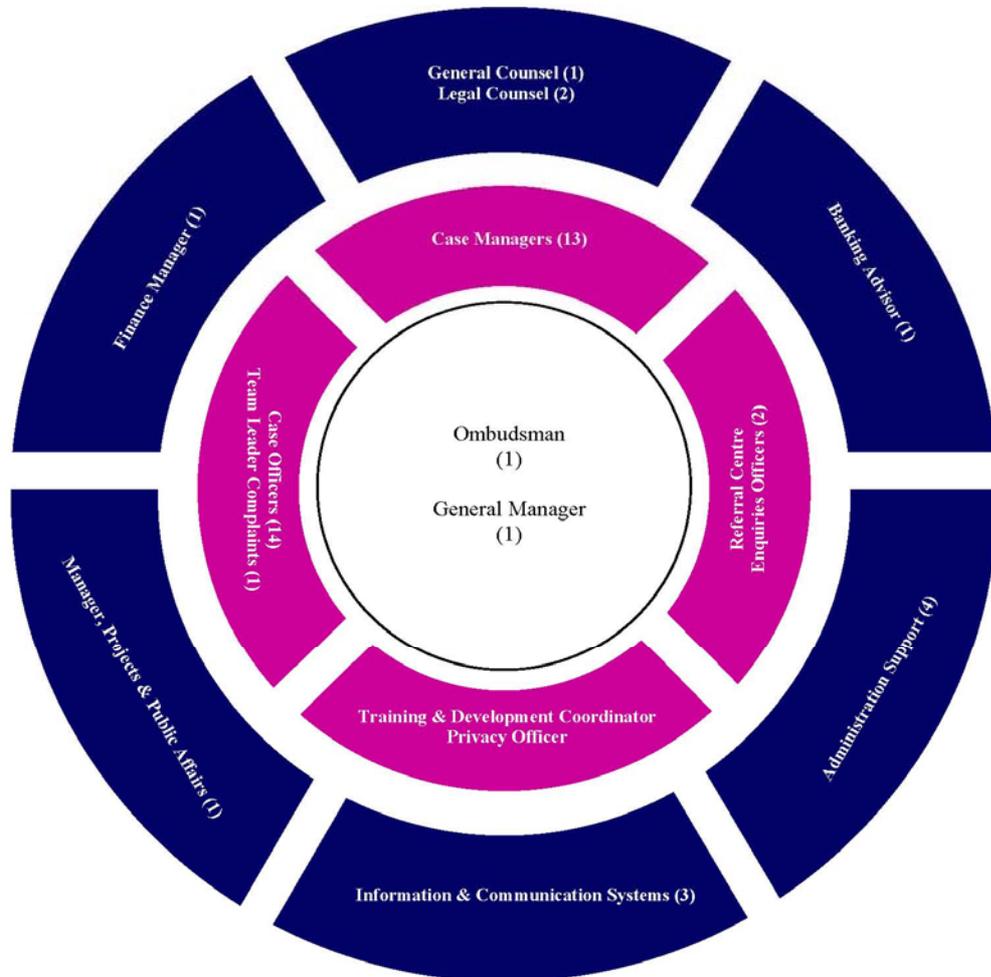
4.4.4 The advantages of this system are that:

- The Ombudsman knows exactly how much income there will be for the quarter and can be confident that it will be recouped from members, irrespective of the number of cases closed in a quarterly period;
- The allocation of cost between the members is based on the number of disputes dealt with for each member;
- Having several levels of closure with increasing costs encourages members to resolve cases at an early stage of resolution; and
- An increase in the annual budget is spread across all the levels of closure.

4.5 *The people – organisation chart and description of staff roles*

4.5.1 The following is an organisation chart followed by a description of staff roles and other information. They are current as at March 2004.

BFSO Organisation Chart



4.5.2 BFSO employs 45 staff who undertake a variety of jobs within the organisation. [Figures and descriptions are current as at March 2004]

Administrative Support (4) The administrative support staff provide personal assistant services to the Ombudsman and reception, mail and the maintenance services for the scheme. They contribute to case management by documenting all incoming correspondence to the office on the scheme's case management database.

Assistant to the Communications Systems Manager and the Information Systems Manager (1) The assistant to the communications and information system managers provides support to those managers.

Banking Adviser (1) The banking adviser provides advice to the Ombudsman and staff on banking practice standards, technical knowledge of banking and banking procedures and systems. The banking adviser is seconded annually from one of the banks.

Case Managers (13) Case managers are responsible for resolving disputes that have not been resolved at the initial referral and facilitation stage and which require investigation. They investigate disputes and resolve them through providing a written Finding, convening conciliation conferences and facilitating negotiation. One of the case managers also has responsibility for privacy issues.

Case Officers (14) Case Officers provide the telephone information and referral service of the BFSO. They classify and summarise written disputes, manage the initial referral and facilitation process and are also involved in investigating some disputes. One of the case officers is also responsible for coordinating the training and staff development program.

Communications Systems Manager (1) The Communications System Manager ensures the provision of quality telephone systems through the management of call flow traffic, the review and improvement of telephone processes, including the call centre service shared with other schemes, Banking Insurance and Investment Assist (BIIA). The communications systems manager is also responsible for the maintenance of the website, the electronic communication within BFSO as well as technical support for special projects.

Finance Manager and Company Secretary (1) The Finance Manager and Company Secretary is responsible for the preparation of the scheme's annual budget and arranging the funding of the scheme from members. Other responsibilities include the maintenance of all financial records and the company registers, the preparation of the scheme's financial statements and the payment of staff salaries and benefits.

General Manager (1) The General Manager contributes to internal management, BFSO policy, quality assurance in case management and the management of external relationships. The General Manager also monitors case managers' workload and undertakes case management in some disputes.

Information Systems Manager (1) The information systems manager has responsibility for the information technology infrastructure of the BFSO. The information systems manager also undertakes the statistical reporting for the performance of the scheme within the BFSO as well as to members, the Board and other stakeholder groups.

Legal Counsel (3) The legal counsel group, which includes the General Counsel, provides legal and jurisdictional advice to the Ombudsman and to staff and also provides quality assessment services to case managers and case officers to ensure all relevant legal and decision-making principles are considered during dispute resolution. The group also contributes to policy direction and to internal and external education. One of the legal counsel also has a role in liaising with non-bank members.

Ombudsman (1) The Ombudsman is the Chief Executive Officer of the BFSO whose principal powers and duties are to consider disputes within the Terms of Reference and to facilitate the satisfaction, settlement or resolution of such disputes.

Projects and Public Affairs Manager (1) The projects and public affairs manager is part of the team which develops internal and external policy, is responsible for management of all systemic issues, including reporting quarterly to ASIC, and coordinates the publication of BFSO materials including the scheme's annual report, and the development of the scheme's website.

Referral Centre Enquiries Officers (2) The referral centre enquiries officers are responsible for answering all calls received by the BIIA (Banking Insurance and Investment Assist) service. They direct callers through to the participating scheme with the most appropriate jurisdiction or to other more appropriate organisations.

Team Leader - Complaints (1) The team leader - complaints provides leadership and case management support to case officers, in addition to producing assessments of disputes and monitoring case officer's workloads.

4.5.3 **Code Compliance Monitoring Committee Secretariat (1)** The BFSO provides secretariat services to the CCMC. One person has been seconded from the BFSO to act as the secretariat, which was established in April 2004. The position is fully funded from the CCMC budget which is derived from fees levied on banks subscribing to the Code of Banking Practice.

4.5.4 The BFSO provides flexible working arrangements for staff including part-time, part day and additional leave working arrangements. 22 staff work under such arrangements and the flexibility of the working conditions has ensured that staff have been retained despite changing family and personal responsibilities, has contributed to the length of service of many of the staff and has attracted experienced staff from the professions, including the legal

profession. 19 staff members have been employees of the BFSO for more than 5 years. Of those 8 have been employees for ten years or more.

4.5.5 The skills and qualities required of and developed in staff involved in decision-making, including advisers, are impartiality, integrity, clear thinking and writing, the ability to analyse information and make decisions on the weight of the relevant information, a sound knowledge of contract principles and consumer protection legislation and good communication skills, as most disputants are not legally represented.

Chapter 5: The jurisdiction of the BFSO

5.1 Introduction: the Terms of Reference of the BFSO

5.1.1 The structure and operation of the scheme and the powers and duties of the Ombudsman are set out in the Terms of Reference and the Constitution.

The Terms of Reference describe:

- the scheme (Clause 1)
- the roles of the Ombudsman and his powers and duties (set out in the clauses referred to above and below and in clauses 4,11,12 and 13)
- who can be a disputant (Clause 2)
- the subject matter of disputes the Ombudsman can consider (Clause 3)
- the limits on the type of disputes the Ombudsman can consider (Clause 5)
- some requirements as to procedure (Clause 6)
- the remedies (Clause 7)
- the test case procedure (Clause 8)
- systemic issues requirements (Clause 9)
- the information that the Ombudsman must collect (Clause 10)
- the procedure for changes to the terms of reference (Clause 14)
- definitions (Clause 15)

5.1.2 The Ombudsman may make recommendations to the Board for changes to the Terms of Reference. Unless the changes are minor, changes may only be made after the Board has consulted with appropriate individuals and

organisations. The Board must consult with ASIC about all changes, including those identified as minor.

- 5.1.3 Clause 12.6 of the Terms of Reference provides that 'The Ombudsman may develop guidelines for the interpretation of these terms of reference.' Guidelines have been published by the BFSO since the early 1990s and the current guidelines were published in March 2002 to coincide with the publication of the current Terms of Reference. The purpose of the Guidelines, which are in effect annotated Terms of Reference, is to provide commentary on the application of the Terms of Reference. The Guidelines are designed to assist disputants, their advisers and financial services providers and also to ensure consistency in interpretation by staff of the Terms of Reference. The Guidelines may be amended from time to time but the Ombudsman must consult with ASIC before doing so.

5.2 *The jurisdiction of the BFSO in summary*

- 5.2.1 The Terms of Reference and the Guidelines to the Terms of Reference set out and discuss the jurisdiction of the Ombudsman in detail and provide information additional to that set out here. In summary, the BFSO has jurisdiction to consider disputes involving amounts of up to \$150,000 brought by an individual or small business, as defined in the Terms of Reference, that has received the financial service the subject of the dispute, has provided security over the financial service or whose information is the subject of a privacy dispute. The limit applies to each separate and unrelated claim brought by the disputant.

- 5.2.2 A financial services provider is defined as a member or a related body corporate of a member. An individual is defined as a natural person and, if the events took place after 11 March 2002, a small business is defined as an incorporated or unincorporated business having less than 100 full time equivalent employees, if a manufacturing business, or 20 full time equivalent employees if the business is of another nature.
- 5.2.3 The small business eligibility provisions of the Terms of Reference have changed over the years of the scheme's operation. For technical reasons to do with applicability of the Terms of Reference, different tests are applied to determine whether a small business is eligible to lodge a dispute, depending on the date of the events, which first gave rise to the dispute.
- 5.2.4 A dispute must relate to an act or omission by a financial services provider in relation to a financial service in Australia or in relation to confidentiality and privacy. A dispute is defined as a disagreement between a financial services provider and a customer of that financial services provider which has not been resolved and, if the disputant is an individual, a privacy issue. A non-customer who has provided security over a financial service or who has a dispute about privacy may also bring a dispute (Clause 2).

5.3 *Matters outside the jurisdiction of the BFSO*

5.3.1 The BFSO will not be able to consider a dispute in a number of situations set out in clause 5. They include that the dispute:

- Relates solely to a financial services provider's commercial judgement in a decision about lending or security, such as assessment of risk, the taking or release of security or a decision to lend or not, unless the dispute involves an act or omission in breach

of a duty owed at law, including a contractual duty. This means that the BFSO can consider a dispute about a decision to lend in circumstances where the appropriate standard of care was not observed, or a decision not to lend where, for example, a relevant representation was made or there was a duty of some sort owed to the potential borrower;

- Relates solely to a practice or policy such as an interest rate or fee-setting policy, unless an error is made in applying the policy or a breach of any obligation or duty or serious misconduct is involved, or at the request of the financial services provider;
- Is or has been the subject of court proceedings or is more appropriately dealt with by a court or in another forum;
- Relates to events which occurred more than 6 years before the first written notification of the dispute to the financial services provider;
- Involves a claim for more than \$150,000 or a claim that is part of or related to a larger claim involving more than \$150,000.

