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Independent Review

Banking and Financial Services Ombudsman

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1. Introduction

As part of the Banking and Financial Services Ombudsman (BFSO) constitution, the Directors are committed to “a review of the operations and procedures of the Scheme every three years”. As an industry owned external disputes resolution scheme, the scheme is also now approved by the Australian Securities & Investments Commission under its Policy Statement PS.139. That policy statement and the terms of the instrument of approval require that as a matter of good management, schemes should be independently reviewed every three years.

The Navigator Company Pty Ltd was commissioned to conduct that independent review, commencing in May 2004 and this is the report of that Review.

The BFSO has commissioned a number of independent reports on specific matters over the past few years and accordingly, the BFSO Board reduced the scope of the review activity in the Terms of Reference. The reviewers were given access to a number of those independent reports – notably the Wallis stakeholder research conducted about 9 months prior to the commencement of this Review.

The reviewers were given full access to BFSO files, policy and procedure documents and received a great deal of support and assistance from BFSO staff. Our thanks go to Colin Neave and all the BFSO staff who assisted and in particular to Diane Carmody, Jacqueline Rush, and Margaret O’Keefe who gave generously of their time and patiently fetched documents, demonstrated systems, searched files, answered endless questions and made us welcome.

An extensive discussion paper was prepared by BFSO staff (available on the BFSO website – www.bfso.org.au) which comprehensively described the history and operations of the BFSO and discussed some of the challenges facing it.

Submissions were invited from members and the general public and the BFSO funded a joint submission from consumer representatives which enabled a more extensive canvassing of issues from the consumer side than would have otherwise been available.

The review was structured around the six benchmarks specified in PS.139 and the main body of this report is so structured - into six corresponding sections. Like all structures, it is not perfect. First, the Terms of Reference of the Review did not encompass every aspect of the benchmarks. Second, issues raised by stakeholders and the findings of the report did not always fit neatly into one or other of those sections.

To better convey the story of the review, we have included a section entitled Key Themes which departs from the six category structure in order to discuss the most important elements of our Review in a hopefully more cohesive way.

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3. Executive Summary

The most important finding of this review is that the BFSO scheme is a very successful operation - widely and strongly endorsed by its stakeholders and demonstrably meeting each of the ASIC PS.139 benchmarks. Our observation and investigation found an environment of professional management, strong systems, high standards of quality and performance, sustained staff morale and active continuous improvement.

That is not to say that the BFSO is beyond improvement. Stakeholders from both the member and consumer sides made a number of suggestions for improvement and our own investigations also identified opportunities for better performance.

Improvements will not be dramatic; rather they will typically be incremental in nature and involve minor refinements, shifts in emphasis and adjustments to process and policy.

The processes for implementing change of this nature will involve continuous improvement techniques, trialling and developing ideas and close partnership with other organisations and stakeholder groups.

We found that stakeholders had some expectations of the BFSO that we believe are properly the responsibility of the banking sector regulators and have made some observations and recommendations for approaches to the regulators.

3.1 Benchmark – Independence

The BFSO has clearly established a reputation for independence – no submission or interview from either side of the stakeholders offered any substantive criticism of this aspect of performance. Its governance system is consistent with other similar schemes and provides for evenly distributed representation.

BFSO has responded to evidence of some consumer expectation that the Ombudsman would be “on our side” and has taken some action to clarify language used in materials and on the telephone in this respect.

3.2 Benchmark – Accessibility

The BFSO has achieved a high profile in the community and has taken opportunities to continue to improve its profile and brand recognition. It provides ready access through telephone and internet to Australian consumers.

Our review found a few areas in which further analysis and systematic effort could be made to improve accessibility – notably amongst disadvantaged groups and through better analysis of consumers who do not pursue complaints.

We recommended that as a trial, the BFSO extend and formalise the use of external consumer advocates to provide assistance to those disputants least able to present their dispute effectively.

3.3 Benchmark – Fairness

We found that considerable effort is made to ensure that the majority of consumers are treated fairly and that the thorough processes used are a very effective tool in producing the right outcomes and promoting satisfaction with the outcomes of disputes.

Stakeholders identified a number of areas of concern, some of which have resulted in recommendations for change. In many instances we were unable to identify systemic or widespread evidence of the reported problems within BFSO files. We have recommended a series of face-to-face forums between the BFSO and members and consumer advocates to deal with these issues in an ongoing continuous improvement system.

3.4 Benchmark – Accountability

The BFSO has proper systems of accountability, with an effective governance structure, appropriate consultation with stakeholders and an effective approach to systemic issues. We recommended some improvement in public reporting of BFSO performance against KPIs and to its analysis of systemic issues.

3.5 Benchmark – Efficiency

The BFSO has a highly effective workplace culture with a very strong emphasis on fairness and quality of decision-making. We found effective systems for ensuring efficient operation and tracking timeliness of its own and member responses.

We thought there was some room for improvement – without sacrificing any of the thoroughness and quality - and have recommended a minor shift in emphasis towards a greater focus on speed and efficiency.

3.6 Benchmark – Effectiveness

In any overall judgement, the BFSO must rate as highly effective. It has clearly had a significant impact on consumer protection in the banking industry – both through its own activity and its influence on improving internal dispute resolution and practices within the banks. Stakeholders did raise some jurisdiction issues and although important they generally do not involve large numbers of consumers.

4. Process

The review process began with the background paper prepared by the BFSO – which set out the history, development and current issues facing the scheme. Steps used in the process included:

- i) Reviews of BFSO documentation (procedure manuals, policies, guidelines, etc)
- ii) Workshop with consumer representatives
- iii) Workshop with member representatives
- iv) On-site visits and interviews with a cross-section of member banks (Commonwealth Bank, National Australia Bank, Citibank, Bendigo Bank, ING Direct and St George Bank)
- v) Written submissions (a joint consumer submission and from the Commonwealth and ANZ banks and the ABA)
- vi) Numerous interviews and meetings with BFSO staff
- vii) Review of the Wallis customer satisfaction research and a briefing from the market research manager
- viii) Review of the CIMS case management system
- ix) Case file reviews including a random cross-section sampling and a number of samplings of specific types of cases of interest
- x) Telephone interviews with a sampling of disputants (including review of their case file)
- xi) Reviewing a range of BFSO written material provided in response to queries and issues raised
- xii) Listening in to a sampling of telephone calls to the BFSO
- xiii) Telephone interviews with some BFSO board members

5. Key themes

There are a number of important observations to be made about our recommendations for BFSO improvement in the context of its current successful operation.

5.1 Incremental gains

As might be expected from an already high-performing organisation, we found no sweeping major reforms capable of producing dramatic gains. The performance gains to be had are incremental in nature and will come from many small refinements.

5.2 Partnership

Once organisations achieve a high level of performance, avenues for further improvement are frequently dependent on the effective engagement of stakeholders and partners. All organisations work within a larger system. In the BFSO's case, it works in a system that includes (at least) member firms, individual consumers, and consumer representatives of all kinds, the media, government and regulator.

Not unlike recent advances in manufacturing efficiency and quality which have come from close supplier/manufacture cooperation, we believe that the BFSO's performance has matured to the stage where improvements can only be achieved with higher active levels of cooperation with its partners in this larger system. Many of our recommendations reflect this belief and call for the active participation of other organisations.

5.3 Holistic approach (tinker at your peril)

The current performance of the BFSO (as in any successful organisation) is a product of the combined characteristics of its strategy, operation and culture. Tinkering with a successful formula must be done with some care and with an eye to the overall impact.

5.4 Continuous improvement processes

For the reasons above, we have framed many of our recommendations as processes for gradual, continuous improvement. We make no apology for this. The practitioners closest to the processes are best placed to implement incremental improvement and the high levels of competence and goodwill we found amongst the consumer representatives, BFSO staff and members gives us confidence that this approach has every chance of succeeding.

5.5 Test and trial

For the same reasons, we have also couched a number of our recommendations as trials. This is specifically because the successful implementation of these ideas will require modification and continuous refinement by those closest to the practical day-to-day realities. Also, the recommendations may not work and the BFSO should not be constrained from sensibly exiting from bad ideas.

5.6 Implementation timeframes

We have not recommended radical change, however we have made some 26 suggestions for improvement – on a number of separate fronts. We expect that, if accepted, this program of change should be prioritised and sensibly staged over a period of eighteen months to two years.

5.7 Regulatory ‘expectation gap’

A number of the criticisms of the BFSO and the associated calls for improvement that we encountered, in our view, fall outside the scope of an industry external disputes resolution scheme.

We are conscious that this response may disappoint those calling for the BFSO to take a tougher line with banks; however we are convinced that many of these are regulatory issues rather than disputes resolution issues.

We felt that the BFSO was somewhat unfairly becoming the subject of some frustration from the consumer side, at least in part because of the way the regulatory landscape has developed in Australia since the implementation of the Wallis reforms.

The split of regulatory responsibility for banking between three agencies has left the public without a clearly branded consumer banking regulator. The fact that there has been little in the way of public profile for ASIC activity in banking-related consumer protection has compounded that apparent gap.

At the same time, of course, the BFSO has built a high level of public recognition of its brand and reputation and we think this has in part, led to unrealistic regulatory expectations of the BFSO.

5.8 A balancing act

A dispute-handling organisation such as the BFSO must make many balancing judgements in the course of its operations – comprehensiveness and thoroughness versus speed and efficiency; degree of assistance to consumers versus need to remain independent; etc. In places, we have suggested some shifts in the emphasis of these balancing judgements and in doing so we recognise that these are delicate adjustments, the extent of which is a matter of continuing judgement for the BFSO.

5.9 Accessibility, assistance and coverage for the disadvantaged

We have made a number of observations and recommendations relating to improving access, assistance and coverage for disadvantaged groups. (Note that our definition of disadvantaged here is those who do not possess the language, effective literacy skills or sophistication to readily interact with the BFSO processes.)

This does not imply poor performance in this area, in fact we found to the contrary. However, it is natural that in a mature and successful scheme, the areas for improvement will tend to be away from the mainstream or majority of consumers. These should be seen as refinements rather than corrections.

6. Benchmark – Independence

In general, the direct feedback from stakeholders regarding the independence of the BFSO was minimal and positive in tone. Amongst the feedback on other topics, we detected just enough faint suspicion (from both sides) of the BFSO's relationship with the "other side" to be satisfied that the BFSO is getting the balance just about right!

6.1 Powers and role of the Ombudsman

No issues or concerns relating to this subject were directly raised with the reviewers, nor did any of the investigations reveal any cause for concern.

6.2 Structure and roles of the Board of the Scheme

No issues or concerns relating to this subject were raised with the reviewers. The BFSO has adopted a unitary board structure which is consistent with governance arrangements in other industry schemes. Although a direct review of the board's effectiveness was not in scope, our enquiries suggested an effective, independent Board with an appropriate delineation between matters for the Board and matters for the management of the scheme.

We also noted a newly drafted procedure for dealing with complaints about the BFSO which appropriately provides for escalation of such complaints through the General Manager, the Ombudsman and ultimately to the Chair of the Board.

6.3 Procedures for appointing the Ombudsman and Board members

The only issue raised by stakeholders in relation to procedures for appointment was from the combined consumer representatives – who expressed their strong support for the continuation of the current method of appointing board members from the consumer side.

We observed that although the BFSO has a representative from the small business sector, both he and the BFSO share the difficulties faced by all representative boards in Australia in achieving meaningful engagement with the small business sector.

