Independent Evaluation of the Canadian Ombudsman for Banking Services and Investments' (OBSI) Investment Mandate

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OMBUDSMAN
for Banking Services and Investments | des Services Bancaires et d'Investissement

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Key findings

- This evaluation primarily concerns whether OBSI is operating consistently with its Memorandum of Understanding (MOU) with the Canadian Securities Administrators (CSA). It covers only OBSI's investment mandate. It also considers OBSI's effectiveness and efficiency with respect to its international counterparts and progress made since the last review.
- OBSI meets the requirements of the MOU and has performed well within its current mandate: its decisions are fair and consistent with those made internationally; and with its loss calculation tools, its ability to determine fair amounts of resolution is world leading.
- OBSI has made exceptional progress since the last independent review in 2011 – the main improvements have been in governance, obtaining the regulators' confidence to expand its mandate, effecting this new mandate and eliminating the backlog of complaints.
- OBSI is unlike other comparable international financial sector ombudsmen in that it does not have the authority to bind firms to observe its compensation recommendations (binding authority). This drives its operating model and prevents it from fulfilling the fundamental role of an ombudsman, securing redress for all consumers who have been wronged:
    - in 2015, 18% of non-backlog complainants who OBSI considered should receive compensation, received less than OBSI recommended (on average $41,927 less); including 3.5% who were at risk of receiving nothing.
- The real mischief, however, is not that some consumers receive less, but that OBSI's current mandate allows this to happen. It, in effect, tilts the playing field in favour of firms. The fact this is happening in a complex industry that has a significant impact on people's well-being, and in which customer literacy is generally low, is of concern.
- The use of naming and shaming as an alternative means of prompting redress has not been universally effective: in 2015, six firms refused to pay, despite OBSI having publicly named 18 firms since 2011.
- Naming and shaming has, in fact, been counter-productive: publicising refusals has served to reinforce OBSI's limitations and undermine public confidence in both the resolution system and the investment market. This is a shame as OBSI has been effective for 82% of complainants who have been assessed as requiring compensation.
- Without the ability to secure redress in all cases, it is difficult to fairly compare OBSI's performance with international counterparts. OBSI's mandate has, however, led to:
    - an operating model that is inherently inefficient – it is overly focused on resolution through negotiated settlements rather than judicious use of determinations
    - longer resolution times
    - the risk of creating future backlogs.
- It would be easy to criticise OBSI for not delivering greater value or promoting its services more. Because its current resources are consumed by the resolution process, OBSI has little left to help consumers, firms and regulators learn from the cases resolved or to identify more widespread issues and trends. And, because the lessons are not shared, OBSI is unable to fulfil an ombudsman's role in helping:
    - prevent future complaints from arising
    - improve the investment industry
    - lift consumer confidence in the investment market.

- Moreover, it is more difficult to confidently promote a service that is unable to assure and secure redress for consumers.
- In our view, therefore, OBSI is not a true industry ombudsman, it is a dispute resolution service.
- Regulators must now decide whether OBSI is to remain with its current limited mandate – and therefore limited effectiveness, efficiency and value – or whether it becomes a full value ombudsman service.
- In our view, OBSI is ready to take this next step.

Glossary

Each of these terms is defined once in the report, but listed here to aid reading.

ADR	Alternative Dispute Resolution (European directive)
ASIC	Australian Securities and Investments Commission (regulator)
CAO	Customer assistance officer
CIAC	Consumer and Investor Advisory Council (OBSI established council)
CMS	Case management system
CSA	Canadian Securities Administrators
EDR	External dispute resolution
E&O	Errors and omissions liability insurance
FMA	Financial Markets Authority (New Zealand regulator)
FOS Australia	Financial Ombudsman Service – Australia
FOS UK	Financial Ombudsman Service – United Kingdom
FSP	Financial service provider
GFC	Global financial crisis
IDR	Internal dispute resolution
IIROC	Investment Industry Regulatory Organization of Canada
IO	Internal ombudsman
INFO	International Network of Financial Services Ombudsman Schemes
JRC	Joint Regulators Committee
KPI	Key performance indicator
KYC	Know your client
MFDA	Mutual Fund Dealers Association
MOU	Memorandum of understanding
OBSI	Ombudsman for Banking Services and Investments
OLHI	Ombudsman for Life and Health Insurance
SCT	Superannuation Complaints Tribunal (Australia)
SRO	Self-regulatory organisation
TOR	Terms of reference

Executive summary

Summary statement

OBSI provides an impartial dispute resolution service, with robust processes which are highly personalised and fair to both registered firms and investors. However, it cannot confidently assure consumers of fair redress when this is warranted which undermines its effectiveness. OBSI's efficiency is affected by a process that is, by necessity, overly reliant on negotiated settlements. It should nevertheless continue to prioritise improving the speed of resolution. Ultimately, to be a world class ombudsman, OBSI should have the means and ability to secure redress and to devote more resources to helping prevent complaints and lift industry standards. This, in turn, will help improve both awareness and strategic impact.

Background

This evaluation was commissioned by the OBSI board, in consultation with the Joint Regulators Committee (JRC) of the Canadian Securities Administrators (CSA) following amendments by the CSA to National Instrument 31-103 Registration Requirements, Exemptions and Ongoing Registrant Obligations ("NI 31-103") which took effect on May 1, 2014.

The amendments require that all registered dealers and advisers outside of Québec make available OBSI as their provider of dispute-resolution services. Previously, only members of the Investment Industry Regulatory Organization of Canada (IIROC) and the Mutual Fund Dealers Association of Canada (MFDA) were required to participate in OBSI through their self-regulatory organisation's rules. In addition, many investment firms participated in OBSI on a voluntary basis, including most scholarship plan dealers.

With the amendments to NI 31-103, the CSA expanded OBSI's membership to include those portfolio managers, exempt market dealers, and scholarship plan dealers whose clients include individuals and who operate outside of Québec.

In conjunction with the amendments, OBSI signed a Memorandum of Understanding (MOU) with the CSA. The MOU provides for securities regulatory oversight of OBSI to ensure OBSI continues to meet standards set by the CSA, and for a framework for cooperation and communication via the Joint Regulators Committee (JRC).

The MOU required OBSI to commence an independent evaluation of its operations within two years of the amendments to NI 31-103 coming into force.

Purpose of the review

This evaluation was limited to OBSI's *investment* mandate. The terms of reference (TOR) are contained in Appendix 1 (note that since the TOR was prepared, the Authorité des marches financiers has become a signatory to the MOU). In summary, the purpose was to form conclusions as to whether:

A. OBSI is fulfilling its obligations as outlined in the MOU between it and the CSA

B. any operational, budget and/or procedural changes in OBSI would be desirable in order to improve OBSI's effectiveness in fulfilling the provisions of the MOU.

Although this evaluation refers to earlier independent reviews, its TOR differ from previous ones. This evaluation primarily concerns the inner workings of the OBSI and whether the CSA can have confidence in OBSI as an ombudsman service. For this reason, there is a focus on the extent to which OBSI meets international definitions and expectations of an ombudsman (see Appendix 2 for a list of references).

Approach

We undertook extensive consultation, including with consumer and investor groups, complainants, industry groups, regulators, self-regulatory groups, the OBSI board, current and former staff, and the 2011 independent reviewer (see Appendix 3). The consultation was supplemented by a review of 36 investigation files, internal guidelines and board minutes; minutes of the JRC; an analysis of statistical information; a survey of complainants who received lower than OBSI-recommended compensation; a review of website and other communications collateral; as well as a high level comparison with international standards and other similar ombudsman services, principally in the United Kingdom, Australia and New Zealand.

We received more than 70 suggestions. Naturally we did not agree with all suggestions; some we considered less important right now; some did not appear to be widely supported; and others have been superseded by events (e.g. systemic issues protocol). Nevertheless, suggestions not covered in this report have been summarised and passed on to OBSI, respecting confidentiality where requested.

Conclusions

The main conclusions and recommendations from this evaluation follow. More minor recommendations can be found throughout the report and most are dependent on implementing the main recommendations. Recommendations are set out in section 16.

Progress since the 2011 review

In 2011, the independent reviewer described two stories: on the one hand an organisation under siege, facing "high levels of [stakeholder] anxiety and furious condemnation" and with key stakeholders "campaigning for its demise" while having made excellent progress internally.

In early 2016, we found similar stories, just no longer life threatening. The major difference, it seemed to us, was the remarkable impact of an effective governing body. Greater regulatory co-ordination and support had also had a big impact. In addition, OBSI had continued to make progress, especially in clearing its backlog of cases arising from the global financial crisis (GFC).

From the perspective of external evaluators, however, thinking not just about OBSI's past but its future, it remained unable to deliver the benefits expected of an international financial services ombudsman. And in many respects it had fallen behind in terms of strategic influence.

This evaluation's debate centred largely on effectiveness – how best to get recalcitrant firms to compensate customers in the amounts that OBSI recommended as fair. Since 2011, OBSI had used its only tool – publicly naming firms that had refused to compensate customers – 18 times. Some of the consequences had become clear: reputational damage to both OBSI and industry more than to those who were named, and a system that enabled firms to negotiate down from OBSI-recommended amounts of compensation.

In this debate, OBSI remained caught between two forces: consumer and investor advocates who were ambitious for OBSI, and industry groups who mostly appeared to question (rather than overtly oppose) greater influence.

And so the underlying questions were: does Canada want an optimally-effective investment industry ombudsman? Is OBSI ready for and capable of fulfilling a bigger role?

Overall conclusions

We found that things were continuing to advance internally. In addition to achievements already mentioned, OBSI had a stronger financial base; its use of modelling to estimate losses for compensation purposes had been improved and appeared to be accepted by most stakeholders (although some aspects of its application remain contentious); and it had successfully implemented the expansion of its mandate.

Further, new member industries were somewhat grudgingly coming to terms with OBSI as their external dispute resolution (EDR) provider and we saw examples of excellent outcomes and industry co-operation. But we also unfortunately saw examples of continuing obstructive behaviour (the 2015 year ended with six firms refusing to pay, affecting about 3.5% of complainants whose cases were inside mandate and who were deemed worthy of compensation) and strong evidence of firms paying less than OBSI considered fair (approximately 18% of non-backlog cases where compensation was recommended).

We heard criticisms of aspects of OBSI's decision-making approach with respect to calculating losses, criticisms that persist despite consultation and previous review findings, and that appeared to have morphed into mythology. We say mythology because we looked carefully for evidence to substantiate these long-held concerns but found very little basis for criticising OBSI's decisions. In fact, we think firms should have a high degree of confidence. Clearly a circuit breaker is required.

And we heard concerns about OBSI's impartiality. On this score, we think industry impressions are caused by some misunderstandings and resistance to the role of an ombudsman and the way in which OBSI may occasionally respond to its relatively weaker ability to secure compensation than other comparable ombudsman offices internationally. On the consumer/investor advocate side, we consider they were justified in criticising what has become an asymmetric model: without binding authority to secure fair redress, OBSI, despite assiduously fair processes, has a model that is weighted in favour of firms who are free to ignore its recommendations and negotiate a lower award. This, and not "low-ball" offers per se, is the mischief.

We also saw an ombudsman whose efficiency was less than optimal by international standards. International comparisons have been useful in revealing where and why Canada's investment ombudsman is falling behind and why this situation is not entirely within OBSI's power to remedy. However, it is important that OBSI continues to focus on those aspects of efficiency it can influence.

Although there are differences in how ombudsmen calculate timeliness, we feel confident in saying that OBSI takes longer to resolve cases than ombudsmen elsewhere. We have identified a couple of minor areas in which timeliness can be improved, but we consider the main cause is an approach that is overly reliant on negotiated settlements. Judicious use of earlier written determinations, backed by a clear power to secure redress, would speed the process.

In other respects, we found that OBSI had slipped behind its international peers in terms of strategic influence and the value ombudsman offices can deliver. By that we mean using intelligence from casework to help prevent and reduce complaints; empower customers and firms to resolve

complaints more effectively; improve investment service provision; and make proactive contributions to public policy.

Overall, although we have made a lot of recommendations, fundamentally OBSI has fair processes and an ombudsman's ethos. We think the CSA can have sufficient confidence in it to move to the next step – exploring how it can best assist OBSI to secure fair redress for all customers. We consider having binding authority is desirable: improved organisational and consumer confidence, efficiency, effectiveness and impact will follow. To give some industry members confidence, however, an independent review of a limited number of factors used to make final decisions on compensation due may help break a long-running circuit. These include vicarious liability; treatment of off-book transactions; expectations of advisers when investments are transferred; and customer responsibility. Ingrained resistance to the ombudsman model will be harder to shift but, OBSI having moved on, it is time for all stakeholders to enable it to move ahead.

Performance against the MOU

In assessing OBSI's current performance, it is important to note a context of newness and transition:

- it had been only 20 months since the extension to OBSI's mandate – insufficient time for the newer industry sectors to have had much experience of the service; and eight months since clearing a backlog of complaints that had built during the GFC
- OBSI was enjoying a no doubt brief respite from the pressures of high complaint volumes, enabling it to put some of that capacity into catch-up projects
- the new ombudsman had only joined OBSI in September 2015: industry was complimentary about the excellent start she had made – cautiously and respectfully waiting and seeing.

We found OBSI:

- has an effective governance structure that generally provides for fair and meaningful representation on its board and committees, promotes accountability of the ombudsman, and allows OBSI to manage conflicts of interest
- would enhance the perception of balanced representation by having one of the community director positions reserved for a person selected from nominations by consumer/investment advocacy groups
- provides impartial and objective dispute resolution services and its processes are fair to both registered firms and investors, but the effectiveness of the service is sub-optimal due to its inability to assure redress for consumers due to its pure dispute-resolution approach to its role rather than a value-enhancing, strategic one
- makes decisions that are in line with international practice, taking into account general principles of good financial services and business practice, and relevant laws, regulatory policies, guidance, professional standards and codes of practice or conduct
- has improved timeliness in the intake and resolution stages of its dispute resolution process and is currently implementing a case management system (CMS) that will help improve timeliness during the investigation phase
- is unlikely to reach international timeframes for resolution because of its (currently necessary) almost exclusive use of negotiated settlements
- is less likely to be able to make effective earlier written recommendations without the ability to secure redress

- is sufficiently well-resourced to carry out core dispute resolution functions and deal with each complaint thoroughly and competently as it currently operates
- has sufficient budget for its current operating model, is building appropriate reserves as a buffer for future events, employs well qualified and highly experienced staff and is maintaining staff levels to resource important development projects
- would ultimately be able to deliver greater value with similar levels of funding if it was able to lift the efficiency of its dispute resolution process by ensuring a means of securing redress
- has devoted much less resource to public awareness and outreach than similar ombudsman offices internationally, but has done well in enabling access to those people who are aware of its services
- has effective and adequate internal controls to ensure the confidentiality, integrity and competence of its investigative and dispute resolution processes
- has appropriate and transparent processes for developing its core methodologies for dispute resolution
- shares information and co-operates with CSA members to facilitate effective oversight under the MOU and should continue to enhance this
- has undertaken public consultations in respect of material changes to its operations and services, including major changes to its Terms of Reference (TOR)
- was already reviewing its allocation methodology and fees following two years' experience with its expanded mandate.

Key recommendations

Our recommendations are designed to:

- lift consumer and industry confidence in the ombudsman role
- improve the efficiency of OBSI's dispute resolution process
- improve the effectiveness of OBSI's dispute resolution mandate
- enhance OBSI's value and awareness.

We suggest the primary strategies for achieving this are:

- enabling OBSI to secure and assure redress for consumers
- ensuring direct consumer representation in governance
- ensuring effective implementation of the systemic issues protocol
- employing a wider range of resolutions, principally earlier adjudicative recommendations
- enhancing knowledge management systems
- moving towards a more strategic ombudsman approach.

Initiatives

Of the 20 recommendations made (and summarised in chapter 16), the following are of greatest priority:

- OBSI is enabled to secure redress for customers, preferably by empowering it to make awards that are binding on the firm, and on the customer if they accept the award (in full and final settlement of the complaint)
- OBSI's constitutional documents are amended to provide for one non-industry director to be nominated by consumer/investment advocacy organisations
- OBSI employs a suitable independent expert to review its approach to those aspects of its loss calculation methodology that remain contentious
- OBSI develops guidance for industry on how it will implement the systemic issues protocol
- OBSI introduces the option of making earlier adjudicative decisions
- the OBSI board adopts a strategic approach to ombudsmanship, incentivising staff to use the intelligence gained from cases to help avoid and reduce the incidence of complaints.

Implementation

We expect the following factors will be taken into account when assessing which recommendations will be implemented and when (i.e. over the next three to five years):

- whether the recommendations rely on having a better means of securing redress, e.g. binding authority
- whether additional funding and/or skills are required
- whether there are likely to be sustained reductions in demand.

1 Evaluation framework

This evaluation has been conducted taking the following standards and requirements into account (see Appendix 2 for list of references):

- MOU between the CSA and OBSI (Appendix 1)
- International Network of Financial Services Ombudsman Schemes (INFO): *Effective approaches to fundamental principles*
- ISO 10003:2007 *Customer satisfaction – Guidelines for dispute resolution external to organizations*
- Ombudsman Association: *Guide to Principles of Good Complaint Handling*
- Thomas & Frizon report, produced for the World Bank: *Resolving disputes between consumers and financial businesses*: *Fundamentals for a financial ombudsman*, produced for the World Bank
- Australian Securities and Investments Commission (ASIC): *Regulatory Guide 139: Approval and oversight of external dispute resolution schemes*
- Australian Treasury guideline: *Key practices for industry-based customer dispute resolution schemes.*

As the evaluation's TOR has overlapping requirements – between parts A) the MOU and B) operational effectiveness – the elements have been combined into one set. Similarly, international comparisons and developments since the 2011 review are woven into the general text although conclusions are drawn in the sections 14 and 15 and in the executive summary. OBSI has also provided a summary of progress against the 2011 recommendations (see Appendix 5).

2 Role and purpose of an ombudsman

2.1 International guidelines

It is important to refer in some detail to internationally accepted guidelines for financial services ombudsmen. These guidelines influence our own expectations of an exemplary ombudsman service and set the framework for evaluating OBSI's service and understanding stakeholder expectations. In this section we consider matters of principle. Evaluation of the details of OBSI's service follow.

We used the Ombudsman Association's[1] statement of principles , extracts from which are set out below, as one such framework (see Appendix 4 for full text).