5.3.2 A court may be a more appropriate forum for a number of reasons including that:

- Evidence from a third party not willing to cooperate in the process is essential to the resolution of the dispute;
- The dispute is brought as a 'fishing expedition' to prepare for contemplated court proceedings;

- The decision turns solely on an issue of credit and it is more appropriate that the evidence be given on oath and tested by cross-examination;
- Resolution depends upon an inquiry into and a finding as to whether criminal conduct has taken place; or
- The dispute is more efficiently brought in conjunction with existing or contemplated proceedings involving third parties.

5.3.3 Difficult or unsettled questions of law are often relevant to dispute investigations and it is the role of legal counsel to identify the relevant principle of law. The fact that such issues are involved does not mean that the court is necessarily a more appropriate forum. Nevertheless, there may be cases where a financial services provider considers that an authoritative determination of a question of law is desirable and this is dealt with by clause 8 of the Terms of Reference.

5.3.4 Clause 8 sets out a test-case procedure. A financial services provider may give notice to the Ombudsman that the dispute involves an important or novel point of law or an issue which may have important consequences to the business of a member or financial services providers generally. The member must undertake to pay the disputant's costs of any proceedings issued within six months of the notice and seek to resolve the dispute expeditiously. On receipt of the notice and the undertakings, the Ombudsman must cease consideration of the dispute.

5.3.5 In practice the test-case provision is rarely used but it remains a safeguard for members who otherwise agree to abide by determinations of the scheme.

5.3.6 The Ombudsman has the power to decide whether a dispute falls within the terms of reference (Clause 6). That decision will involve consideration of any submissions made or further information provided by the disputant or the financial services provider and may involve advice from legal counsel. The Ombudsman's decision as to whether a dispute is inside or outside of the Terms of Reference is final.

5.4 *The monetary limit: its rationale, past increases and future considerations*

5.4.1 The BFSO was established with a monetary limit of \$100,000, which increased to the current limit of \$150,000 in March 1996. The then Chairman of the Council, the Hon Sir James Gobbo, AC, CVO, commented in the Annual Report that 'the increased limit broadens the coverage of this free service to more bank customers, ensuring the scheme remains able to deal with a wide cross-section of personal banking matters.'

5.4.2 Historically, only a small percentage of cases recorded by BFSO involve claims of more than the monetary limit. In 1991 it was 0.9%, in 2001 it was 1.17% and in 2003 it was 2.29%. This may reflect the fact that the monetary limit is easily communicated and understood.

5.4.3 For a dispute resolution scheme to be approved by ASIC and maintain approved status it must have coverage sufficient to deal with:

- The majority of consumer complaints in the relevant industry and the whole of the complaint; and

- Consumer complaints involving monetary limits up to a specified maximum that is consistent with the nature, extent and value of consumer transactions in the relevant industry [ASIC Policy Statement 139.34].

5.4.4 In assessing a scheme's monetary limit, ASIC will also consider:

- The nature of the complaints made to the scheme;
- The limits operated by other schemes with similar coverage; and
- The desirability of ensuring consistent coverage across schemes that consider complaints about similar products or services, or have a common membership. [ASIC Policy Statements 139.98 and 165.54].

5.4.5 Factors to take into account when considering the adequacy of the BFSO's monetary limit include:

- Increases in the size of housing and small business loans;
- Median house prices (houses are commonly the security for a guarantee);
- Rises in the inflation index (17.9% between June quarter 1996 and June quarter 2003);
- The Reserve Bank definition of small business lending (commercial loans under \$500,000);
- Expansion of disputant categories;
- The need to ensure that retail clients under the *Corporations Act* are able to access the scheme;
- Parity with other schemes; and
- Increases in jurisdiction of the lower and middle level courts (Magistrates' and District or County Courts).

- 5.4.6 The relevant amount in a BFSO claim is the amount in dispute not the size of the facility or the value of the product. However, where the claim is about issues such as maladministration in the decision to lend, guarantees, poor investment advice or negligence in arranging insurance there is likely to be a direct relationship between the size of the facility or transaction and the size of the claim.
- 5.4.7 The monetary limit for BFSO is generally equal to or greater than the limit for other schemes that cover similar products and services, with some exceptions. In life insurance matters, FICS can make binding determinations of up to \$250,000. IEC can make non-binding Recommendations for amounts between \$120,000 and \$290,000.
- 5.4.8 The jurisdictional limit of the District Court of New South Wales is \$750,000 in civil cases. The jurisdiction of the County Court of Victoria is \$200,000 in non-personal injury civil cases. Different considerations apply to court jurisdictional limits, however, it is important to bear those limits in mind when considering the monetary limit for a scheme that is intended to be an alternative to the courts.

5.5 Remedies available

5.5.1 A Determination of the Ombudsman can include:

- A sum of money which does not exceed \$150,000;
- Where the dispute involves a privacy issue, any other non-monetary requirement that may be made under s 52 of the *Privacy Act*; and

- An order for the provision of information relating to the subject matter of the dispute.

5.5.2 The Ombudsman may require a financial services provider to pay compensation to a disputant for loss or damage suffered as a result of the conduct of the financial services provider, up to a maximum of \$150,000. Compensation may take the form of an actual cash payment or its equivalent, which may include the reduction of a loan balance, the reconstruction of a loan or the reduction of an interest rate on a loan.

5.5.3 Non-monetary remedies may include a determination that a contract or a contract term is unenforceable or should not be enforced for reasons of law or fairness. Other non-monetary remedies may form part of a negotiated settlement. They may include refinance of a debt, the provision of a service at a discounted rate or fee, a written apology or an acknowledgment of error addressed, for example, to payees of wrongly dishonoured cheques.

Chapter 6: Dispute Resolution and decision-making processes

6.1 Accessing the BFSO

6.1.1 Potential disputants can contact the BFSO:

- By telephone using the Banking Insurance and Investment Assist shared telephone service: 1300 78 08 08 or TTY (03) 9613 7344;
- By fax: (03) 9613 7345;
- By writing: to GPO Box 3, Melbourne VIC 3001;
- By lodging the dispute online at www.bfso.org.au.

6.1.2 Banking Insurance and Investment Assist (BIIA) is a cooperative venture between BFSO, Financial Industry Complaints Service Limited and Insurance Enquiries and Complaints Limited. It provides customers with a single access number for assistance with enquiries covered by those three schemes and also the Credit Union Dispute Resolution Centre and the Credit Ombudsman Service Limited, formerly the Mortgage Industry Ombudsman.

6.1.3 The BFSO web-site provides an online dispute service, allowing disputants to submit a dispute directly to the web server via a secure encrypted area. The dispute form is accessed via a link on the 'Lodging your dispute' page. This page contains information about the process for lodging a dispute. This page also provides links to other information that may help the consumer with lodging a dispute, including the online Terms of Reference checker, which is an interactive question and answer process to help the user check that their dispute is within the BFSO's jurisdiction.

- 6.1.4 A TTY number allows callers with a speech or hearing impediment to converse via text. An interpreting service is available for callers whose first language is not English and arrangements can be made for written material to be translated so that disputants can send correspondence to the BFSO in their first language. The BFSO brochure is available on the website in 7 languages other than English.
- 6.1.5 When a person first telephones the BFSO, the case officer answering the call will assess whether the dispute is likely to fall within the BFSO's jurisdiction and if not will refer the caller to other organisations that may be able to assist. The case officer will encourage the caller to contact the member directly to try to resolve the dispute. The case officer provides the contact details of the area nominated by the member to deal with customer disputes. If the dispute appears to be within the BFSO's jurisdiction, the BFSO's postal and web site details are also provided so that the caller can lodge a dispute if they are unable to resolve it with the member.
- 6.1.6 As an FSR requirement, licensees are required to provide details of their external dispute resolution scheme to customers. In addition, under the Code of Banking Practice, banks are required to notify customers of the availability of the BFSO or other relevant EDR scheme at the same time as notifying them of the internal dispute resolution process - at the time the dispute arises and again at the time that the customer is told about the final outcome of the internal process if the customer is not satisfied with that outcome. Banks are also required to publicise prominently the availability and accessibility of both their internal and external process at all bank-controlled points of contact with customers including branches, Internet sites and telephone based banking services.

6.1.7 If a disputant is unable to lodge a written dispute the case officer will take the details of the dispute over the telephone and will then send a written record of the dispute for them to verify and sign. Disputants can also authorise an agent to bring the dispute and communicate on their behalf with the BFSO and the member. The agent may be a friend, family member, financial counsellor or other professional adviser.

6.2 After receipt of a written dispute

6.2.1 When a dispute is received the details of it are entered on to the BFSO's Case Information Management System (CIMS) (see Chapter 8 for more information about CIMS and other systems). Information recorded is:

- Case number;
- Disputant's name address and contact numbers;
- Member complained about;
- Short summary of the dispute;
- The amount claimed;
- Product code(s) for the product(s) complained about; and
- Problem code(s) for the problem(s) complained about.

6.2.2 The case officer then assesses whether the dispute is within the Terms of Reference and seeks advice if necessary. If it is not within the Terms of Reference, the BFSO writes to the disputant explaining why it is not within jurisdiction, providing appropriate contact details so that the disputant can pursue the dispute directly with the member and the contact details of any relevant agency or organisation that may be able to assist. In most cases the disputant is given the opportunity to respond if they believe that they can establish that the matter is within jurisdiction, for example, by clarifying the nature of the dispute or the amount claimed.

- 6.2.3 If the dispute appears to be within jurisdiction, the case officer will write to the disputant acknowledging receipt of the dispute and explaining the dispute resolution steps. The letter will enclose a brochure 'How to Resolve Your Dispute', which explains the BFSO procedures, the BFSO Privacy brochure and an authorisation form which the disputant must sign and return to the BFSO. This form enables the BFSO to obtain information from and disclose information to the member. An authorisation form is also sent if the disputant wishes to bring the dispute through an agent. The case officer will also write to the member to give it the opportunity to resolve the dispute before further consideration by the BFSO.
- 6.2.4 If the dispute is from a small business the case manager will also ask the business to sign a small business declaration and authority form which will enable an assessment to be made of whether the business is an eligible small business and will also identify the person authorised to discuss and resolve the dispute on behalf of the business.
- 6.2.5 If the dispute is from an individual and relates to an alleged breach of privacy, the disputant will be made aware of the option of referring the dispute to the Privacy Commissioner.

6.3 *Stages of Resolution: referral to and response by the member*

- 6.3.1 The member has 30 days in which to either resolve the dispute or provide a response to the BFSO addressing the issues raised by the dispute and providing any documents that are relevant to the dispute. An extension may be sought but reasons must be provided. Information about monitoring compliance with time limits is set out in 8.4.

- 6.3.2 There may also be exceptional circumstances where an earlier response or the fast tracking of the dispute generally will be required such as where the sale of a security property is imminent or the health of the disputant warrants a faster response.
- 6.3.3 The member must write to the BFSO with a response that confirms the outcome of its review of the dispute. The response will either be notification that the dispute has been settled with a copy of correspondence sent to the disputant or notification that the dispute has not been settled with details of the member's position.
- 6.3.4 If it appears to the case officer that the members' response may have resolved the dispute, the case officer writes to the disputant asking whether the response has resolved the dispute and if not asks the disputant to explain why they are not satisfied and provide any new or relevant information for consideration. If it then appears that the matter, although not resolved, may be able to be resolved fairly quickly, the case officer will refer the disputant's reply to the member for further consideration and may discuss the prospects for resolution with the member and the disputant. During this stage, as at all other stages, the member and the disputant are encouraged to seek to resolve the dispute with or without the assistance of the BFSO.

6.4 *Stages of Resolution: Investigation*

- 6.4.1 Where a case remains unresolved after it has been referred to the member and the member has responded, the case will move into the investigation process. It is placed in a Pending Investigation List to await allocation to a case manager. Cases are taken from the list consecutively by case managers unless the dispute raises issues more efficiently dealt with by a particular case manager who, for example, may already be investigating cases raising

the same issue involving the same member or where fast-tracking of the dispute is desirable. A number of case officers also undertake investigation of less complex cases and EFT Code cases.

6.4.2 When a case manager commences their investigation they will telephone or write to the disputant and the bank to:

- Outline their understanding of the dispute as put by the disputant and the member's response and asking for correction of any misunderstanding of either the dispute or the member's response ;
- Set out the legal, industry practice or factual issues they will be addressing in the investigation; and
- Request any further information necessary for the assessment of the dispute.

6.4.3 After the case manager has received the requested information, there are several ways in which the dispute may be resolved.