Overall, we found no cause for concern.

7. Benchmark – Accessibility

7.1 Amount and focus of the promotion conducted by the Scheme

7.1.1 Promotion program

Issues considered

Broadly, members felt that the BFSO is putting about the right amount of effort into promotion of the scheme and a number felt that anything beyond the current level of expenditure was unjustified.

Consumers raised questions about how the BFSO prioritised its external promotion and whether they were effective at reaching the disadvantaged.

We also noted the Wallis consumer research that identified comparatively lower awareness of the BFSO amongst some groups (eg. 18-24 year olds).

Findings

We found evidence of an extensive program of promotion including press releases, road shows, media interviews, brochures, newsletters, invitations to speak to community groups, etc. We saw examples of proactive targeted activity including promotional trips to remote indigenous communities, participation in an ethnic community awareness campaign, participation in the Youth Access Line and some effort focused on older citizens. This activity is professionally supported and usually involves the Ombudsman or the most senior BFSO staff.

We considered the extent of the effort made by the BFSO to be equal or better than practice across the industry schemes (we note the arguable exception of the Victorian Legal Ombudsman's television advertising), and that the BFSO was meeting its obligations under its own Terms of Reference (cl. 11.1). The most telling measure of this success was the high level of recognition that the BFSO enjoys amongst the public.

That said, the Wallis research does demonstrate that those aged 18 to 24 have a low level of awareness of the BFSO. There is also likely to be validity in the concerns expressed by consumer representatives about whether disadvantaged groups were sufficiently aware of the BFSO. It is not difficult to imagine that there are other demographic segments that would also show comparatively low levels of awareness of the BFSO.

Of course, the fact that there are comparatively low levels of awareness in some community groups is not of itself a cause for great concern – the real issue is whether that low awareness is preventing consumers from obtaining the service when they actually need it.

Public promotion is an area that can readily absorb any amount of resource and without a sound basis for targeting; the effort can be easily wasted. We did not see any need for significant increase in overall promotional effort; however we did think that an improved strategic framework for promotional activity would be a useful long-term investment of effort (see recommendation below).

Currently, BFSO promotional priorities are driven by its own experience of problem areas, by input/intelligence received from stakeholders and by response to media interest and community groups – which is a perfectly sound approach, but limited in its capacity to systematically improve over time.

A stronger framework would not only enable more effective targeting and prioritisation over time, it would also provide the sort of analysis-based justification of priorities and resource allocation that stakeholders will increasingly be looking for.

Recommendation 1.

That the BFSO begin a medium to long term project to develop an analysis-based strategic framework for its promotional activity.

This should include:

- i) working with members, consumer representatives and regulator(s) to develop sources of information that would form the basis for a prioritisation framework. Eg – combining relevant IDR, consumer and regulator data and comparing this with BFSO data to identify possible low awareness problem areas;
- ii) development of some more comprehensive benchmarks for profile including amongst selected disadvantaged communities;
- iii) identification of periodic priorities and special projects; and
- iv) improved analysis of the effectiveness of promotion activity against those priorities and measures.

This could be done in cycles that align with already planned periodic market research – enabling a cost effective way of measuring profile over time.

We understand that this will be a difficult and ground-breaking task and there should be acceptance by stakeholders that this will take some time to develop.

7.1.2 Name of 'Ombudsman'

Issues considered

Consumer representatives also raised the issue of the name 'Ombudsman' and reported that it had negative connotations (associated with law enforcement and the police) in some parts of the community.

Findings

We find it difficult to question the choice of name, given the evidence of high public recognition and current arguments to rename other schemes as 'Ombudsman' schemes – precisely because of the profile that the BFSO enjoys. We concluded that it is highly unlikely that a single term is ever going to perfectly fit the understanding of every group in the community and some compromise is inevitable. It may be that some modified branding may be effective in some distinct communities (eg- adding a more explanatory tagline to the BFSO title for remote indigenous communities).

7.1.3 Members providing BFSO referral information

Issues considered

An important issue for our review and a concern raised by consumers was that banks themselves are not consistently referring consumers to the BFSO and that the BFSO is not doing enough to encourage/force compliance with this obligation.

Findings

Based on our observations of case files and interviews with disputants, there is clearly evidence that the banks have not been consistently providing consumers with information about the right to go to the BFSO.

Under the Code of Banking Practice, members are obliged to effectively refer customers to both IDR and the BFSO and we note also that members we interviewed are very conscious of their new obligations under the FSR legislation. From our observations of the files, the banks' correspondence (at least from central customer relations/IDR areas) has been improving in this regard as they improve their compliance with FSR.

We think however that the consistency of referral information at branch or business unit level is still likely to be poor for some time and the BFSO could be more active in encouraging the banks to comply (see recommendation below).

In saying this, we are conscious that the BFSO's most cost-effective promotional effort will almost certainly be ensuring that the banks themselves are actively providing referral information to consumers.

Under the new FSR regime, the responsibility to accurately refer consumers to the BFSO is a bank obligation which should be part of their overall compliance systems. Clearly, the BFSO has an interest in a high level of compliance, however it is now also ASIC's obligation as the regulator to enforce this compliance. It would seem appropriate for the BFSO and ASIC to jointly lead efforts to improve standards.

Recommendation 2.

That the BFSO propose a joint industry/ASIC/BFSO shadow-shopping exercise to monitor progress on this issue. The BFSO could usefully offer to assist with collecting data about the source of referral information at the point of telephone enquiries and at dispute lodgement.

7.2 User-friendliness of the Scheme's contact points, processes and systems, including for those with special needs

This benchmark attracted considerable commentary from stakeholders. The issues considered by the Reviewers are grouped below.

7.2.1 Referral to correct EDR scheme

Findings

The Financial Complaints Service 'front-end' referral service that the BFSO operates on behalf of FICS, CUDRC, IEC and itself is professionally managed and staffed. Staff are trained and provided with appropriate supporting information. Nonetheless, there are occasional problems with assessing where an enquiry or complaint should be referred. A database of licensed financial service providers with their internal dispute resolution contact details and the external disputes resolution scheme that they belong to, would clearly be a sensible resource.

The BFSO has already accepted the need for this resource and has approached the licensing regulator – ASIC to discuss ways of implementing this suggestion. For the record, this is included as a recommendation below.

Recommendation 3.

That BFSO continue current efforts to obtain the support of ASIC and the other financial sector EDR schemes to make available to the public a database of licensed financial service providers' membership of EDR schemes.

7.2.2 Assistance at the point of enquiry with BFSO

Issues considered

Consumer representatives raised questions about the level of assistance offered at the point of enquiry with the BFSO, expressing a concern that enquirers were simply being sent back to their banks in the first instance.

Findings

We reviewed the BFSO enquiry procedures and spent some time listening in to telephone calls. The Wallis research provided some insight into consumer satisfaction with the enquiry service and we also sought feedback on this subject from disputants interviewed in the course of our case file review. We took into account the work done by BFSO-engaged communications consultants to identify and address instances of lack of empathy on the part of enquiry staff.

We concluded that the level and mode of assistance at the point of enquiry was appropriate. Callers were dealt with flexibly and patiently and were given the contact details for the bank's central customer relations area and for the BFSO at the same time – giving them the option of not having to go back to the bank if they didn't want to. (We note that other financial sector schemes require consumers to have pursued IDR fully before accepting their disputes).

BFSO will accept a telephone dispute from a consumer if it appears that the consumer is not practically able to prepare one in writing. In these cases, the transcribed dispute is sent back to the disputant for checking and signature. This service happens infrequently and is not actively offered.

BFSO provides callers with a verbal outline of what information is required in writing and has had a policy of not being too prescriptive – allowing the disputant to express the matter in their own words. We did find in our conversations with disputants that a number felt that a dispute form or template would have been helpful when they were writing up their dispute. The fact that the on-line form provided a template guide was also rated highly by the disputants who had used the BFSO on-line lodgement service.

Recommendation 4.

That all calling enquirers be in the first instance directed to the BFSO website to the content of the 'How to Resolve Your Dispute' brochure. Where enquirers do not have access to the internet or do not appear to have the confidence or skills to do so, they should be offered a mail out of the brochure (We understand that this will have a resource impact).

Additionally, a simple (and not overly prescriptive) template guide could be included on the website and with the brochure for a time – to test its impact. If successful, it could be incorporated into future reprints of the brochure.

7.2.3 Obstacles to putting dispute forward

Another issue encountered relating to accessibility arose from the recent market research conducted for the BFSO by Wallis. That report raised the issue that a significant number (24%) of those who called the BFSO with a complaint and were advised to approach the bank, did not follow through with the bank (or return to the BFSO). As one might expect, there were a range of reasons offered including:

- i) Previously contacted the bank;
- ii) Had not got around to it yet; or
- iii) Could not make contact with right area of bank; or
- iv) Decided against pursuing the issue.

The research at the time did not delve more deeply into the reasons for this. We explored ways of testing the issue in the course of this review with both Wallis and the BFSO, however it was not possible to identify a new sample and follow them up within the timeframes of the review.

Note that there may not be any great problem signified by the Wallis numbers; a number of callers should be expected to choose not to continue with their matter. But we do think that a high performing EDR scheme ought to know more about the causes and should be able to form a view as to whether there are unreasonable obstacles affecting consumers at this early stage.

Recommendation 5.

That the BFSO conduct periodic research to determine the principal reasons why some enquirers choose not to pursue their dispute with either their bank or return to the BFSO. In this way, the significant obstacles to action can be analysed and tested and the BFSO will be able to reach a view as to whether the level of non-follow through is appropriate.

We envisage a process that, for a limited period, identifies a sample of callers at the point of their initial contact, who are asked if they would be willing to provide their contact details to enable researchers to call them in 3-4 months to see what happened with their matter. This could be either done as part of the next market research project or as a separate special project run by BFSO staff.

7.2.4 Assistance with putting disputes forward

In raising the issue of assistance to the consumer, representatives offered examples of matters that if framed properly would have fitted within jurisdiction and would have raised the right issues from the outset – giving the consumer the best chance of success. They also thought that for these consumers, some ongoing assistance would be necessary to ensure that the various responses required during the process were completed well.

They also raised two distinct possible solutions for this problem

- i) employment of a rotating, seconded ‘consumer adviser’ to provide a similar role to that of the banking adviser - generally assisting BFSO staff to understand the needs of consumers.
- ii) employment of consumer advocate(s) to directly assist disadvantaged consumers to prepare and track their individual disputes through the BFSO system

In our review, we looked for evidence confirming that:

- i) **the problem exists** – ie. examples where consumers were not putting their case forward effectively;
- ii) **the extent to which the problem is systemic** – ie. that BFSO processes or culture are insufficiently helpful to disadvantaged consumers; and
- iii) **the potential of the proposed solutions** – ie. examples where a consumer would have been materially assisted by the presence of either/or an adviser or advocate and any instances where the BFSO processes and culture would be improved by the presence of an in-house consumer adviser .

Our sampling of case files has not been sufficient to establish the existence of any pattern problems appearing with real certainty and as we have discussed elsewhere, the majority of disputants we encountered had no problem dealing with the BFSO processes. However we did encounter a few examples where we thought that the disputant’s language skills and sophistication were such that they were not given the full opportunity to put their case.

In addition, a small but significant number of disputants interviewed mentioned that some one to help write up the dispute would have been of assistance. *“You need a PhD to make a complaint!”*- as one disputant expressed it.