> *The ombudsman model is used to resolve complaints made by someone 'small' (citizen/consumer) against something 'big' (public body or commercial business).*
>
> *Ombudsman scheme procedures are designed to redress the difference between the resources and expertise available to the citizen/consumer and those available to the body/business.*
>
> *… the outcome is not affected by how well either of the parties presents his/her/its case, and representation by lawyers (or others) is not necessary.*
>
> *Ombudsman scheme recommendations/decisions are based on what is fair in the circumstances, taking account of good practice as well as law.*
>
> *They are committed to achieving redress for the individual, but also, where they identify systemic failings, to seek changes in the work of the bodies in their jurisdiction, both individually and collectively.*
>
> *Where they identify injustice, they seek to put this right.*
>
> *In the private sector, ombudsmen usually have the power to make recommendations which are binding on the bodies in their jurisdiction unless successfully challenged through the courts.*

Industry ombudsman services therefore help engender public, and indeed international, confidence and trust in industry – in this case, Canada's investment industry. To quote Thomas & Frizon (2012, p.10) in their review for the World Bank:

[1] Formerly the British and Irish Ombudsman Association

> *Experience shows that an effective financial ombudsman benefits financial businesses and the state, as well as benefiting consumers:*
>
> - *Consumers have greater confidence in financial services when they know that, if anything goes wrong, they will be able to take their dispute to an independent body that will resolve the issue quickly and informally, without the consumer needing a lawyer.*
> - *Financial businesses benefit because: consumers are more likely to buy financial products; the cost of resolving disputes with consumers is kept to a minimum; and unscrupulous competitors who act unfairly are held to account.*
> - *The state benefits because: redress can be provided at minimum cost; feedback from an ombudsman can help improve future regulation; and confident consumers are more likely to play their part in helping to develop a sound financial market.*

Similarly, in Australia, ASIC (2013, p.11), has stated in its regulatory guide:

> *We believe that industry-supported schemes play a vital role in the broader financial services regulatory system. The existence of these schemes has provided:*
>
> *(a) a forum for consumers to resolve complaints that is quicker and cheaper than the formal legal system; and*
>
> *(b) an opportunity to improve industry standards of conduct and to improve relations between industry participants and consumers.*

It is also now expected that ombudsmen will have a more strategic approach to their work including using intelligence from casework to help: prevent and reduce complaints; empower customers and firms to resolve complaints more effectively; improve the provision of financial services; and make proactive contributions to government policy. This can be illustrated in the following quotes.

> *Ombudsman schemes publicly feed back the general lessons from cases they have handled, so stakeholders (including government regulators) can take steps to improve things for the future. (Ombudsman Association. n.d.)*

> *Financial ombudsmen: help to support improvements and reduce disputes; help financial businesses themselves to resolve disputes with consumers… (Thomas & Frizon, 2012, p.6.)*

> *…ombudsman schemes [are] becoming more proactive in using casework intelligence to help service providers to improve and taking – along with regulators – a more strategic approach to dealing with disputes (Gill et al, 2013, p.3.)*

2.2 Consultation insights

We found that **consumer and investor** advocacy groups supported the wider ombudsman roles of prevention, improvement, systemic investigation and binding decisions, and were ambitious for OBSI to embrace these roles in addition to core dispute resolution.

Firms and industry groups generally had a somewhat less ambitious agenda for OBSI. They wanted timely, cost-effective and expert dispute resolution. Some had residual concerns about industry knowledge. Some challenged OBSI's impartiality, holding the view that "levelling the playing field" between firms and customers created a consumer bias (see section 5.2.1). Some feared that having a wider mandate that included binding authority and systemic issues would turn OBSI into a regulator (discussed below in 2.3). Others opposed binding authority because of residual issues with OBSI's compensation approach and because it would turn OBSI into a tribunal (section 4).

Bigger firms tended to consider an external ombudsman was limited in the value it could add given the much higher number of complaints these firms resolved through their own internal complaints procedures. That said, most noted that an external ombudsman was helpful in resolving complaints for clients who needed a higher perceived degree of independence or who presented a reputational risk (e.g. from social media campaigns). They also saw it as a cost-effective alternative to the courts.

On the other hand, stakeholders shared common ground in acknowledging that an ombudsman may be able to add greater value through a more strategic focus on helping prevent and reduce the incidence of complaints. This is explored further in section 9. To quote one bank's internal complaints resolution staff member:

> *We used to have really good trending discussions back when all banking complaints were in the one organisation. There was more value in the way they looked at complaints.*

Given the common ground and consistency with international expectations, we recommend that OBSI's board supports a strategic approach to ombudsmanship. Suggestions as to the potential added value services are made throughout the report, particularly in section 9, and summarised in section 16.

Recommendation 1:

That the OBSI board supports a strategic approach to ombudsmanship, incentivising staff to use the intelligence gained from cases to provide suitable additional services to participating firms and guidance to customers.

2.3 Comment – relationship to regulatory roles

2.3.1 Systemic issues

The JRC has now developed a systemic issues protocol with OBSI. The substance of this is discussed in section 3.2.4.1. In this section we lay out our general views on the role of ombudsmen and regulators in the context of industry concerns about ombudsmen becoming more regulatory in nature if they have a systemic investigation responsibility.

An ombudsman seeks to determine whether there is a problem and, if so, ensure it is resolved fairly. In carrying out its role, an ombudsman typically works co-operatively with the parties but also has

tools to incentivise co-operation. On a more macro level, when an ombudsman has a view of the whole industry, as OBSI has for investments, it adds value by identifying wider issues, often at an early stage. Experience and contextual knowledge often enables it to identify whether an issue potentially affects more customers than the original complainant, in other words, whether it is a potential systemic issue and whether it is significant.

The annual reports of international ombudsman offices reveal significant benefits from systemic issues investigations, including prompting:

- better ways of communicating with customers to avoid problems
- improved disclosure
- improvements to systems and processes
- improved training
- identification of gaps in the law.

In our experience, resource-constrained regulators find it more efficient to investigate potentially serious systemic issues themselves and delegate less serious matters to an ombudsman.

Arrangements such as these are efficient and promote public confidence in the regulator, the law, the relevant sector and the ombudsman. Formalising the arrangements in the law or through protocols helps ensure issues are not missed. This is common practice internationally.

Provided there is a definition of "serious" and a clear investigation protocol for systemic issues, industry should not be concerned about an ombudsman becoming a regulator. The primary aims are to identify:

- whether there is, in fact, a problem
- how many people have been affected
- whether the problem is historic (in which case how long it has existed)
- whether it could happen again and how to prevent that
- what is needed to put affected parties right.

It is usually only where the matter is material or where firms refuse to co-operate that it is necessary to refer matters more formally for regulatory intervention. Firms may also choose to self-report to the regulator – many regulators have a co-operation policy to encourage this.

2.3.2 Contribution to public policy

An ombudsman may also use its experience to inform public policy. We understand OBSI provides perspectives informally but consider it would better demonstrate OBSI's expertise, value and independence if it commented more formally on proposed legislation and regulations. This would supplement its responsibility to proactively inform regulators about systemic issues.

Recommendation 2:

That OBSI includes a public policy function within its stakeholder relations team to prepare formal submissions on relevant regulatory or legislative proposals, and respond to regulatory requests for advice on the effectiveness of existing regulation.

3 Governance

OBSI's governance structure should provide for fair and meaningful representation on its Board of Directors and board committees of different stakeholders, promote accountability of the Ombudsman, and allow OBSI to manage conflicts of interest.

3.1 Achievements

OBSI has made significant progress since the last review, much of which is due to governance changes and subsequent governance practice. Despite its unusual, and in our view, rather large board, OBSI would make an excellent case study in the value and influence of boards. To quote one relatively new board member, the board is characterised by *"rigour and high standards"* and *"the passion for living up to the mandate is exceptional"*. Having interviewed most board members, reviewed minutes and policies, assessed progress, and listened to the views of other stakeholders, we agree.

Major achievements include:

- establishing effective boardroom practice: decisions are made unanimously following open discussion; and the board conducts director performance reviews and board effectiveness reviews
- developing a rigorous director selection policy and process
- improving management oversight, direction and mentoring, especially with respect to addressing the backlog and developing the new chief executive/ombudsman's performance agreement
- engendering culture change within the organization – empowering management to take action, for example, by using OBSI's long-held (but until 2011 seldom-used) naming and shaming powers
- engendering greater regulatory confidence, resulting in the decision to award OBSI the sole responsibility for resolving investment-related complaints, and expanding its mandate
- steering the organisation through the expansion of its role
- ensuring it has the resources to operate efficiently and placing a clear priority on clearing the backlog
- recruiting the new ombudsman.

3.2 Key issues

Key issues raised through consultation and our own observations follow.

3.2.1 Independence

OBSI is an independent not-for-profit corporation. It is approved as a dispute resolution scheme by regulators, but independent of them. OBSI has its own board of directors and by-laws. The by-laws stipulate that the board has no involvement in dispute resolution and that directors act in the best interests of the organisation.

Some customers or consumer representatives submitted that, to be truly independent, OBSI needed to be a statutory scheme. Internationally there is a range of effective models. The United Kingdom's Financial Ombudsman Service (FOS UK) is a statutory ombudsman while most financial sector

dispute resolution services in Australia and New Zealand are industry-based, but approved by government. The Australian Financial Ombudsman Service (FOS Australia) has a specific mandate from its financial regulator, ASIC, to investigate systemic issues and resolve hardship cases.

In our view it is not necessary to be constituted as a statutory scheme to be effective. Rather, an ombudsman office must be constituted as a demonstrably independent organisation and given some form of governmental reinforcement of the ombudsman's authority.

Regulatory oversight, through the JRC, is somewhat more formal than we are used to seeing. This, however, appears to be appropriate given the recent extension to OBSI's mandate and earlier industry views. Our review of the minutes showed the relationship between the JRC and OBSI is constructive. We also consider the JRC has been instrumental in lifting some of the value OBSI provides, particularly through requiring more detailed quarterly statistical data.

The self-regulatory bodies (SROs), IIROC and MFDA, who also sit on the JRC, have been particularly helpful in assisting with the administrative task of ensuring that members' fees are invoiced and paid. In other jurisdictions this has been left to the ombudsman, causing a considerable administrative burden.

3.2.2 Board composition

Consumer and investment advocacy groups voiced strong concerns about the lack of consumer or investor advocacy representation on OBSI's board. In essence, they would like to see at least one consumer/investor director nominated by these groups as they consider the board has no such input. This is consistent with the 2011 independent review recommendation (The Navigator Company, 2011, p.9) to bring a "consumer voice" to the board.

The International Network of Financial Services Ombudsman Schemes (INFO), *Effective Approaches to Fundamental Principles* (2014) state:

> *Members of any governance body are any of the following which commands public confidence in the relevant country:*
>
> - *appointed by the legislature, the government, the financial regulator (s) or a body that has only public-interest members; or*
> - *a body with balanced membership – for example:*
>   - *one third each from the financial regulator(s), the financial industry and consumer bodies; or*
>   - *equal numbers from the financial industry and consumer bodies with an independent chair; or a majority are independent members.*

Similarly, the Australian Treasury (2015, p.12) in its guideline on key practices for industry-based customer dispute resolution states:

2.7 Where the office is established as a company, the overseeing entity must have a balance of consumer, industry and, where relevant, other key stakeholder interests involved in governance.

2.8 Representatives of consumer interests on the overseeing entity must be: a) capable of reflecting the viewpoints and concerns of consumers; and b) be a person in whom consumers and consumer organisations have confidence.

Under its by-laws, OBSI is not limited to any particular number of directors. Rather, it must have three industry-nominated directors and a minimum of four (one more than the industry directors) community directors. The organisation's officers, including the chair, may be an existing director but, if not, the minimum complement would be eight. The chair acts as a community director but is not able to exercise a casting vote.

The board may also have committees, whose members may include non-directors. Currently the board has three committees: Governance and Human Resources, Finance and Audit, and Standards (although in recent years this committee's function has been discharged by the whole board because of the nature of the issues the board has been addressing).

OBSI currently has 10 directors: four members' terms expired recently and they have been replaced. The by-laws envisage staggering of terms, so to lose four experienced members at once might ordinarily be a problem, except OBSI's board is large and one of the new members has extensive experience with the organisation having formerly been on OBSI's Consumer and Investment Advisory Council (CIAC).

With respect to the INFO guidelines, OBSI has a mixed model, but is consistent in having a majority (seven/ten) of independent (meaning independent of industry) members, including an independent chair.

Directors are selected based on a skills matrix. Community directors come from a variety of backgrounds and geographic locations, but are characterised by strong governance experience. They also bring backgrounds in academia, community organisations, law, business and accounting. None is nominated by consumer or investor advocacy groups.

Five submitters suggested that community directors should have no industry background. We consider the current limitation on directors, i.e. that they not have been employed in industry for two years, to be sufficient. It is likely this suggestion is related to consumer advocacy representation and that our recommendation in this respect (Recommendation 3) provides an appropriate counter-balance. Nor do we agree with two submitters who suggested directors be limited to two, two year terms. We consider the current arrangement is appropriate as it takes some time to learn about the organisation and the industry.

All directors interviewed impressed with their prior experience and dedication to doing the right thing by the organisation. We note in particular that it was the industry members who encouraged OBSI's board to build reserves rather than immediately return any surplus to members in order to put the organisation on a sounder financial footing.

By all accounts the board has been impressive in effecting a turnaround since the lamentable governance situation recorded in the 2011 review and we are somewhat reluctant to recommend

any tinkering with what appears to be a successful formula. However, we have made a few observations and recommendations below.

The governance structure appears large. There are many directors, there is a strong weighting in favour of non-industry representatives, and no consumer (rather than community) voice (this comes informally through the CIAC).

The CIAC, which is useful in extending OBSI's reach into the community and bringing consumer views to the board table up to twice a year, should not be seen as a substitute for a consumer voice on the board.

We agree with the 2011 recommendation to have a consumer voice on the board. There is no easy way to substitute for the person whose first question comes from a consumer advocacy perspective. Accordingly, we recommend that one of the community positions be reserved for a consumer/investment advocate and that this be based on nominations from consumer groups. The nominees should be subject to the same selection process as industry representatives, screening for their ability and willingness to act in the best interests of the organisation, rather than as a sector advocate.

We acknowledge that the current board has worked exceptionally well and that this is in large part due to the skills of a highly effective chair. This situation should be able to continue with a consumer advocate director aboard.

In other respects, we suggest the board considers whether it is necessary to have so many members. Having a consumer advocate board member may reduce the need for more than eight, although we also recognise the benefits of having nationwide representation and access to a suitably wide range of skills.

We do not agree with some submitters that the CIAC and its role be formally incorporated into the by-laws. We consider by-laws should enable maximum organisational flexibility and new ones should only be created when absolutely necessary. Although we consider the CIAC should remain, if the recommendation to appoint a consumer/investor advocate representative is accepted, OBSI's board will need to rethink the CIAC's role and how it can best add value.

Until a consumer representative is appointed, we recommend involving the CIAC in the process of developing the next strategic plan by requesting:

- written advice on what the CIAC considers to be the key issues from a consumer/investor perspective
- inviting a CIAC representative to participate in the board's strategic planning meeting and present its paper
- inviting a consumer/investor advocate to the board's strategic planning meeting.

As an aside, we do not consider it necessary for the CIAC to publish an annual report, as suggested by one submitter, although it would be helpful for OBSI's annual report to reference some of the issues, intelligence and opportunities the CIAC has brought for discussion.

Recommendation 3:

That one of the community director positions on OBSI's board be reserved for a consumer/investor advocate and that this appointment be based on nominations from consumer/investor advocacy groups.

That, until a consumer representative is appointed:

- the CIAC is asked to present a paper outlining key issues from an investor perspective for the OBSI board's next strategic planning meeting and to participate in that meeting
- the OBSI board invites a consumer/investor advocate to attend the strategic planning meeting.

3.2.3 Board and CIAC transparency

OBSI commissions independent reviews and produces an annual report which incorporates a report from the chair as well as financial statements. These reports are attractive and contain novel ways of presenting information. In our view the information and insights provided in this report could be enhanced to increase transparency and add even greater value to stakeholders.

Good developments internationally include: publishing the ombudsman service's strategic framework and annual plans (including objectives, initiatives and KPIs); and reporting against those KPIs and initiatives. FOS Australia is a particularly good model because of its readability and transparency and because it has clearly lighted on a range of KPIs of most significance to its strategic objectives.

OBSI's next strategic plan is scheduled for completion by September 2016. This is sensible and gives the new ombudsman a chance to form her own recommendations. We therefore recommend that OBSI publishes its key strategic objectives, initiatives and performance measures alongside progress towards these.

Some consumer and investment advocate submitters called for a range of additional transparency measures that we considered demonstrated an unusual lack of trust in the board. For example, there was a call for the board to publish its minutes as it used to do some time ago and for board committees to also publish minutes. Having reviewed similar international ombudsman services, only one, FOS UK, makes its board minutes publicly available.

We do not have a strong view on publishing board minutes, but are not convinced that doing so would enhance the effectiveness of governance or be best practice internationally from a transparency perspective. In any event, boards can always choose what they make public. Accordingly, we leave this to the board's discretion. We do, however, recommend that board committees provide more detail about their activities in the annual report.

Recommendation 4:

That OBSI enhances transparency by publishing in its Annual Report:

- key strategic objectives, initiatives and performance indicators, and progress against these
- more information about board committee activities.

3.2.4 Terms of Reference

Consumer and community submitters raised the following matters:

- lack of binding authority
- removal of OBSI's ability to investigate systemic issues
- carving out of segregated funds
- six-year limitation period
- $350,000 compensation cap
- 180-day period for customers to submit their complaint to OBSI
- frequency of independent reviews
- specifying resolution timeframes
- inclusion of reference to promoting awareness.

Because of the significance of the discussion on binding authority, it is covered in section 4.

3.2.4.1 Systemic issues

The JRC has now finalised OBSI's role with respect to systemic issues, and its MOU with OBSI has been amended. The protocol requires OBSI's chair to inform the CSA designates, in writing, of any potential systemic issue OBSI identifies and to provide sufficient detail about why it considers the matter to be systemic. OBSI must do so within 30 days of identifying the issue. Systemic issues are defined in the protocol to encompass:

> *a) multiple complaints against a registered individual(s) about products or services provided to investors*
> *b) multiple complaints against the same registered firm about similar products or services provided to investors, or*
> *c) the same complaint against multiple registered firms in a registration category and/or about similar products or services*
>
> *which appear likely to have significant regulatory implications or to raise concerns about the registrant's fitness for registration.*

This protocol in effect requires OBSI to be alert to potential systemic issues and to distinguish those matters which are more serious (i.e. that are likely to have significant regulatory implications or raise concerns about a registrant's fitness for registration) from those which are more minor (for example, improvements to processes or to disclosure). In addition, it must have undertaken sufficient enquiry to be confident that a potentially serious problem has occurred.

