the navigator company

Ombudsman for Banking Services and Investments

Report

2011 Independent Review

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2. Introduction

This 2011 Report is the second independent review of the Ombudsman for Banking Services and Investments (OBSI). The Navigator Company also conducted the first independent review in 2007, so we are able to comment on the progress of the organisation over that interval.

Planning, preparation and document-based research began in November of 2010. Fieldwork was conducted in February 2011, with further investigation, interviews and analysis conducted from Australia over the next few months.

As in 2007, OBSI's preparation, support and transparency were exemplary. Our thanks go to the Chair, Dr. Peggy-Anne Brown, members of the Board, Ombudsman Doug Melville and his staff, who were unfailingly helpful, provided us with open access to information and gave generously of their time.

2.1 Requirements of the Review

In setting out the Terms of Reference for the Review, the Board of OBSI specified three areas of required coverage:

i) To report on progress of implementation of the recommendations of the 2007 Independent Review

ii) To assess OBSI's operations and procedures against the Guidelines set out in the Framework for Cooperation established by Canada's Joint Forum of Financial Market Regulators (Joint Forum) through its Dispute Resolution Committee (DRC) (referred to as Joint Forum Guidelines)

iii) To report on stakeholder perceptions of the OBSI and any issues of concern

2.2 Limitations

This Review has some natural limits to its depth.

We have done what research has been feasible into comparable practice in other jurisdictions. We have used our existing knowledge (some of which may be a little out of date), publicly available information (some of which may not be exactly comparable) and interviews with regulators, government officials, industry association staff and senior external dispute resolution (EDR) staff in other countries (discussions which are confidential, at times anecdotal and also open to misinterpretation).

Our comparisons are at a high level, not attempting to detail every difference between each of their histories, economies, laws, regulation, financial industry, consumer preferences and scheme operations - some subtle and some not so subtle.

Our sample size of complainants, industry participants and other stakeholders interviewed is sufficient to provide an understanding of the issues and a level of confidence – but not to be a statistically valid measurement of their views.

That said, we are confident in our analysis and that the conclusions and recommendations are sound.

2.3 Structure of report

This is not a typical independent review. OBSI faces significant challenges – significant enough to threaten its ongoing viability. We have chosen to deal with what we see are these key issues for OBSI in a separate section at the front of the Report, rather than solely by the structure suggested by the Joint Forum Guidelines.

We think that the issues are better understood in the context of OBSI's unique environment, better considered together and better responded to in a coordinated multi-faceted way. For flexibility and completeness, we have also recorded our assessment against the Joint Forum Guidelines later in the Report. We apologise that there is some repetition as a result.

3. Executive Summary

There are two stories to tell in this independent review of OBSI. The first is the evolution of the organisation internally and in this story, the Board of OBSI should be very pleased with progress. The second, and more important, external story is the much less happy one that sees a storm of criticism and key stakeholders campaigning for OBSI's demise. This review addresses both 'stories' with recommendations directed at the strategic level and at the continuous improvement level.

3.1 OBSI internal operations

Since our review of 2007, OBSI's internal operations have coped with a significant surge in complaints arising out of the global financial crisis. The organisation has grown significantly and has benefited from the addition of more skilled staff, improved supervision, improved technology support, improved effort on timeliness and cost efficiency and of course, the experience of many thousands more complaints.

OBSI has now gained the authority to conduct systemic investigations – a significant gap in its scope identified in 2007.

Its external interfaces are improved, with more active consultation with stakeholders and the establishment of the new Consumer and Investor Advisory Council, providing a platform for a strengthened consumer voice. Participating firms now have strengthened obligations to inform consumers of the availability of the OBSI and to our eye, the OBSI has a higher community profile.

Although we found no area where OBSI's effort had slipped, we encountered many more criticisms from stakeholders in 2011. We found that the external environment has applied such pressure that, despite significant internal effort, OBSI is not meeting all expected performance standards. See below for a high-level summary of performance against the Joint Forum Guidelines, which are the standards OBSI must meet.

3.1.1 Accessibility

OBSI meets this Guideline with ready consumer accessibility of an internationally comparable standard, improved industry promotion of the scheme and active promotional and awareness work from OBSI.

3.1.2 Scope of Services

OBSI meets this Guideline with an internationally comparable approach to admitting complaints, with sound jurisdictional limits and exclusions and with a newly authorised ability to investigate systemic issues. There remain some issues with gaps in coverage of the financial sector and industry resistance to systemic investigations.