6.4.4 Negotiated Settlement

At all stages of a dispute it is open to the parties to negotiate a settlement of the dispute. The case manager will often facilitate a settlement by acting as a conduit between the parties. If a resolution is reached the terms of the settlement are set out in a Confirmation of Settlement form which is signed by the disputant and sent to the member. Sometimes the member will also require an additional Release and Indemnity. Disputants are encouraged to seek independent legal advice before signing either of these documents.

6.4.5 Conciliation Conference

At any stage a case may be referred to a conciliation conference with the Ombudsman or with the case manager or legal counsel. This can be done at the suggestion of the case manager or at the request of the disputant or the member. It is the Ombudsman's decision whether the case is suitable for a conciliation conference. If it is, the conference is arranged at a location geographically convenient to the disputant, so in practice conciliation conferences are held all over Australia. The disputant may attend alone or with a person that they trust and a legal representative may accompany them. The member must be represented by a bank officer with knowledge of the case and authority to settle it and may also have legal representation. If a resolution is reached the Heads of Agreement are recorded and a Confirmation of Settlement form will be sent subsequently to the disputant to sign. Disputants are encouraged to obtain independent legal advice before signing the Confirmation of Settlement and any other related documents.

6.4.6 Finding

If the case is not resolved during the investigation process, the case manager will write a Finding. The majority of cases referred to investigation result in a Finding, which is a written decision on the merits, with reasons. A Finding includes:

- A summary of the dispute;
- A summary of the issues raised by the dispute;
- The case manager's analysis of the information, any applicable legal principles, any relevant codes, the relevant standard of banking practice and fairness; and
- The case manager's conclusions about the merits of the dispute and how it should be resolved.

6.4.7 The Finding is sent to both the disputant and the member. Any documents relied upon in the Finding will either be available to the parties on request or attached to the Finding. Both parties have 30 days in which to accept or reject the Finding, providing reasons for any rejection. Acceptance is acknowledged by the signing of a Confirmation of Settlement form by the disputant (in cases where the Finding recommends the payment of money or other compensation to the disputant). Disputants are encouraged to seek independent legal advice if they have any concerns.

6.4.8 Most Findings are subject to a quality assessment process. This involves a review of the draft by legal counsel, the general manager or a senior case manager, who will check the Finding to ensure that it identifies and addresses the relevant issues, gives appropriate weight to relevant information and is clear.

6.5 *Stages of resolution: Recommendation*

6.5.1 A party rejecting a Finding must provide reasons which may include the following:

- There is some fact or matter relied upon in the Finding which is incorrect, including information provided by the other party;
- There is additional relevant information which may change the Finding;
- The analysis of the applicable law is incorrect; or
- Insufficient weight has been given to particular information.

- 6.5.2 The Ombudsman must notify the parties of his intention to issue a Recommendation. Either party is free to make further submissions about the matters in dispute and has 30 days to do so.
- 6.5.3 If a Finding is rejected and the dispute is not otherwise resolved, the Ombudsman will provide a Recommendation. This is a written decision with reasons taking into account the Finding, matters raised by either party in response to the Finding or the other party's reasons for rejecting it, and any required legal or industry practice advice.
- 6.5.4 The Recommendation is sent to both parties both of whom have 30 days to accept or reject it. If the disputant rejects the Recommendation, there is no further right of appeal and the disputant must pursue the dispute elsewhere. If the disputant accepts the Recommendation but the member rejects it, the Ombudsman will issue a Determination.

6.6 *Stages of Resolution: Determination*

- 6.6.1 A Determination is a decision of the Ombudsman, in writing, which sets out:
- A summary of the dispute and the member's response;
 - The Ombudsman's analysis of the case, including the application of the law, good industry practice, any relevant codes and fairness; and
 - The Ombudsman's conclusion about how the matter should be resolved.

6.6.2 The Determination is sent to both parties. If the disputant accepts it, it will be binding on the member. If the disputant rejects it, the Ombudsman's processes will conclude.

6.7 *Historical development and reviews of the dispute resolution processes*

6.7.1 The BFSO periodically reviews its processes to ensure that disputes are being dealt with efficiently and fairly. From the mid to late 1990s, the BFSO used a procedure known as the Initial View. It occurred prior to the Investigation stage and after the receipt of the member's response if the case officer's view was that the member's response appeared to address the dispute. The Initial View was an assessment of whether, on the information provided, the member's action, explanation or offer of settlement was reasonable.

6.7.2 The purpose of the Initial View was to give the disputant an early indication that a decision was unlikely to be in the disputant's favour and give the disputant the option of withdrawing the dispute or providing reasons why it should continue to be considered. It was also intended to encourage early and complete response by members to the dispute. If the disputant responded to the Initial View, the case was then referred to investigation. A related procedure, the ABIO View, was developed subsequently. It was an assessment of the disputant's response to the initial view followed either by closure of the case or referral to investigation. The Initial View and ABIO View procedures were discontinued in the late 1990s as a result of an internal review of procedures to assess efficiency and fairness and after representations by consumer advocates that they were confusing to disputants and could give rise to a perception that a case had been pre-judged.

- 6.7.3 At the beginning of October 1996, the BFSO set up a new process for reviewing disputes about electronic transactions using card and PIN, generally ATM and EFTPOS disputes. A team was established, headed by a senior case manager, with responsibility for all such cases. Team members reviewed disputes and made early contact with the member and the disputant to establish the issues and the relevant information. The subject matter of disputes managed by the team has broadened to include online transactions but the process has remained in place. The process has enabled the development of expertise in the detail and application of the EFT Code as well as the particular forensic skills involved in assessing whether a transaction was authorised and whether and how PIN security has been compromised.
- 6.7.4 In 1999, following the extension of the BFSO's jurisdiction to disputes from incorporated small business, the BFSO established special procedures for small business disputes and a small business team. These procedures, aimed at early resolution, included a second referral to the bank before investigation and an increased focus on telephone facilitation of resolution. In 2000, after a major internal review of procedures, the small business procedures were incorporated into the procedures for handling all disputes.

6.8 *Procedural fairness in practice*

- 6.8.1 The procedures of the BFSO are designed to ensure that the parties are given a reasonable opportunity to present their case and to have an independent decision provided in writing, with reasons, and logical analysis based on relevant information. Written reasons will clearly identify the documents or information relied upon, which will be annexed, sent to the parties, be available on request or clearly summarised in the decision. If a party requests that information be kept confidential from the

other party it will not be able to be relied upon in a decision adverse to the other party (see clause 6.4 of the Terms of Reference).

- 6.8.2 The investigation process is inquisitorial. This means that the case managers and the Ombudsman ask questions of the parties and require information from them. This is done in the context of a letter sent to both parties at the commencement of the investigation setting out a summary of the dispute and the member's response and the issues identified as relevant. The letter gives both parties the opportunity to correct the summary of the dispute and provide further relevant information.
- 6.8.3 Both parties may appeal the Finding and provide any new or additional relevant information, which is considered before the issue of a Recommendation by the Ombudsman.
- 6.8.4 The quality assessment process, described in 6.4 and 6.10 is designed to ensure that all relevant information is taken into account in reaching a decision, and is given its appropriate weight, and the decision is properly made on the balance of probabilities. The Ombudsman is not bound by the rules of evidence and may consider information provided by either party. It is important, therefore, to ensure that such information is given its appropriate weight.
- 6.8.5 There is an expectation that parties will participate in the process in good faith. In addition clauses 6.2 and 6.3 of the Terms of Reference allow the Ombudsman to require a member to provide any information the Ombudsman considers relevant to a dispute and require the member to comply with such a request as soon as reasonably practicable except where:

- to do so would be in breach of a duty of confidentiality owed to a third party; and
- the member has used its best endeavours to obtain consent to disclosure.

In addition, if legal professional privilege applies to documents the BFSO will not compel their disclosure.

6.9 Fairness in outcomes

6.9.1 The following figures are from the 2003 Annual Report. Of cases within Terms of Reference:

- 87% of disputes were resolved to the disputant's satisfaction by referral to the scheme member, which may include facilitated negotiation. This does not mean that the resolution was necessarily in the disputant's favour or involved monetary compensation, in some cases the explanation or further information given by the member resolved the dispute;
- 7% were resolved after a Finding, 3.3% by negotiated settlement 0.7% by a conciliation conference and 2% after a Recommendation.

6.9.2 The outcome of the 662 cases that were closed after an investigation by BFSO was as follows:

- The member's actions were considered correct in 41.1% of cases;
- The resolution benefited only the disputant in 28.1% of cases;

- The outcome benefited both the disputant and the member in 30.8% of cases.

6.10 *Expertise and independence of mind: staff training, support and advisory services.*

6.10.1 In addition to providing introductory training to all new staff and encouraging staff to attend external education seminars, the BFSO conducts an internal professional development program, involving approximately 20 hours a year of training and education. Sessions are presented by legal counsel, the banking adviser, the EFT team manager and external speakers. The content includes legal issues, industry practice related to specific products and services, the processes and principles of decision making and other relevant issues. All casework staff and advisers undergo mediation and negotiation training. Relevant post-graduate study is supported.

6.10.2 By way of illustration, the internal professional development program for 2004 includes presentations on:

- Water rights and state responses to the National Water Initiative;
- EFT Code training;
- Financial Services Reform: Compliance issues and potential disputes;
- Identifying legal issues;
- The law relating to decision-making;
- Investigating disputes;
- The law of cheques;
- Credit cards: banking practice and principles;
- Consumer Credit Code;
- Decisions under the Code of Banking Practice; and
- Information sessions on the BFSO quarterly Bulletins

- 6.10.3 The BFSO has three legal counsel, including the General Counsel to the Ombudsman, and one banking adviser. As well as formally requesting written legal and industry practice advice, staff are encouraged to discuss cases with the advisers and the General Manager at any time. Such discussion may include checking that relevant issues are being addressed, seeking advice on questions to ask the parties and assessing the relevance and effect of a particular piece of information. The quality assessment process is not limited to review of draft decisions but includes work-in progress discussions where desired by the case officer or case manager and review of draft correspondence. The Team Leader - Complaints is also available to provide advice to case officers on case assessment and recording and on draft correspondence.
- 6.10.4 Case officers and case managers have monthly meetings to discuss administrative and procedural matters, emerging issues and difficult or unusual cases.
- 6.10.5 The BFSO holds a staff planning day. Topics discussed on previous planning days include future directions, organisational issues and the goals of the organisation. In addition most staff attend the annual BFSO Members Conference which is described in more detail at 7.2.3.
- 6.10.6 The workplace culture is cooperative and focussed. Although it is difficult to prove conclusively, it appears that the availability of flexible working arrangements also enhances productivity, commitment and the efficient management of the workload.
- 6.10.7 How is independence of mind maintained when a scheme is funded by industry? This is a question that is raised by some disputants and their representatives and reflects a legitimate concern with ensuring that the processes and outcomes of EDR schemes such as the BFSO are fair. In the

case of the BFSO, a number of structural and procedural factors operate to ensure that the Ombudsman and his staff are able to make independent decisions and are supported in maintaining independence:

- The Ombudsman is appointed by and answerable to a Board, with equal representation of industry and consumer directors and an independent Chairman, of a company that is independent of the members of the scheme;
- The staff are employed by the company and answerable to the Ombudsman not to the members. The Board does not and cannot interfere in decisions about individual cases made by the Ombudsman or his staff;
- The scheme is accountable to ASIC, which is an independent government agency, as well as being generally accountable to the Australian community;
- Quality and fairness in decision-making are assisted by the quality assessment processes of the BFSO;
- Decisions about changes to the terms of reference are the subject of consultation with government, industry and consumer representatives;
- The policies, procedures and operations of the scheme are transparent and information about them is available on the web site. Case studies are published in the Annual Report and from time to time in the Bulletins issued by the scheme; and

- All staff involved in decision-making receive training in the principles of natural justice and their application. Independence is reinforced by the Ombudsman and by the culture of the organisation. Staff are supported in asserting independence where necessary.

Chapter 7: Raising Standards: Ancillary roles of an EDR scheme

7.1 Identifying and resolving systemic issues

7.1.1 The BFSO Terms of Reference (clause 9), and ASIC Policy Statement 139, require the BFSO to identify systemic issues and serious misconduct, obtain a response from the relevant member and report to ASIC. In practice, the BFSO has for some time informally addressed systemic issues identified in disputes.

7.1.2 In broad terms, a systemic issue is an issue, which will have a material effect on a class of individuals or small business beyond the parties to the dispute. Serious misconduct is conduct that may be fraudulent, grossly negligent or involve wilful breaches of applicable laws.