Although the protocol is not explicit, we assume OBSI will identify, enquire into and resolve more minor systemic issues without the need to refer these to the CSA designates. This will require a definition of what OBSI considers to be serious and a guide for firms on how it will implement the protocol, including its initial enquiry process. We would expect this responsibility to lie with the ombudsman.

We consider it preferable for a financial services ombudsman to have formal investigative powers for systemic issues enshrined in its TOR: the protocol, however, is a step forward. Having reviewed the protocol we consider it could be enhanced by expanding the definition of systemic issues to include issues arising from a single complaint. Financial services products are complex, issues can be hard to detect, and customers need to trust representations and promises made by firms. It is not unusual for systemic issues to be identified by one particularly knowledgeable and conscientious person, as ASIC (2013) envisages in its regulatory guideline:

> *120. While several complaints or disputes of the same type may indicate a systemic problem, we do not believe that it is sufficient to define or classify a systemic issue by reference only to the number of complaints or disputes a scheme may have received.*
>
> *121. A systemic issue may be identified out of the consideration of a single complaint or dispute. This is because the effect of the particular issue will clearly extend beyond the parties to the complaint or dispute. Some examples of a systemic issue include where there is a mistake in how interest is calculated or there is a mistake in how a fee is applied. Alternatively, a systemic issue may only become evident after the scheme has received multiple complaints or disputes that are similar in nature – for example, where a particular intermediary has mis-sold financial or credit products to a number of consumers.*

This is a matter for the CSA to consider.

Recommendation 5:

- That OBSI produces a working definition for what constitutes a matter that is "serious" enough to refer for regulatory attention, and a guide for firms on how it will implement the systemic issues protocol.
- That the CSA extends the systemic issues protocol to include complaints raised by a single complainant.

3.2.4.2 Segregated funds

Consumer and investor group submitters were concerned that the OBSI board had decided to carve out segregated funds from the range of products covered by the ombudsman. Their principal concern appeared to be whether it was possible to fairly consider a portfolio if a part of that portfolio had been removed.

OBSI does, in fact, include segregated funds in its portfolio assessments, but any claims for losses need to be separately investigated and resolved by the Ombudsman for Life and Health Insurance (OLHI).

This raises concerns about whether both offices will consider matters the same way; whether OLHI has access to loss adjustment methodologies as sophisticated as OBSI; and about the fact that complainants may be put to the effort of going through two dispute resolution processes.

Although, historically, there has not been much interaction between the two ombudsman offices, the new OBSI ombudsman has met with her counterpart and agreed to conduct a joint investigation when a suitable case arises. A closer link is preferable for complainants who should not have to deal with multiple agencies for their investment portfolios. In the absence of any plans to have a common dispute resolution service, we recommend the two ombudsmen continue developing this relationship and that they develop a common approach to identifying and quantifying losses. As the relationship develops, we would also expect to see joint promotion of the respective ombudsman services.

As an aside, Thomas & Frizon (2012, p.24 & p.38) observed:

> *Most ombudsmen started covering a single sector (such as banking or insurance). The number of combined ombudsmen, covering all sectors, has grown over time – first in the United Kingdom and then Ireland, Netherlands and Finland – with others considering moving in that direction."*
>
> *An ombudsman with partial coverage is better than no ombudsman at all. But, even if the ombudsman only covers a single sector (such as banking or insurance), it is helpful if all the financial businesses in that sector are covered by one ombudsman. It is unhelpful if a financial ombudsman covers only the members of a particular national industry association – especially where:*
>
> - *there is more than one association (so that there is more than one ombudsman); or*
> - *foreign-owned financial businesses are not members (creating gaps in coverage).*

Observing the UK model, in particular, it is clear there are considerable benefits from having one service, not least in economies of scale and scope, consistency of approach, consumer awareness and access, and ability to deliver value to all stakeholders.

Recommendation 6:

That the OBSI and OLHI chief executives develop a joint approach to identifying and quantifying losses associated with segregated funds.

3.2.4.3 Six-year limitation

Under OBSI's TOR, OBSI cannot consider a matter if the complaint has been made to a participating firm more than six years after the time the complainant knew or reasonably ought to have known of the problem or issue giving rise to the complaint. A term of six years is consistent with most other international ombudsman services, but participating firms have questioned whether it should be more consistent with provincial court jurisdictions where we understand it is becoming increasingly common to reduce the limitation period to two years.

Bearing in mind that ombudsman services are established to enhance access to justice, that investment time horizons are long, and that it was only relatively recently that OBSI introduced a six-year period, it may be too soon to reduce mandatory timeframes. However, as no information is available on which to base an informed decision, we recommend gathering information about the length of time between the genesis of a problem, the client noticing it and a complaint being laid. The data should cover at least a two-year period. A record of cases ruled outside mandate at the enquiries stage because they exceed the six-year limitation period should also be kept. OBSI should then analyse the data, review international practice and decide whether it is timely to reduce the limitation period.

Recommendation 7:

That OBSI records information when investigating a case about the length of time between the genesis of a problem, the client noticing it and a complaint being laid. Data should also be collected at the enquiries stage about cases ruled outside mandate for exceeding the six-year limitation period. Data should cover at least two years before deciding whether to reduce the current six-year limitation period.

3.2.4.4 Compensation cap

OBSI's compensation cap, at $350,000, has remained the same since 2002. Judging by the nature of compensation claims made, very few approach this amount and only one case involved capping the amount recommended (although the firm ultimately paid the full amount of loss, approximately $75,000 more than the cap). There is no way of knowing, however, whether and how many complainants may have been deterred from making complaints for larger sums simply because of the cap.

OBSI's mandate is not restrictive in that it allows complaints of any size; it is only limited with respect to the amount of compensation it can recommend. Complainants can therefore opt whether they want to go through the OBSI process or take a claim for a larger amount to court, or if IIROC members, access the arbitration service it offers.

Independent lawyers we consulted advised that claims needed to be over $500,000 before they were worth pursuing in court. IIROC arbitration limits compensation to $500,000 but is not free to the client. Costs are split between the parties.

It is unclear why IIROC offers an alternative route and why, in its brochure on compensation, it places OBSI third on its list of pathways for seeking compensation. It is also unclear why there is a $150,000 difference in compensation caps between arbitration and OBSI as it seems unlikely the marginal cost of arbitration would be as much as this. Having an alternative would seem unnecessary if OBSI's compensation cap were closer to $500,000 and it had binding authority. It

would also reduce confusion for consumers. We also note that one of the new participating groups felt a compensation cap of $500,000 would be more appropriate because of the size of investor portfolios in their industry. That said, nothing limits firms from paying above what OBSI can award.

Comparing compensation amounts internationally, FOS UK has a cap of GBP150,000 (approximately CAD280,000), FOS Australia, AUD309,000 (approximately the same in CAD) and New Zealand schemes NZD200,000 (approximately CAD176,000). OBSI's compensation cap would not seem to be out of alignment although we did not compare average investment portfolios across the countries. We note, however, that FOS Australia's TOR reflect ASIC's requirement to review the compensation cap every three years based on the higher of two specified indices, therefore ensuring the amount stays approximately in line with inflation. We consider this to be best practice.

On the face of it, there does not appear to be a compelling need to increase the compensation cap. On the other hand, there seems no reason why the compensation cap should be allowed to drift relative to inflation and growth in investment portfolios. We therefore recommend that OBSI reviews its compensation cap relative to IIROC's arbitration scheme and to the point at which a case is worth bringing to the courts. We also recommend that OBSI's terms of reference be amended so that the compensation cap stays in line with inflation.

Recommendation 8:

That OBSI reviews its compensation cap to bring it closer to the IIROC arbitration limit and amends its terms of reference to require the compensation cap to be adjusted in line with inflation, on a three yearly basis.

3.2.4.5 180-day period for lodging complaints

We received two complaints about the manner in which OBSI had dealt with cases that were outside the 180-day period following a firm's decision to bring a case to OBSI. The complaints were that the period was not long enough and that OBSI should exercise greater discretion.

A six-month period is not unreasonable. Timeframes in New Zealand and the UK vary from two to six months, while FOS Australia has a two-year timeframe.

OBSI is not precluded from using its judgement to extend the timeframes in suitable cases, a point the deputy ombudsman makes in his 2015 annual review. Our review of files satisfied us that OBSI was, by and large, exercising its judgement appropriately and that customers were given adequate opportunities to explain their situations.

3.2.4.6 Frequency of independent evaluations

Seven submitters suggested OBSI should be subject to independent evaluations three-yearly rather than every five years. We consider five-yearly to be sufficient provided an ombudsman commissions independent reviews of their decisions more frequently. It is not uncommon to submit a small sample of decisions to an independent reviewer every year, or two-yearly. We think this is good practice and provides both firms and customers with independent assurance over the quality of decision-making as well as valuable feedback to staff on opportunities for improving resolution practice. We recommend that OBSI submits a small sample of files to an independent reviewer for evaluation on one to two occasions in between formal five-yearly evaluations.

Recommendation 9:

That OBSI submits a small sample of decisions to an external reviewer on one or two occasions between formal five-yearly evaluations.

3.2.4.7 Inclusion of dispute resolution timeframes

Five submitters suggested including specific investigation timeframes in OBSI's TOR. OBSI's investment case resolution timeframes are set by the board and may change. We consider that board and JRC oversight is sufficient.

Two submitters also recommended OBSI's non-financial data be audited in the same way as the finances. We do not think it is necessary to make this a specific recommendation, but the board could consider including non-financials in the Audit and Finance Committee's terms of reference. This could include KPI measures stipulated in the annual plan such as timeliness, consumer satisfaction and awareness.

3.2.5 Ombudsman and organisational accountability

The ombudsman has an individual performance agreement that sets out her objectives for the year. These are confidential to the ombudsman but having reviewed these we can attest to the fact that they are clear, appropriate and measurable for the current year.

For future years, we recommend enhancing the ombudsman's accountability by ensuring the strategic plan is cascaded down through an annual plan to her performance agreement, and by having a wider set of annual key performance indicators (KPIs), e.g. client satisfaction, firm satisfaction, staff engagement, complaints received about OBSI's service, public awareness, financial performance and productivity metrics.

To enhance transparency, and in addition to Recommendation 4, we recommend providing more information about cases closed; and adding a table that reports workflow, including how many cases were on hand at the start of the year, the number of new cases received, the number of cases completed and the number of cases on hand at the end of the year.

But reporting is not just about accountability. It is also an opportunity to demonstrate organisational impact. Accordingly, we recommend OBSI:

- reports a wider range of resolutions achieved beyond financial compensation: even though there may have been no financial loss, there may have been poor service or other factors that led to some inconvenience or dissatisfaction that was ultimately recognised in some way. In these circumstances, an international ombudsman would typically report on such wider remedies, including apologies, repayment of fees paid and any internal responses firms may have taken such as staff training
- over time, evaluates the impact of its decisions by collecting case studies from individual complainants and reporting any improvements firms have made to their processes.

In other respects, it is good practice to enable customers to make complaints about an ombudsman's process and service. Most other international ombudsman websites we visited enabled consumers to make a complaint, and provided details of the process. We therefore

recommend OBSI develops a process for enabling consumer users of its service to make a complaint about OBSI's complaints resolution service and publishes that on its website.

Recommendation 10:

That OBSI:

- prepares a strategic plan that cascades into an annual plan and the ombudsman's performance agreement, that contain a range of KPIs
- publishes a table in the Annual Report that summarises workflows
- reports the wider range of resolutions achieved beyond direct financial redress
- develops a process for enabling consumer users of its service to make a complaint about OBSI's own complaints resolution service and publishes that on its website.

4 Securing redress

The TOR for this evaluation requires an assessment of OBSI's effectiveness and the reasons for settlements below amounts recommended.

According to Thomas & Frizon (2012, p.9), for an industry ombudsman scheme to engender consumer confidence and be effective it must be able *"in practice to secure redress for consumers".*

> *The title 'ombudsman' should only be used for an external body that complies with ombudsman principles – including independence and effectiveness – and which is able in practice to secure redress for consumers. A 'pretend' ombudsman will damage consumer trust.*

Much of the debate in Canada has focused on whether OBSI should have binding authority. The crux of the issue, however, is whether OBSI can, in practice, secure and assure consumers of redress, and whether "naming and shaming" powers have been effective in fulfilling this requirement.

4.1 Current situation

The majority of large companies, and those who respond to reputational risks, typically agree to pay at least a proportion of OBSI's recommended compensation. However, OBSI's only tool in the face of a firm refusing to compensate affected customers is to publicly "name and shame" that party by publishing the fact of the refusal.

Naming and shaming is expected to deter others from refusing to abide by the ombudsman's decision to award compensation and incentivise compliance. To be effective, therefore, we would expect to see a reduction in the number of defaults as a proportion of total cases resolved over time. We would also not expect to see unintended adverse consequences.

We could find no evidence that naming and shaming had improved the behaviour of those who were at risk of outright rejecting OBSI's decisions. At the end of fiscal 2015, six cases were headed in this direction despite OBSI having used its naming and shaming powers 18 times since 2011 and despite a continuing reduction in the number of cases it was dealing with.

The more worrying (unintended) consequence was that firms had worked out that if OBSI could not require them to pay, they (the firms) effectively held the balance of power, enabling them to negotiate down the amount of compensation paid to affected customers.

The quantum of recommended compensation is a judgement call and OBSI, even with its sophisticated loss calculations, still has to make judgements about how much of the losses clients should bear. This is the major reason firms disagree with OBSI's recommendations (see 4.2.1 below).

An analysis of OBSI's data appeared to show a weighting in favour of firms. And it appeared that some firms treated OBSI's recommended compensation as their upper limit, an amount to be negotiated down from unless they had already made an offer before the case had been referred to OBSI.

For example, in 2015, 23 (18%) of the 131 non-backlog cases that OBSI assessed as deserving compensation, received less than OBSI recommended. The same proportion, 18%, received more but the overall differences in dollar values were stark: those receiving less received, on average,

$41,300 less while those who received more (typically when a firm was reinstating an original offer), received, on average, $13,000 more.

It was therefore evident that although OBSI's process helped effect settlement, it also enabled firms to award lower than recommended compensation. And, the balance was weighted in favour of losses rather than gains, by a factor of more than three times.

Even if publishing refusals to compensate had been initially effective, we understand it has lost impact: media interest, for example, is reported to have waned with each successive refusal. Media interest, in any event, was likely to have been counter-productive.

All factors considered, publishing refusals is of limited utility because:

- customers recover none of their losses
- customers may lose confidence in OBSI because they have not received what either they or OBSI consider to be a fair outcome
- the broader public loses confidence in OBSI: publishing refusals taints not only the firm but OBSI as the reports are public demonstrations of ineffectiveness
- confidence in regulators and SROs is undermined if they are not seen to be backing up the actions of their appointed dispute resolution service
- the wider industry's reputation is tainted, lowering confidence and potentially the propensity to invest.

In sum, naming and shaming has failed to deter undesirable conduct, has incentivised some firms to make lower offers and failed to level the playing field for at least 18% of consumers whose cases were deemed worthy of compensation.

Much of the debate in Canada has focused on "low-balling" – that is, firms making excessively low offers of compensation. But in our view, this is not the mischief. Rather, the mischief is systemic – the system enables consumers to be put in a weaker position, contrary to the purpose of an ombudsman scheme.

4.1.1 Reasons for lower offers

The reasons given for lower offers being made in the 43 (inclusive of backlog) cases in 2015 are recorded in table 1.

Table 1: Reasons for low offers

Reason	Firms (N)	Firms (%)
Disagreed with OBSI's calculation with respect to client responsibility	13	30
Did not want to pay recommended amount	5	11
Vicarious liability	5	11
Generally disagreed with OBSI's conclusions	5	11
Disagreed with the Know your Client (KYC) conclusion	5	11
Errors and omissions (E&O) liability insurer would not pay for a voluntary settlement	4	9
Disagreed with OBSI benchmark used	4	9
Disagreed with suitability conclusion	2	5
Other	1	2
Total	**43**	**100***

* Does not equal 100% due to rounding

Some 30% of firms who made lower offers disagreed with OBSI's views on the customer's contribution to losses. This is consistent with industry concerns about OBSI having a weighting towards consumers.

Laws and codes do not generally create obligations for clients beyond not committing dishonesty offences. Ascribing and quantifying a customer's responsibility to mitigate losses is therefore a matter of judgement although there appears to be remarkable consistency between international ombudsmen based on a reading of their case notes. In that respect, we did not find anything unusual in OBSI's decisions.

More importantly given the size of some recommended settlements in investment cases, disagreements over matters such as who should pay in cases of vicarious liability, and when errors and omissions (E&O) liability insurers refuse to pay, are bound to cause tough negotiations. That said, firms need to ensure ombudsman decisions are included in their E&O cover.

4.1.2 Client views

We sampled clients who had received less compensation than OBSI recommended to assess their experience and the potential impact on OBSI's reputation. Ten people responded.

The majority of clients reported being pleased to have received something back (something being better than nothing) and were complimentary about OBSI's staff and efforts. But most reported feeling they were in a weaker bargaining position and said they had simply caved in. Representative responses are reported below.

"The compensation was $10000 less than recommended by OBSI. However I was unable to afford a lawyer to handle the matter in court in order to fight for the full amount. I didn't feel equipped to negotiate back and forth on my own with the firm. I was glad to walk away with something."

"I was not satisfied but at least it was something after a long period of time. I did come to realize two very important things. First, in this day and age when the financial industry has grown and includes now many facets, the fact that if they do not comply with your ruling, the only power you have is to publish their name. It became more than evident that they really don't care. They are now so large, there is no shame attached if they are named. Secondly, the system needs adjusting. There are two agencies IIROC and [OBSI] dealing with the same case and using umpteen man hours to do so. IIROC has the power to enforce but they do not deal with compensation. Therefore the little guy Joe public suffers. Is a better system possible? Can OBSI be given more power to enforce????"

"It seemed the easy way out at the time I was tired of the stress"

"I accepted the resolution as I did not have the energy or patience to continue. Overall I feel that I was under compensated for the damage inflicted. My experience with financial firms has been negative and financially costly. Unfortunately when one is working and busy with other priorities of family and children one does not have time to focus on such things (That is why we pay investment advisers)."

"0% satisfaction with the outcome]. My [relative] was left with an outrageous amount of debt after being tricked into investing $200,000.00 worth of her home into high risk accounts. She is low income and will have to pay off these debts for the rest of her life. The OBSI recommended over $100,000.00 be paid back to her but she received less than $50,000.00 from the institution."