It may be that in the examples that we encountered, the case manager had seen sufficient documented evidence to be confident that they could form a view; however the disputants were not left with the satisfaction of feeling that they had put their case forward properly.

Interestingly, had their skills been a little worse, we suspected that the BFSO would most likely have provided them with the benefit of an interpreter and/or a referral to a consumer advocate.

We were satisfied therefore that at least to some limited degree, the problem occurs. Our review of the procedural guidelines, the training materials, the knowledge management materials and the QA annotations on files did not identify any flaws or gaps that would produce a systemic problem in this area. We also found the culture and practices to be quite consumer-friendly with staff exhibiting considerable patience in both telephone and written communication.

Our review found that the BFSO processes are well within the capability of the majority of consumers; however it is our impression that referrals for assistance could usefully happen more often. In a couple of the examples that we sighted and the case study provided by the consumers, we felt that access to an advocate may well have helped in a way that an impartial, albeit supportive staff member may not.

We also do not think that an in-house consumer advocate would be a successful inclusion to the BFSO's operations and (strong) culture and recommend (below) the use of existing external consumer advocates, funded by the BFSO on a case by case basis. On the volumes that we imagine, a trial would need to run for at least six months to generate sufficient experience.

It is difficult to see how an in-house rotating consumer adviser would be an effective influence on BFSO culture and practice. There is little parallel with the banking adviser - which is a far more technical and hands-off role. We think instead that the regular face-to-face and detailed continuous improvement meetings between the BFSO and consumer representatives proposed at Recommendation 10 and Recommendation 6 below are more likely to produce a practical and lasting improvement.

Recommendation 6.

That the BFSO conduct a trial to evaluate the use of advocates to assist consumers for whom the standard process may not provide sufficient support.

We are conscious that the BFSO currently has the practice of referring consumers to a translation service or an advocacy service where they form the view that the consumer needs the additional

assistance - although this is quite infrequent. We see the trial service as being more clearly branded as a BFSO initiative – as an integral part of the process for some disputants.

To simplify the administrative overhead, the trial should be confined to one or two states and a limited panel of external advocates.

7.2.5 Complexity of BFSO correspondence

Issues considered

We were concerned from our first examination of BFSO case files about the comparative complexity of the correspondence and any difficulty that disputants might find in understanding the material.

Findings

We assessed the complexity of the correspondence for the case files reviewed and asked disputants whether they had understood the stages of the process and the communications from the BFSO.

We found well-documented files with considerable effort put into (in particular) the excellent letters setting out the facts and issues of the dispute and the Findings and Recommendations. We did find that case managers tended to vary in their usage of the telephone to supplement written communication and that the recording of telephone conversations in the case management system was not always complete.

There is no doubt that there are a small proportion of disputants who struggle with the process and find it difficult to keep up with. As one interviewed disputant said - *“My heart sank each time I saw a letter from the BFSO – it usually meant more work!”*

Balancing that observation are the bulk of disputants that we spoke with who found the process easy to understand and in particular were complimentary regarding the thoroughness of the process and the clarity of the letters and Findings.

We concluded that the benefits of the thoroughness of style outweigh the cost in terms of difficulty for some consumers and would not suggest any wholesale change to the approach to documentation. Rather some additional effort could be placed on making it easier for those without the skills and confidence to effectively interact with the standard BFSO processes.

Recommendation 7.

As a measure to make the BFSO's processes a little more accessible and understandable to those with limited effective literacy, the BFSO should encourage case managers to use the telephone more frequently to explain significant steps in the process. As difficult as telephone conversations can be, they are an essential companion to written communication and we think could improve the experience for some disputants if used a little more often.

In the course of the Review, we went through a process of reviewing a number of files and then were able to speak with the disputant involved. We found this to be very valuable and felt that it provided a dimension of insight into the disputant's experience of and understanding of the process that is not available from a document review.

Recommendation 8.

That the BFSO, at regular intervals conduct a review of a sampling of closed files including telephone contact with the disputant to assess their understanding of the progress of the matter and of the issues involved. This could be part of the independent audit suggested at Recommendation 11, but may be more valuable if done by senior BFSO staff.

8. Benchmark – Fairness

8.1 Procedural information provided to disputants and members

Issues considered

The BFSO processes are comparatively complex with a number of distinct stages and grading of complexity used for internal management. From the external perspective of the disputant, of course, much of that complexity should be invisible.

The Wallis research suggested that a significant grouping of disputants laboured under the misapprehension that the Ombudsman would be ‘on their side’ – an advocate ‘against’ the bank; and the misapprehension that the Ombudsman had ‘investigated’ their matter when they had not in fact formally done so.

Consumer representatives raised a concern about whether unrepresented or unassisted disputants were challenging Findings and whether there were conscious or unconscious disincentives to them exercising that right.

8.1.1 Process complexity

Findings

We found on balance that the internal process complexity is generally well screened from disputants. By far the majority of disputants never see any of the process steps beyond the initial referral to the bank and the investigation/finding stages. With few exceptions, the disputants we interviewed said that they had no trouble understanding the steps of the process.

One notable exception was when a matter is referred back to the bank more than once, some disputants did not understand why that was happening and expressed some frustration. This issue could be ameliorated somewhat by more frequent use of the telephone to keep disputants up to date on progress (see recommendation elsewhere) but will never disappear completely as case managers’ reasons for these additional referrals are tactical judgements and presumably not always easy to explain.

8.1.2 Ombudsman as 'advocate' for the consumer

Findings

Already identified by the Wallis research, we also found that a number of disputants were disappointed by the Ombudsman's neutrality – and continued to complain about it even after explanations from BFSO staff (and in some cases, the Reviewers).

The BFSO has already taken some steps to ensure that its printed material is unambiguous on this score; however we are inclined to think from our interview experience that those who expect this personal advocacy may not be persuaded by explanatory text.

8.1.3 Disincentives to challenging Findings

Findings

Our review of the correspondence to parties to the dispute found no bias or lack of clarity. The right to challenge a finding is clearly expressed and in neutral language. We were able to obtain some statistics from the CIMS system that showed that 61 out of 67 challenges during 2003/2004 to Findings were made by unrepresented disputants.

8.2 Fairness of Procedures

8.2.1 Time allowed for voluntary resolution /settlement

Issues considered

At a workshop for consumer representatives the issue was raised as to whether the BFSO was giving banks too much opportunity to resolve problems before going to a Finding – and thus encouraging banks to 'drag feet' at early stages.

In a somewhat contrasting view, one of the member bank submissions argued for an additional discussion between the parties after a Finding had been made – with the aim of achieving a settlement that would avoid the bank going on to formally appeal the Finding.

Findings

From our review of the files, we found some evidence of case managers giving banks additional chances to resolve problems (and extra time to disputants); however none of the cases we saw were unreasonable in this. Typically, when additional opportunities were granted to the bank; either some additional information had come to hand or the case

manager was signalling to the bank what direction the Finding would likely take.

It is important to note that the bank side of these processes is not monolithic. There are internal parties with different views on a matter that need to understand the issues and come to terms with the likely outcomes. In these cases, the approach seemed a sensible way to avoid the time and expense involved in a Finding or even a Recommendation.

Please also see Recommendation 10 re: continuous improvement.

8.2.2 The 'knock-out'

Issues considered

A number of members raised concerns with what was seen as unmeritorious complaints and while recognising the difficulties, felt that the BFSO should do more to 'knock out' some of the more obvious ones.

They also were concerned that the BFSO was not doing enough and early enough to disabuse disputants of any illusions that significant non-financial loss compensation might be awarded – thus unnecessarily prolonging matters and heightening disputants' disappointment at the outcomes.

Findings

We did see files and interview disputants that clearly had unrealistic expectations of compensation for non-financial (and financial) loss. We also saw evidence that the BFSO was quite active in discussing these issues with disputants quite early in the piece and quite directly.

We did not see any files that we thought could fairly have been dismissed out-of-hand as unmeritorious and cannot therefore comment directly. We did see files that were closed very quickly with a letter to the disputant explaining why the bank was entitled to act as it had and saying that unless they could provide further information the matter would be closed.

As tempting as a knock-out letter may seem to frustrated and indignant members, we could not recommend any change to procedure based on our review. The value of an apparently fair and proper process for the majority clearly outweighs the risk that some time and resource is wasted on the (very) few.

8.2.3 Fairness of settlement offers

Issues considered

At the other end of the dispute process, questions were also raised as to the fairness of settlements and whether consumers were being unfairly pressured to settle; whether consumers were encouraged to seek independent advice as to the adequacy of settlement; and whether the BFSO were effectively monitoring the fairness of settlements. Consumer representatives went on to suggest that the consumer advocate or adviser role put forward might perform this function.

Findings

Our file reviews and discussions with BFSO staff suggest that where settlement discussions occur at the outset, prior to the BFSO commencing its investigation, the BFSO is usually removed from the settlement negotiation process. The disputants we spoke with were comfortable about this and were generally quite clear in their own minds as to what would be an acceptable settlement. Some disputants negotiated with effect – their refusal of the bank's first settlement offer produced a second (and sometimes third) more generous offer which they then accepted.

Where settlement discussions occur after the BFSO has commenced investigation, the Case Manager will sometimes facilitate a settlement. If so, the disputant will be explicitly advised in writing to seek independent advice before accepting the settlement.

Although our file review did not find any evidence of settlements which were clearly insufficiently advantageous to the disputant, it is likely that there will be some disputants who lack the skills or confidence to assess the merits of a settlement offer. Some of these disputants would benefit from the assistance of a BFSO funded consumer advocate (see Recommendation 6).

8.2.4 Use of conciliation conferences

Issues considered

Consumer representatives were concerned about whether conciliation conferences were being encouraged enough – noting a reduction in numbers over time and comparing the BFSO usage with a reported 45% of cases at the UK Financial Ombudsman Service (FOS).

Findings

Statistics do show a small reduction in the numbers of conciliation conferences. Interviews with members uncovered no change in policy or reluctance on the part of members to use the conferences - in fact; they were highly supportive of their effectiveness and value for money.

BFSO staff confirmed that the conferences are still being actively offered although it is only promoted in those matters where there is some reasonable prospect of success and the parties are likely to agree to participate. It is possible that any decline may reflect the changing nature of matters in dispute, but this is speculation only and the decline may yet prove to be a natural variation rather than any downwards trend.

We did not think that the comparison with the FOS (UK) statistics is valid as it the definition of mediation in the UK context is far wider. The 2004 FOS Annual Report shows some 42% of complaints “resolved at the Assessment stage – generally involving some conciliation or mediation”. The Chief Ombudsman of the FOS, Walter Merricks confirms that face-to-face or teleconferenced mediations are rare; that this “guided conciliation” is almost always a process of shuttle negotiation by the case manager.

8.2.5 Appeals to Findings – case management

Issues considered

Consumer representatives expressed some concern about the process for an Ombudsman’s Recommendation (an appeal against a Finding). Their concern is that although presented by BFSO as an ‘appeal’, the Case Manager responsible for the investigation remains involved in the review and usually does the drafting work on the Ombudsman’s Recommendation. In their view this is misleading, as a consumer would expect an entirely uninvolved BFSO staff member to take over responsibility for the review – bringing ‘fresh eyes’ to the appeal.