7.1.3 Examples of systemic problems might be:

- Inadequate or misleading disclosure in documents given to customers relating to a particular product or service;
- Application of an undisclosed or inadequately disclosed fee or charge to customers' accounts or application of a fee in breach of the Consumer Credit Code;
- Breaches of privacy affecting a group of customers caused by system malfunction or human error.

7.1.4 Examples of serious misconduct might be:

- Repeated failure to comply with the member's obligations as a BFSO member or to comply with a relevant Code or law.

- Unwarranted threats or seriously inappropriate behaviour towards a customer.

7.1.5 Systemic issues are identified as early as possible and:

- Recorded in the systemic issues register by the BFSO Systemic Issues Manager as possible systemic issues;
- Notified to staff so that they can identify cases raising the issue;
- Referred to the member for a response, including information necessary to determine whether a systemic issue in fact exists and, if so, what solution is proposed to rectify the issue and identify and compensate affected customers;
- If confirmed as a systemic issue, a 'notable case code' is created on the BFSO case management database for all cases which raise the issue;
- Discussed with the member with the aim of resolving the issue, including any necessary system or training changes; identification and compensation of affected customers including any necessary advertising; communication with affected customers about the issue; and a time frame for implementation.

7.1.6 Systemic issues' reporting is described in 8.6 below. Although systemic issues' reporting is relatively new, the process described above appears to be resulting in improvements in systems and standards in areas affecting classes of customers which may be large in number and benefiting customers beyond those who bring disputes to the BFSO. The level of cooperation from members is generally high and the response time good.

Rectification of a systemic issue will of course minimise the risk of a class action or regulatory action but the process and its benefits in terms of customer satisfaction and the maintenance of trust appear to be well understood by members.

7.2 Member and external education

7.2.1 The BFSO contributes to the education of members about issues raised in disputes and dispute resolution processes in a number of ways.

7.2.2 The Ombudsman and his general manager, legal counsel, and EFT team leader make presentations to and conduct training workshops with bank staff on a regular basis on issues such as the EFT Code, the procedures and processes of the BFSO and other relevant issues as they arise. In addition, presentations and guest lectures on the role of the BFSO are made to universities, professional associations, community groups, banks and at alternative dispute resolution forums. In the year 2003, BFSO was involved in 46 such presentations or training.

7.2.3 The BFSO was the first EDR scheme to hold a members' conference. The annual members' conference is a two-day conference principally for members of the scheme, but also for consumer advocates and BFSO staff. During the two days the Ombudsman, staff and guest speakers from government, industry and consumer groups provide up-to-date information about changes, trends and issues affecting the industry, consumers and dispute resolution. The content of the conference includes regulatory developments, consumer perspectives on industry issues and practice, emerging legal and industry practice issues and a series of interactive workshops with case studies and discussion presented and facilitated by BFSO staff. Speakers are senior industry, government and consumer representatives, the Ombudsman and BFSO staff members. The

conference is an opportunity to bring together the dispute resolution and customer relations professionals across all members and for them to discuss issues not only with the BFSO but also with each other.

- 7.2.4 Since 1994 the BFSO has published a quarterly Bulletin which is addressed to all members and other interested stakeholders or observers and is available on www.bfso.org.au . The content of the Bulletin has changed from its early years, when it was principally information to members about the scheme, its procedures and the development of its policies. It has developed to include more legal content and detailed discussion of emerging legal and industry practice issues and contains information and principles aimed at assisting members to identify and resolve disputes. Special Bulletins focus on a particular issue such as relationship debt, the EFT Code, Internet banking and the duty of a mortgagee on sale.
- 7.2.5 Some Bulletins have been produced in cooperation with external organisations: the 2001 Special Bulletin on Disability, Incapacity and Banking Issues was produced jointly with the Victorian Civil and Administrative Tribunal, Guardianship and Administration List and the Office of the Public Advocate and involved consultation with the Australian Guardianship and Administration Committee. The 2001 Youth and Banking Issues Bulletin was produced in cooperation with the South Australian Department of Consumer and Business Affairs. The Bulletins are a useful resource not only for those interested or involved in the work of the scheme but also for students and teachers who may find them relevant to the curriculum.
- 7.2.6 The BFSO Policies and Procedures Manual, which is available on the website, contains an explanation of the procedures as well as the policies followed by the BFSO in relation to particular types of disputes which frequently arise in the financial services sector. They provide commentary

on the legal principles and industry practice issues that apply to those disputes and may set out the questions that will be asked in an investigation. The policies are designed to alert both disputants and members to the approach that will be applied to particular kinds of disputes to encourage the parties to resolve the issue without necessarily involving the BFSO. They also assist transparency and consistency in the decision-making processes.

7.3 Contributing to policy development

- 7.3.1 EDR schemes such as the BFSO receive and resolve disputes involving a particular industry. This has the inevitable and desirable consequence of the development of expertise in the legal and industry practice issues relevant to that industry. It also enables a scheme such as the BFSO to see patterns in disputes - practices and the consequences of those practices that appear to be industry wide and which might well be addressed by regulatory or legislative change or industry initiative. The BFSO contributes to the development of government and industry policy in the financial services sector by providing submissions to government reviews and law reform discussion papers and by participating in consultation on the development and implementation of codes such as the EFT Code and the Code of Banking Practice. Recent submissions include a submission to the Review of the *Insurance Contracts Act 1984 (Cth)*, available at www.icareview.treasury.gov.au .
- 7.3.2 The BFSO also contributes to policy development through the participation of the Ombudsman and senior staff in committees or councils such as the Commonwealth Consumer Affairs Advisory Council and the Law Council of Australia.

7.3.3 BFSO Bulletins may also raise emerging issues about which policy debate is desirable. In some case the BFSO will then facilitate discussion of those issues at a relatively high level. For example, Bulletin 35 published in September 2002 discussed emerging issues in electronic banking disputes. The issues raised were discussed at a Forum held in Sydney and Melbourne in 2003 attended by government, industry, consumer and academic representatives. The outcomes were reported in Supplementary Bulletin 39 published in September 2003.

Chapter 8: Systems, Data Collection and Reporting

8.1 *The use of technology in the BFSO processes*

- 8.1.1 BFSO uses a purpose built Case Information Management System (CIMS) to log and track all telephone enquiries and written disputes. The CIMS application has been continually developed and improved since the scheme's inception in 1990.
- 8.1.2 In 2000, CIMS was rebuilt on a commercially available database engine. By using a commercially available database in which to store the data, BFSO is able to use sophisticated 'off-the-shelf' reporting tools to provide both external stakeholder reporting and internal management reporting.
- 8.1.3 The BFSO telephone systems are based on a Nortel Meridian Option 11 PABX. The PABX has an integrated Automatic Call Distribution function (ACD) and a Voice Mail service. ACD queues are managed via the Avotus Control Centre software package. Incoming calls are distributed to the BFSO case officers via the Banking, Insurance and Investment Assist Call Centre (BIIA). BIIA is a joint venture between the BFSO, Insurance Enquiries and Complaints Ltd and Financial Industry Complaints Service Ltd. BIIA provides a single access point to consumers via a 1300 service to the services provided by the participating schemes. BIIA also switches calls for the Credit Ombudsman Service Ltd and the Credit Union Dispute Resolution Centre.
- 8.1.4 Calls are transferred to the BFSO Enquiries queue by the BIIA staff. If case officers are on other calls, callers receive an on-hold message via the telephone system message service (Miran). Appropriate messages are provided to callers at designated intervals. Case officers are alerted to

waiting calls by intrusive pop-up messages on their desktop, and the supervisor receives notification of waiting calls via a queue monitor.

8.1.5 In addition to the lodgment of disputes by mail and facsimile, users of the scheme are also able to lodge disputes online via the BFSO website. The user completes an online dispute form and the dispute is then recorded in CIMS as a new case and given a case number. An interactive 'jurisdiction checker' enables a potential disputant or their adviser to check whether a case is likely to be in or outside the jurisdiction of the BFSO by answering a series of questions about the dispute. 28,616 hits to the website home page were recorded from the beginning of September 2003 to the end of March 2004.

8.1.6 Online subscription research resources and selected Internet sites are available to all staff from their desktop computers and are used not only for research on cases but also by case officers to enable appropriate and accurate referral information to be provided while on the telephone to callers. For security reasons, general Internet access is limited to one PC located in the library. A Lotus Notes based Knowledge Management System has been developed and was implemented in May 2004. Use of technology is subject to an e-mail, telephone and Internet policy document that was developed in consultation with staff.

8.2 *Collecting and recording of case information*

8.2.1 All telephone enquiries received by BFSO case officers are logged into CIMS, recording the following data:

- Basic demographics of the caller (gender, postcode, whether disputant is an individual or a small business);

- Name of member being complained about;
- The financial product category being complained about and the problem category raised;
- How the caller found out about the scheme.

8.2.2 All written disputes are entered into CIMS. BFSO records the following addition information for written disputes:

- Name and address;
- A summary of the issues raised by the disputant;
- Amount of compensation sought (and at the closure of the file the amount of any compensation paid, if known);
- Detailed codes for each product/problem combination raised by the disputant;
- Details of any systemic issue raised by the dispute; and
- Details of any alleged breach of the Code of Banking Practice.

8.2.3 In addition to the above core information, CIMS also provides diary recording of contact with the parties, actions taken or requested, or action to be taken at a future date. CIMS records the relevant dates and the current status of the case; and facilitates the generation of all outbound correspondence by connecting with a set of standard letter templates.

8.2.4 Status codes record where the case is in the process and the level of complexity of the case and facilitate both the quarterly assessment of a member's funding contribution and the monitoring of time performance targets for each stage. Problem and product codes enable the relative proportion of disputes about particular products and problems to be identified.

8.2.5 Case officers and managers also record keywords for cases describing the legal or industry practice issues raised. Keyword searches can be made by staff to find other cases raising similar issues and to facilitate consistency of approach and the efficient use of legal or industry practice advice.

8.3 *Reporting to stakeholders and the public*

8.3.1 To Bank members:

- Summary information regarding open and recently closed cases is available from a secure, members-only area of the website;
- Monthly Case Listing Reports (Open, Provisional and Closed case listings) are available each month from the secure area of the website;
- A statistical summary is provided to each member quarterly, with comparison data based on the relevant statistics of the major four banks, other bank members and all bank members. In addition to the statistical data which covers numbers of cases received, closed and open as at the end of the period, the quarterly reports include a full list of all cases closed and charged during the quarter, including the indicative cost for each case; and
- A more extensive statistical summary is provided to each bank member covering the half-year and the full year.

8.3.2 To Non-bank members:

- Monthly Case Listing Reports (Open, provisional and Closed cases listing); and
- Quarterly and half-yearly reports: these are in a more limited format than for bank members because the diversity of the non-bank members makes comparative data less meaningful.

8.3.3 To management and staff:

- Monthly Summary Statistics for Open, Provisional and Closed cases at the different levels, including performance against Key Performance Indicators (KPIs - discussed below). Some reports are run on a daily basis to enable close supervision by management of selected KPIs. The Monthly Summary Statistics reports are provided to all staff;
- Separate reports for individual case officers and case managers are produced to enable management of individual staff performances. Each case officer and case manager is provided with their own statistical summary, which includes some comparative data to enable them to benchmark against their peers;
- Exception reporting is regularly undertaken to ensure that any anomaly in case processing is identified early.

8.3.4 To the Board:

A statistical summary is provided to all Board members prior to each quarterly meeting, accompanied by an explanatory memorandum.

8.3.5 To ASIC:

ASIC receives a quarterly statistical summary report and a quarterly systemic issues report (referred to in more detail in 8.6).

8.3.6 To external stakeholders and the public:

BFSO publishes an Annual Report, also available on its website, which includes extensive statistical and prior year comparative information covering such matters as:

- demographics of users;
- analysis of telephone calls received;
- new cases received;
- outcome of closed cases and relative levels of closed cases;
- case resolution times;
- analysis of products and problems; and
- disputes outside the Terms of Reference.

The Annual Report also contains illustrative case studies and a summary of systemic issues with case studies.

8.3.7 Statistical information is also regularly provided to other interested parties (for example consumer groups), and member organisations are encouraged to use the BFSO's statistical reporting capabilities.