On the one hand, it appears that OBSI currently lacks both the moral suasion and the tools to achieve fair redress. On the other hand, it could be argued that at least customers get some compensation when, absent a free dispute resolution service, they might otherwise have received nothing at all.

The key question, then, is: "Is better than nothing, good enough?" In an ombudsman context, we think not.

4.1.3 Conclusion on effectiveness

Having found that OBSI's current process and sanctions have not stopped firms refusing to compensate; that they enable lower offers; and are liable to produce results that are "better than nothing", we have concluded that publishing refusals, while partly effective, is counter-productive, likely to lead to worse outcomes and undermines the credibility of firms and regulators as well as OBSI.

These are harsh words, because we also recognise that OBSI obtains some very good results: most firms (82%) pay at least the recommended amount (64% pay the recommended amount, 18% above), and most parties work hard to make the system work.

However, we have found that, contrary to international expectations of an ombudsman, OBSI is not able to level the asymmetric playing field. Nor can OBSI and its overseers, the regulators, assure the public of OBSI's ability to secure redress. A more effective mechanism for securing fair redress is therefore required. Absent that, we would expect the investment industry to risk greater government intervention and higher compliance costs.

4.2 Binding authority in practice

Financial industry ombudsman services in Commonwealth countries (UK, Australia, New Zealand, India) typically have the power to make binding decisions. This is also true in other jurisdictions. In most instances, the decisions are binding on firms but customers retain the right to pursue a matter in the courts or elsewhere if they do not agree with the decision. Customers are, however, typically bound by the decision if they accept the ombudsman's decision. This is intended to prevent consumers relitigating their complaints in other forums. Once accepted, determinations usually remain confidential to the parties.

FOS-UK is a creature of statute and Parliament made FOS-UK's awards court-enforceable (by the consumer). The Financial Conduct Authority, the UK's regulator can, and does, take action against businesses they regulate that refuse to do what the Ombudsman has determined. The UK also has a Financial Services Compensation Scheme – a safety net for customers of regulated financial businesses that are unable to pay what they owe.

Australia has one statutory EDR service in the financial services sector – the Superannuation Complaints Tribunal (SCT). This began operating in 1994, pursuant to the Superannuation (Resolution of Complaints) Act 1993. Consistent with being a tribunal, its recommendations are binding on both parties and enforceable by ASIC. SCT decisions can be appealed by either party to the Federal Court on questions of law. It is also subject to judicial review by the Federal Court and complaints can also be made to the Commonwealth Ombudsman.

Where the service is not statutory but regulatory, or government approval is required to operate as an external dispute resolution service, as in the Australian and New Zealand ombudsman schemes, the power to make binding decisions is typically required for approval but it is *contractual*. In other words, it is a condition of membership. Such authority is accepted as a core component of an ombudsman service but does not give the ombudsman service the status of a tribunal. This is because the decisions bind only one party, the member firm, and because of the contractual nature of the relationship.

In New Zealand, an EDR scheme not only has binding authority, but it can refuse membership if a scheme participant does not abide by the EDR decision. Because there are multiple EDR schemes in New Zealand, schemes will share information about recalcitrant financial service providers (FSPs). Other schemes will not admit an FSP as a member if there are outstanding compensation awards.

This effectively means an FSP risks not being able to trade: an FSP cannot trade unless it is registered, and it can only remain registered if it is a member of an EDR scheme. If a scheme expels a firm for non-payment, its documented process is to report the matter to the regulator, the Financial Markets Authority (FMA). In practice it would also report to the Financial Service Providers registrar. The registrar would then notify the FSP, giving it 20 days to show that it is a member of an EDR scheme. In June 2014, the FMA was also given the ability to direct deregistration if being registered gave the misleading impression that the FSP was regulated by New Zealand law or the FSP was otherwise damaging the integrity or reputation of New Zealand's financial markets or laws. As at 22 July 2015 the FMA had directed the Registrar to remove two entities due to their dispute resolution

scheme membership being cancelled post the FMA issuing a Notice of Intention to issue a direction to the Registrar. It is important to note, however, that registration does not equate to licensing.

The Australian system is similar: for an EDR scheme to be approved by ASIC, it must be able to make binding decisions; FSPs must be *licensed*; and membership of an approved EDR scheme is a condition of that licence. If an FSP fails to compensate as directed, it must be given the opportunity to comply. If the FSP refuses to do so, FOS Australia will notify ASIC, which will then take appropriate action. This action may include varying licence conditions; imposing a condition on the FSP's licence that requires ongoing compliance with the EDR's rules and decisions; and suspending or revoking the licence for the failure to "conduct business efficiently, honestly and fairly".

FOS Australia also has a memorandum of understanding with the Credit and Investment Ombudsman (CIO) regarding outstanding cases and determinations.

Having binding authority, with strong regulatory back-up and penalties for non-compliance, has created incentives on FSPs to comply. To the best of our knowledge, New Zealand EDR schemes have only needed to report overseas-based FSPs. Further, there is no evidence to suggest that having binding authority has led to difficulties with firms – all schemes report having very good co-operation from most participant FSPs.

4.3 Appealing binding decisions

All ombudsman offices we are familiar with have put in place procedures to enable reviews, not appeals, and principally through internal review processes. These review processes are clearly outlined on websites. Complainants continue to retain the right not to accept an ombudsman's decision and to take alternative action, e.g. through the courts.

The question of whether there should be an appeal right was considered by New Zealand's Finance and Expenditure Committee when the Financial Service Providers (Registration and Dispute Resolution) Act 2008 (FSP Act), which required FSPs to belong to an EDR scheme, was at the Bill stage. The Ministry of Business, Innovation and Enterprise's guidelines for parties seeking ministerial approval as an EDR (MBIE, N.D. p.9) state:

> *119. The FSP Act does not require schemes to provide appeal rights to an outside forum, such as the District Court. There was some discussion of appeal rights by the Finance and Expenditure Committee which considered the Bill preceding the FSP Act. It was decided that appeal rights and review processes would reduce finality and would undermine the low cost nature of the scheme. However, a number of FSPs considered there needed to be some basic review rights. Accordingly, schemes may consider internal mechanisms for reviewing determinations.*

The guidelines went on to distinguish between an appeal and a review process, and to discourage substantive reviews or appeals.

> *120. For clarity, under a review process a decision may be confirmed or revoked, but may not be varied. An appeal is a reconsideration of the decision based on the merits of the facts (substantive appeal), or on the process (procedural appeal). An appeal body or court may substitute the initial decision with one of its own.*
>
> *121. If any review processes are provided for in a scheme, it is important that there are clear rules for refusing reviews based on the substantive merits of the case, as allowing such reviews may lead to an unnecessarily protracted process. This would undermine the purpose of dispute resolution schemes as a simple, low cost method of resolving complaints. Consumer dispute resolution schemes generally do not provide for reviews or appeals for that reason…*
>
> *122. It may be possible for complainants or FSP members to seek judicial review of the decision-maker's decision. Private organisations can be susceptible to judicial review if they are exercising a public function under statute.*

Review in Australia is internal, and conducted by a decision-maker who was not involved in the original case. Ombudsman decisions are judicially reviewable. FOS UK, being a statutory scheme has a slightly different process but the principle of having no substantive appeal remains the same.

4.4 Issues with implementing binding authority

4.4.1 Means of implementation

Binding authority appears to be more contentious in Canada, possibly because ombudsman offices were not set up with this power from the start. In some respects it could be argued that the investment industry in Canada has never had an industry ombudsman's office. Rather, it has had a dispute resolution service that operates with an ombudsman's ethos.

In contrast, financial services sector ombudsmen in Australia and New Zealand were established with the ability to make binding decisions: as noted earlier, compliance with ombudsman decisions was a condition of membership. More recently (2008 in New Zealand, after 16 years of having voluntary industry ombudsmen) binding authority was acknowledged in regulatory guidelines issued either by regulators or government ministries, following the introduction of a requirement for providers of retail financial services to be registered or licensed and to belong to an EDR scheme.

Determining exactly how Canada can improve OBSI's ability to secure redress for consumers is a bigger task than can be accomplished in this evaluation. However, it appears there are two main options:

- OBSI would not have contractual binding authority but would revoke a firm's membership for non-compliance and report non-compliant firms to the relevant regulator who would then take action based on a set of potential stated consequences, including preventing the firm from trading
- OBSI would have binding authority in its own right, based on its membership contract.

The second option is more consistent with the ombudsman concept in that it is simpler and quicker – it does not rely on another party to take action and is more immediately proportionate in its consequences (does not automatically result in regulatory attention). Moreover, binding authority appropriately reinforces the role of the ombudsman's office: there would seem to be little point in having an ombudsman if they cannot make and secure those decisions.

There are, however, risks with binding authority. The greatest potential risk is an incentive to introduce more formal processes and detailed investigation, especially where the awards are large or where they may have a significant impact on the firm or individual adviser. This can be managed through building good judgement about which process is most likely to effect resolution in a given situation: as the Ombudsman Association's principles for good complaint handling state, an ombudsman needs to be "Firm on principles, flexible on process".

It would also not be surprising if some parties feared the impact of binding authority on OBSI's culture. As noted earlier, OBSI is currently highly settlement/negotiation focused and we would not expect that to markedly change (although we would like to see some "stiffening" of this culture in any event – see chapter 6.6.2). The majority of firms respect OBSI's decisions and there is no need to change that relationship: binding authority aids efficiency and effectiveness in securing fair redress for the 18% of cases where compensation is awarded but firms are unwilling to pay at the recommended level. Other ombudsmen with adjudicative powers can, and do, choose amongst resolution tools to determine the most proportionate and expeditious approach, while also maintaining constructive working relationships.

Ultimately, no process or powers – moral suasion, publishing, binding decisions or otherwise – will stop those who cannot pay from defaulting. Binding decisions are, however, likely to be more effective than naming and shaming when firms can pay, but either refuse to pay or want to pay less. Similarly, they can be effective when customers are being unreasonable; for example, when they have excessively high expectations of the amount of compensation due, or do not accept any contributory fault.

Issuing a binding decision when settlement negotiations become protracted can also improve efficiency: the act of presenting a written decision in itself can facilitate settlement.

We consider the benefits of having the ability to make binding awards outweigh the disadvantages and therefore recommend that OBSI be enabled to secure redress for customers, preferably by empowering it to make decisions that are binding on the firm, and on the customer if they accept the awarded compensation.

4.4.2 Appeal rights

In the Canadian context, some industry parties consulted argued that Canada could not introduce binding authority without a right of appeal. This appeared to be based on two factors: a) that binding authority would effectively make OBSI a tribunal, and b) that Canadians were used to having a right of appeal.

As noted in 4.4 above, internationally, financial services industry ombudsmen are not considered to be tribunals because their binding authority is contractual and because they bind only one party.

We cannot comment on the Canadian cultural context but we can say that Thomas and Frizon (2012, 43-44) also do not consider appeal rights to be necessary if there is some legal compulsion on financial businesses to belong to a dispute resolution scheme and judicial review is therefore available.

> *If financial businesses are compelled by law to be covered by the financial ombudsman and that ombudsman makes binding decisions, some oversight by the courts may be required … But that does not require a full appeal to the courts on the merits of the case. It is enough that the court can require the ombudsman to reconsider the case if it comes to the conclusion that the ombudsman failed to follow a fair procedure.*

Judicial review is concerned with procedural, not substantive, fairness. In that respect, it differs from a right of appeal except when the issues are purely legal ones. It would be rare for an award to be overturned on its merits, provided the position reached was one that was open to a reasonable decision maker.

If a decision were to be substantively appealed to any other authority, for example the courts or an independent arbiter, it would effectively negate the purpose of an ombudsman and undermine the ombudsman's authority. Having an appeal process would also undermine the purpose of ombudsman offices: fair, fast and informal resolution as an alternative to the court system.

We understand judicial review would not be an appropriate option given OBSI's current mandate, however we consider that some form of review rather than appeal is desirable. We therefore consider that an internal review process should be established alongside binding authority.

4.4.3 Coverage

Any extension to OBSI's mandate would need to be limited to investments given that the banking sector has contestable provision of EDR services. Our views on competition amongst dispute resolution services are not part of this review. We simply note Thomas & Frizon's (2012, p.24) observation that "*most ombudsmen started covering a single sector (such as banking or insurance). The number of combined ombudsmen, covering all sectors, has grown over time – first in the United Kingdom and then Ireland, Netherlands and Finland – with others considering moving in that direction*."

Recommendation 11:

That OBSI is enabled to secure redress for customers, preferably by empowering it to make awards that are binding on the firm, and on the customer if they accept the award, accompanied by an internal review process.

5 Independence and standard of fairness

> *OBSI should provide impartial and objective dispute resolution services that are independent from the investment industry, and that are based on a standard that is fair to both Registered Firms and investors in the circumstances of each individual complaint. When determining what is fair, OBSI should take into account general principles of good financial services and business practice, and any relevant laws, regulatory policies, guidance, professional standards and codes of practice or conduct.*

5.1 Overview

The files we reviewed demonstrated considerable attention to fairness in reaching decisions about whether a complainant's case was within OBSI's mandate, whether the complainant was eligible for compensation, and the extent to which complainants themselves contributed to the losses. We found it necessary to get additional clarification about the merits of a decision in only one case.

OBSI's outcomes, with consumers receiving compensation in 43% of cases, are consistent with those in international jurisdictions. In 2015, FOS UK reported compensation rates ranging between 25% and 45% depending on the investment category and Australia's CIO 48%. FOS Australia did not publish its equivalent outcomes for the investment category.

However, as noted in the previous chapter, OBSI, without binding authority to secure fair redress, in fact operates within an asymmetric process. It is weighted in favour of firms who are free to ignore OBSI's recommendation and negotiate a lower award. If this inherent imbalance were first addressed by giving consumers better redress, then OBSI could be more fairly assessed as to its overall objectivity and impartiality.

5.2 Consultation insights

When consumers complained about lack of fairness, this was usually in the context of their own cases, and the lack of success they had experienced. Some put this down to the fact that OBSI was industry-funded, alleging a lack of independence. We found no grounds for this allegation. In fact, OBSI was similarly accused by some members of industry for being weighted towards consumers. This is a reasonably typical state of affairs for ombudsman offices – conceptions of fairness vary.

An ombudsman typically addresses this tension by having processes that are consistent with the principles of natural justice; by providing clear and well-argued reasons for their decisions; by being considered and consistent in their decision-making; and by being as dispassionate as humanly possible. OBSI's success in these endeavours is discussed in section 6. In this section we discuss a range of concerns considered, primarily by industry, to constitute evidence of lack of fairness:

- the language of "levelling the playing field"
- investigating more widely than the original complaint
- investigating matters apparently clearly out of mandate
- advocating for clients when negotiating settlements
- providing a view to clients on settlement offers proffered by firms
- declining to provide loss calculation spreadsheets
- meaning of fairness

- consistency between industry and OBSI standards
- accepting complainants' statements as fact.

5.2.1 The language of "levelling the playing field"

Some submitters considered that the notion of "levelling the playing field" between consumers and firms meant that OBSI was automatically biased in favour of consumers. Frankly, this is the purpose of an ombudsman service – to ensure that people who are less knowledgeable than the firms they deal with are able to put their case, be heard and receive some form of redress if appropriate. That is not the same thing as "bias" in an improper sense. Nor is it an invitation for the ombudsman to advocate on behalf of consumers.

We looked carefully for any evidence of systemic weighting in favour of complainants when reviewing files and processes, but found nothing in practice to support this belief. It is possible that concerns arose more from misunderstandings or misplaced expectations about an ombudsman's role.

Rather, consistent with good ombudsman practice, we found OBSI staff were trained to ensure the complaint was clear, and that relevant information was gathered and presented in a way that enabled both parties to identify the issues and understand each other's perspectives.

It is not uncommon for consumers to struggle to know where the problem lies. On the other side, firms sometimes need help stepping aside from their industry knowledge to explain things in a way that consumers can understand.

Speaking with staff, it was clear they spent as much time ensuring consumers understood the firm's perspective as the other way around. Indeed, we were made aware of instances where OBSI had resolved a problem by providing complainants with a clearer explanation.

5.2.2 Investigating more widely than the original complaint

One complaint about investigating too widely involved an assertion that OBSI investigates matters that have never been raised by complainants in the first instance.

It is appropriate and best practice for ombudsmen to look carefully at complaints to determine the exact nature and cause of the problems that consumers present with. For example, complainants commonly do not understand why they have lost money. In these circumstances they may not directly complain about having been given unsuitable advice and yet this may be an appropriate starting point for an investigation into investment losses.

We expect investigators to keep their eyes open to the possibility that other problems may have occurred, and if spotted, we would expect these issues to be investigated. Not to do so would be a derogation of duty. We did not see examples in the files we examined of OBSI embarking on a general "fishing expedition", deliberately looking for wider problems. To mix metaphors, we don't deny investigators may head down rabbit holes from time to time – but suspect any such occurrences are rare.

5.2.3 Investigating matters out of mandate

Ruling a case outside mandate is a serious matter as it denies access to the service, and potentially, to justice. Such decisions are therefore not taken lightly and are normally reserved for senior staff

members. In addition, matters of jurisdiction are not always straightforward to determine, especially where investments are involved.

OBSI closed 21 cases as outside mandate in 2015 having opened them as investigations. This was 5.5% of all cases closed, a low percentage compared with other international jurisdictions. In Australia, for example, some 17% of cases were ruled outside jurisdiction. This is similar to the New Zealand experience where between 8% and 19% of cases were ruled outside mandate.

OBSI's consumer assistance officers (CAOs) are able to screen out obvious cases but any cases involving judgement calls are made by the deputy ombudsman. Early senior management involvement enables efficient as well as fair decision-making.

5.2.4 Advocating for clients

Maintaining an unbiased approach to settlement negotiations is critical for both client and firm confidence in the process. We were told of an instance where an investigator used phrases such as "dealers lie too" and "it's not about the account holders, it's about the children". The firms who complained about investigators appearing sympathetic to the client's situation also conceded that it was not a widespread problem. Rather, they had concerns about a small number of instances.

It is not easy to investigate such hearsay well after the events. However, it would be an understandably human response in OBSI's circumstances, where staff know OBSI is the only channel for redress and a firm is negotiating hard to reduce compensation. Nevertheless, ombudsman staff have to take great care to remove the emotion and remain neutral.

We have raised these comments as a matter for management to address. We note that providing individual monitoring and coaching will be easier once a telephone recording system is introduced.