Findings

The BFSO rationale for the current process is primarily efficiency. Our review found that the case file is genuinely reviewed by the Ombudsman (the fresh eyes). We sighted examples where the case manager’s draft Recommendation was substantially altered by the Ombudsman.

We were satisfied that the case manager’s continued role is chiefly administrative and for drafting a recommendation for the Ombudsman. The efficiency argument is compelling. From our own experience of reviewing the files, to turn all challenged Findings over to new case

managers to come up to speed on the file and prepare a completely fresh draft recommendation would have a significant resource impact in a small organisation.

In addition, the BFSO advises that where there is evidence that the disputant has lost confidence in the investigating case manager personally, the decision is taken to pass the case file to a previously uninvolved staff member.

We were satisfied that the case manager's continuing involvement in the Recommendation process is not actually constraining the appeal avenue, however we accept that every effort should be made to ensure that consumers do not misunderstand the appeal process.

Recommendation 9.

That the BFSO review the information provided to disputants to ensure that the process for a challenge is fully disclosed – and to expressly give disputants a chance to request a change of case manager. This would have to be carefully expressed to avoid frivolous demands.

8.2.6 Appeals against Recommendations

Issue considered

At present the BFSO rules only allow for members to appeal an Ombudsman's Recommendation. The Consumer representatives felt that, as a matter of perceived and actual fairness, disputants should also have the right to appeal a Recommendation. (Note that a Determination – or Award as they used to be known - has not been made for many years and none during the present Ombudsman's term – since 1996).

Finding

Upon first consideration, it does seem anomalous that one side has an avenue of appeal not open to the other, however after examination this is less of an issue than it first seems.

First, the rights and obligations of the two sides are not the same. A member is ultimately bound by a Determination of the Ombudsman, but there is no mechanism for binding disputants by BFSO decisions. Disputants can reject a Recommendation (or even a Determination should a member take a matter to this level) and can begin again in the Courts.

Second, the presence of the Determination stage is strictly more of a mechanism for binding a reluctant member to a BFSO decision; in the absence of new information, a second appeal to the same authority is highly unlikely to produce a different outcome.

Third, the Determination stage has not been used for some time – both for the reason above and because members have not yet been sufficiently reluctant – they have been willing to accept Recommendations although not bound to do so.

One thing that could be certain is that if disputants had access to this avenue of appeal, the Ombudsman's 'no determinations' record would be broken. Unconstrained by cost, there is no doubt that aggrieved disputants will take every appeal step available to them.

We do not think this is a good idea. Given the very low likelihood of any successful 'second' appeals by disputants, the additional (and significant) cost to members would only act to diminish current high levels of member support for the BFSO.

In a way, although an unused appeal right may seem useless, it has become an often mentioned, symbolic representation of the members' willingness to accept the Ombudsman's final view and of their general goodwill towards the scheme. We would be reluctant to tamper with it.

8.2.7 Changes to processes for exchange of documents

There were a number of detail observations and suggestions made about the processes for exchange of documents. We simply did not have sufficient background in the detail of the processes to add any value by way of recommendations.

Instead, we have passed them on to the BFSO to be dealt with as ongoing management issues and recommended that the BFSO and members institute a structured process for working through these and other continuous improvement issues.

Recommendation 10.

That the BFSO and individual member banks of significant size institute a regular (say 6 or 12 monthly, depending on size) face-to-face continuous improvement forum in which 2 or 3 actual recently closed cases are reviewed in some detail to identify problems or ways of improving processes or procedures at a level of detail.

These discussions should incorporate all relevant aspects of the management of the case including timeliness and efficiency, but of course must not be seen as a chance to re-open the outcomes.

In this way, the discussions are dealt with on the basis of agreed facts without privacy constraints and the impacts of any proposed changes can be discussed openly.

8.2.8 Impartiality of the Banking Adviser

Issues considered

Consumer representatives raised a question about potential conflicts affecting the banking adviser (seconded for a fixed term from member banks) – especially when considering disputes involving their own bank.

Findings

We interviewed the current banking adviser, interviewed other BFSO staff about how the Banking Adviser is used, examined their duties and examples of their work. We also saw their contribution to some of the files that we reviewed.

We found that:

- i) their tasks are frequently purely technical (loan reconstructions, calculations of financial loss, analysis of statements);
- ii) when giving advice about good banking practice, the questions put to them to answer are well structured and confined to highly specific technical advice (in each case we saw, judgements about fairness or the substance of the case were left to the case manager);
- iii) frequently, their advice on banking practice requires the collection of information regarding practice in several banks, not merely their own;
- iv) there is an awareness of the potential conflict issues and we saw one example of a banking adviser excluding himself from a matter that involved past colleagues.

We are satisfied that potential conflicts are being well managed.

8.2.9 Relationships between BFSO staff and member staff

Issues considered

Consumer representatives relayed a concern regarding the relationships between BFSO case staff and member staff with which they had good, long-term working relationships. They wondered if these relationships got too close and resulted in an uneven informal disclosure of

information and allowed for too much influence of the case staffer's thinking about a dispute.

Findings

We observed from our interviews that there were certainly examples of good, friendly working relationships between BFSO staff and member staff – as we would have expected to find.

We did not find any evidence in any file reviewed of inappropriate confidences between member staff and BFSO staff. We found consistent adherence to procedures designed to ensure an even-handed approach to information sharing – eg. sending letters simultaneously to both parties, notifying the other party of correspondence from the other side, etc.

We did find evidence that these good relationships contributed to the advantage of the disputant from time to time – eg where a BFSO staff member was able to request a quick response from the bank or quickly obtain supplementary information without going through all the formal steps. We also found that BFSO staff were able also to call on good relationships with consumer advocates in a similar way.

We found no basis for concern. Such relationships are inevitable and provided that there are strong procedures in place (there are) and a culture of integrity and independence (there is), then the benefits in goodwill far outweigh any downside risks.

8.2.10 Independent review of files

The BFSO has previously commissioned a periodic independent audit of case files, focussed on natural justice, the decision-making processes, and outcomes, by an expert in the field. We think this is a valuable process and it should be repeated from time to time, however it need not have the same objectives each time. The BFSO could change the basis of an audit to focus on specific issues of relevance at the time which could include procedural fairness, effectiveness of the case communication, file documentation, consistency and merits of Findings, issue identification etc.

Recommendation 11.

That the BFSO institute a regular (say every 2-3 years) independent audit of case files. The focus of the audit should be decided at the time and could be selected from amongst a range of aspects of case management.

8.3 Determinations based on law, industry codes, good practice and fairness

8.3.1 Use and appropriateness of criteria

We found that these criteria are actually used as a day-to-day reference point in decision-making. We also found that members and consumer representatives were supportive of the BFSO and the use of the criteria. Although some members wondered aloud if the Fairness criterion was equally applied to member banks, no stakeholder seriously suggested that any change was appropriate.

8.3.2 Conflicting accounts

Issues considered

In our investigation of sample files we came upon an issue of fairness relating to matters on which the outcome rested on conflicting accounts.

The BFSO is at pains to point out that it does not take sworn evidence and it avoids any judgement about the veracity of the parties. We found that the case managers went to considerable lengths to seek out relevant material from which inferences can be drawn that would enable a decision to be made on the facts. This is not always possible and we saw some files where the matter came down to the disputant's word against the bank's.

In the cases we saw, there was no consistent convention of decision-making nor language and case managers made calls that varied from giving the disputant the benefit of the doubt (finding for the disputant on the basis that there was no reason to doubt their story), giving some benefit to both (perhaps splitting the amount in dispute 50/50 between the bank and disputant) and giving the benefit of the doubt to the bank (finding for the bank on the basis that the disputant had not established their case).

We are not arguing with the variation in decision itself – inevitably, different cases will call for different approaches and outcomes; however we felt that the BFSO would benefit from developing a more consistent approach to the decision logic and the language used.

Recommendation 12.

That BFSO develop a more consistent approach to the decision logic and language used in Findings which come down to one party's word against another's. This could be done by using existing files as case studies and workshopping them amongst a small group of case managers and senior staff.

9. Benchmark – Accountability

9.1 Collection and recording disputes information

9.1.1 Capturing caller details

Issues considered

The present mode of operation of the BFSO enquiries area is to focus on providing the necessary information and capturing the essential information as quickly as possible (postcode of caller, name of bank, product and nature of problem). Personal details of the calling consumer are not ordinarily captured. Consumer representatives questioned this approach, expressing concerns that BFSO was missing out on potentially important information about emerging problems and also could not track whether consumers were able to resolve their problem with the bank or whether they came back to the BFSO.

Consumer representatives suggested periodic surveying of those who did not follow through with their complaints.

Findings

We concluded that it would be a significant impost and low cost-benefit (and somewhat user-unfriendly) to attempt to capture all the contact details of all the callers contacting the BFSO enquiry line.

We did agree however that the periodic research of those who did not pursue their dispute is worthwhile (see discussion at Section 7.2.3 above) and made a recommendation to that effect. This would involve collecting contact details for a defined period every 2-3 years to enable that research.

9.1.2 Reporting to members

Issues considered

Members were very happy with the reporting and the members' area of the BFSO website generally. In fact, a number of those interviewed told us that they relied on the BFSO tracking system in preference to their in-house systems.

Some members raised directly with the Reviewers an observation that the BFSO method of categorising disputes as Benefiting Both (BB) was not especially helpful - as the range of outcomes within that single categorisation was too great. I.e. - outcomes could range from 99% : 1% in

favour of the bank through to 1% : 99% in favour of the consumer and still be classified as BB.

Consumer representatives recommended improved reporting of overdue responses to members - discussed at section 10.5

Findings

The only suggestion we can make here is the obvious one: - greater granularity within the category BB. (For example – BBb where the outcome is mostly in favour of the bank; BBc where the outcome is mostly in favour of the consumer and BB where it is about even.) There would need to be a discussion between BFSO and stakeholders to settle this as there would be inevitable difficulties in the categorisation and the benefit would have to be there to warrant the change.

9.2 Content of published material

Both members and consumer representatives raised a few issues with the content of BFSO public reporting.

9.2.1 Statistical reporting

Issues considered

Consumer representatives were very keen to see some capacity to report on numbers of complaints per bank compared with that bank's size or market share. There was some sympathy for that view from some of the member banks.

A specific suggestion made by one bank has already been picked up by the BFSO and that is to publish a statistic reflecting the median days to resolution – which, it is argued, provides a better reflection of performance of the members.

In general, stakeholders praised the quality and usefulness of BFSO publications. A number of stakeholders on both sides would like to see some further breakdown or refinement of the statistical reporting.

The ABA submission suggested that a process of consultation with industry prior to publishing bulletins and interpretation guidelines would be helpful.

There was some objection to the reporting of telephone calls by banks – some members thought it was misleading as not all calls represented complaints.

Findings

While we too, think that statistical reporting should be related to the size of the bank's business, we acknowledge the difficulty of agreeing a universal measure that all banks would live with. (Is it turnover, asset base, market capitalisation, number of customers, number of customer transactions, etc?)

We do support a process of continuous improvement of the statistical reporting provided by the BFSO. We urge some caution against allowing requests for more and better statistics to impact too much on the collection side. Specific requests for information are frequently better dealt with on a one-off project basis rather than establishing an indefinite overhead of collecting additional information.

We found the issue of prior consultation difficult to judge. There are arguments for and against. Clearly there are times when some consultation (not approval) is clearly sensible and other times when the BFSO should be able to express its independent view on an issue without provoking a long-winded and unproductive process of argument. On balance we think it is a matter for the ongoing judgement of the BFSO executives and its governing board - only they are in a position to strike the right balance over time.