8.4 Monitoring members' compliance

- 8.4.1 To ensure members comply with their obligations to the scheme and to enable exceptions to be addressed promptly, an automated follow-up diary system is integrated into CIMS which case officers and case managers use to follow up any response that has not been received by the due date.
- 8.4.2 Members receive a list of cases where the initial response is overdue by more than 15 days. This list is faxed each month.
- 8.4.3 The Ombudsman and General Manager will also follow up with members any issues or anomalies that appear in the statistical information reports. These discussions may also include observations about patterns of problems with particular products or areas of the member, which have come up at case officers or case managers monthly meetings.

8.5 Performance targets

8.5.1 BFSO has implemented the following case management KPIs. They are reviewed regularly to ensure they remain relevant:

- 97% of all cases received in the enquiries area to be answered: that is, the abandonment rate to be no greater than 3%;
- 95% of cases identified for investigation to be allocated to a case manager within 30 days;
- 80% of all cases to be finalised within 120 days;

- 80% of cases allocated for investigation to be finalised within 180 days of allocation to a case manager. This KPI is currently under review and will change to more accurately capture investigation time requirements and to reflect the increasing complexity of investigated cases. This increasing complexity appears to be a result of a higher resolution rate at the initial referral and facilitation stage than in recent years.

8.6 Recording and reporting systemic issues

- 8.6.1 The identification and resolution of systemic issues is described in 7.1 above. Systemic issues are recorded in two places - the systemic issues register maintained by the Systemic Issues Manager and by use of the systemic issues code in the CIMS record of individual cases in which a systemic issue is raised. A systemic issues code is created for each systemic issue identified to enable cases raising the same issue to be identified and monitored as part of the resolution of the particular systemic issue.
- 8.6.2 The obligation to report to ASIC is an obligation to report all satisfactorily resolved and rectified systemic issues without identifying the member but including the nature of the issue and the numbers of instances involved. In the case of unresolved issues where the member has failed to respond adequately and has been given 10 days notice, the BFSO must report the identity of the member, the details of the issue, the action taken by BFSO and the response by the member.
- 8.6.3 Reports are quarterly. In the last quarter of 2003, for example, the report included 2 new confirmed systemic issues, 2 new possible systemic issues still under investigation, and 3 systemic issues identified as possible systemic issues in the last quarter 1 of which had been confirmed and rectified. The confirmed systemic issues included a member's method of

calculating early repayment costs on a fixed rate loan, incorrect information on home loan statements and a misrepresentation as to available funds on credit card accounts where cheques had been dishonoured but were included in available funds. No cases of serious misconduct have been identified in disputes to the BFSO.

Chapter 9: Reviewing Performance

9.1 Introduction

9.1.1 Since its inception, the BFSO has carried out, commissioned or been involved with a number of reviews and surveys of its operations and performance.

9.1.2 The reviews and surveys carried out to date have resulted in changes to the BFSO's jurisdiction, procedures, operational processes and communications. These are discussed in Chapters 3, 5 and 6.

9.1.3 This chapter will focus on the 2003 Board Review and the Stakeholder Survey, including a comparison with previous surveys.

9.2 Board Strategic Review 2003

9.2.1 In December 2002, the BFSO Board commenced a strategic review of the scheme, which concluded in June 2003. An independent consultant, Ms Fiona Guthrie of Creative Sparks Pty Ltd, facilitated the strategic review. It followed on from a review of the structure of the scheme carried out in 1999 which led to the abolition of the dual governing structure of Board with bank members and an independent Council and extension of the Terms of Reference to related companies of banks together with a major review of the content and arrangement of the Terms of Reference.

9.2.2 The Board reviewed:

- International developments and models;

- The structure and membership of the BFSO and any required changes to the Constitution;
- The role and function of the BFSO;
- The performance of the BFSO;
- The jurisdiction of the BFSO; and
- The development and improvement of the scheme and its communication with stakeholders.

9.2.3 As part of the strategic review, the Ombudsman and the Chairman of the Board engaged in Australia-wide consultation meetings with stakeholders over a six-month period beginning in March 2003. They met with Chief Executive Officers of a number of member banks and otherwise with senior bank representatives, Government and Opposition parliamentarians with financial services responsibilities, senior officers of government regulatory agencies and consumer advocates.

9.2.4 As a result of the Review, the Board resolved to:

- Change the Constitution to enable a separate non-bank membership to be created (effective August 2003);
- Change the name of the scheme to reflect the expansion of membership and the fact that banks are now involved in the supply of financial services products other than banking products (effective August 2003);
- Consider an increase in the monetary limit of the scheme (the issues are referred to in Chapters 5.4 and 10.1);

- Commission a stakeholder survey and research report (implemented August to October 2003 and referred to in more detail below);
- Develop the scheme's information analysis capability (implemented September 2003); and
- Review the scheme's communication and awareness strategy (see Chapter 10.1)

9.3 The 2003 Stakeholder Survey

9.3.1 In 2003, as an outcome of the strategic review referred to above, the Board of the BFSO commissioned the Wallis Consulting Group Pty Ltd to undertake a study of the following stakeholders:

- The general public (1000 participants);
- Consumers who had telephoned the BFSO (telephone enquirers) (501 participants);
- Consumers who had used the BFSO dispute resolution processes (452 participants); and
- Customer Relations Departments of banks (35 participants).

9.3.2 The objectives of the study were to:

- Measure levels of customer service delivered to stakeholder groups;
- Compare BFSO performance against benchmarks for industry-based alternative dispute resolution schemes (Department of Industry Science and Technology (DIST) Guidelines;

- Provide feedback on current performance to assist preparation for future external review; and
- Provide information about awareness levels and understanding of the BFSO.

9.3.3 Each of the stakeholder groups identified were surveyed separately using separate tailored questionnaires with common questions included wherever possible. The methodology used for the general public, telephone enquirers and disputants was telephone interviewing. Members of the bank's Customer Relations Departments were surveyed using an Internet-based survey method.

9.3.4 The key findings from the research report are Appendix 3 to this Background Paper.

9.4 Action arising from the 2003 Stakeholder Survey

9.4.1 The 2003 stakeholder survey results indicated a number of areas where steps could be taken by the BFSO to improve perceptions and awareness of the scheme. The following is a general summary of those areas and the steps taken or to be taken. A number of issues have been identified for Board consideration and these are summarised in Chapter 10.1. A comparison with previous surveys is set out in 9.5 below. To assist with future comparisons, the Board has resolved to repeat the survey every two years, asking at least the same questions.

9.4.2 A significant number of telephone enquirers (46%) and disputants (37%) had expected the Ombudsman to act as an advocate on behalf of the enquirer or disputant. A review of brochures and material issued in

writing by the scheme has commenced in order to ensure that the fact that the Ombudsman is a neutral 'umpire' and not an advocate is clear.

9.4.3 Whilst the picture of the BFSO staff that emerges from the survey is that of generally efficient, courteous, and motivated to help, a minority of respondents felt they were not treated in an empathetic or sympathetic way. There is undoubtedly a difficult balance between expressing empathy, which is often sought by disputants, and maintaining independence. The role of the Ombudsman is to be a neutral umpire - overt empathy or sympathy, unless carefully communicated, can be taken as agreement with the disputant about the merits of the claim and can, if reported to the member by the telephone enquirer, be seen as a pre-judgement of the issues in dispute. The survey results in this respect might well be related to the reported expectation of a number of telephone enquirers and disputants that the Ombudsman would be an advocate - an advocate is expected to be 'on your side'. It is proposed that external consultants whose services have been previously used in the BFSO enquiry centre, spend time listening to the manner in which staff members communicate with the aim of helping staff communicate the positive role of the Ombudsman whilst making clear the boundaries of the role of the scheme. The results also raise a broader issue of the importance of clear roles for the different services available to consumers of financial services and clear communication of those different roles. This is a challenge not only for the BFSO but also for all dispute resolution schemes, regulators and advocates.

9.4.4 In respect of disputants, a review of the written material provided by the scheme has commenced to ensure it is easily understood and makes clear what can and cannot be done by the BFSO. In addition, case managers have been encouraged to advise disputants of the result of an investigation

by telephone and explain the reasoning in all cases where an oral explanation can be efficiently given.

- 9.4.5 Levels of awareness of the scheme amongst 18 to 24 year olds requires specific attention. The BFSO is already a participant in the Youth Access Line Project, which is a joint venture between nearly all industry-supported dispute resolution schemes in the financial services, telecommunications and energy and water areas. This service is provided through a single toll-free number, which connects to the various schemes and is managed by the BFSO. This method of contact will continue to be promoted through TAFE Colleges and Universities and other methods of promotion to non-students may need to be considered.
- 9.4.6 Communication of the procedures and role of the BFSO and of the progress of cases to members of the scheme needs to be reviewed. At present information about the Terms of Reference, the procedures and the content of the Guidelines to the Terms of Reference are communicated at annual members' conferences and at member-specific seminars organised by the scheme, as well as being available on the website. The secure section of the BFSO website now provides up to date information concerning the status in the office of all cases for the particular member, including information about the last action taken and when it was taken. As staff in the customer relations or dispute resolution areas of the member change, however, and especially where dispute resolution or debt collection services are provided to members through outsourced services such as firms of solicitors, there is the possibility of awareness gaps. It is therefore proposed that in addition to the annual conference, two workshops a year be held for members, with external solicitors or service providers being encouraged to attend, and any advocacy groups such as Community Legal Centres who would be interested in attending in-depth workshops.

9.4.7 The survey results indicate a need to increase awareness of the BFSO, communicate its new role and clarify its powers and boundaries. In some ways, the time when information about the scheme is most needed is when a dispute arises but it is also important that customers of financial services providers are generally aware of EDR schemes and, where relevant, the BFSO. The scheme during its history has regularly been involved in presentations and the provision of information to the professional groups likely to have resort to the services of the scheme on behalf of their clients. The new Code of Banking Practice, which came into operation in August 2003, requires banks to advise customers of the existence of the relevant scheme both at the time a dispute arises and when the bank's investigation is concluded. This should assist in raising awareness of the scheme amongst bank customers, as should the FSR requirement for licensees, including banks and non-banks, to provide information about available external resolution schemes to retail customers. At the time of the survey, the new website had only been in operation for a few months. Given the levels of public access to the website, it is hoped that future surveys will reflect the fact that the website provides easily accessible information about the scheme. In addition, the possibility and format of a public communications campaign will be considered.

9.5 Comparison with other surveys

9.5.1 As an internal project, the results of the 2003 survey were compared with previous surveys, in 1999, 1996 and 1995. The sample size in each survey varied, as did the terminology – reflecting in part the changes in the scheme's process and the terminology used for those processes. In addition, identical questions were not used in all the surveys - there were some similarities but the comparisons below are necessarily approximate. The 2003 survey also covered a number of issues not included in previous surveys, such as respondents' experiences of bank customer relations

departments and bank perspectives of BFSO operations. While consistency of survey format would have enabled direct comparisons to be made, it is also important to ensure that developments in survey methodology and increasing knowledge of the impact of different forms of questions are taken into account. Nevertheless, as referred to in 9.4 above, the Board of the BFSO has resolved to carry out a survey every two years, using at least the same questions asked in the 2003 survey, to assist in future comparisons.

9.5.2 *Awareness of the general public*

This was tested in 1995 and 2003. Both surveys used a three-stage questioning involving 'top-of mind- awareness', 'unaided awareness' and 'prompted awareness' but the questions asked were slightly different. In both surveys levels of unprompted awareness were highest among people based in Victoria and lowest among young people (18 to 24 years). The results otherwise suggested that awareness overall has increased by a significant number of percentage points since 1995.

9.5.3 *Source of information*

In all the surveys respondents were asked a question along the lines of 'How did you become aware of the scheme?'. Responses were categorised differently across the surveys. The results show a continuing high reliance on, and possibly a higher effectiveness of, informal sources such as word of mouth. The level of reliance on the media appeared to have decreased over time although it may well form part of the background to 'just knowing' about the scheme. Scheme users are much more likely to hear of the scheme from their bank compared to the general public, which is consistent with the principle more recently embedded in the Code of Banking Practice – that a bank should tell its customers about the existence of the scheme

when a dispute is first raised with the bank and again if it remains unresolved.

9.5.4 *Expectations and perceptions*

There were no direct comparisons across the surveys, however, both the 1995 survey and the 2003 survey suggested that there is a low level of awareness of the limitations on the BFSO's jurisdiction and that it was commonly perceived that the role of the BFSO was or should be to be an advocate. In one respect, perceptions of the general public of the independence of the Ombudsman, a comparison could be made. In 2003, compared to 1995, a significantly higher proportion of those surveyed agreed with the statement that the Ombudsman is independent and impartial (88% to 75%). The results for users of the scheme showed less of an increase – in 2003, 75% of telephone enquirers and 77% of disputants agreed with the statement compared with 71% of users in 1995. The level of disagreement for BFSO users with the statement has however significantly decreased – 4% in 2003 compared to 17% in 1995. In 2003 there was a higher proportion of neutral/don't know answers.