5.2.5 Providing a view to clients

Some firms considered that investigators should pass on firms' offers for compensation without giving a view to complainants on the fairness of those offers. We do not agree. An ombudsman service is charged with ensuring fair outcomes for those who have been found to have suffered losses.

Consumers are not always well-placed to know whether an offer is fair: when investigators provide information on how OBSI approaches compensation, they enable the consumer to make an informed choice. In a high proportion of the cases we saw, the advice suggested a firm's offer was fair and no further compensation was due.

The general practice internationally is firstly to make consumers aware of any offer a business puts forward. If for some reason the investigator cannot assess how fair the offer is (perhaps because they have not yet started investigating the complaint or have insufficient information) they would put the offer to the consumer but without giving an opinion. It would then be for the consumer to decide whether to accept the offer. If the consumer does not accept the offer – or would rather wait for the service's view on it – the investigator would carry on looking into the complaint and then give an opinion.

5.2.6 Declining to provide loss calculations

Some firms complained OBSI had declined to provide details of loss calculations. We found this surprising as it is OBSI's stated and published policy to do so (see 2015 Annual Report). Although some residual concerns around OBSI's loss calculation methodology remain, the main advantage of

its loss calculation modelling is that it allows the various parties to agree on the underlying assumptions. We encourage escalating concerns to the deputy ombudsman if problems arise.

5.2.7 Meaning of fairness

Despite OBSI publishing a guide on "fairness", there appears still to be some confusion about its approach, especially for firms.

Under its TOR, the ombudsman is required to resolve matters in accordance with the fairness statement. The most relevant statements are:

> *In the performance of its complaint-handling mandate, OBSI will:*
>
> > *Resolve complaints with a view to what is fair and reasonable in the circumstances of each individual complaint.*
> >
> > *Resolve complaints using an informal, non-legalistic approach taking into account general principles of good financial services and business practices, law, regulatory policies and guidance, professional body standards and any relevant code of practice or conduct applicable to the subject matter of the complaint.*

This approach is consistent with other ombudsman services. To quote the Thomas & Frizon (2012, p. 11):

> *In deciding whether or not to uphold the consumer's complaint, the ombudsman will take into account the law, any industry code and good industry practice. But the decision/recommendation will be based on equity – what the ombudsman considers to be fair in the circumstances of the case.*

Our review of files raised no issues about OBSI's application of the fairness mandate. However, given firms' concerns, the earlier recommendation (9) that OBSI employs an external expert to review a small sample of cases in between formal five-yearly reviews should alleviate this situation by providing greater assurance on case decisions.

Greater use of written decisions would also assist (see section 6). Some industry groups and participating firms complained that OBSI no longer provided a written analysis of what it considered to be the wrong-doing or the rationale for its compensation calculations. Some firms said they were surprised by the recommendations.

Although it is OBSI policy to give firms oral explanations, this may not always be sufficient particularly if the firm wants the opportunity to make a considered response. This situation is likely a consequence of moving to a more settlement-oriented approach. Written decisions can also be turned into case notes which, as they build, assist with perceptions of consistency.

5.2.8 Consistency

A number of submitters raised concerns about OBSI's approach to issues being potentially in conflict with industry or regulatory standards and the law. This is a recurring theme, reported in 2011.

OBSI's fairness mandate requires it to take account of industry standards as well as the law and individual circumstances. Our review of files showed that it did do so. So we were left puzzled about the concerns, and why they had persisted for so long and particularly since OBSI and SROs have different mandates.

OBSI's approach to a number of the more contentious issues – vicarious liability, treatment of off-book transactions, dealer A/dealer B matters (expectations of advisers when investments are transferred) and customer responsibility – are covered in a policy document on its website and in more extensive internal guidance. Although some feedback came through meetings with industry groups it was very difficult to tell how widespread the concerns were. This matter is also covered in section 6.6.3 below.

5.2.9 Accepting complainants' statements as fact

In reviewing the files, we came across one instance where it may have appeared OBSI unduly favoured the customer. This was not actually the case, but the explanation to the firm may have caused it to doubt OBSI's impartiality.

A case went against a firm after the investigator decided they preferred the complainant's evidence. In writing the decision, they mentioned the firm's inability to produce any file notes or written evidence of their position. Ultimately, this was not the deciding factor – the complainant's view was independently corroborated – but could have created the impression that OBSI did not believe the firm's submissions.

In fact, OBSI had carefully investigated many of the complainant's claims and found her wanting in some respects. The firm was no doubt aware of this. A more careful balancing of the factors, and a clear statement that, in this case, irrespective of the firm's submissions, the independent corroboration was the most persuasive factor, would have helped allay perceptions of impartiality.

We note, however, that although this case did not turn on the matter of documentation, firms have a greater responsibility for record-keeping than customers and it is not unusual for ombudsmen to hold firms to a higher standard of proof.

6 Timely performance

> *OBSI should maintain its ability to perform its dispute resolution on a timely basis and deal with complaints without undue delay, and should establish processes that are demonstrably fair to both parties.*

Matters of fairness have been addressed above. This section covers timeliness and factors that enable timely case handling at all stages of the process.

6.1 Current performance

As of May 2015, OBSI had eliminated the backlog of complaints arising from the GFC, a tremendous achievement. Only 58 backlog cases needed completing in 2015. From this year, therefore, and coupled with a new case management system, all old cases should be through the system and average completion timeframes should continue to reduce. This is important as both firms and customers expressed concerns about timeliness.

OBSI's current timeliness benchmark is to complete 80% of investment cases in 180 days, excluding delays. Excluding delays, and including backlog cases, OBSI achieved 84.6% in 2014/15. An equivalent 2013/14 comparison was not available but if both the backlog cases and delays are removed, OBSI completed virtually 100% of cases within the 180 days in both years.

Including delays, OBSI achieved 64.3% closure within 180 days in 2014/15 compared with 41.1% in 2013/14. This shows good progress which has occurred mostly at the initial intake/assessment and resolution phases. Investigation timeframes are yet to show an improvement.

6.2 Current measurement process

We were struck by the extraordinarily detailed way in which OBSI records and reports on delays. These are recorded at each step of the process and are accompanied by an equally detailed set of guidelines and instructions for staff.

It appears OBSI started tracking delays when its backlog started to climb and it was under constant criticism for the time it was taking to resolve cases. We can understand this, having seen the pressure OBSI was under – its process was being extended by other parties and yet it was taking the blame.

However, while removing delays may be a useful defensive strategy and have been useful historically in revealing where the delays occur, there is no indication the system has been successful in obtaining behaviour change: in 2014, 61% of cases were found to have been affected by delays compared with 59% of cases in 2015, an improvement of only two percentage points. Moreover, the system is open to gaming and too easy to use as an excuse for lack of progress. We would prefer to see management and staff focusing on proactive strategies for managing delays, taking charge of the process and getting stakeholders to respond. More benefit will be gained by keeping cases moving (rather than looking backwards).

We also consider it is only appropriate to remove delays when reporting publicly if there has been a clear understanding between the parties that a case needs to be suspended for a reasonable period of time due to illness or some other extenuating circumstances.

Internationally, timeliness is reported for public purposes inclusive of delays to show how long cases actually take to be resolved from a consumer, or client, and firm perspective. We therefore recommend that OBSI reverts to its former practice of including delays when publicly reporting on timeliness.

Recommendation 12:

That OBSI only suspends a case with the agreement of both affected parties and reports timeliness inclusive of delays for external purposes.

6.3 International comparisons

It is difficult to compare OBSI's current resolution times with other ombudsman services because measurement parameters vary. Many ombudsman services start measuring timeliness from the point at which a complaint is accepted for registration (that is, it is considered likely to be within mandate but before further information has been gathered) and others from the point at which consent is received. Yet others use working days rather than calendar days. Some wait until they have received a final response from customers on a written review before closing the case. Most do not differentiate between investment and other types of complaints for the purposes of time-reporting. And some ombudsman services undertake more investigation than others.

OBSI starts the clock once all the information is gathered and ready for investigation. This is typically later than other ombudsman offices. Cases are closed when OBSI issues its decision – this can be earlier than other offices, particularly at the "view letter" stage as other offices may give complainants a timeframe for response and not close the case until this has elapsed. In total, therefore, OBSI's timeframe of 180 days covers a shorter part of an ombudsman's total process.

Comparing OBSI with FOS UK, the latter starts measuring from the date it receives the consumer's complaint and accepts it as one that it can consider (in OBSI's process this could add some 54 days on average, exclusive of delays, to overall timeframes). The end point is case closure, which either means it has issued a final ombudsman decision, the parties have accepted its view at an earlier stage, or the consumer has withdrawn their complaint. It does not remove delays. Using this measure, FOS UK closed 44% of investment and pensions complaints within three months (90 days) in 2014/15.

FOS UK will be changing its standards and reporting to comply with the European Union Directive on Alternative Dispute Resolution (2013/11/EU) that requires time to be measured from when a complete complaint file is received (i.e. all the information needed to investigate the complaint, similar to the way that OBSI now measures its timeliness) until it gives its first view. The EU directive benchmark is 90 days (approximately three months). FOS UK expects to achieve this. OBSI would likely complete cases to the view letter stage (about half the cases) in close to this timeframe.

FOS Australia's timeframes for strategic measures are focused on the timeliness of its active dispute handling after any internal dispute resolution period. The clock starts running when an unresolved dispute is accepted for investigation/resolution. The clock stops when a dispute's status moves to "closed": for disputes resolved by agreement this is when FOS has confirmed with both parties that a resolution has been reached. In some circumstances it may keep a case open until it has a signed resolution agreement from both parties.

Using this definition, FOS Australia closed 83% of all disputes (including banking cases) in 180 days in 2015. From June 2015 to February 2016, 95% of all cases closed in 180 days.

Although not directly comparable, it is probable that both the Australian and UK ombudsmen are resolving cases more quickly than Canada.

We accept investment complaints would have longer timeframes than banking as they are, on average, more complex. In FOS UK's 2015 Annual Report, for example, it reported closing 69% of current account complaints in three months compared with the 44% for investment complaints. However, FOS UK seems confident that all complaints, including investment-related ones, will meet the new 90-day target.

Our review suggests that OBSI is correct to continue targeting timeliness as a matter of strategic importance. We do not believe, however, that it can achieve best practice international timeframes without the same ability to bring cases to a close by making binding decisions. Nor do we consider OBSI should compromise the quality of its investigative work.

6.4 Handling enquiries

> *An independent explanation from the financial ombudsman can often sort things out straight away. So, by handling enquiries effectively, ombudsmen can prevent many of them turning into full-blown complaints as well as playing a role in consumer financial education.*
>
> *And financial ombudsmen receive enquiries from financial businesses as well. A business may receive a complaint and accept that it has not treated the customer well – but be unsure what redress would be fair. Advice from the ombudsman can often settle things there and then.*
>
> *The financial ombudsman's procedure should include enquiry-handling, so that some problems can be resolved before they turn into full-blown cases.*
>
> *Thomas & Frizon (2012, p. 11)*

6.4.1 Obtaining customer consent

Consumer assistance officers (CAOs) are OBSI's front line for public enquiries and handle the complaint process until a case is assigned to an investigator. Where a complaint has not been through the firm's internal dispute resolution process the complainant is referred back to the firm. If the complainant has received a final view from the firm, they are asked to fill out a complaint form and return it. They are then asked to complete a waiver and given 21 days to return this.

The efficiency of this process is dependent on complainants' responsiveness. We recommend reducing timeframes by sending out the consent form at the same time as the complaint form. This has the potential to speed the process by some 10 days on average, excluding delays. Although this would not impact on OBSI's timeliness measure (as this does not include the CAO process), it would improve the customer experience.

6.4.2 Obtaining information from firms

CAOs obtain complainants' files from firms upon acceptance of a complaint. This can result in information arriving at OBSI earlier in the process but also risks inefficiency as more information may be requested than is necessary. It would be better for CAOs to focus on mandate decisions and seek sufficient information for that purpose. The firm's final response should suffice in most cases at this point. Detailed file requests would then be made by investigators once they were clear about the nature of the issues and evidence required.

Based on the relatively low percentage (5.5%) of investigations ruled out of mandate (other ombudsman services internationally have figures up to 16%), CAOs appear to be highly effective in screening these complaints. Asking two additional screening questions of complainants may have saved only two or three complaints from being assigned for investigation:

- Has the complainant already entered into a settlement agreement with the firm?
- Is the complainant also pursuing their complaint in court or in another forum?

Some firms have the impression that OBSI does not rule as many cases out of mandate as others. This may be because they cannot see that complaints are being ruled out at an early stage (they are not reported). Reporting early mandate decisions is useful in monitoring whether the TOR remain relevant, and whether they are preventing accessibility to OBSI's services. We recommend monitoring and reporting on complaints ruled out of mandate at the enquiries stage.

6.4.3 Early resolution

As noted in the quotation from Thomas & Frizon (2012), an enquiries division in ombudsman services can be highly effective in helping resolve complaints at an early stage, without the need for investigation. This includes by giving a simple explanation, providing information or by referring people to a more appropriate service. We have no doubt this happens and recommend that OBSI formally reports on how enquiries are resolved.

6.4.4 CAOs and systemic issues

CAOs are often well placed to pick up on potential systemic issues. Now that the JRC's systemic protocol has been finalised, CAOs (as well as investigators) will need to be trained in what to look for and enter product and issue information into the new CMS. We therefore recommend that CAOs capture additional information from people calling to make enquiries, including the products and issues complained of and the relevant firms. We also recommend CAOs (as well as investigators) receive training in the identification of potential systemic issues.

6.4.5 Advice to firms

Also as stated by Thomas & Frizon (2012, p. 11) and noted above, a financial ombudsman helps resolve complaints at an early stage by providing advice to firms on appropriate levels of redress. This may not be a proper role for the CAO to take because senior investigative staff will know more about amounts paid to resolve a complaint.

However, at least two schemes in New Zealand (the Banking Ombudsman Scheme and Financial Services Complaints Limited) have introduced early advice services for firms. In our experience, these are well received by participating firms. Providing advice not only benefits consumers through earlier resolution, but demonstrates a commitment to reducing complaints by empowering firms to better resolve their own complaints. It also complements guidance notes and generates ideas for new ones. We therefore recommend OBSI implements an early advice service for participating firms.

6.4.6 Referral to internal ombudsmen

Some participating firms questioned whether OBSI had changed its policy regarding referring complainants back to an internal ombudsman (IO) for internal resolution.

It appears possible that more complaints were referred back to firms during the backlog days. OBSI's current practice is as follows:

> *OBSI will refer complainants to the IO/compliance department if they have not completed the internal process at the firm.*
>
> *In cases where the complainant has received a final response from the firm's business unit and has the option to bypass the IO and come straight to OBSI, it will ask the complainant if they have also escalated the complaint to the IO.*
>
> *If the complainant has also filed with the IO, OBSI will advise the complainant they have the option to come straight to OBSI. [This avoids both ombudsman offices investigating at the same time].*
>
> *If the complainant wants the IO to review the complaint, OBSI advises the complainant that OBSI's file will be placed on hold until it hears back from them. OBSI reiterates to the complainant that they can come back to OBSI if they are not satisfied.*
>
> *If the complainant has not filed a complaint with the IO and does want to go through them, OBSI escalates the complaint at that point. If at any point, the complainant wants to bypass the IO and come straight to OBSI, it proceeds accordingly.*

OBSI's process is therefore largely in the hands of complainants, which we consider to be appropriate. However, we were made aware that at least one IO had started directly approaching clients whose complaints had been accepted by OBSI to offer them the opportunity of an IO review. And, it appeared others were contemplating following suit.

We could see that IOs were rightly proud of the job they did; however, under OBSI's TOR it is able to accept a complaint for investigation if 90 days have elapsed since the complaint was made to the firm and the complainant asks OBSI to investigate. OBSI can decide that the firm has not had sufficient opportunity to resolve the complaint but the decision is for OBSI to make. IOs, therefore, may need to better promote their services internally or develop protocols for earlier referral to their offices.

That said, it is also in the best interests of resolution for firms to offer external dispute resolution early in the process, for example when it becomes clear that a customer would prefer to deal with an organisation that is not party to the complaint. And firms must allow customers the opportunity of external resolution. We do not consider direct intervention to be good practice no matter how well-meaning the approach is intended to be.

We also endorse the observation made in previous reviews about the potential for customer confusion when firms use the word 'ombudsman'. It appears the term is used internally to signify independence and authority, but we agree with the 2011 review finding that is liable to mislead customers into believing they are receiving an investigation that is independent of the firm. We

would like to see a name change in order to clearly differentiate OBSI; however we appreciate that the term ombudsman is used much more widely in North America.

Recommendation 13:

That OBSI:

- issues consent forms at the same time as complaint forms
- monitors and reports on complaints ruled out of mandate at the enquiries stage
- formally reports on how enquiries are resolved
- enables CAOs to capture additional information from callers making initial enquiries, including the name of the firm, the product and issues of concern
- gives CAOs training in the identification of potential systemic issues
- implements an early advice service for participating firms.

6.5 Investigation

Our review of the files showed OBSI investigators, for the most part:

- were able to identify the key issues in a complaint
- took a thoughtful and planned approach to investigating
- requested relevant additional information
- escalated matters appropriately to more senior staff when needed; for example, when settlement negotiations became difficult or protracted, or when fine judgment calls were required
- kept firms and customers apprised of progress and their thoughts on where the investigation was heading
- were respectful and patient in their dealings even when parties were adversarial
- explained their views well.

6.5.1 Staff guidance and training

OBSI has developed a three-week, structured induction process specifically for investigative contractors and permanent staff who started while the backlog was being addressed. Even though turnover is now low and formal induction processes are not run in the same way, the structured approach remains useful as a guide.

OBSI has highly specified investigation process guidelines and forms to assist staff. Its new CMS will embed the process in the system along with maximum timeframes for each step, based on the 180-day standard. The system is flexible and will allow staff to cut out unnecessary steps. However, one risk of embedding the 180-day standard is that staff will work to the maximum time allowable. Although staff know they are expected to complete cases more quickly, we saw evidence in the file review that staff planned backwards from the 180-day end point. The new CMS may help avoid this (it embeds some shorter timescales such as completing view letters in 90 days), but establishing

different pathways and internal timeliness KPIs for the different (A, B, C) levels of complexity may also provide better guidance and incentivise more timely case completion.