9.2.2 Published decision information

Issues considered

The BFSO case studies and bulletins were generally seen as high quality and very helpful, although a number of both members and consumer representatives expressed a desire for more detailed information. Some expressed the view that a similar approach to the IEC's database of determinations would be very helpful – even if substantial editing was required to protect participants' privacy.

Findings

We discussed this idea at interview with members and reviewed the existing BFSO material and the IEC and FICS material. We found the BFSO bulletins to be informative and well written and they are seen as very useful by stakeholders. The case studies published, while very effective at communicating a story, are too brief and unspecific to fully meet the need expressed.

Having reviewed a significant number of files, we felt that the lengthy and detailed format of the BFSO Findings and Recommendations (ranging from 15-40 pages) would be difficult to edit to remove personal information while retaining coherence and usefulness. We think this would make systematic publishing of all Findings impractical.

We concluded that an edited sampling of relevant Findings would be most useful (see recommendation below).

Recommendation 13.

That the BFSO identify a number of reasonably typical Findings and Recommendations (perhaps 20 or so to begin with) and arrange for them to be professionally edited to remove personal information and to enable them to be used by disputants, consumer representatives and members as a guide to the way decision-making works at the BFSO.

Once the initial examples are published, BFSO could arrange for a small number of additional Findings to be added every 6 months or so as notable cases are completed. At this number, the task should not be too onerous and by posting them on the website, would go some way to providing some further transparency and assistance to parties.

9.2.3 BFSO Key Performance Indicators

Issues considered

BFSO reports on its own performance to its governing board and to members and to the public via its annual report. The content of these differs and we looked at whether the differences are appropriate to the different levels of accountability to each group.

Findings

The BFSO KPIs cover the areas that would be expected – telephone response times, new case processing, cases allocated for investigation within 30 days and time taken to close cases. The actual targets set seemed to be a sensible balance of ‘stretch’ and achievability and the reports to the Board show trend information, year on year comparisons and identify the key causes of any significant variations.

We also note that the BFSO should take some credit for reporting its finances in the Annual Report, which not all industry-owned EDR schemes do.

The operational KPIs are not reported in a structured and consistent way in the Annual Reports or on the website. We understand that the accountabilities are different for the board and members and for the public. We also recognise that the audience for the website and the Annual Report is rather more interested in the performance of the members and in dispute information than in BFSO performance against KPIs.

Nonetheless, we thought that an organisation that holds others accountable for their performance probably should demonstrate better practice in accountability and transparency to stakeholders as well as to its owners.

Every internal indicator used need not be reported publicly nor do the KPIs need to take up disproportionate prominence or space on the website or the Annual Report.

Recommendation 14.

That the BFSO should review its reporting practices with a view to improving the transparency of its internal performance. This should be kept simple, with (say) the four major KPIs reported to all stakeholders – via the website and with a little more prominence in the annual report – eg.

- i) Telephone response times
- ii) New case response times
- iii) Time before investigation
- iv) Overall time to complete cases

9.3 Systemic issues and serious misconduct

This benchmark attracted considerable concern from the Consumer representatives and a near-universal expression of satisfaction from the banks.

Consumer representatives are concerned that the BFSO working definition of ‘systemic issue’ is too narrow and that important consumer protection issues such as unrequested credit extensions are being ignored by the BFSO despite significant evidence that it is a widespread problem.

A similar set of concerns were raised around the issue of the BFSO’s ability to compel bank compliance. One aspect of this compliance issue is banks failing to alter their business practice to reflect guidance issued from the BFSO (as to what it will do where bank practices lead to consumer loss and so to a dispute with the bank (eg. - unrequested credit extensions). A second aspect is bank compliance with what has been already accepted by the industry as best practice – (eg. accepting consumer cancellation of direct debit authorities).

Findings

We saw a well-developed and resourced systemic issues function – head and shoulders above anything else we have seen in other financial/professional schemes. All case staff have a responsibility to identify disputes that may raise systemic issues and an email alert is used to seek out other current examples of matters suspected of being systemic in nature. Suspected systemic issues are referred to a dedicated specialist officer who then monitors and as appropriate takes over responsibility for the matter.

From what we saw, issues are raised by the BFSO with members promptly and from interviews with members, it appears that systemic issues are taken seriously and that the BFSO is rigorous in following up implementation of corrective action.

It also seems that there is an effective system for reporting matters to ASIC, although we note that no serious misconduct matters have been reported to date. Providing transparency, the BFSO's Annual Report gives a good overview of the BFSO's activity in this area.

With one qualification, we were satisfied that BFSO has the necessary focus, skills, culture and systems in place to effectively deal with systemic issues. Our concern relates to the extent to which the BFSO looks beyond current cases for a pattern of conduct which is illegal, contrary to industry practice or codes or is unfair.

We are aware that the BFSO has the capacity to do this and has done so in the past when systemic issues have arisen, however we are inclined to think that the process of checking or scanning for the existence of systemic problems could be strengthened. At the least, the BFSO should be able to respond to allegations of un-actioned systemic problems with some authority.

Putting these comments in the context of the example that consumer representatives have given, transaction account direct debit cancellations, in our view, if the BFSO receives more than just an occasional complaint about the failure of banks as a group or an individual bank to act upon a customer's request to cancel a transaction account direct debit arrangement, then the BFSO should be checking how many complaints of this type have been received over, say, the period since the BFSO's Bulletin on this topic.

If there have been repeat complaints, it may be that the bank's failures are not just very occasional breakdowns in systems, but rather suggestive of a systemic problem. As the BFSO says in its Bulletin on the topic, the Australian Payment Clearing Association rules expressly state that a bank may not refuse to accept a customer's cancellation request and the bank must notify the third party direct debit recipient of the cancellation.

On the other hand, if as in fact the BFSO has indicated to us, there have been very few complaints of this type, then the BFSO will be able to rely upon its investigations to respond confidently to consumer representatives that the BFSO has no evidence of a systemic problem in this area.

Recommendation 15.

That the BFSO review its systemic issues procedures with a view to ensuring that it is able to identify a pattern of poor conduct on the part of its members collectively or an individual member which emerges over a period of some months or more.

The systemic aspects of the issue in relation to unrequested credit extensions is more complex and, we think, involves what we have described elsewhere as a 'regulatory expectation gap'.

To rehearse the arguments, the consumer representatives take the view that the banks' practice is unconscionable because it encourages a significant number of consumers to enter into high levels of debt with the attendant risk of default.

It is the banks' core business to create wealth by taking risk and generally, the banks we spoke to take the view that it is entirely within their rights to offer credit and accept the associated risk – including that they may ultimately lose disputes at the BFSO.

The BFSO takes the view that its role is limited to that of an external disputes service – it is not a regulator. It fully accepts its responsibilities to alert banks and consumers as to how they can expect the BFSO to treat any disputes that do reach the BFSO; it can and does publicise and agitate for change to best practice – but it has no capacity to force the banks to restrict their provision of credit. Even under its systemic issues role, it limits itself to acting on behalf of those who have actually experienced some loss.

Whilst we recognise the social cost associated with lax credit extension practices, and fully understand the cry for some action, we have to agree with the BFSO's conception of their role. In our view, these are principally issues for industry and the regulators – the Banking Code of Practice committee and ASIC.

10. Benchmark – Efficiency

10.1 Workplace culture

Issues considered

No issues were raised by stakeholders with the Reviewers regarding the workplace culture. In our observations, we found a strong culture – which is to say it seemed noticeable and highly consistent across the workplace environment, staff attitudes, processes and procedures and written work.

Key features of the culture that we observed were a focus on quality and fairness; a frankness and openness; a willingness to learn and improve and a level of respect for stakeholders.

In terms of the impact on efficiency, we would make two observations relating to the culture.

- i) Although a detailed review of the costs of the scheme was specifically excluded from the scope of the Review, the approach to expenditure that we observed seemed to strike a very good balance between providing a healthy, comfortable and supportive work environment for staff and a cost-consciousness that emphasised keeping costs to an appropriate minimum.
- ii) From our review of the way case handling is done – it is clear that the overriding emphasis is on thoroughness, fairness and clarity of reasoning. The CIMS case management system does provide suitable tools and reports to ensure that the progress of cases is moved along, however we felt on balance that some greater emphasis could be placed on speed and efficiency.

Although we saw no real systematic problems, we saw enough that persuaded us that timeliness is probably not given sufficient attention. These observations included a few cases in which some earlier thought may have allowed for some parallel evidence gathering from two banks (rather than one after the other); a few where a well-timed early reminder may have saved weeks of delay in obtaining information from a disputant and some Findings that looked a little ‘over-engineered’. (We are conscious in making this latter point that a short Finding may well take more time to produce than a long one.)

We offer this general observation cautiously as we know that calls for greater efficiency can easily be misconstrued – and stress the following qualifications:

- The processes used are very good and the current emphases on quality and thoroughness are strongly supported by stakeholders;
- We found no specific prevalent practice to criticise;
- We are not proposing any reduction in thoroughness, fairness or the quality of the reasoning;
- We are principally talking about a minor shift of the focus of the operational oversight and continuous improvement activity to encompass some additional focus on improving speed and efficiency;
- We understand that this is a somewhat imprecise recommendation, however we believe that the management group at the BFSO are far better placed to figure out how best to make these detail changes than are external Reviewers;
- We expect that the gains to be had will be incremental and may take some time to become evident.

Recommendation 16.

That the BFSO review the focus of its operational oversight and continuous improvement activity with a view to providing some additional emphasis on timeliness and speed.

Recommendation 17.

That the BFSO review the CIMS system to identify ways of providing more prominent alerts to case managers and operational management of timeliness information – eg. the elapsed time that cases have been open; elapsed time since last action, cases awaiting case manager action, etc.

10.2 Use of technology

Issues considered

Other than very minor irritations or requested minor refinements, members seemed highly satisfied with the BFSO use of technology. The on-line dispute lodgement system was generally praised although some felt that the BFSO should do more to ensure that on-line complaints were complete (ie. account details, contact details, etc) before passing them on to the banks. No consumer representative issues were raised directly regarding the use of technology by BFSO.

Findings

We found a conservative, modern, professional standard of use of information technology. The case management system CIMS is of an excellent standard and has had continued investment to keep it relevant and up-to-date. (nb. this system

is now being adopted by other EDR schemes). The BFSO also retains an essential and sound level of in-house IT skills which is supplemented by outsourced specialist services.

10.3 Timeframes for stages of dispute resolution

Issues considered

As mentioned elsewhere, consumer representatives and members raised concerns relating to the perceived failure of parties to comply with the timeframes, but did not generally express concerns with the specified timeframes as such.

One member made the suggestion that the BFSO should adopt the Code of Banking Practice industry standard timeframes for internal dispute resolution – as a matter of consistency

Another suggestion made was for the establishment of a formal “urgent case list” that members could use where there were bona fide reasons for fast-tracking a case (typically where there is a risk of asset dissipation through delay).

Findings

We found no reason to recommend any change to the timeframes as specified currently. To the extent that specified timeframes have a role in expediting matters, they must strike a reasonable balance between ‘stretch’ and achievability to remain credible and effective.