9.5.5 *Telephone service and BFSO staff*

Meaningful comparisons were not possible given the different rating systems and questions used.

9.5.6 *Time taken to resolve disputes*

The results were roughly comparable and suggested a considerable improvement between 1996 and 2003 in the proportion satisfied with the time taken to resolve their dispute (from 62% to 77%). In both 1996 and

2003 the level of satisfaction with the time taken was highest for matters that were resolved with the bank prior to investigation.

9.5.7 Overall satisfaction with BFSO

The 2003 survey used a different rating system which makes comparison only very approximate and dependent on how the earlier rating system (1-10) is translated to the 2003 rating system (very dissatisfied to very satisfied). As an approximate conclusion, however, the overall level of satisfaction with the scheme appears to have increased since the mid 90s.

9.6 Other forms of feedback

9.6.1 The statistical information provided to staff, which is described in Chapter 8.3, enables staff members themselves to monitor performance, both their own and that of their area as a whole. In addition staff receive more informal kinds of feedback from disputants such as letters of appreciation or letters expressing discontent with the process, the time taken or the decision. The fact that some disputants send the latter suggests that although they might feel frustrated or unhappy, they are not intimidated by the process and are willing and able to express any discontent.

9.6.2 The BFSO uses an external consultant who assists in monitoring the performance of the telephone service and suggesting improvements. The consultant also provides training for new staff in communication skills and telephone techniques so that they can respond appropriately to a caller, can, within reason, control a telephone call and can elicit the information required to provide a professional service to the caller.

Chapter 10: Future planning for the Board of the BFSO

10.1 *Issues for the future*

10.1.1 The BFSO has now been in operation for fourteen years. It has been approved as an external dispute resolution service by ASIC within the framework of the regulation of financial services providers. It has engaged in a regular process of internal and external review of its operations and procedures, including the current review, and has evolved both in its jurisdiction and its processes.

10.1.2 The current review is focussed on the extent to which the operations and procedures of the scheme are meeting the criteria set out in ASIC Policy Statement 139. As such it is part of a process of continual review and improvement undertaken by the Board and the Ombudsman and staff of the scheme. As mentioned in 9.2, in 2003 the Ombudsman and the Chairman of the Board engaged in extensive consultation with stakeholders and the Board commissioned a survey of stakeholders. In addition to the issues that are the focus of the current review, the Board has identified a number of issues for the future. Some of these have come out of the Stakeholder Survey described in Chapter 9.3. Others have come out of consultation with stakeholders.

10.1.3 The issues for consideration by the Board include:

- Procedural or structural changes required to accommodate the extension of the scheme to non-bank financial services providers.

- Strategies for increasing awareness and understanding of the work of the BFSO, particularly amongst youth.
- The potential for greater use of online dispute resolution techniques and enhancement of the existing online service including monitoring developments in ODR.
- Reviewing the range of services provided and considering what other services might usefully be provided to members and the community that are consistent with the independence of the BFSO.
- The potential for and desirability of changes to the monetary limit and coverage of the scheme.
- The role of the Board in receiving and considering complaints about the scheme, without reviewing disputes or decisions made by the Ombudsman or his staff.

Links for further information

Banking and Financial Services Ombudsman: www.bfso.org.au

Australian Securities and Investments Commission (for Policy Statement 139 follow links to Financial Services Reform publications and then policy statements):
www.asic.gov.au

Benchmarks for Industry-based Customer Dispute Resolution, Consumer Affairs Division, Department of Industry, Science and Tourism:
www.selfregulation.gov.au/resources.asp

Code of Banking Practice: www.bankers.asn.au

National Alternative Dispute Resolution Advisory Council: www.nadrac.gov.au

Other external dispute resolution schemes in the financial services sector:

Credit Ombudsman Service Ltd: www.creditombudsman.com.au

Credit Union Dispute Resolution Centre: www.cudrc.com.au

Financial Co-operative Dispute Resolution Service: www.fcdrs.org.au

Financial Industry Complaints Service Ltd: www.fics.asn.au

Insurance Brokers Disputes Ltd: www.ibdltd.com.au

Insurance Enquiries and Complaints Ltd: www.iecltd.com.au

Superannuation Complaints Tribunal www.sct.gov.au

UK

Financial Services Ombudsman: www.financial-ombudsman.org.uk

Canada

Ombudsman for Banking Services and Investments: www.obsi.ca

Appendix 1 BFSO Terms of Reference

	<p style="text-align: center;">1</p> <p style="text-align: center;">What is the Banking and Financial Services Ombudsman scheme?</p>
<p style="text-align: center;">Overview</p>	<p>1.1 The Banking and Financial Services Ombudsman scheme is a self-regulatory scheme. It provides an accessible alternative to other remedies, such as court proceedings, for people and businesses who use financial services.</p> <p>1.2 The Ombudsman’s principal powers and duties are to consider disputes within these terms of reference and to facilitate the satisfaction, settlement or resolution of such disputes whether by agreement, by making recommendations or determinations or by such other means as seem expedient. It is not a function of the Ombudsman to provide general information about financial services providers or financial services.</p>
<p style="text-align: center;">Aim of scheme</p>	<p>1.3 The aim of the scheme is to provide an independent and prompt resolution of the disputes described in 3 having regard to:</p> <ul style="list-style-type: none"> (a) law; (b) applicable industry codes or guidelines; (c) good industry practice; and (d) fairness in all the circumstances.
<p style="text-align: center;">How is independence maintained?</p>	<p>1.4 The scheme is an incorporated entity, with the Directors of the scheme comprising three Members’ Directors, three Consumers’ Directors and an independent Chairman, which assists in assuring that the scheme is and remains independent.</p> <p>1.5 The independence of the scheme is further assured by the fact that the decision makers and employees of BFSO are:</p> <ul style="list-style-type: none"> (a) entirely responsible for the handling and determination of complaints; (b) accountable only to the Directors; and (c) adequately resourced (pursuant to 1.8) to carry out their respective functions.
<p style="text-align: center;">What is the effect of a determination by the Ombudsman?</p>	<p>1.6 A determination by the Ombudsman will be binding on a financial services provider only if the disputant accepts the decision. The disputant will always be able to reject a determination of the Ombudsman and to proceed with any other remedy which may be available, such as bringing an action in a court..</p>

<p>What is the cost of the service?</p>	<p>1.7 The scheme is a free service for disputants.</p> <p>1.8 Costs of the scheme are met by financial institutions who are Members.</p>
	<p>2 Who can be a disputant?</p>
<p>Wealthy individuals and professional investors</p> <p>Deciding if a disputant is a business disputant</p> <p>Business that are not small businesses</p> <p>Disputes relating to guarantees or charges</p>	<p>2.1 The Ombudsman may consider a dispute brought by:</p> <ul style="list-style-type: none"> (a) an individual; and (b) a small business; <p>that:</p> <ul style="list-style-type: none"> (i) has received the financial service that is the subject of the dispute; or (ii) has provided security over a financial service and either the security or the financial service is the subject of the dispute; or (iii) whose information is the subject of a dispute relating to confidentiality (in the case of both an individual and a small business) and privacy (in the case of an individual). <p>2.2 The Ombudsman may, at the Ombudsman’s discretion, determine that the Ombudsman should not consider a dispute involving an individual who the Ombudsman considers should not have access to the Scheme because of the assets or wealth, or both, that the individual holds or has.</p> <p>2.3 The Ombudsman decides if a disputant is a small business and may consider representations and arguments from the small business disputant and the financial services provider if either wish to make them.</p> <p>2.4 The Ombudsman may, at the Ombudsman’s discretion, consider a dispute from a business which is not a small business if the financial services provider concerned agrees.</p> <p>2.5 If the dispute relates to a guarantee or charge which is given to secure moneys owing by a business, then the Ombudsman must not, unless the financial services provider concerned agrees, consider the claim unless the business that owes the money is a small business. This is regardless of whether the disputant (who may be the guarantor or chargor) is an individual or a small business.</p>

	3	What sort of disputes can the Ombudsman consider?
<p>Financial services Disputes</p> <p>Disputes relating to privacy and confidentiality</p>	<p>3.1</p> <p>3.2</p>	<p>The Ombudsman can, subject to these terms of reference, consider a dispute which relates to:</p> <ul style="list-style-type: none"> (a) any act or omission by a financial services provider in relation to a financial service in Australia; (b) any act or omission by a financial services provider relating to confidentiality and, in the case of an individual disputant, privacy. <p>There is more information about the types of disputes the Ombudsman can and cannot consider in 5 below.</p>
	4	What other roles does the Ombudsman have?
<p>Can the Ombudsman delegate?</p>	<p>4.1</p> <p>4.2</p> <p>4.3</p>	<p>The Ombudsman can also:</p> <ul style="list-style-type: none"> (a) if the Ombudsman thinks it is more appropriate for another dispute resolution scheme to deal with the issue, refer a dispute to the relevant specialist dispute resolution scheme approved by ASIC, or if there is no such scheme approved by ASIC, then to any other specialist dispute resolution scheme considered appropriate by the Ombudsman. <p>If a dispute is referred to another dispute resolution scheme then the Ombudsman must obtain the consent of the disputant before forwarding any information to the relevant scheme body;</p> <ul style="list-style-type: none"> (b) where the Ombudsman considers it appropriate, provide assistance to disputants with translating, lodging or presenting disputes, though not in a way that will jeopardise the Ombudsman’s impartiality; (c) actively promote the scheme; and (d) establish internal systems and procedures to fulfil the requirements of these terms of reference. <p>The Ombudsman must, as required by applicable law, these terms of reference and the Constitution, provide reports and recommendations to any regulator (such as ASIC and the Privacy Commissioner).</p> <p>The Ombudsman may delegate all or any of the Ombudsman’s powers and duties to employees of BFSO except:</p> <ul style="list-style-type: none"> (a) the Ombudsman’s power to make recommendations or determinations; and (b) the Ombudsman’s power to delegate.

Financial services received by another person	(g) if the dispute is not made by or on behalf of the person who was receiving the financial services complained of;
Dispute to be raised with the financial services provider before the Ombudsman	<p>(h) if the Ombudsman has referred a dispute to the financial services provider concerned, the Ombudsman cannot consider the dispute until:</p> <p>(i) the financial services provider has responded to the dispute; or</p> <p>(ii) 45 days, or any lesser period determined by the Ombudsman, have elapsed,</p> <p>whichever occurs first other than in exceptional circumstances where delay, in the opinion of the Ombudsman, is undesirable in which case the Ombudsman may consider the dispute earlier;</p>
Frivolous or vexatious claim	(i) if the Ombudsman considers that the dispute being made is frivolous or vexatious; or
New information	(j) if the dispute is based on the same events and facts as a previous dispute by the disputant to the Ombudsman, unless there is new information.
Confidentiality and Privacy disputes	<p>5.2 Where the dispute involves a confidentiality issue the Ombudsman may consider it:</p> <p>(a) if the disputant is a natural person or a small business; and</p> <p>(b) to the extent that the Ombudsman considers the dispute relates to information which is confidential information.</p>
	<p>5.3 Where the dispute involves a privacy issue the Ombudsman may consider it:</p> <p>(a) if the disputant is a natural person; and</p> <p>(b) to the extent that the Ombudsman considers the dispute relates to information which is personal information.</p>
Disputes about fees and charges	5.4 The Ombudsman may consider a dispute about a fee or charge being incorrectly applied by the financial services provider having regard to any scale of charges generally applied by that financial services provider.
Time limits	5.5 Subject to 5.6, the event to which the dispute relates must have occurred not more than six years before the disputant first notified the financial services provider in writing of the dispute.
	<p>5.6 The Ombudsman must only consider a dispute in relation to events which first occurred:</p> <p>(a) on or after the financial services provider became a Member;</p> <p>(b) on or after 6 July 1998 if the disputant is incorporated; and</p> <p>(c) on or after 6 July 1998 if the dispute relates to a guarantee or charge in favour of a financial services provider to secure an amount owed by an incorporated entity.</p>