OBSI has also developed considerable amounts of written guidance for staff on common issues such as suitability assessment and assessing credibility. We also note OBSI is developing a self-directed, online training programme. This should provide OBSI the opportunity to streamline its content guides. We expect this will ultimately develop into an electronic knowledge management system that enables staff to draw on the full knowledge they need to perform their roles. Such a system would include manuals, guidelines, policies, employees' knowledge, industry/product knowledge, directories and networks. We recognise this is a major undertaking, but suggest it as the next step following implementation of the CMS. We therefore recommend that OBSI develops a business case for a knowledge management system.

Recommendation 14:

That OBSI develops a business case for a knowledge management system.

6.5.2 Other observations from international experience

With respect to the efficiency of the investigative process, most financial ombudsman services elsewhere faced backlogs and a very large increase in the number of disputes requiring investigation. In addition to a number of initiatives similar to OBSI's, common responses included:

- having a separate team deal with lower value, more straightforward complaints
- delegating authority to specially-selected adjudicative staff to make decisions on more straightforward complaints
- assigning senior staff to assist with the early assessment stages of a complaint.

Even though backlogs have now subsided in most ombudsman services, these innovations are being used to improve efficiency under more normal workloads. We note that OBSI already has considerable senior involvement at the early stages and we understand it has previously experimented with having a separate team deal with lower value complaints.

In 2015, OBSI resolved 33 C level (lowest level of complexity) investment complaints – only 10% of all cases resolved. Assuming level C is also synonymous with lower value and easier to resolve, such a small number would not justify a separate team, but we agree that the alternative of assigning these cases to CAOs, with the support of an experienced senior investigator with delegated signing authority, may be an efficient alternative. This would also provide an excellent training ground for CAOs keen on moving into investigative roles, and potential succession for a senior investigator to managerial roles. It is also likely consistent with the decision that CAOs take greater responsibility for investigating jurisdictional cases on the banking side.

One submitter suggested OBSI develop a fast-track process for hardship cases. OBSI has indicated there are insufficient such cases on the investment side to develop a specific process, and that its current process enables it to prioritise cases appropriately. We suggest it keeps this option under review.

6.6 Resolution

Increasingly, according to Gill et al (2012, p.76), modern demands for speedy resolution and a general preference for informality have led ombudsmen to use facilitated or negotiated methods of resolution:

> *…the notion that ombudsman schemes will need to shift towards greater informality remains valid; pressures to achieve greater timeliness, deal with higher caseloads and cope with restricted funding mean that greater informality is likely to be inevitable.*

Negotiated settlements can indeed be quicker, especially where both parties are reasonable. But negotiated settlements can also cause the resolution process to become protracted if the investigator is not highly skilled, where the parties have become entrenched and determined to "win", and when they are not backed by the power to require redress.

An ombudsman, however, needs to use a range of resolution tools – facilitation, negotiated settlements, decisions – to provide for a proportionate, flexible, efficient and effective response. They must also ensure their investigators develop judgement as to when each of the tools is best used, particularly when an early written draft determination is the better path.

As set out in the table below (note it excludes 49 cases either out of mandate, voluntarily withdrawn or closed for non-response/poor conduct), nearly half of all clients whose cases were inside mandate received OBSI's view at an early stage – these all involved cases where OBSI determined no compensation was due. The remaining cases involved more in-depth investigation and resolution.

Table 2: Methods used in resolving cases (2015)

Resolution method	Number	% inside mandate
View letter	163	48.7
Facilitated settlement	162	48.3
Settlement recommendation	4	1.2
Written recommendation	6	1.8
Total	**335**	**100**

6.6.1 View letters

If OBSI considers a client has not suffered any losses, it will provide this view along with a brief explanation in a letter, inviting the complainant to produce new evidence within 30 days, if such evidence exists. The case is closed immediately the view letter is issued. OBSI reports that complainants rarely respond. Although this is quite unusual in our experience, the low response could be indicative of: high quality OBSI communication during the process; cultural differences; the potentially lengthy complaint process in Canada (customers may be ready to give up having been through at least two levels of internal dispute resolution); and/or the quality of earlier internal resolution.

Based on our file review and discussions with staff, complainants have many opportunities to present new evidence and to challenge views before the letter is issued, and so the process appears to be fair and effective. Little is known about customer satisfaction at this point as surveys do not distinguish satisfaction at the different points at which a case was resolved. This is something OBSI may wish to consider when reviewing its customer surveys. Typically, those complainants whose

cases are ruled out of mandate are least satisfied and so it can be useful to separate these cases out when analysing results for management purposes. This is because there is little an ombudsman can influence in this context other than try to set appropriate expectations, provide good service and an explanation, and "say no nicely".

6.6.2 Facilitated settlements

OBSI resolves almost all remaining cases through facilitated settlements. In 2015, six recommendations were written when the firm refused to settle and in a further four cases, a more detailed letter or recommendation was written when the complainant declined OBSI's settlement recommendation. At 2.6% of cases closed, this is unusually low. According to other international ombudsmen, investment cases, with their higher value redress, often lend themselves to earlier written determinations. In FOS UK's case, 27% of investment cases required a formal ombudsman view (compared with 14% of banking cases); FOS Australia resolved nearly 19% of cases accepted for investigation by written determination; and Australia's CIO, 23.5%.

In its Annual Report, FOS UK (2015, p.76) noted*, "complaints involving pensions and investments were far more likely to require an ombudsman's decision. These complaints often involve very large sums of money – and people's financial security can depend on the outcome."*

We agree there are benefits in facilitating settlements without the need for more detailed reports. However, we believe OBSI should consider increasing the use of more formal written adjudications. These are particularly useful when either or both parties are entrenched and unlikely to settle.

Compared with other jurisdictions, we consider that Canada's ombudsman goes to extraordinary lengths to effect settlement. We understand that OBSI represents the last and only opportunity for many clients to receive some form of redress. Nevertheless, we were unconvinced that all the time spent negotiating would lead to different outcomes. And we consider providing an earlier written recommendation, with timeframes for response, may be just as effective in facilitating resolution. We therefore recommend that OBSI introduces earlier written recommendations in appropriate cases.

We also recommend expanding settlement letters in some cases – not to a full investigation report and not for initial views. This is because some firms complained they could not see that their submissions had been taken into account. We think it would be particularly useful when settlements had to be escalated within the firm for sign off to people who had not been involved in prior discussions. It would also provide a record for senior management and others to use for future cases and for considering whether they could make internal improvements to help prevent the same things happening again.

Further, because both consumers and firms reported being unclear about the negotiated settlement process, we recommend that OBSI produces a short guide for both parties on how the negotiated settlement process works, their role in the process, how their views will be taken into account and what to expect. While a guide has been developed for firms, the resolution process described was outdated (there was no reference to negotiated settlements) and may well have contributed to new firms' lack of clarity. It is important that website resources be kept updated.

Recommendation 15:

That OBSI:

- reintroduces earlier written recommendations in appropriate cases
- expands settlement letters, where appropriate, to include the rationale for the final settlement amount
- develops a short guide for firms and consumers on how the negotiated settlement process works.

6.6.3 Loss calculation

As noted earlier, it appears there is much greater acceptance of the loss calculation methodology now than in 2011. We did not hear any challenge to OBSI calculating losses, and some firms have adopted OBSI's approaches, including asking OBSI to calculate losses to assist with internal resolution. Disappointingly, however, we did hear of residual concerns with some aspects of its approach.

We agree with the 2011 independent review findings that OBSI's loss adjustment methodology leads the ombudsman world. Approaches are also consistent with underlying international policies (e.g. the use of indices, opportunity cost). Use of a model brings all parties onto the same level, enabling them to agree on underlying assumptions and inputs. The model also ensures prices are relevant to the time at which the stock was held. In this respect it addresses one of the 2011 industry criticisms that OBSI made recommendations with the benefit of hindsight.

The model is also neutral, and produces results that favour neither side. Firms reported results that were both lower and higher than their own estimates.

A further benefit is that it is quick to produce results. Interestingly we received one comment from a firm complaining about OBSI using the model early in an investigation process. However, in our experience it can be efficient to determine whether a customer has suffered any losses early on: if there are no losses, it is likely no compensation is due and a view can be given more quickly.

OBSI has continued to refine aspects of the model, incorporating proxies such as Morningstar data for fees. It also has direct access to Bloomberg data and can now feed tax assumptions into the model.

Everything should, therefore, point to excellent progress. And so it was puzzling to find some firms and industry groups raising a few old chestnuts – whether losses were offset by gains on other holdings within a portfolio; off-book transactions; "dealer A/dealer B" (i.e. apportioning losses when the investment portfolio transfers from one firm to another); vicarious liability; apportionment of losses to customers – issues that were the subject of extensive consultation in 2012 and should have been well settled by now.

Some of the concerns appeared to be historic – i.e. they arose on cases closed some time ago. Others arose from misinformation or misunderstandings. But others indicated more fundamental misgivings.

We recommend that OBSI provides additional guidance on its loss calculation approaches and makes that available on the website. This will be helpful for firms when explaining issues to their

customers; help customers decide whether to pursue a complaint with the ombudsman; and provide a tremendous resource for those involved in financial literacy education, including the media and front-line financial advisory services.

Better firm and customer understanding would also be facilitated by increasing the number of case notes available on the website. In the UK, FOS publishes its final decisions, or determinations. These name the companies involved, but keep the names of complainants confidential. Such decisions are helpful but no doubt controversial for participating firms even though they clearly show both outcomes – when the firm was in the right, and when not.

However, we think guides – even if they are made shorter, pithier, more relevant (by adding illustrative case notes) and more easily accessible (they are hard to find) – and case notes are unlikely to settle some firms' residual issues. It is clear that some type of circuit-breaker is required as these concerns may interfere with the recommendation that OBSI's ability to secure redress is improved. We therefore recommend that OBSI submits a sample of decisions involving compensation that firms consider to be contentious, along with the relevant guidelines, to an expert with acknowledged relevant legal and technical industry expertise.

Recommendation 16:

That OBSI:

- turns its current policy documents into short guides with case studies to explain its approaches to key loss calculation policies
- increases the number of case studies on its website
- submits a sample of decisions involving compensation that are considered by firms to have been contentious, along with the relevant guidance materials, to an independent expert authority.

7 Fees and costs

OBSI should have a fair, transparent and appropriate process for setting fees and allocating costs across its membership.

OBSI has a clear process for setting fees and allocating costs across its membership. Considerable care is taken to avoid cross-subsidisation between investment and banking while maintaining some flexibility of staff resource.

We understand OBSI is reviewing the way it charges for its services. This is appropriate in light of the fact that OBSI has received much lower complaint volumes than originally anticipated from the new areas added in 2014. In our view, the board made the correct decision to maintain fees at 2014 levels for the 2015 year, and use any potential surplus to both replace OBSI's aged case management system and build reserves.

We advise OBSI to continue using an allocation-based method – a move to user pays would be administratively burdensome, and risk its not-for-profit status. Nevertheless, it would be possible to build an allocation system that took into account a participating firm's use of the service. For example, by setting a minimum fee for all members, and then increasing fees for those firms that had made more use of the system than others in the previous year.

In developing this kind of system, OBSI may wish to build in incentives for firms to settle at an earlier stage. Two ways of doing this are to weight cases based either on the complexity rating or the stage at which a case was closed. In the latter scenario, the weighting for a case that closed after an initial view letter would have a lower weighting than one that settled; the highest weighting being reserved for a case that went through to a full determination.

One submitter asked for OBSI to publicly disclose its fee model. It is usual for an ombudsman to disclose the components of their model and we expect there will be greater transparency, if needed, during consultation with industry about any future revised funding models.

8 Resources

OBSI should have the appropriate resources to carry out its functions and to deal with each complaint thoroughly and competently.

8.1 Funding

In our view, OBSI is adequately resourced for the number of cases it is presently receiving and its current stage of development. It received an additional nearly $1 million from new members without the corresponding anticipated increase in cases. Based on our experience, newly participating firms can expect two things: that initial use of the ombudsman will be low and that complaints will increase over time as customers learn about OBSI.

OBSI made budgetary savings last year, primarily through releasing contractors required to address the backlog, deferred spending on CMS, and savings from temporary staff vacancies. Now that vacant positions have been filled, and funds have been assigned to the new case management system, we would expect higher expenditure this year, as budgeted. Investigative efficiency savings may not materialise before 2016/17. Even then, we consider savings should be channelled into delivering on development initiatives (including those recommended in this report) so that OBSI can improve timeliness and create greater value for stakeholders.

We do not, therefore, recommend any reduction in fees before 2017/18, and then only if OBSI is able to obtain the efficiencies envisaged through having binding authority, and neither investment nor banking case numbers show signs of escalating. The picture will likely become clearer by the time OBSI develops its strategic plan, but complaints in January 2016 were up 22% on the same period in 2015 and at that time there appeared to be every possibility complaint numbers would continue to increase given the volatile environment for investment and the extraordinarily long bull run the markets have experienced. We also acknowledge the large number of recommendations in this report that will require resourcing.

8.2 Staff

8.2.1 Levels

OBSI was well-resourced for its investment mandate when we visited in January. It had a complement of 15 investigators, three managers and six investment analysts. Of these, one manager was temporarily working exclusively on training for the new CMS system and three investigators were temporarily working partially or fully on banking cases to service an increase in these cases. Average case-loads, at 7-9 per investigator, seemed low by international standards although this is difficult to assess as staff at other ombudsman offices are more likely to have a range of cases, rather than being exclusively focused on investment (which is acknowledged to be more complex).

We agree with OBSI's current strategy of maintaining staff at existing levels. It is not easy to recruit suitable new staff if and when demand rises; it is efficient for staff to be transferred across mandates as demand dictates and it provides good developmental opportunities. OBSI must take this potentially short-lived opportunity to implement its new systems and undertake projects that will enhance its efficiency.

8.2.2 Qualifications

OBSI has hired staff from an impressive range of relevant backgrounds, including directly from industry and internal dispute resolution offices. Staff professional backgrounds include: lawyers (4), Chartered Professional Accountant, Chartered Financial Analyst (4), CFA candidates (3), Fellows of

the Canadian Securities Institute (2), Certified Financial Planners (4), Chartered Investment Managers (4), Derivative Market Specialist, Certified Forensic Investigator, and Certified Mediator.

OBSI is fortunate to have a good proportion of senior, experienced staff. There is almost no substitute for experience in dispute resolution. It can take many years to develop the full range of skills, knowledge and judgement required to resolve cases efficiently and well. These competencies include industry and product knowledge; skills in the areas of dispute resolution, investigation, negotiation, relationship management, written and oral communication, numeracy, listening, and dealing with stressed and sometimes unreasonable people; and, of particular importance to dispute resolution, the ability to remain neutral, respectful and resolution-focused (non-adversarial).

8.2.3 Capability

Aside from feedback from new participating firms, which we discuss below, we heard some residual concerns about consistency of decision-making. Naturally, some investigators will be less experienced than others, but we note OBSI provides extensive and regular training, both on the basics of dispute resolution and on content-related topics.

OBSI has two all-staff, two-day meetings per year that have a strong focus on training. They also run "lunch and learn" sessions two to three times per month, individual staff are coached by their managers and have their own development plans. In addition, staff are expected to seek advice from peers with specialist expertise and to seek peer review as appropriate. Outside experts and stakeholders (e.g. SROs) are also brought in to help train staff as appropriate.

We also note that OBSI is planning to introduce a process of evaluating staff performance at the end of each case. This is an excellent initiative and will be conducted by individual staff and their managers when cases are closed. These will build a rich picture of strengths and development needs, and be useful for individual annual performance reviews as well as for identifying common organizational training needs.

We recommend also introducing wider case debriefs at investigative staff meetings so that all staff can share in the learning from individual cases. Lessons or insights include: what went well and not so well from an investigative/resolution perspective; what investigators could have done differently to enable more timely or high quality resolution; what lessons there may be for the wider public or firms; opportunities for FAQs and guides; and which cases would be instructive for publishing on the website or disseminating more widely.

We also suggest, given some (limited) residual concerns about industry knowledge, that it would be worthwhile for OBSI to "bring the outside in" more often. That is, increase the number of times industry and firm staff come into OBSI's offices to share the latest industry developments or any industry insights they feel may help OBSI's understanding of issues.

8.2.4 Newly participating industries

Considerable preparation was undertaken for the 2014 extension of OBSI's mandate. Despite these preparations:

- one group complained that it had been necessary to educate OBSI on its industry during relevant investigations
- another said it had prepared a whole series of case studies to help members understand OBSI's approach to fairness.

We would have expected a learning curve for OBSI. Similarly, in a mature and co-operative environment, firms and industry groups will reach out and ensure their ombudsman understands the nuances of their industry so that they can work with the common objective of fair resolution. We think industry did the right thing in taking the initiative. We also think it would be better if relationships were sufficiently open that the industry group felt it could raise any concerns directly with OBSI. In this respect, we recommend that OBSI includes questions in its planned participant firm survey about whether they consider OBSI has the appropriate industry knowledge to fairly resolve complaints and whether they consider OBSI approachable and open to feedback.

The other group's initiative beautifully illustrates the value of case studies and the extent of assistance new participating firms require. When the New Zealand government required all providers of financial services to join a dispute resolution scheme, the relevant schemes responded by making training in dispute resolution available in addition to standard information about how their services worked. It is possible that industry groups and/or SROs are seen to have this role in Canada; however, we suggest there is value in the parties working together, given OBSI's independent dispute resolution expertise. Accordingly, we recommend that OBSI explores participating firms' interest in attending training sessions on dispute resolution and on OBSI's approaches to different types of cases.

Recommendation 17:

That OBSI:

- introduces case debriefs at investigative meetings enabling all staff to share in the learning from individual cases
- includes questions in its planned participant firm survey about whether firms consider OBSI has the appropriate industry knowledge to fairly resolve complaints and whether they consider OBSI approachable and open to feedback
- explores participating firms' interest in attending training sessions on dispute resolution and on OBSI's approaches to different types of cases.

9 Accessibility

OBSI should promote knowledge of its services, ensure that investors have convenient, well-identified means of access to its services, and provide its services at no cost to investors who have complaints.

In evaluating accessibility, we have considered the following:

- resources available for stakeholders
- use of the website and social media
- analysis of data
- outreach.

OBSI provides its services at no cost to investors, enables consumers to contact it via a range of channels, and provides access to interpretation and translation services. Relative to other ombudsman services, however, OBSI has not devoted much resource to improving accessibility and awareness of its service. In short, this area is ripe for development – few resources are available, the website has limited and, in some cases, outdated information, website hits are relatively low and OBSI carries out relatively little outreach.