From our observation, the current timeframes (particularly at the earlier stages) apply a realistic stretch to members and are sufficiently achievable. Given the absence of any meaningful and fair way to put pressure on disputants to respond more quickly and, we understand, more than half of the late response delays are in fact due to disputants – little would be gained by compressing those timeframes either. We were not persuaded that the COBP timeframes for IDR are directly comparable given the different processes that the BFSO goes through.

BFSO does in fact fast-track disputes where a genuine urgency exists and we sighted examples of these. There are provisions in the procedure manual for reducing response timeframes as required. The BFSO are loathe to establish a formal “urgent list” – for the not unreasonable concern that it risks becoming over-used and therefore ineffective. We suggest that BFSO ensure that members and disputants are made aware that the BFSO will try and fast-track disputes in appropriate cases and identify the circumstances that would justify urgent attention (and queue-jumping).

Recommendation 18.

That the BFSO's publications (eg. 'How To Resolve Your Dispute' brochure and Online Dispute Form) should invite disputants and members to explain any unusual urgency which is associated with a matter. Without encouraging unnecessary urgency claims, the BFSO should indicate that, to the extent possible given resource constraints and consistent with a thorough investigation, the BFSO will try and expedite unusually urgent matters. The BFSO should examine its office procedures to ensure reliable tracking of matters accepted as urgent.

10.4 Systems for tracking and reporting to parties

Issues considered

While members generally were very supportive of the BFSO reporting and of the members' area on the website, some felt that some more refinement of the current status information would be helpful. Examples provided referred to the lengthier investigation stages, where some additional information regarding current action or status would help.

Consumer representatives also thought that there were times when long periods passed without contact being made with the disputant to report on progress and that could be improved upon.

Recommendation 19.

As part of the process of minor enhancements to CIMS, the system should be modified to provide a standard indicator of "elapsed days since contact with member/disputant". This could be part of the standard summary display on entry to a case by the case manager and form a summary report for operational management.

10.5 Systems for monitoring members compliance

Issues considered

A significant issue for both members and consumer representatives was timeliness; with each side making suggestions for ways in which the BFSO could improve the timeliness of the other side. These suggestions included (from both sides) earlier warnings of deadlines, better reporting of overdue responses and tougher penalties for failure to comply!

Findings

The first thing to emphasise is that delays are by no means the exclusive fault of the member banks – as noted at section 10.3 above, disputants are the cause at least half of the time and of course, the BFSO is itself responsible for some of the delays that occur. Any system for monitoring member compliance must be cognisant of this reality – and be built around a joint responsibility for timeliness.

Second, it is frequently in the interests of the consumer for the BFSO to 'stretch' the time limits – for the consumer's response and sometimes to give the bank extra time. There is a certain amount of 'give and take' in the system which must also be allowed for.

The BFSO provides members with a monthly standard status report on all current matters that, amongst other things, alerts them to any overdue responses. Our understanding is that any of the banks with sizeable volumes of disputes are using the members' area on the BFSO website to keep a daily watch on case progress.

In addition, individual case managers telephone or write with reminders when responses have not arrived at the deadline.

Practice seems to vary according to the case manager and presumably their workload. In the files we read, we saw written reminders sent a few days before the deadline, many reminder letters dated one the day or the day after the deadline and a few that went 3 or 4 days later.

In only one file did we see repeated failures to respond on time by a member. From our conversations with bank IDR staff, these instances are most likely to involve an over-stretched (or recalcitrant) business unit that is also failing to respond to internal bank IDR deadlines.

This is an issue of some importance, not only for the timely progress of individual disputes but also because a significant part of the BFSO's perceived independence and toughness in the eyes of stakeholders hinges on its performance in this area. A perceived failure to act on tardy or incomplete responses from banks was often cited by interviewed disputants as an early factor in their confidence in the BFSO.

Overall, we found that the BFSO relationships with member IDR staff and the systems of monitoring compliance were reasonable and effective. That said, the BFSO must be seen to be keeping a focus on this compliance and probably should have some capacity to act beyond remonstrations when the responses fall below an acceptable standard.

The BFSO currently can and does take up repeat problems with timeliness with individual banks – on an ad-hoc basis. This is probably not quite sufficient as a sustainable system.

Although we understand the temptation to recommend draconian penalties – the loss of goodwill and cooperation may well be counter-productive to overall timeliness. We did not support the idea of fining members; we think that is too regulatory in flavour, puts the BFSO in the position of judge and executioner and is likely to generate considerable ill-will.

We concluded that a combination of a regular face-to-face opportunity to iron out difficulties and the option of stronger action would be optimal. Periodic, scheduled face-to-face meetings are a stronger system than ad-hoc issue discussions; lowering the threshold for a matter to be raised and ensuring a continuous process of feedback (see Recommendation 10).

Finally, we thought that the addition of a tougher consequence for late or poor responses is not a bad idea – particularly as the BFSO may be attracting a broader membership in the coming years. A version of the system adopted by the FOS in the UK – of proceeding to Finding without waiting for a significantly late response from a member is probably the correct consequence for the BFSO to retain in its armoury, provided it is not over-used.

It has the distinct advantage of being case-specific, thus penalising the responsible business unit within the bank rather than some overall penalty to the IDR function. It is also a ‘consequence’, rather than a ‘punishment’ and more likely to be accepted. It has the downside that it could have the ultimate effect of disadvantaging the consumer and there will be circumstances where it will not be appropriate.

Recommendation 20.

That the BFSO consider the adoption of a provision in its procedures that allows the BFSO to notify members that they intend to move directly to Finding or Recommendation without waiting for a response - in disputes where the matter had been unreasonably delayed by significantly or repeatedly late responses. This step should remain a matter of judgement for BFSO management and should be used (and threatened to be used) sparingly.

10.6 Procedures for referral to other forums

Issues considered

Consumer representatives raised concerns about the difficulty of finding which scheme financial service providers belong to. The major institutions are clear enough, but problems are experienced with some of the smaller firms and where the product or service involved crosses over traditional industry boundaries.

The other dimension is referrals to forums other than EDR schemes – regulators, courts and tribunals.

Findings

See the discussion above at section 7.2.1 regarding development of a searchable database of financial services providers’ membership of EDR schemes.

We found no problems with the referral to non-EDR forums.

10.7 Meeting performance targets and reporting

Issues considered

In general the feedback from members about the BFSO in this regard was positive and a number acknowledged that problems from some time ago with backlogs had now been cleared.

A few concerns and suggestions were raised by members, and although they differed in detail, related to a concern that efficiencies are being realised at the BFSO as the volumes of disputes reduces and as BFSO's dispute handling experience grows. At interview, a number of members referred to staff and cost reductions in their own areas and questioned whether this was happening at the BFSO.

Findings

See discussion above at section 9.2.3 regarding the BFSO KPIs. We found a simple and sensible framework of KPIs, with targets set at achievable but sufficiently testing levels and the appropriate level of management focus on monitoring their achievement.

See also the discussion at section 10.1 above regarding the workplace culture, in which we have recommended a little more focus on efficiency.

As a general observation, we think that the BFSO should be able to find evidence to support the anecdotal agreement that the matters before the BFSO are, on average, more complex and more difficult to conclude. Indicators such as the number of actions per matter reported on CIMS, even the length of Findings, the number of rejected Findings and so forth may provide useful data to share with members and help illustrate what is driving some of the fee increases.

In a similar vein, we also note that the BFSO is now providing full-time equivalent information about staffing to members to improve the transparency of the salary costs.

10.8 Other issue – fees

Issues considered

We were not asked to review fees and have done no direct analysis of the costs of operating the BFSO. A number of members have raised the issue of fees with us in the course of interviews or through written submissions and we felt we should make some observation in response.

Leaving aside the very few general grumbles about the overall cost of the scheme, issues raised were typically at a level of detail and most frequently querying either the level of a fee compared with the apparent effort or querying the level of fees compared with the amount in dispute.

Findings

The BFSO has the most complex fees structure amongst the financial sector EDR schemes; with by far the most user-pays bias and the most workload-related fee scale. It is a good indication of the inevitability of complaints about costs that even the BFSO still comes under fire over fees.

That inevitability does not mean that there is not more that can be done to educate member staff about the value of the fees paid to the BFSO. As the Reviewers have found in work with other EDR schemes, these criticisms are usually based on a narrow intuitive reaction to a particular fee rather than any fact-based analysis.

The fees have to be put into context. The total budget of the BFSO has stayed pretty static (reducing in real terms) over the past three years, however the number of complaints has reduced, producing a higher per-dispute cost. Both members and BFSO also agree that disputes are on average more complex and as banks' IDR processes screen out the more clear-cut matters, more of the disputes are 'shades of grey' and more difficult to decide.

The most important context is that the BFSO is but a small part of the overall complaint and dispute-handling environment in the banking industry. A number of CEOs of non-bank financial institutions that we have interviewed over the past few years in relation to EDR schemes have told us the same story. As one put it: *"Of course, we want them (the EDR scheme) to be efficient and cost-conscious – but in the context of our total internal and external cost of dealing with dissatisfied customers – the EDR cost is a fraction of the total. It is just not an issue."*

This will be every bit as true for banks as for non-bank financial institutions. A quick look at some of the case files shows the extent of the effort expended from within the bank on a typical dispute.

It is also true that because the BFSO structures its funding to be almost exclusively provided through case fees, the dollar cost of each fee is significantly higher than for EDR schemes in which large part of the funding is raised through a levy. The higher individual fees attract more attention – which can be both an advantage (as an incentive to early resolution) and a disadvantage (attracting complaints from members). It may be possible to persuade one or more of the members to run a brief costing project with the BFSO to help develop a picture of the true total cost of dealing with dissatisfied customers.

Recommendation 21.

That BFSO approach member banks to seek any available costing data that could be used to develop a picture of the BFSO costs in comparison to total member expenditure on dissatisfied customers – eg. publicity, staff, support, technology, legal and other professional fees and costs of tribunals and courts.

11. Benchmark – Effectiveness

11.1 Jurisdiction

11.1.1 Financial limit

Issues considered

Almost all stakeholders are in favour of a widely discussed increase in the absolute financial limit for the scheme – to something within the range of \$200-250k. The only reservation expressed to us by members was whether the BFSO had the experience and skills in-house to deal with the more complex small business disputes that would inevitably start to flow as a result.

As part of the same discussion, consumer representatives suggested that an exemption (no limit) for the family home would be a useful modification to the upper financial limit.

Also raised was a suggestion that the BFSO should permit “opting in” where the consumer can choose to forgo some part of their loss in order to bring the matter within the jurisdiction of the BFSO.

Findings

It is worth noting that the rationale for the upper limit is not merely the amounts involved but also because the limit acts as something of a proxy for complexity.

It should also be noted that the limit does not have as great an impact as might be imagined as very few disputes are for the entire amount of a loan, mortgage or asset under charge, etc. (eg - Even if a loan is for \$350,000, the amount in dispute is usually much less than that and likely to be within jurisdiction.) Having said that, the numbers of matters affected have been increasing; in 2001 it was 1.17% and in 2003, 2.29% of disputes lodged were outside jurisdiction for exceeding the financial limit.

We were not able to establish definitively how many of the disputes excluded in recent times as above the financial limit would have been accepted into the Scheme had the proposed new \$250,000 financial limit then applied. But based on our limited sampling of those files, it would seem that a useful additional number of disputes would come within jurisdiction. Of course a number will remain outside the terms of reference because they involve sums very much higher than the limit.