<p>Return of information</p> <p>Rules of evidence</p> <p>Previous decisions</p>	<p>6.5 Subject to 6.4, all documentation should be provided to all parties to a dispute. However, it is not necessary for documents and information used by the Ombudsman to be provided to both parties as long as the Ombudsman’s written reasons clearly identify the documents or information relied on and the identified documents or information are provided on request.</p> <p>6.6 Where a party to the dispute supplies information and asks that it be treated confidentially, the Ombudsman must return it as soon as practicable after the dispute is resolved or withdrawn. If the dispute is sent to another forum then the Ombudsman must obtain the consent of the relevant party before forwarding any information to the new forum.</p> <p>6.7 The Ombudsman shall not be bound by any legal rule of evidence.</p> <p>6.8 The Ombudsman will not be bound by any previous decision by him/her or by any predecessor in the Ombudsman’s office.</p>
	<p>7 What award, recommendation or settlement can the Ombudsman make ?</p>
<p>Criteria for determinations</p> <p>Withdrawal and settlement of disputes</p> <p>Investigation of disputes</p>	<p>7.1 Subject to 6.7, when deciding what the appropriate determination should be, the Ombudsman must take into account the criteria of:</p> <ul style="list-style-type: none"> (a) law; (b) applicable industry codes or guidelines; (c) good industry practice; and (d) fairness in all the circumstances. <p>7.2 In determining the principles of good banking practice, the Ombudsman must consult within the industry as the Ombudsman thinks appropriate.</p> <p>7.3 The Ombudsman may, while the Ombudsman is considering a dispute, suggest that:</p> <ul style="list-style-type: none"> (a) the dispute be withdrawn; or (b) the dispute be settled. <p>by agreement between the parties in full and final settlement of the dispute.</p> <p>7.4 If the parties do not agree to this, then the Ombudsman may continue to consider the dispute and may make a recommendation at the conclusion of the Ombudsman’s considerations.</p> <p>7.5 The Ombudsman must set procedures for the investigation of disputes which lead to a recommendation. The procedures must ensure that:</p> <ul style="list-style-type: none"> (a) the reasons for any conclusion about the merits of a dispute must be provided on request to the parties to the dispute; and

Procedure when making a recommendation	(b) in response to any such conclusion, the parties to the dispute have an opportunity to make further submissions before a recommendation may be made by the Ombudsman.
Form of recommendation	7.6 The Ombudsman must give at least one month's notice to all parties about the Ombudsman's intention to make a recommendation. This notice must be in writing.
	7.7 The recommendation must:
	<ul style="list-style-type: none"> (a) be in writing; (b) include the reasons for the recommendation; (c) include in detail the terms of the settlement or what the Ombudsman recommends. If the recommendation includes that the financial services provider pay the disputant an amount of money, this amount must be assessed using the criteria in 7.1; (d) include any documentation necessary to complete the withdrawal or settlement; and (e) state the date for acceptance of the recommendation by the parties to the dispute and the consequences of them failing to respond in time.
	7.8 The time for acceptance must be no more than one month except in exceptional circumstances as determined by the Ombudsman.
Recommendations not accepted by financial services provider within one month	7.9 If the Ombudsman has made a recommendation which has been accepted by the disputant within one month but not the financial services provider, then the Ombudsman can make a determination against the financial services provider.
Types of determination	7.10 A determination can include: <ul style="list-style-type: none"> (a) a sum of money which does not exceed \$150,000; (b) where the dispute involves a privacy issue, any other non-monetary requirement as described in 7.14 that the Ombudsman thinks is appropriate; and (c) an order for the provision of information relating to the subject matter of the dispute.
	7.11 The Ombudsman's determination must identify the amount the Ombudsman considers is fair and appropriate to compensate the disputant for any loss or damage the disputant has suffered because of the conduct of the financial services provider in relation to the event the subject of the dispute.
Form of determination	7.12 The determination must: <ul style="list-style-type: none"> (a) be in writing; (b) state the terms of the determination including any monetary amount to be paid;

<p>How does the determination etc differ if the dispute relates to privacy?</p>	<ul style="list-style-type: none"> (c) provide a summary of the reasons for the determination; and (d) state that, if within one month after its issue the disputant agrees to accept it in full and final settlement of the subject matter of the dispute, the determination shall be binding on the disputant and the financial services provider (as a result of the financial services provider's undertaking to the Banking and Financial Services Ombudsman) against which it is made. <p>7.13 The Ombudsman must give a copy of the determination to the disputant and the financial services provider. The Ombudsman must also give the disputant a form addressed to the Ombudsman and the financial services provider providing for acceptance of the determination by the disputant in full and final settlement of the dispute.</p> <p>7.14 In addition to the Ombudsman's other powers, if the dispute relates to privacy then the Ombudsman may make any determinations, awards, declarations, orders or directions that the Privacy Commissioner may make under section 52 of the Privacy Act.</p>
	<p>8 How does a Test Case notice work?</p>
<p>When a notice can be given?</p>	<p>8.1 If a financial services provider wishes a dispute to be treated as a "test case" the financial services provider must give the Ombudsman a notice in writing containing:</p> <ul style="list-style-type: none"> (a) a statement, with reasons, why the financial services provider is of the opinion that the dispute involves or may involve: <ul style="list-style-type: none"> (i) an issue which may have important consequences for the business of the financial services provider or financial services providers generally; (ii) an important or novel point of law; and (b) an undertaking that, if within 6 months after the Ombudsman receives the notice, either the disputant or the financial services provider institutes proceedings in any court or tribunal which has the ability to make a binding determination of the issue or point of law in respect of the dispute, the financial services provider will: <ul style="list-style-type: none"> (i) pay the disputant's costs and disbursements (if not otherwise agreed, on a solicitor and own client basis) of the proceedings at first instance and any subsequent appeal proceedings commenced by the financial services provider (except by way of respondent's notice, cross appeal or other similar procedure); and (ii) make interim payments of account of such costs if and to the extent that it appears reasonable to do so. (c) an undertaking that the financial services provider will seek to resolve the dispute expeditiously

	<p>8.2 When the Ombudsman receives this notice the Ombudsman must stop considering the dispute. The Ombudsman must then inform the disputant in writing that:</p> <ul style="list-style-type: none"> (a) the Ombudsman has received the notice; (b) the date of the notice; and (c) the effect of the notice upon the disputant.
	<p>9 Systemic Issues and Serious Misconduct</p>
<p>What does the Ombudsman have to report to ASIC?</p> <p>What is a systemic issue?</p> <p>What is serious misconduct?</p>	<p>9.1 The Ombudsman must report all systemic issues and serious misconduct to ASIC as described in 9.2 and 9.3.</p> <p>9.2 In broad terms, a systemic issue is an issue which will have a material effect for individuals or small businesses beyond the parties to the dispute. Some examples of systemic issues are:</p> <ul style="list-style-type: none"> (a) poor disclosure or communications; (b) administrative or technical errors; (c) product flaws; and (d) inaccurate interpretation of standard terms and conditions. <p>9.3 Serious misconduct is conduct which may be fraudulent, grossly negligent or involve wilful breaches of applicable laws.</p>
	<p>10 What information must the Ombudsman collect?</p>
	<p>10.1 The Ombudsman must collect and record the following information:</p> <ul style="list-style-type: none"> (a) the number of disputes and enquiries; (b) demographics of the disputants (where practicable); (c) details of cases which were thought to be outside the scheme and why; (d) the current caseload including the age and status of open cases; (e) the time taken to resolve disputes; and (f) a profile of disputants which identifies: <ul style="list-style-type: none"> (i) type of financial product or service; (ii) product or service provider; (iii) purpose for which the product was obtained; (iv) the underlying cause of the dispute; and

<p>What should be done with this information?</p>	<p>(v) any systemic issues or other trends.</p> <p>10.2 The Ombudsman must also produce a report every twelve months for publication and provision to the Members. This report must be a comprehensive summary and analysis of this information.</p>
	<p>11 How is the scheme to be promoted?</p>
	<p>11.1 The Ombudsman must ensure that the existence of the scheme is actively promoted.</p> <p>11.2 In particular, any groups (such as people living in rural areas or people with non-English speaking backgrounds) which are under-represented in the information collected should be targeted by the promotion.</p> <p>11.3 The Ombudsman must publish and promote details about how the scheme works. This should include:</p> <ul style="list-style-type: none"> (a) how a dispute can be lodged; (b) assistance which is available to disputants; and (c) the time frames which are imposed on the procedure.
	<p>12 What other powers and duties does the Ombudsman have?</p>
	<p>12.1 The Ombudsman is responsible for the day to day management and conduct of the business of BFSO (including, without limitation, the power to appoint and dismiss employees, independent contractors and agents and to determine their terms of employment).</p> <p>12.2 The Ombudsman has the power to incur expenditure on behalf of BFSO consistent with the budget approved by the Directors.</p> <p>12.3 The Ombudsman cannot exercise any power which the Constitution expressly assigns to the Directors or any other person.</p> <p>12.4 Except as required by law or these terms of reference or the Constitution, the Ombudsman must not disclose any information relating to a dispute.</p> <p>12.5 Paragraph 12.4 does not prevent the Ombudsman from disclosing any information to any employee, consultant, independent contractor or agent of BFSO to the extent that such information is reasonably required by that person for the purpose of performing his or her duties to BFSO. The Ombudsman must report to the financial services provider concerned any threat to staff or property of which the Ombudsman becomes aware in the course of the Ombudsman's duties and which the Ombudsman considers to be serious.</p> <p>12.6 The Ombudsman may develop guidelines for the interpretation of these terms of reference.</p>

	13	Annual business plan and budget
Draft business plan and budget to be prepared by Ombudsman	13.1	<p>The Ombudsman must:</p> <ul style="list-style-type: none"> (a) prepare an annual business plan for the scheme, together with a proposed budget (including a total funding figure); and (b) submit both the budget and the annual business plan to the Directors at least 60 days before the start of the relevant financial year, <p>and must, on request, consult with the Directors (including any committee of the Directors) about a proposed business plan and budget.</p>
	14	Changes to terms of reference and guidelines
Terms of reference	14.1	The Ombudsman may make recommendations to the Directors (including a committee of the Directors) for changes to these terms of reference.
	14.2	The Ombudsman must, on request, consult with the Directors (including any committee of the Directors) about proposed changes to these terms of reference)
Guidelines	14.3	The Ombudsman must consult with ASIC about any changes to the guidelines.
	15	Interpretation
	15.1	<p>The following words have the following meanings where they appear in these terms of reference:</p> <p>“BFSO” means Banking and Financial Services Ombudsman Limited (ABN 48 050 070 034).</p> <p>“ABN” means Australian Business Number as defined in the A New Tax System (Australian Business Number) Act 1999 (Cth).</p> <p>“ASIC” means the Australian Securities & Investments Commission.</p> <p>Australia” includes the external territories.</p> <p>“business” includes every trade, occupation and profession continuously carried on, whether or not for profit and whether or not incorporated.</p> <p>“Constitution” means the Constitution of BFSO.</p> <p>“Directors” means the Directors of BFSO.</p> <p>“disputant” means a person bringing a dispute before the Ombudsman.</p>

“dispute” means a disagreement in relation to:

- (a) a financial service between a financial services provider and a customer of that financial services provider which has not been resolved by the parties; and
- (b) a privacy issue of the type described in 5.2.

“financial service” means a product or service provided by a financial services provider which:

- (a) is financial in nature including a product or service which relates to:
 - (i) a loan or any other kind of credit transaction (including, without limitation, credit card use overseas);
 - (ii) a deposit (such as a term deposit, a fund management deposit or a retirement savings account);
 - (iii) a financial investment (such as a security or an interest in a registered managed investment scheme);
 - (iv) a facility under which a person seeks to manage financial risk or to avoid or limit the financial consequences of fluctuations in, or in the value of, receipts or costs (such as an insurance contract, a futures contract, a foreign currency transaction or derivative);
 - (v) a facility under which a person may make, or cause to be made, a non-cash payment (such as a direct debit arrangement or a facility relating to cheques, bills of exchange, travellers cheques or a stored value card);
 - (vi) leasing and hire purchase arrangements;
 - (vii) guarantees or charges in favour of the financial services provider given or created by:
 - (A) an individual not carrying on a business; or
 - (B) a small business;

to guarantee or secure any moneys owing to the financial services provider by any other individual or small business under any advance or analogous facility; and

- (b) a custodial service.

“financial services provider” means a:

- (a) Member; or
- (b) related body corporate of a Member within the meaning of the Corporations Act 2001 (Cth) which is incorporated in Australia. A reference to the financial services provider includes any employee, agent or contractor of the financial services provider including any person who has actual, ostensible, apparent or usual authority to act on behalf of the financial services provider or authority to act by necessity in relation to a financial service.