We are aware of the view that promoting awareness is simply "drumming up business". We agree that awareness for the sake of it should not be the focus; besides, it is typically ineffective. Rather, we consider the focus should be on *prevention:* sharing the insights and lessons learnt from disputes resolved to help all stakeholders avoid mistakes, reduce complaints and know what to do. Telling the human stories – the cautionary tales, the success stories, and providing useful guidance is what firms and their customers typically value.

We therefore recommend OBSI develops a prevention strategy that incorporates:

- suggestions from the following sections
- planned general omnibus awareness survey
- responses from a planned participant firm survey
- information from improved customer surveys.

9.1 Building firm and industry support

Participating firms are the most important source of referral and awareness because it is when problems arise that customers are most likely to need information about the firm's dispute resolution pathways and options. Firms therefore need to offer OBSI to customers as a service when an independent review will assist resolution. However, as one firm said, *"it is harder to refer a customer to OBSI when they have never heard of it".*

Participating firms are required to inform their customer about OBSI, particularly when they are giving customers their final views on complaints. It is difficult to know what percentage of firms are routinely referring customers, but evidence from OBSI's own surveying shows that some 52% of respondents reported finding out about OBSI through their own research, with 35% indicating they found out through their investment firm. In all cases we reviewed, firms had given the requisite warning, and one SRO confirmed its audits showed members were doing so; therefore, we expect

respondents were indicating they already knew about OBSI before receiving the firm's final response. They may even have contacted OBSI before going through the internal dispute resolution process, but this information is not currently recorded – a useful development awaiting the new CMS.

In our experience, one particularly cost-effective way of building awareness and improving accessibility to ombudsman services is to first channel people to the website. To do this requires:

- building website content and resources (case studies, guidance notes, FAQs, brochures, newsletters, news, reports, statistical trends etc.)
- keeping the website current, simple, lively, easily accessible on all devices and to as many stakeholders as possible, including those whose first language is not English or French, those with disabilities, the elderly
- building linkages – to and from relevant organisations, websites, firms
- using social media to channel people to the website
- building firm and industry support
- making it easy to submit a complaint.

As OBSI's website is relatively undeveloped, we recommend the prevention strategy plan includes an objective of increasing website visits. This is an area in which the CIAC may be able to assist.

We also recommend:

- obtaining demographic data from a wider range of people who contact OBSI – at present the demographic data is based on the 30% of customers whose complaints have been resolved and who respond to the post-closure customer survey
- incorporating the capacity for customer survey respondents to make open-ended comments – these can be valuable in eliciting ideas about service improvements
- over time, developing added value services such as:
  - information about common problems across the investment sector
  - insights on effective dispute resolution
  - information on approaches to specific issues (useful also for clients in making their decisions about whether to pursue a complaint)
  - training on matters of common interest, such as dealing with unreasonable complainant conduct.

Recommendation 18:

That OBSI:

- develops a prevention strategy that sets out how it will assist customers and firms avoid and reduce complaints
- obtains demographic data from a wider range of complainants
- includes open-ended questions in customer surveys to capture qualitative feedback
- over time, develops a range of added-value services and products for firms and consumers.

10 Systems and controls

OBSI should have effective and adequate internal controls to ensure the confidentiality, integrity and competence of its investigative and dispute resolution processes.

10.1 Confidentiality

OBSI has a nominated privacy officer and a privacy policy on its website. It reports that it has had no breaches of its policy, and only one potential breach that was investigated two years ago and found not to be problematic. If staff suspect a breach may have occurred, they are required to report it to their manager who will then investigate and report to senior management. In discussions with OBSI management, they agreed it would be useful to document the reporting chain for suspected breaches. This will have been completed in April 2016.

As a detail, we note it is remarkably easy to send emails to the wrong person. OBSI has instructed staff to disable the auto-populate feature for email addresses. It may also want to enhance protection by activating the functions that:

- give users a second chance to consider before sending
- introduce a delay factor, enabling users to cancel an email within a specified timeframe.

10.2 Quality control

OBSI has good quality control processes and is planning to further improve these. Practices include:

- providing detailed guidelines
- preparation of investigation plans which are then discussed with managers
- regular management catch-ups with staff
- ready access to managers and peer experts
- management review of all view letters
- quarterly peer review of a manager's decision.

The analyst team is also uniquely placed to comment on consistency of decision-making. In addition, we note and support the planned management initiatives of introducing call recording and a short evaluation of each case as it is closed.

11 Core methodologies

OBSI should have appropriate and transparent processes for developing its core methodologies for dispute resolution.

OBSI has sound and well-documented dispute resolution methodologies. It has also published some guides on important matters, such as its approach to suitability, on its website. A lot more information about its processes and approach is available internally. As recommended earlier, if this information was shared more broadly, in the form of short, digestible guides and FAQs, we believe there would be much greater room for mutual understanding, also enhancing the perception (and reality) of consistency in approach.

In our experience, making guides available on approaches to different topics also helps firms to resolve issues with consumers themselves, and it helps consumers to see whether it is worthwhile making a complaint to the ombudsman.

Finally, preparing guides also demonstrates OBSI's technical proficiency – not only for firms but for the media, who will be more likely to view OBSI as a source of expertise and seek comment on topical matters.

12 Information sharing

OBSI should share information and cooperate with CSA Members through the CSA Designates in order to facilitate effective oversight under this MOU.

OBSI meets and shares information quarterly with the JRC. Over time, OBSI's reports have become more detailed, and we would hope of more use to the JRC. Currently analytical reports are in the form of tables and raw data – they could be made more readily digestible if accompanied by a short report setting out the main insights and observations; and more meaningful if they contained comparisons with previous years and periods.

As statistical data is compiled quarterly, summaries would also be of interest to wider stakeholders and we recommend publishing statistical data on the website at least six monthly, if not on a quarterly basis.

Recommendation 19:

That OBSI publishes statistical data and trends on its website at least six-monthly, if not quarterly.

13 Transparency

OBSI should undertake public consultations in respect of material changes to its operations or services, including material changes to its Terms of Reference or By-Laws.

Since 2011, OBSI has undertaken two major consultations. The first concerned its loss calculation methodology. The second concerned a range of changes to its terms of TOR. These were handled professionally and received a number of submissions which were considered by the board.

We are not aware of any material changes to either its TOR or By-Laws that were made without consultation.

14 Progress since previous reviews

OBSI's own report against progress from the 2011 independent review is attached as Appendix 5. The report was completed in preparation for the current review. Boards are not expected to agree with all recommendations. Although there has been no formal reporting against the 2011 report, it is clear that progress has been made. A few relevant recommendations remain outstanding, the more important ones being outside OBSI's control.

Key achievements are:

- governance reforms have been made and boardroom culture is clearly one in which directors act in the best interests of OBSI
- substantial consultation on the loss calculation methodology has occurred and steps have been taken to address the impression that it was unfairly assessing complaints with hindsight (firms did not complain about this in our consultations)
- the JRC has been formed, giving OBSI: much improved regulatory support; regulatory oversight of funding/budgeting; and greater certainty of survival through being awarded the mandate for dispute resolution in the investment industry
- efficiency has improved with elimination of the backlog of complaints that had been a feature for many years
- OBSI's TOR were amended to change the limitation period to six years
- processes and templates have been refined to ensure OBSI has addressed fairness standards and that these are recorded on files
- records are kept of settlement discussions with firms, including guidance given
- OBSI can readily extract data about participating firms' timeframes for responses to requests for information (see discussion at section 6.2)

Outstanding matters include:

- seeking agreement of government and regulators to establish a binding power for ombudsman decisions
- establishing a limited appeal mechanism for ombudsman decisions
- establishing a workload model to manage budgeted funding levels at a realistic level (pending)
- discussing, with internal ombudsmen, the use of the term internal ombudsman to suggest a renaming to avoid confusion
- publishing case decisions on the website (this matter is outstanding from 2007) and again recommended in this report.

15 Summary of international comparisons

Comparisons with other financial ombudsman services internationally have been included throughout this report. In summary, although the board and CSA can take comfort in the quality of OBSI's decision-making on individual cases, OBSI currently lags behind its peers in terms of its general effectiveness, efficiency and strategic impact.

To be comparable, OBSI must:

- have the ability to obtain redress for consumers who have sustained losses through a firm's wrong-doing or mistake
- continue to improve timeliness
- widen its range of resolutions to include earlier written recommendations and determinations
- collect information to evaluate the impact of its dispute resolution outcomes
- publish additional information to firms and consumers about its processes and approaches to common issues on its website
- support industry internal dispute resolution through training
- provide advice to participating firms on individual complaints before external dispute resolution
- publish more case studies on its website
- publish more information on trends and issues
- make submissions on regulatory proposals
- increase its outreach.

16 Summary of recommendations

Strategic recommendations

Recommendation 1:

- That the OBSI board supports a strategic approach to ombudsmanship, incentivising staff to use the intelligence gained from cases to provide suitable additional services to participating firms and guidance to customers.

Recommendation 2:

- That OBSI includes a public policy function within its stakeholder relations team to prepare formal submissions on relevant regulatory or legislative proposals, and respond to regulatory requests for advice on the effectiveness of existing regulation.

Recommendation 11:

- That OBSI is enabled to secure redress for customers, preferably by empowering OBSI to make awards that are binding on the firm, and on the customer if they accept the award, accompanied by an internal review process.

Recommendation 14:

- That OBSI develops a business case for a knowledge management system.

Recommendation 16:

- That OBSI turns its current policy documents into short guides with case studies to explain its approaches to key loss calculation policies.
- That OBSI increases the number of case studies on its website.
- That OBSI submits a sample of decisions involving compensation that are considered by firms to have been contentious, along with the relevant guidance materials, to an independent expert authority.

Governance recommendations

Recommendation 3:

- That one of the community director positions on OBSI's board be reserved for a consumer/investor advocate and that this appointment be based on nominations from consumer/investor advocacy groups.
- That, until a consumer representative is appointed:
  - the CIAC is asked to present a paper outlining key issues from an investor perspective for the OBSI board's next strategic planning meeting and to participate in that meeting
  - the OBSI board invites a consumer/investor advocate to attend the strategic planning meeting.

Terms of reference recommendations

Recommendation 8:

- That OBSI reviews its compensation cap to bring it closer to the IIROC arbitration limit and amends its terms of reference to require the compensation cap to be adjusted in line with inflation, on a three yearly basis.

Operational recommendations

Recommendation 4:

- That OBSI enhances transparency by publishing in its Annual Report:
  - key strategic objectives, initiatives and performance indicators, and progress against these
  - more information about board committee activities.

Recommendation 5:

- That OBSI produces a working definition for what constitutes a matter that is "serious" enough to refer for regulatory attention, and a guide for firms on how it will implement the systemic issues protocol.
- That the CSA extends the systemic issues protocol to include complaints raised by a single complainant.

Recommendation 6:

- That the OBSI and Ombudsman for Life & Health Insurance chief executives develop a joint approach to identifying and quantifying losses associated with segregated funds.

Recommendation 7:

- That OBSI records information when investigating a case about the length of time between the genesis of a problem, the client noticing it and a complaint being laid. Data should also be collected at the enquiries stage about cases ruled outside mandate for exceeding the six-year limitation period. Data should cover at least two years before deciding whether to reduce the current six-year limitation period.

Recommendation 9:

- That OBSI submits a small sample of decisions to an external reviewer on one or two occasions between formal five-yearly evaluations.

Recommendation 10:

- That OBSI prepares a strategic plan that cascades into an annual plan and the ombudsman's performance agreement, and that contains a range of KPIs.
- That OBSI publishes a table in the Annual Report that summarises workflows.
- That OBSI reports the wider range of resolutions achieved beyond direct financial redress.
- That OBSI develops a process for enabling consumer users of its service to make a complaint about its own complaints resolution service and publishes that on its website.

Recommendation 12:

- That OBSI only suspends a case with the agreement of both affected parties, and reports timeliness inclusive of delays for external purposes.

Recommendation 13:

- That OBSI issues consent forms at the same time as complaint forms.
- That OBSI monitors and reports on complaints ruled out of mandate at the enquiries stage.
- That OBSI formally reports on how enquiries are resolved.
- That CAOs capture additional information from callers making initial enquiries, including the name of the firm, the product and issues of concern.
- That CAOs receive training in the identification of potential systemic issues.
- That OBSI implements an early advice service for participating firms.

Recommendation 15:

- That OBSI reintroduces earlier written recommendations in appropriate cases.
- That OBSI expands settlement letters, where appropriate, to include the rationale for the final settlement amount.
- That OBSI develops a short guide for firms and consumers on how the negotiated settlement process works.

Value-added and awareness recommendations

Recommendation 17:

- That OBSI introduces case debriefs at investigative meetings enabling all staff to share in the learning from individual cases.
- That OBSI includes questions in its planned participant firm survey about whether firms consider OBSI has the appropriate industry knowledge to fairly resolve complaints and whether they consider OBSI approachable and open to feedback.
- That OBSI explores participating firms' interest in attending training sessions on dispute resolution and on OBSI's approaches to different types of cases.

Recommendation 18:

- That OBSI develops a prevention strategy that sets out how it will assist customers and firms avoid and reduce complaints.
- That OBSI obtains demographic data from a wider range of complainants.
- That OBSI includes open-ended questions in customer surveys to capture qualitative feedback.
- That OBSI over time, develops a range of added-value services and products for firms and consumers.

Recommendation 19:

- That OBSI publishes statistical data and trends on its website at least six-monthly, if not quarterly.

Appendix 1: Independent evaluation Terms of Reference

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The Evaluator will report on: (A) whether OBSI is fulfilling its obligations as outlined in the MOU between the Participating CSA Members and OBSI; and, (B) whether any operational, budget and/or procedural changes in OBSI would be desirable in order to improve OBSI's effectiveness in fulfilling the provisions of the MOU.

The Evaluator will evaluate operations and procedures applicable to the handling of investment complaints involving participating firms whose relevant regulator is a Participating CSA Member, IIROC and/or the MFDA, including the effectiveness of complaint resolution.

The Evaluator will evaluate investment complaint case files completed since January 1, 2014 (the "Review Period"). During the Review Period, OBSI's investigation files were pursued in two categories: cases that had been backlogged since prior to November 1, 2013 ("Backlog Cases"), and current cases received after November 1, 2013 ("Current Cases"). The Evaluator will consider cases completed during the Review Period including Backlog Cases, but will focus principally on Current Cases completed during the period. The Evaluator will ensure that the files included in their review sample include files with the following characteristics: out of mandate following investigation, no compensation recommended, low settlement amount, and refusal of recommendation resulting in publication.

In addition to examining case files, the Evaluator will undertake interviews with key stakeholders including participating firms, complainants, consumer/investor groups, regulators and OBSI staff. Interviews may be conducted personally, in writing or by telephone and may include the use of surveys.

The Evaluator will be given reasonable access to information, meetings, communications, and OBSI staff for the purposes of the Evaluation. OBSI will use its best efforts to facilitate and coordinate access to former staff members. Access to any materials or staff must pertain to the Review Period.

A. Obligations under the MOU

With respect to requirement (A) set out above, the Evaluator's report must include analyses and conclusions on the following standards set out in Article 2 of the MOU:

a) Governance – OBSI's governance structure should provide for fair and meaningful representation on its Board of Directors and board committees of different stakeholders, promote accountability of the Ombudsman, and allow OBSI to manage conflicts of interest.

b) Independence and Standard of Fairness – OBSI should provide impartial and objective dispute resolution services that are independent from the investment industry, and that are based on a standard that is fair to both Registered Firms and investors in the circumstances

of each individual complaint. When determining what is fair, OBSI should take into account general principles of good financial services and business practice, and any relevant laws, regulatory policies, guidance, professional standards and codes of practice or conduct.

c) Processes to perform functions on a timely and fair basis – OBSI should maintain its ability to perform its dispute resolution on a timely basis and deal with complaints without undue delay and should establish processes that are demonstrably fair to both parties.

d) Fees and costs – OBSI should have a fair, transparent and appropriate process for setting fees and allocating costs across its membership.

e) Resources – OBSI should have the appropriate resources to carry out its functions and to deal with each complaint thoroughly and competently.

f) Accessibility – OBSI should promote knowledge of its services, ensure that investors have convenient, well-identified means of access to its services, and provide its services at no cost to investors who have complaints.

g) Systems and controls – OBSI should have effective and adequate internal controls to ensure the confidentiality, integrity and competence of its investigative and dispute resolution processes.

h) Core Methodologies – OBSI should have appropriate and transparent processes for developing its core methodologies for dispute resolution.

i) Information sharing – OBSI should share information and cooperate with CSA Members through the CSA Designates in order to facilitate effective oversight under this MOU.

j) Transparency – OBSI should undertake public consultations in respect of material changes to its operations or services, including material changes to its Terms of Reference or By-Laws.

B. Operational Effectiveness

With respect to requirement (B) set out above, the Evaluator's report must set out analyses and conclusions including:

a) Report on progress towards the recommendations from the previous independent reviews.

b) A high-level benchmarking exercise that compares OBSI to other financial Ombudsman schemes or equivalent in comparable international jurisdictions.

c) A high-level evaluation of OBSI's operations with reference to its terms of reference, internal policies and procedures, fairness statement and loss calculation methodologies. A detailed assessment of loss calculation methodologies employed by OBSI is not required.

d) An analysis of OBSI governance, including particular reference to stakeholder representation on OBSI's board of directors.

e) An analysis of the reasons for settlements below amounts recommended by OBSI.

Deliverable(s)

The Evaluator will present a final report to OBSI and make separate presentations to OBSI Senior Management, OBSI's Board of Directors, and a joint meeting of the OBSI Board of Directors and the JRC.

Timeline

The Evaluator will regularly update OBSI on its progress and immediately disclose any material issues that could hinder its ability to carry out an effective independent evaluation. A full project timeline will be presented by the Evaluator to OBSI for consideration and approval.

The final presentation to the OBSI Board of Directors and JRC will take place at a meeting in May 2016. Work on the review could begin in late 2015 or early 2016.