We felt that given the support of most parties to the BFSO proposal to an increase of the limit to \$250,000, that was an obvious first step (for the record, we have included this as a recommendation below).

Opting-in is not permitted in the FICS scheme but has occurred in isolated cases at the IEC – only where there is a clear, written abandonment by the consumer of some part of the potential claim and with the consent of the insurer. Members have a concern that an opting-in provision may be misused as a cost-free tactic by disputants with substantial means or with every intention of continuing to a commercial dispute before the courts.

Similarly, we had our own doubts about who would ultimately benefit from the effect of a blanket exemption for the family home, noting that the scheme was not conceived to benefit the very wealthy, nor those that use the family home as a capital-gains-free vehicle for speculation and wealth and tax management.

We did not think in the end that we had enough evidence for recommending either opting-in or a blanket exemption for the family home as additions to the absolute dollar increase and have suggested below that the BFSO collect and report on the types of matters that fall outside the limit.

Recommendation 22.

That the BFSO raise the monetary limit to its jurisdiction from \$150,000 to \$250,000.

Recommendation 23.

That BFSO collect sample data categorising the nature and amount by which disputes are out of jurisdiction on grounds of the monetary limit. This should begin once the upper limit is increased and be reported on annually. It need not be collected for longer than required to establish the patterns. Once this data is established, consideration should be given to the workability and fairness of any variation to the monetary jurisdictional limit.

11.1.2 Application of the exclusion for 'commercial judgement'

Issues considered

Consumer representatives raised a number of concerns that the exclusion for 'commercial judgement' was being overused and questioned whether the BFSO was actively testing whether the dispute really was confined to a matter of commercial judgement.

In particular they referred to matters where there was no question that an element of commercial judgement existed but there were other matters that could allow the BFSO to admit the dispute – eg. maladministration.

Findings

We found no evidence that the BFSO was failing to test members assertions that the dispute centred on the commercial judgement argument. We sighted a sample of files where case managers requested information from members to support the assertion and files where case managers opened an investigation with the stated proviso to both parties that there was an issue of commercial judgement and that the matter may prove to be outside of jurisdiction.

We did not find any systemic problem, which is not to say that individual matters have never been incorrectly assessed. In this case as with similar issues raised by members and others raised by consumer representatives, we have recommended that these issues belong in an ongoing continuous improvement process where examples can be dealt with on a case-by-case basis.

Recommendation 24.

That the BFSO and consumer advocacy agencies with significant volume of disputes with the BFSO institute a regular (say 12 monthly, depending on size) face-to-face continuous improvement forum in which 2 or 3 actual recently closed cases are reviewed in some detail to identify problems or ways of improving processes or procedures at a level of detail.

These discussions should incorporate all relevant aspects of the management of the case including timeliness and efficiency, but of course must not be seen as a chance to re-open the outcomes.

In this way, the discussions are dealt with on the basis of agreed facts and the impacts of any proposed improvements can be discussed openly. (There may be privacy issues if more than one agency is to be involved which would presumably have to be solved with specific releases or on a no-names basis).

11.1.3 Exclusions for matters of financial hardship

Consumer representatives presented a detailed argument that the BFSO, under its present rules, does have jurisdiction where a complaint is made about a bank refusal to grant temporary relief on the grounds of hardship.

Currently, the BFSO will raise such a complaint with a bank which is a member of the new Code of Practice and so has committed itself to help a customer to overcome financial difficulties. For other banks, the BFSO takes the view that a bank's decision about a hardship application is essentially a commercial risk decision and moreover, Section 68 of the Credit Code provides consumers with the option of taking the matter to a Court or Tribunal – (the forum varies between States).

Findings

Whilst we appreciate that a hardship application does in part involve a commercial judgement on the part of banks, we think that there should be scope for the BFSO to investigate:

- i) whether or not the bank did in fact give proper consideration to the application; and
- ii) if so, on what basis the bank refused the application. We accept that it is not appropriate for the BFSO to second-guess a bank's judgement that temporary relief would not be enough to enable the debtor to meet their obligations; however there should be scope for the BFSO to examine a bank's refusal of a hardship application for some other reason.

In suggesting this, we are assuming that fairness and presumably good industry practice would require a bank to give proper consideration to a hardship application. We are simply contemplating that if the BFSO finds a bank has not given proper consideration to a hardship application, the BFSO could ask the bank to consider the application afresh and could even in some cases require some compensation to be paid to the disputant.

In our view, it is appropriate for the BFSO to look at least to some extent at hardship variation complaints, even though the Credit Code provides a Court or Tribunal avenue. We understand that these forums are apparently not considering many applications from consumers under Section 68 of the Credit Code at present – which may well be because bank customers experiencing hardship are less likely to have the means, time or confidence to access the more formal Court or Tribunal avenue – precisely the reason for an avenue to an ombudsman.

Recommendation 25.

That BFSO should re-examine its approach to hardship variation disputes with a view to establishing a sensible, complementary role in this area. For example, the BFSO could undertake some research so as to form a view about what should be expected of a bank receiving a hardship variation application.

11.1.4 Matters before the courts or other tribunals

Issues raised

Consumer representatives raised examples where matters were also before the courts and argued that the BFSO should be able to deal with those matters in certain circumstances.

Findings

We were not persuaded that this was either desirable or that the courts would react favourably.

11.1.5 Outsourced and factored debts

Issues raised

Consumer representatives expressed considerable concern about disputes that were slipping out of the BFSO jurisdiction because bank debt collection had been either outsourced to or factored (sold) to third party debt collection agencies.

Findings

This is clearly an issue of some seriousness. Our querying of the BFSO and interviews with members revealed that where debt collection is outsourced (as opposed to being sold), the matter remains the responsibility of the bank and both BFSO and members confirmed that any dispute raised would be called back and dealt with by the bank and the BFSO in the normal way.

The issue is a little different in the case of factored debt. In some cases, if the dispute is about bank action prior to the selling of the debt, then the bank will accept the dispute and 'take back' the debt. Legally however, the debt is no longer the banks' and the debt collection agencies are not members of the BFSO – nor are they obliged to be members of any EDR scheme. In cases where the dispute relates to the conduct of the debt-collector, there is little option for the BFSO – there is no jurisdiction.

The BFSO reports having spoken to members and made suggestions to the debt collection industry that they voluntarily become members of the BFSO, however none have to date taken up the offer.

Options for dealing with the problem could include banks voluntarily requiring membership of the BFSO from all future purchasers of bank debt; or the government/regulators effectively requiring this of banks (or the debt collection industry). We also understand that the Telecommunications Industry Ombudsman (TIO) has amended its constitution to give it the capacity to deal with complaints about factored debt, which may be applicable. We think that this is an issue for consumer representatives and the BFSO to take up with the industry and regulators – the Code of Banking Practice Committee and ASIC.

Recommendation 26.

That the BFSO provide appropriate support to any future proposal by consumer representatives to approach either the banking industry and/or government and the relevant regulators with a view to establishing a proper complaint-handling and EDR environment for firms engaging in collection of factored bank debt.

11.2 Decision-making criteria

As referred to in section 8.3, the BFSO's decision-making criteria are: i) the law; ii) industry codes; iii) good industry practice; and iv) fairness in all the circumstances. Stakeholders universally supported these criteria as appropriate and felt that the BFSO's decisions were consistent with the criteria.

11.3 Training, support and development of staff

Issues considered

Consumer representatives raised a concern with the level of issue identification skills amongst BFSO staff and suggested that training ought to be provided in this area.

Training, support and development of staff is, in our view a critical element of successful management of an EDR scheme - or any complaints-handling workplace for that matter. It is very easy – almost inevitable - that staff ultimately become jaded and worn down in that environment – losing that critical ability to empathise with the disputant and the morale to apply energy and enthusiasm to the task.

Findings

We found a well-documented and professional training program (which included training in issue identification). Even more impressive was the extensive quality assurance program which acts as a long-term on-the-job training scheme. The QA is highly valued by the staff we spoke to and has clearly encouraged a very open, learning environment.

We found a culture of support for staff, with good quality amenities, support for external study and a flexible workplace with a significant number of part-time staff. A number of staff have been long-serving and have progressed through a number of roles in the office.

11.4 Range of remedies and resolution methods

Issues considered

We gave consideration to whether the BFSO in practice provides a sufficient range of remedies to disputants and whether it is limited unduly here by its Terms of Reference. (Section 8.2 addresses the issue of resolution methods.)

Findings

Although the BFSO's Terms of Reference perhaps suggest that the BFSO's focus, outside the privacy context, will be upon awarding a sum of money, we were content that the BFSO has the power and does in appropriate cases provide other forms of remedies. We saw cases where the BFSO found that a loan balance should be reduced or interest waived. We also saw instances where the BFSO, with evident effect, suggested to a bank that as a signatory to the new Code of Banking Practice, the bank should consider a customer's request for temporary loan relief where financial difficulties were being experienced.

We saw a number of cases where compensation was awarded for stress and inconvenience. Consistent with the BFSO's Guidelines, a conservative approach was taken and frequently less compensation was provided than that initially claimed by the disputant. In the cases we saw, we were content that the BFSO was striking an appropriate balance between acknowledging unusual inconvenience and stress and expecting disputants to have a robust ability to deal with problems.

11.5 Cooperation of members

There is no doubt that the BFSO enjoys a high level of cooperation from its members. Evidence of this includes:

- i) Testimony of goodwill from member interviews and submissions;
- ii) Willingness of members to make commercial settlements;
- iii) Members acceptance of Findings and Recommendations;
- iv) Improvement of IDR and customer relations functions due to BFSO influence and so forth.

We observe that this level of cooperation should not be taken for granted – especially if the membership of the BFSO grows more diverse over time.

11.6 Impact on member internal dispute resolution

Any direct investigation of member banks' IDR operations were out of scope for the Review, however we were able to ask the members that we interviewed and can report on the impressions gained.

All of the members that we spoke with that had any volume of disputes reported a significant lift in the internal profile and influence, professionalism, efficiency and effectiveness of their IDR areas. They all gave credit to the BFSO for influencing that improvement.

Clearly, the banks pay close attention to BFSO decisions and apply them as precedent internally – giving advice to business units on how the Ombudsman is likely to view a matter. It is clear from the interviews that many disputes settle without getting to the BFSO – simply because there has been an earlier, similar matter that has been to the Ombudsman.

A number also mentioned examples of improvements to brochures, selling practices, call-centre scripts, contract provisions, etc – directly as a result of BFSO decisions.

On the other hand, a few also made the point that banks are not especially homogenous organisations in these days of conglomerates and frequent acquisitions and there are clearly parts of the very large banks that remain rather more removed from the influence of the IDR, let alone the BFSO.

12. Summary of Recommendations

As observed in the body of the report, the BFSO scheme is a very successful operation – widely and strongly endorsed by its stakeholders and demonstrably meeting each of the ASIC PS.139 benchmarks. Our observation and investigation found an environment of professional management, strong systems, high standards of quality and performance, sustained staff morale and active continuous improvement.

The recommendations for change that we have made, summarised below, are not dramatic; rather they are incremental in nature and involve minor refinements, shifts in emphasis and adjustments to process and policy.

They can be divided into two broad groups – the majority, which are essentially internal refinements to process or emphasis that are within the BFSO's control – and those which require the involvement of other organisations and stakeholders. Recommendations 1, 2, 5, 10, 21 & 24 fall into this latter category.