“guidelines” means guidelines developed by the Ombudsman in relation to these terms of reference.

“including”, “such as” or “for example”, when introducing an example, does not limit the meaning of the words to which the example relates, that example or examples of a similar kind.

“incorporated” means being registered under the Corporations Act 2001 (Cth) or under the incorporated associations legislation of a jurisdiction within Australia.

“individual” means a natural person.

“Member” means a person who is a Member of BFSO as defined in the Constitution.

“personal information” means information or opinion (including information or an opinion forming part of a data base), whether true or not, and whether recorded in a material form or not, about an individual whose identity is apparent, or can be reasonably ascertained, from the information or opinion.

“Privacy Act” means the Privacy Act 1988 (Cth).

“related body corporate” has the meaning given in the Corporations Act 2001 (Cth).

“small business” means a business, which at the time the events relating to the dispute occurred, had:

- (a) if the business is or includes the manufacture of goods - less than 100 full time (or equivalent) employees; or
- (b) if the business is of another nature - less than 20 full time (or equivalent) employees.

“scheme” means the dispute resolution scheme described in these terms of reference.

- 15.2 References to the provision of financial services include, where the context allows, references to their non-provision.
- 15.3 References to the singular include the plural and vice versa.
- 15.4 References to paragraphs are to paragraphs of these terms of reference.
- 15.5 A reference to a statute, ordinance, code or other law includes regulations and other instruments under it and consolidations, amendments, re-enactments or replacements of any of them.
- 15.6 Headings are inserted for convenience only and do not affect the interpretation of these terms of reference.

Appendix 2: ASIC Policy Statement 139.151

The benchmarks and their underlying principles

1 *Accessibility*

The scheme makes itself readily available to customers by promoting knowledge of its existence, being easy to use and having no cost barriers.

2 *Independence*

The decision-making process and administration of the scheme are independent from scheme members.

3 *Fairness*

The scheme produces decisions which are fair and seen to be fair by observing the principles of procedural fairness, by making decisions on the information before it and by having specific criteria upon which its decisions are based.

4 *Accountability*

The scheme publicly accounts for its operations by publishing its determinations and information about complaints and highlighting any systemic industry problems.

5 *Efficiency*

The scheme operates efficiently by keeping track of complaints, ensuring complaints are dealt with by the appropriate process or forum and regularly reviewing its performance.

6 *Effectiveness*

The scheme is effective by having appropriate and comprehensive terms of reference and periodic independent reviews of its performance.

Appendix 3: Key Findings of the Stakeholder Survey

[Extract from Research Report by Wallis Consulting Group Pty Ltd]

KEY FINDINGS

Awareness of the BFSO:

- When asked what they would do in the event of a dispute with their bank, most members of the public mentioned some form of contact with the bank first. Only 3% mentioned contacting the Ombudsman at this stage;
- However, in response to further questioning, another 26% spontaneously stated that they would contact the Ombudsman. Unprompted awareness was higher in Victoria, but very low among 18-24 year olds;
- When specifically asked a further 20% said they had heard of the ABIO (as it was at this time) showing that just under half (49%) of all adults were aware of the Ombudsman;
- Members of the general public said that either they “just knew about the ABIO” (48%) or had heard about it through advertising (27%) or a news or current affairs program (14%);
- In contrast significant proportions of the telephone enquirers and disputants had heard of the Ombudsman via word of mouth or being told of it by their bank.

Expectations and perceptions:

- The great majority of those members of the public who knew of the Ombudsman prior to the survey saw its role as being an arbitrator or mediator in disputes between customers and banks;
- However, among the public generally, the expectations of what the Ombudsman could do was often incorrect.
 - Most knew (accurately) that the Ombudsman could assist if the bank made a mistake in general, or mis-recorded an ATM transaction in particular.
 - However, significant proportions imagined that the Ombudsman could assist if the bank would not grant a mortgage or loan.
 - Significant proportions also thought the Ombudsman could help if a bank raised its charges too much.
- Telephone enquirers and dispute resolution process users were asked to recall their original expectations of the Ombudsman – did they expect an advocate, an umpire or an extension of their bank’s Customer Relations Department? It is significant that the largest group of telephone enquirers (46%) and a very significant proportion of those who had taken a dispute to the Ombudsman (37%) had expected the Ombudsman to act as an advocate on behalf of the consumer;
- In response to pre-formulated attitude statements it transpired that members of the general public had more favourable perceptions of the Ombudsman than those who have had some form of contact with the Ombudsman’s office, both telephone enquirers and those who had used the dispute resolution process.

- For example, in response to the statement "The Ombudsman would be independent and impartial in resolving a dispute", 88% of the general public agreed compared to 75% of telephone enquirers and 77% of disputants.
- However, in two respects, those with experience of the BFSO gave better ratings than members of the general public:
 - more enquirers and dispute resolution users disagreed with the statement "The Ombudsman's services are complicated and difficult to use" compared with the general public, and
 - more agreed that "The Ombudsman's Office operates efficiently and is well-managed" (high don't know response among members of the general public).
- However, when considered in greater details, perceptions of disputants in particular were found to be anything but objective. When they took a negative view of the Ombudsman's office it very often seemed to reflect either that the Ombudsman had not been able to help them or that the BFSO had found in the bank's favour.

Telephone service

- At least nine in ten of both the telephone enquirers and those involved in dispute resolution said it had been easy to make contact with the BFSO by telephone;
- When respondents were asked to rate the Case Officer who dealt with them in terms of their explanation of how the Ombudsman could assist them, the following were the outcomes.
 - Among telephone enquirers 81% said either good or excellent with just 5% saying poor (remainder neutral or don't know).

- Among dispute resolution users, outcomes were marginally worse with 76% giving an excellent or good rating overall; although a similar number (6%) gave a poor rating.
- In cases where the BFSO could not help the respondent, 26% of telephone enquirers and 12% of those presenting a dispute were referred elsewhere.

Contact with Customer Relations Departments:

- Respondents who had been advised to contact the Customer Relations Department of the bank concerned in the dispute, were asked whether they had in fact made contact:
 - Among telephone enquirers, 68% of whom had been advised to contact the CR department, over three-quarters, 76%, had made contact;
 - Similarly, among those dispute resolution users who had been advised to make contact with the CR department, when they first called the Banking Ombudsman, 79% said they had done so before proceeding to submit written notification of their dispute;
- Reasons given by telephone enquirers for not making contact with the CR department were often related to the fact that the respondent had already been in contact with the bank or the CR Department itself; however, a quarter said that they had not got round to doing so, and one in ten had decided not to follow up the dispute. A small proportion had tried to make contact but had been unable to do so;
- Two thirds of respondents reported that it had been easy to get through to the CR Department, 30% said it was difficult (remainder don't know/can't recall);

- Where contact was made with the CR Department of the bank concerned (after BFSO referral), over half (52%) went on to resolve the enquiry or dispute with the bank directly, hence averting the need for further investigation.

Investigating disputes:

- As expected, a considerable proportion of those recorded as having a dispute which was not investigated by the Ombudsman had reached an acceptable solution with the bank prior to the investigation commencing;
- However, nearly a quarter of those who did not have an investigation believed that the Ombudsman had conducted one; in addition a small proportion of those who had an investigation were not aware of it;
- Leaving aside those cases where the bank had settled the case prior to investigation, outcomes were relatively evenly split between cases decided in the customer's favour and those decided in the bank's favour, with a small proportion where a compromise was reached;
- Respondents were asked how the outcome of the case was communicated to them. Just over a quarter, 27% indicated that they had been telephoned, with 54% saying they received written advice only. (Others claimed to have received communication via the bank or in some other way):
- Just three-fifths of respondents rated the way in which the outcome was communicated as excellent or good. Ratings were high among those to whom the outcome was communicated by phone, but there is evidence of a tendency by BFSO staff to prefer to communicate unfavourable outcomes in writing only;

- Just over three-fifths of respondents had stayed with the same bank following the dispute. This did not vary with the outcome.

Satisfaction with the BFSO:

Both telephone enquirers and disputants were asked to rate BFSO staff on a number of measures. Taking the telephone enquirers, however, it seems that staff are:

- Exceptionally well rated for their politeness and courtesy, with 94% seeing them as either excellent or good;
- Also well-rated for their efficiency – with 86% saying excellent or good;
- Satisfactorily rated for being motivated to help the caller with their problem at 81% excellent/good;
- Rather less than might be hoped in terms of their sympathy or empathy for the caller with a 78% excellent or good rating;
- Ratings by disputants were consistently worse than those given by telephone enquirers. The reason for this is that disputants who did not receive a favourable outcome were highly likely to rate the Ombudsman's office badly, even on a measure such as 'efficiency';
- When asked their satisfaction with the taken to settle their dispute, 76% of disputants rated it as satisfactory, 14% as unsatisfactory (remainder neutral or don't know). Once again disputants receiving a negative (to them) outcome were more likely to give negative ratings;

- Telephone enquirers and disputants were asked their satisfaction with the service from the Ombudsman’s office overall.
 - 82% of enquirers were satisfied with the BFSO and 8% dissatisfied, and
 - 78% of disputants were satisfied, 15% dissatisfied.

- Once again the level of satisfaction among disputants depended on the outcome of the case:
 - it was 43% satisfied, 47% dissatisfied, among those the BFSO could not help (eg because the issue was OTR);
 - it was 96% satisfied, just 2% dissatisfied if the bank had come to a resolution prior to investigation;
 - it was 95% satisfied, 4% dissatisfied if the Ombudsman investigated and found in the respondent’s favour;
 - it was 34% satisfied, 50% dissatisfied if the Ombudsman investigated but found in the bank’s favour;

- Respondents who declared themselves dissatisfied gave the following reasons;
 - 72% said the Ombudsman had been unable to help them, or that they did not get the result they were looking for;
 - 14% said the Ombudsman was a “toothless tiger” or could not influence the banks or give rulings;
 - 13% said the process had taken too long to resolve;;
 - 9% said the BFSO had taken too long to get back to them or follow up the dispute;
 - 7% said they had not been given the right information.

Suggestions for improvement by respondents:

- Comments or suggestions from members of the general public focused on a requirement for the BFSO (or the ABIO as it was known at the time) to do more advertising, a few indicated that they had never heard of the Banking Ombudsman prior to the survey.
- Comments from telephone enquirers and dispute resolution users were split between positive and negative comments: on the one hand some wished to reiterate that the Ombudsman “does a good job”, whilst others were concerned to express that they felt the Ombudsman had no real power, or that the Ombudsman’s office had not been very helpful. A few disputants said the Ombudsman took too long to resolve their banking dispute, with some feeling that the Ombudsman’s office is understaffed.

The bank’s perspective:

Respondents [from bank’s Customer Relations Departments] were asked to rate BFSO staff on six dimensions, using a scale from excellent to poor. The percentages rating the staff excellent or good were:

- 86% for politeness and courtesy – a very good outcome
- 80% for knowledge and training
- 75% for being efficient and effective
- 74% for managing relationships with bank customers;
- Just 60% for “managing relationships with the bank” and “keeping you properly informed of what is going on”. Both of these seem to be areas in which there could be improvement.

- Respondents were further asked to give the BFSO an overall rating for the service received from BFSO staff. Overall 86% said they were satisfied – a commendable result, indicating that it is only the minor issues highlighted above that require attention; and
- Finally respondents were asked to rate their satisfaction with the findings of the BFSO’s investigations; 80% said they were satisfied, with just one person dissatisfied.

Respondents to this survey were asked to state their level of agreement with a number of statements, which were similar to those used in the customer surveys. The following responses were obtained on key measures:

- Just over three-quarters (77%) agreed that the BFSO operates efficiently and is well managed. Whilst this agreement level is not outstanding no one was in disagreement, the majority of the remainder gave a ‘neutral’ rating;
- Similar percentages agreed that the BFSO is truly independent and impartial; and that the BFSO’s operating procedures are clear and simple. Disagreement was, however, quite high on the latter (17%) indicating that some banks would derive benefit from clarification of procedural issues.
- Opinion was relatively evenly split in relation to the statement, “in a dispute the BFSO tends to favour the customer over the bank”, 40% agreed with this statement, 34% disagreed and 26% gave either a neutral or don’t know response.
- Finally a considerable proportion of bank staff (49%) felt that the BFSO process was an expensive way of resolving disputes.

- The bank staff showed generally positive attitudes to the reports, communications and training provided by the BFSO.
- In answer to a final question all but three of the 35 staff said they were satisfied with the BFSO overall, one was neutral and two dissatisfied.