Appendix 2: References

1. Australian Credit and Investment Ombudsman Scheme. 2015. Annual Report. Retrieved from http://www.cio.org.au/publications/annual-report-on-operations/
2. Australian Securities and Investments Commission (ASIC) *Regulatory Guide 139. 2013. Approval and oversight of external dispute resolution schemes.* Retrieved from http://download.asic.gov.au/media/1240742/rg139-published-13-june-2013.pdf
3. Banking Ombudsman Scheme. 2015. *Annual Report*. Wellington, New Zealand. Retrieved from https://bankomb.org.nz/ckeditor_assets/attachments/291/annual_report_2014-15.pdf
4. The Treasury (Australia). 2015. *Key practices for industry-based customer dispute resolution*. Canberra: Commonwealth of Australia. Retrieved from http://www.treasury.gov.au/~/media/Treasury/Publications%20and%20Media/Publications/2015/key%20pract%20ind%20cust%20dispute%20reso/Documents/PDF/key_pract_ind_cust_dispute_resol.ashx
5. European Commission. 2013. *Directive on Consumer Alternative Dispute Resolution (ADR) 2013/11/EU.* Retrieved from http:/eurlex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2013:165:0063:0079:EN:PDF
6. Financial Ombudsman Service. 2015. *Annual Review*. Melbourne, Australia. Retrieved from https://www.fos.org.au/publications/annual-review/
7. Financial Ombudsman Service. 2015. *Annual Report*. London, United Kingdom. Retrieved from http://financial-ombudsman.org.uk/publications/ar15/index.html
8. Financial Services Complaints Ltd. 2015. *Annual Report*. Wellington, New Zealand. Retrieved from https://www.fscl.org.nz/2015-annual-report
9. Gill C., Williams J., Brennan C., O'Brien N. 2013. *The future of Ombudsman schemes: drivers for change and strategic responses.* Edinburgh: Queen Margaret University. Retrieved from http://eresearch.qmu.ac.uk/3251/
10. Insurance & Financial Services Ombudsman Scheme. 2015. *Annual Report*. Wellington, New Zealand. Retrieved from http://www.iombudsman.org.nz/assets/Uploads/ISO-2015-Annual-Report.pdf
11. International Network of Financial Services Ombudsman Schemes. 2014. *Effective Approaches to Fundamental Principles*. Retrieved from http://www.networkfso.org/independence.html
12. Ministry of Business, Innovation and Employment (MBIE) (n.d.) *Guidelines for applying to become an approved dispute resolution scheme under the Financial Service Providers (Registration and Dispute Resolution) Act, 2008.* Wellington, New Zealand. Retrieved from http://www.consumerprotection.govt.nz/for-business/compliance/selling-credit-or-consumer-loans/financial-dispute-resolution/guidelines-dispute-resolution-scheme
13. Ombudsman Association. 2007. *BIOA Guide to the principles of good complaint handling*, 2007. Retrieved from http://www.ombudsmanassociation.org/docs/BIOAGoodComplaintHandling.pdf

14. Ombudsman Association. (n.d.). *Principal features of an ombudsman scheme*. Retrieved from http://www.ombudsmanassociation.org/about-principle-features-of-an-ombudsman-scheme.php

15. The Navigator Company. 2011. *Independent Review of the Ombudsman for Banking Services and Investments.* Retrieved from https://www.obsi.ca/en/resource-room/reference-documents/independent-review

16. Thomas, D., & Frizon, F. 2012. *Fundamentals for a financial ombudsman: A practical guide based on experience in western Europe.* The World Bank. Retrieved from *http://siteresources.worldbank.org/EXTFINANCIALSECTOR/Resources/Financial_Ombudsmen_Vol1_Fundamentals.pdf*

Appendix 3: Contributors to the evaluation

In addition to OBSI's ombudsman, management and staff, the following people or organisations participated in the evaluation.

Regulators	Canadian Securities Administrators (CSA) Joint Regulators Committee (JRC) Ontario Securities Commission British Columbia Securities Commission Alberta Securities Commission Autorité des marchés financiers
Self-regulatory groups	Investment Industry Regulatory Organisation of Canada (IIROC) Mutual Funds Dealers Association of Canada (MFDA)
Industry organisations	Investment Industry Association of Canada (IIAC) Investment Funds Institute of Canada (IFIC) Portfolio Management Association of Canada (PMAC) Registered Education Savings Plan Dealers Association of Canada (RESP Dealers Association) Federation of Mutual Fund Dealers (FMFD)
Investor/consumer advocacy groups	Canadian Foundation for the Advancement of Investor Rights (FAIR Canada) Neil Gross (FAIR Canada) Small Investor Protection Association (SIPA) Andrew Teasdale (SIPA) Ontario Securities Commission, Investor Advisory Panel (IAP) Ursula Menke (IAP) Ken Kivenko, Kenmar Associates
Firms	Canaccord Investors Group
Internal ombudsman offices	CIBC RBC Scotia TD BMO
Complainants/private submitters	Confidential (7) Art Ross B Kennedy Larry Elford Peter Whitehouse D McFadden Ms Porter David Fieldstone Harold Blanes and Alan Blanes Harold Geller Mildred Jagdeo
Board members (at the time of the review)	Fernand Bélisle (chair) Adrian Burns Louise Martel Ian Lightstone Angela Ferrante

	Steve Gaskin Janis Riven Scott Stennett Kevin Regan
OBSI advisory	Julia Dublin (chair) CIAC members
Former staff	Douglas Melville (OBSI Ombudsman) Tyler Fleming (Director, Investor Office, Ontario Securities Commission)
Others	Phil Khoury (2007 and 2011 independent reviewer)

Appendix 4: Extracts from the Ombudsman Association "Principal Features of an Ombudsman Scheme"

Ombudsmen offer their services free of charge, and are thus accessible to individuals who could not afford to pursue their complaints through the courts.

They are committed to achieving redress for the individual, but also, where they identify systemic failings, to seek changes in the work of the bodies in their jurisdiction, both individually and collectively.

They can generally undertake a single investigation into multiple complaints about the same topic, thus avoiding duplication and excessive cost.

They are neutral arbiters and not advocates nor "consumer champions".

They normally ask the body concerned and the complainant to try to resolve complaints before commencing an investigation.

They usually seek to resolve disputes without resort to formal investigations where this is possible and desirable.

Where they identify injustice, they seek to put this right.

In the private sector, ombudsmen usually have the power to make recommendations which are binding on the bodies in their jurisdiction unless successfully challenged through the courts. The cost of their services is normally met by a charge to the bodies in their jurisdiction. Most are established by, or as a result of, statute, and the relevant industry or sector is obliged to participate in the scheme.

In the majority of cases, the principal features of an ombudsman scheme are:

Ombudsman schemes resolve complaints. They are not regulators, though some of their decisions may be seen as precedents and have wider effect.

The ombudsman model is used to resolve complaints made by someone 'small' (citizen/consumer) against something 'big' (public body or commercial business).

Ombudsman scheme procedures are designed to redress the difference between the resources and expertise available to the citizen/consumer and those available to the body/business.

Access to ombudsman schemes is free for citizens/consumers, and they are not at risk of an order for costs. Ombudsman schemes handle enquiries as well as complaints, because dealing with an enquiry may head off a complaint (for example, by resolving a misunderstanding).

The citizen/consumer first complains to the body/business, accessing the ombudsman scheme if dissatisfied with the body/business's response (or if it does not respond within a reasonable time).

When dealing with complaints, ombudsman schemes seek to achieve a fair resolution at the earliest possible stage – rather than working towards an assumed future hearing.

Ombudsman schemes use flexible and informal procedures – resolving cases by mediation, recommendation or decision as appropriate.

Ombudsman schemes do not just rely on the evidence the parties volunteer. They actively investigate cases (using their specialist expertise) – calling for the information they require.

So the outcome is not affected by how well either of the parties presents his/her/its case, and representation by lawyers (or others) is not necessary.

Ombudsman scheme recommendations/decisions are based on what is fair in the circumstances, taking account of good practice as well as law.

Ombudsman schemes publicly feed back the general lessons from cases they have handled, so stakeholders (including government/regulators) can take steps to improve things for the future.

Because there is a flexible and informal process, and representation is not necessary, the costs of an average ombudsman case are significantly less than an equivalent case in a court or tribunal.

Appendix 5: Progress against 2011 Independent Review

Strategic recommendations

Recommendation	Status
Recommendation One. Seek endorsement by the regulators and acceptance by industry of the basic framework of OBSI loss calculation methodology.	Complete. Stakeholder consultation completed in November 2012. Consultations involved publication of two consultation papers, participation in an industry working group, solicitation of opinions from experts in loss valuation and the law, three information sessions (one for each of the public, IIROC members and MFDA members), and consultations with securities regulators, industry participants, investor representatives, and OBSI's independent Consumer and Investor Advisory Council. Although the regulators did not formally endorse OBSI's loss calculation methodology they did not indicate objection. OBSI's Board issued its decisions resulting from the consultations in November 2012.
Recommendation Two. Establish a joint industry/regulator standing advisory panel for OBSI to refer controversial technical matters in dispute (principle only, not individual cases), such as aspects of loss calculation.	Incomplete. However, ad hoc discussions take place with the SROs when appropriate (e.g. Dealer A/B cases, loss calculations).
Recommendation Three. Seek agreement of government and regulators to make membership of OBSI by all banks and investment firms compulsory.	
Recommendation Four. Seek regulatory backing and industry agreement to binding power for Ombudsman decisions over member firms.	Incomplete. Strategy development to begin in fiscal 2016.
Recommendation Five. Establish a limited appeal mechanism for Ombudsman decisions.	Incomplete. Navigator envisioned a third-party appeal process via a tripartite panel (typically with a legally qualified independent Chair, a knowledgeable industry person and a consumer/investor advocate with appropriate skills) as used in Australian FOS or an appropriately qualified single Appeals Ombudsman. However, with respect to appeals we should consider that at the end of October 2011, OBSI received a letter from the Canadian Securities Administrators (CSA), the Investment Industry Regulatory Organization of Canada (IIROC), and the Mutual Fund Dealers Association of Canada (MFDA) concerning the resolution of twenty-one complaints considered to be stuck at impasse as of the date of the letter (several have since been resolved).

	At the direction of the regulators, OBSI identified a one-time method of independent review of these cases with a view to bringing them to a resolution. In 2012, firms were offered the opportunity to have credible and experienced former commissioners of the Ontario Securities Commission (OSC) provide an independent assessment of the files in question, at the firms' expense, based on standards consistent with OBSI's Terms of Reference. If OBSI had unfairly considered the facts of the case or our investigation findings were objectively flawed, the reviewer would say so in his or her report on the matter. Only one firm took up the offer for an independent review. Ultimately, the reviewer upheld OBSI's conclusions and recommendation and the firm agreed to pay the full recommendation for $228k. Several of the stuck cases resolved without independent review. OBSI published the remainder. There has been no further work on a third-party appeal process since the conclusion of the stuck cases.
Recommendation Six. That the OBSI Board be restructured to include an independent Chair, a consumer voice and to involve all Directors in all decisions.	Complete. Governance reform undertaken and completed in 2012.
Recommendation Seven. That OBSI establish regulatory oversight of annual funding/budgeting.	Complete. JRC oversight per MOU. FCAC requirement is for OBSI to publicly post information its sources of funding for its functions and activities as an ECB.
Recommendation Eight. That OBSI continue its work to improve its efficiency, giving this prominence in the annual report and providing an annual update of initiatives to improve both cost and time efficiency.	Complete. Efficiency is a continuing theme in all policy and procedural development and review. Recent in-progress examples include investigation process renewal, investigation report template development and firm file request process renewal. See also, Carly Rian process improvement report 2014. Many of the recommendations in the report have been adopted or are in process of development and implementation.

Continuous improvement recommendations

Recommendation Nine. That the proposed reform of the OBSI Board be used as an opportunity to clearly communicate to all stakeholder groups that while OBSI Directors should bring their knowledge of their constituent groups to the Board table, once there, they are no longer advocates for any external group and are obliged to act as fiduciaries in the interests of the OBSI.	Complete. See governance reform.
Recommendation Ten. That the OBSI management and the Board establish a workload model that can be used to manage budgeted funding levels at a realistic level – moving both up and down as appropriate - and that this model be used to provide annual presentations on funding adequacy to the Regulators Joint Forum Disputes Resolution Committee (or similar) – see Recommendation Six.	Incomplete. Strategy development pending.
Recommendation Eleven. That the OBSI, in its processes of continuous review of the Policy & Procedures Manual, templates and staff training materials, ensure that every effort is made to avoid creating the impression that OBSI is unfairly assessing complaints with the benefit of hindsight. The procedure might include a standard set of paragraphs for communication at the outset of an investigation that reaches back a considerable time.	Complete. OBSI policies reflect that firm policies, business practices and standards, rules and regulations in effect at the time of the matters in question are considered in assessing each complaint.
Recommendation Twelve. That OBSI amend its Terms of Reference to limit the age of complaints it is prepared to investigate to six years from when the consumer became aware or ought to have become aware of the basis for the complaint.	Complete. TORs updated to include six-year limitation period in December 2013.
Recommendation Thirteen. That OBSI refine its procedures and templates to ensure that where relevant, OBSI has satisfied itself that a firm's practice and procedure meets basic standards of the law, applicable codes and reasonable fairness and that this assessment is recorded on the file.	Complete. OBSI's policies and procedures specify that rules and regulations be considered in conjunction with firm policy and procedure, codes, standards and good business practices and fairness overall. The factors considered are recorded in investigation working documentation and in reports as appropriate.
Recommendation Fourteen. That, where OBSI staff are involved in discussing a participating firm's offer with a complainant, a record be kept on file of the nature of that discussion, any guidance provided and if known, the consumer's reasons for an acceptance or rejection of the offer.	Complete. I-Sight action items and other file notes are retained to reflect conversations with clients.

Renewed recommendations

Recommendation Fifteen. That OBSI meet with participating firms that have an internal Ombudsman's Office function to discuss this naming problem and to suggest a re-naming/redescription of the internal function to reduce confusion by consumers between the firm's internal function and OBSI.	Incomplete.
Recommendation Sixteen. That OBSI progressively publish on its website a collection of de-personalized Investigation Reports to be used as a resource by stakeholders.	Partially complete. Annual report case studies published in the report and select cases posted in the "Case Studies" section of the website. However, postings have not necessarily been continuous.
Recommendation Seventeen. That OBSI revisit its iSight record keeping with a view to enabling ready extraction of data as to participating firms' timeframes for response to requests for information or other assistance.	Complete. Yellowfin reporting tool has improved i-Sight reporting flexibility. CMS reporting functionality expected to be robust.

Appendix 6: Independent evaluators

Deborah Battell was the principal independent evaluator.

From 2009 to 2015, Deborah was New Zealand's Banking Ombudsman. Prior to that she worked as a regulator at New Zealand's Commerce Commission, first heading its Fair Trading branch and then its Competition Branch. Deborah also spent six years at KPMG New Zealand as a strategic management consultant, specialising in independent review and evaluation.

Deborah holds an MBA from Victoria University of Wellington as well as a Bachelor of Arts. She completed mediation training through LEADR (Lawyers Engaged in Alternative Dispute Resolution) in Australia. She belongs to New Zealand's Institute of Directors.

During her time as Banking Ombudsman, Deborah modernised the scheme's operation and lifted its impact while also dealing with a considerable influx of cases (waiting list of 521 at its peak and a 225% increase in cases requiring investigation). The scheme resolved more than 700 investment-related cases during that time and developed related technical guidelines. It also commissioned two reviews – firstly by Chapman Tripp (law firm) and then by Cameron Ralph.

As a member of INFSOS (International Network of Financial Services Ombudsmen Schemes) and executive member of ANZOA (Australia New Zealand Ombudsman Association), Deborah gained considerable knowledge of modern ombudsman schemes, dispute resolution and the financial services sector. She has also participated in international studies of ombudsman schemes undertaken by Queen Margaret University in Edinburgh.

Deborah has presented at conferences and published articles on the topic of organisational review as well as ombudsman practice. While a consultant, she studied evaluation with the Federal Department of Finance in Australia.

Deborah has evaluated the effectiveness of more than 20 organisations, including publicly funded organisations, where the primary aims were to determine whether the funders were obtaining value for money and whether they could have confidence in the governance and management of the organisations. Since leaving the Banking Ombudsman role, she has undertaken a strategic and governance review of New Zealand's Financial Services Federation, advised the Ministry of Finance in Doha on effective consumer protection as part of an international team led by Strategy&, and advised a government department on how to improve its complaints handling processes.

Nikki Pender assisted with the evaluation.

Nikki holds a Bachelor of Laws degree from Victoria University of Wellington (VUW) and a Master of Administrative Law and Policy from the University of Sydney. She has also completed papers towards a Graduate Diploma in Finance at VUW's Business School.

Nikki has been a lawyer since 1989 and has practised in both New Zealand and Australia. She is a senior public law and litigation specialist with experience working in both the adjudicative and inquisitorial jurisdictions.

Nikki is a former Crown Counsel. She has acted for regulatory agencies in New Zealand and Australia and has advised business clients on their government interactions. She has also advised clients involved in regulatory enquiries and complaints. Nikki has served on professional disciplinary and complaints bodies, having been a standards committee member for the New Zealand Law Society, a

Code Commissioner for Wellington Cricket, an adviser to the International Education Appeal Authority and a member of the New Zealand International Education Review Panel.

Stephen Franks provided comment and advice.

Stephen is a prominent lawyer, expert in company and securities law, and law reform.

After early general practice he spent two years as an Investigating Officer in New Zealand's Office of the Ombudsmen (then the only one outside Scandinavia). He joined major law firm Chapman Tripp in 1979 and became a partner in 1981. Stephen served as Chairman of the firm's National Board.

Stephen had six years in Parliament, then four back as a consultant with Chapman Tripp before establishing in July 2009 a specialty law firm, Franks Ogilvie (Commercial and Public Law Limited) to focus at the intersection of government and commerce.

Other relevant experience includes:

- lawyer for many industry peak bodies including Trustee Companies Association, New Zealand Stock Exchange, Stock and Station Agents' Association (auctioneers body), predecessor to the Institute of Finance Professionals New Zealand
- principal advisor in 1991 establishment of the New Zealand Stock Exchange investor and listed company surveillance, complaints and disciplinary body
- member of supervisory, complaints and disciplinary body of the New Zealand Stock Exchange for nine years including four years as deputy chairman before becoming a member of parliament
- primary author of the reformed (and still mostly current) 1991 Listing Rules of the New Zealand Stock Exchange after review of the securities law and exchange codes and practice prescriptions of the New York, Sydney, London, and Zurich stock exchanges
- principal adviser in the establishment of the New Zealand Futures Exchange
- 2009 independent reviewer of the code governing the operation of the New Zealand Electricity and Gas Complaints Commission
- 2011 scheduled independent reviewer of the consumer protection Code of Banking Practice for the New Zealand Bankers' Association
- 2014 independent reporter on the roles, structure and functioning of New Zealand Telecommunications Forum (the industry peak body).

Stephen has also been a member of the Securities Commission, the Council of the Institute of Directors in New Zealand, and the New Zealand Stock Exchange's Market Surveillance Panel. In 2009/10 he served on the Minister of Energy's expert advisory group on the electricity market structure.