Recommendation 1 – Strategic framework for promotions

That the BFSO begin a medium to long term project to develop an analysis-based strategic framework for its promotional activity.

This should include:

- i) working with members, consumer representatives and regulator(s) to develop sources of information that would form the basis for a prioritisation framework. Eg – combining relevant IDR, consumer and regulator data and comparing this with BFSO data to identify possible low awareness problem areas;
- ii) development of some more comprehensive benchmarks for profile including amongst selected disadvantaged communities;
- iii) identification of periodic priorities and special projects; and
- iv) improved analysis of the effectiveness of promotion activity against those priorities and measures.

This could be done in cycles that align with already planned periodic market research – enabling a cost effective way of measuring profile over time.

We understand that this will be a difficult and ground-breaking task and there should be acceptance by stakeholders that this will take some time to develop.

Recommendation 2 – Monitoring bank referrals to BFSO

That the BFSO propose a joint industry/ASIC/BFSO shadow-shopping exercise to monitor progress on this issue. The BFSO could usefully offer to assist with collecting data about the source of referral information at the point of telephone enquiries and at dispute lodgement.

Recommendation 3 – Public database of EDR membership

That BFSO continue current efforts to obtain the support of ASIC and the other financial sector EDR schemes to make available to the public a database of licensed financial service providers' membership of EDR schemes.

Recommendation 4 – Brochure & template mail out

That all calling enquirers be in the first instance directed to the BFSO website to the content of the 'How to Resolve Your Dispute' brochure. Where enquirers do not have access to the internet or do not appear to have the confidence or skills to do so, they should be offered a mail out of the brochure (We understand that this will have a resource impact).

Additionally, a simple (and not overly prescriptive) template guide could be included on the website and with the brochure for a time – to test its impact. If successful, it could be incorporated into future reprints of the brochure.

Recommendation 5 – Research non-pursuit of complaints

That the BFSO conduct periodic research to determine the principal reasons why some enquirers choose not to pursue their dispute with either their bank or return to the BFSO. In this way, the significant obstacles to action can be analysed and tested and the BFSO will be able to reach a view as to whether the level of non-follow through is appropriate.

We envisage a process that for a limited period, identifies a sample of callers at the point of their initial contact, who are asked if they would be willing to provide their contact details to enable researchers to call them in 3-4 months to see what happened with their matter. This could be either done as part of the next market research project or as a separate special project run by BFSO staff.

Recommendation 6 – Trial of external advocates

That the BFSO conduct a trial to evaluate the use of advocates to assist consumers for whom the standard process may not provide sufficient support.

We are conscious that the BFSO currently has the practice of referring consumers to a translation service or an advocacy service where they form the view that the consumer needs the additional assistance - although this is quite infrequent. We see the trial service as being more clearly branded as a BFSO initiative – as an integral part of the process for some disputants.

To simplify the administrative overhead, the trial should be confined to one or two states and a limited panel of external advocates.

Recommendation 7 – Encourage use of telephone

As a measure to make the BFSO's processes a little more accessible and understandable to those with limited effective literacy, the BFSO should encourage case managers to use the telephone more frequently to explain significant steps in the process. As difficult as telephone conversations can be, they are an essential companion to written communication and we think could improve the experience for some disputants if used a little more often.

Recommendation 8 – File reviews to include disputant contact

That the BFSO, at regular intervals conduct a review of a sampling of closed files including telephone contact with the disputant to assess their understanding of the progress of the matter and of the issues involved. This could be part of the independent audit suggested at Recommendation 11, but may be more valuable if done by senior BFSO staff.

Recommendation 9 – Transparency of appeal process

That the BFSO review the information provided to disputants to ensure that the process for a challenge is fully disclosed – and to expressly give disputants a chance to request a change of case manager. This would have to be carefully expressed to avoid frivolous demands.

Recommendation 10 – Improvement forum with members

That the BFSO and individual member banks of significant size institute a regular (say 6 or 12 monthly, depending on size) face-to-face continuous improvement forum in which 2 or 3 actual recently closed cases are reviewed in some detail to identify problems or ways of improving processes or procedures at a level of detail.

These discussions should incorporate all relevant aspects of the management of the case including timeliness and efficiency, but of course must not be seen as a chance to re-open the outcomes.

In this way, the discussions are dealt with on the basis of agreed facts without privacy constraints and the impacts of any proposed changes can be discussed openly.

Recommendation 11 - Regular independent file audit

That the BFSO institute a regular (say every 2-3 years) independent audit of case files. The focus of the audit should be decided at the time and could be selected from amongst a range of aspects of case management.

Recommendation 12 – Approach to conflicting accounts

That BFSO develop a more consistent approach to the decision logic and language used in Findings which come down to one party's word against another's.

This could be done by using existing files as case studies and workshopping them amongst a small group of case managers and senior staff.

Recommendation 13 – Publish edited sample Findings

That the BFSO identify a number of reasonably typical Findings and Recommendations (perhaps 20 or so to begin with) and arrange for them to be professionally edited to remove identifying information and to enable them to be used by disputants, consumer representatives and members as a guide to the way decision-making works at the BFSO.

Once the initial examples are published, BFSO could arrange for a small number of additional Findings to be added every 6 months or so as notable cases are completed. At this number, the task should not be too onerous and by posting them on the website, would go some way to providing some further transparency and assistance to parties.

Recommendation 14 – Report KPIs publicly

That the BFSO should review its reporting practices with a view to improving the transparency of its internal performance. This should be kept simple, with (say) the four major KPIs reported to all stakeholders – via the website and with a little more prominence in the annual report – eg.

- v) Telephone response times
- vi) New case response times
- vii) Time before investigation
- viii) Overall time to complete cases

Recommendation 15 – Strengthen scanning for systemic issues

That the BFSO review its systemic issues procedures with a view to ensuring that it is able to identify a pattern of poor conduct on the part of its members collectively or an individual member which emerges over a period of some months or more.

Recommendation 16 – Emphasis on improving speed

That the BFSO review the focus of its operational oversight and continuous improvement activity with a view to providing some additional emphasis on timeliness and speed.

Recommendation 17 – CIMS timeliness alerts

That the BFSO review the CIMS system to identify ways of providing more prominent alerts to case managers and operational management of timeliness information – eg. the elapsed time that cases have been open; elapsed time since last action, cases awaiting case manager action, etc.

Recommendation 18 – Fast-tracking urgent disputes

That the BFSO's publications (eg. 'How To Resolve Your Dispute' brochure and Online Dispute Form) should invite disputants and members to explain any unusual urgency which is associated with a matter. Without encouraging unnecessary urgency claims, the BFSO should indicate that, to the extent possible given resource constraints and consistent with a thorough investigation, the BFSO will try and expedite unusually urgent matters. The BFSO should examine its office procedures to ensure reliable tracking of matters accepted as urgent.

Recommendation 19 – Monitoring contact with parties

As part of the process of minor enhancements to CIMS, the system should be modified to provide a standard indicator of "elapsed days since contact with member/disputant". This could be part of the standard summary display on entry to a case by the case manager and form a summary report for operational management.

Recommendation 20 – Move to decision if unreasonable delay

That the BFSO consider the adoption of a provision in its procedures that allows the BFSO to notify members that they intend to move directly to Finding or Recommendation without waiting for a response - in disputes where the matter had been unreasonably delayed by significantly or repeatedly late responses. This step should remain a matter of judgement for BFSO management and should be used (and threatened to be used) sparingly.

Recommendation 21 – Develop total costs picture

That BFSO approach member banks to seek any available costing data that could be used to develop a picture of the BFSO costs in comparison to total member expenditure on dissatisfied customers – eg. publicity, staff, support, technology, legal and other professional fees and costs of tribunals and courts.

Recommendation 22 – Support proposal to raise \$\$ limit

That the BFSO raise the monetary limit to its jurisdiction from \$150,000 to \$250,000.

Recommendation 23 – Collect data on monetary limit

That BFSO collect sample data categorising the nature and amount by which disputes are out of jurisdiction on grounds of the monetary limit. This should begin once the upper limit is increased and be reported on annually. It need not be collected for longer than required to establish the patterns. Once this data is established, consideration should be given to the workability and fairness of any variation to the monetary jurisdictional limit.

Recommendation 24 – Continuous improvement forum with consumers

That the BFSO and consumer advocacy agencies with significant volume of disputes with the BFSO institute a regular (say 12 monthly, depending on size) face-to-face continuous improvement forum in which 2 or 3 actual recently closed cases are reviewed in some detail to identify problems or ways of improving processes or procedures at a level of detail.

These discussions should incorporate all relevant aspects of the management of the case including timeliness and efficiency, but of course must not be seen as a chance to re-open the outcomes.

In this way, the discussions are dealt with on the basis of agreed facts and the impacts of any proposed improvements can be discussed openly. (There may be privacy issues if more than one agency is to be involved which would presumably have to be solved with specific releases or on a no-names basis).

Recommendation 25 – Re-examine hardship cases policy

That BFSO should re-examine its approach to hardship variation disputes with a view to establishing a sensible, complementary role in this area. For example, the BFSO could undertake some research so as to form a view about what should be expected of a bank receiving a hardship variation application.

Recommendation 26 – Support moves to cover factored bank debt

That the BFSO provide appropriate support to any future proposal by consumer representatives to approach either the banking industry and/or government and the relevant regulators with a view to establishing a proper complaint-handling and EDR environment for firms engaging in collection of factored bank debt.

13. Appendix A – Terms of Reference for the Review of the Banking and Financial Services Ombudsman Scheme

The reviewer is asked to report on the operations and procedures of the BFSO with regard to accessibility, independence, fairness, accountability, efficiency and effectiveness, taking into account the following:

Independence of the Scheme:

- The powers and role of the Ombudsman;
- The structure and roles of the Board of the Scheme; and
- The procedures for appointing the Ombudsman and Board members.

Accessibility of the Scheme:

- The amount and focus of the promotion conducted by the Scheme: and
- The degree to which the Scheme's contact points, processes and systems are user-friendly, including to consumers with special needs.

Fairness of the Scheme's decision-making procedures:

- The information provided to disputants and members about the procedures for resolving disputes; and
- Whether the Scheme's procedures accord with the principles of procedural fairness and allow for determinations and assessments of loss to be based on fairness, law, relevant industry codes and good industry practice.

Accountability of the Scheme:

- The adequacy of its systems for collecting and recording disputes information;
- The content of the Scheme's Annual Reports, Bulletins and other published material; and
- The reporting of systemic issues and serious misconduct to ASIC.

Efficiency of the Scheme's operations:

- The workplace culture and its impact on the timely resolution of disputes;
- The use of technology in the Scheme's process, including on-line dispute resolution techniques;
- The timeframes set by the Scheme for the various stages of the dispute resolution process;
- The systems in place for keeping track of disputes, and reporting to parties about progress;
- The Scheme's systems for monitoring members' compliance with timeframes for responding to disputes;
- The Scheme's procedures for referring disputes to more appropriate fora; and
- The degree to which the Scheme meets its performance targets and reports to the Board.

Effectiveness of the Scheme's operations:

- The jurisdiction of the Scheme, with particular emphasis on the monetary limit for claims;
- The appropriateness of the criteria used in decision making;
- The training, support (including advisory resources) and ongoing professional development of staff;
- The range of remedies and dispute resolution methods available to parties;
- The degree of cooperation of members with the scheme to achieve the purposes of the Scheme; and
- The Scheme's impact on members' internal dispute resolution mechanisms.