3.1.3 Fairness

OBSI meets this Guideline with a well-developed complaints methodology, a comprehensive Policy and Procedures Manual and a Terms of Reference that sets

out an appropriate basis for decision-making. OBSI has come in for sustained criticism of its investment complaints methodology, however we found no substantive basis for the criticisms. To the contrary, we found the methodology to be world-leading in some respects. (See Attachment at Section 10.)

3.1.4 Methods & Remedies

OBSI meets this Guideline. It has a range of documented approaches used for different complaints including a greater focus on early settlement compared with 2007. We also found competent, well trained and supported staff. Timeliness (only loosely covered by this Guideline) has however dropped significantly, mostly as a result of the surge in volume and complexity of complaints, industry resistance and the drop in real levels of funding.

3.1.5 Accountability & Transparency

OBSI meets this Guideline with good quality public reporting, consultative mechanisms, periodic independent evaluation and an independent Board. There are ways in which the system of accountability for OBSI could be strengthened, which we discuss as a package of 'circuit-breaking' reforms at Section 6.)

3.1.6 Third Party Evaluation

OBSI meets this Guideline – having conducted 2 full independent Reviews and an independent Efficiency Review in the past 4 years.

3.1.7 Independence

OBSI does not meet this Guideline. We found that OBSI has the internal structures, procedures and processes in place to meet the Objectives of this Guideline, however the public collapse of support from industry means that OBSI is not fully achieving it. In particular, its funding has not kept pace with the workload and industry compliance has deteriorated with firms walking away, threatening to walk away, using more aggressive negotiating tactics and in some cases outright refusing to comply with recommendations.

3.2 OBSI environment

For reasons that are at one level somewhat baffling, OBSI has experienced rising levels of criticism and pressure – largely from industry but also from consumer advocates over the period since the last review.

This pressure has manifested itself in OBSI constantly defending itself externally, fractures amongst the Board, inadequate funding, more difficult complaint-resolution, case backlogs, and confusion and uncertainty amongst stakeholders (including the regulators). The impact is of course, magnified because OBSI lacks the structural support of compulsory membership, binding powers over its participating firms and strong regulatory engagement.

Our investigation found that OBSI compares favourably with international EDR services and we found no substantive basis for the level of local criticism. In this report we explain that is likely a result of quite different conceptions of where OBSI sits on the spectrum between its service obligations to industry and its public interest obligations.

We also note that three factors which we would ordinarily expect to see acting as a 'dampener' on these tensions, are either missing or having little influence in this debate: first, an organised, effective consumer pressure on the political process; second, an authoritative cross-sector regulatory presence (very much more diffuse in Canada) and finally the senior executive-level, broad strategic industry perspective and leadership which we would normally expect to see.

We do not believe that the current impasse between industry and the OBSI can be resolved in any sustainable way with only minor refinements. The situation has moved beyond that. We argue that resolution of the current impasse will require the active intervention of the regulators and a multi-faceted package of reforms designed to act as a 'circuit-breaker'.

3.3 Strategic recommendations

Our recommended strategic reforms are aimed at addressing the structural weaknesses of OBSI's voluntary authority; improving the presence of the consumer voice; strengthening regulator engagement with OBSI's mission; establishing 'safety-valve' mechanisms for resolving issues of great contention between industry and OBSI and strengthening confidence in the governance of the OBSI. They include:

i) Acceptance of the basic framework for OBSI investment loss-calculation;

ii) A joint industry/regulator, independently chaired advisory panel for dealing with technical aspects of complaints-handling;

iii) Establishment of a limited appeals mechanism for OBSI decisions;

iv) Agreement to make membership of all relevant firms compulsory;

v) Agreement to provide OBSI with binding powers over participating firms;

vi) A restructuring of the OBSI Board to include the consumer voice and to involve industry-appointed directors in all decisions;

vii) Establishment of annual regulatory oversight of funding/budget decisions; and

viii) Continuation of OBSI work on efficiency and cost-reduction.

We stress that these recommendations are a package. They are designed to restore OBSI's external support mechanisms (industry, regulators and consumers) to a state of reasonable balance. Selectively implementing these recommendations risks exacerbating the current state of 'imbalance'.

3.4 Continuous improvement recommendations

We also make some minor recommendations for process and operational continuous improvement in our assessment against the Joint Forum Guidelines. There is a summary of all the 2011 Recommendations at Section 9.

4. The OBSI Environment

4.1 Significant change since 2007

Our return to the organisation for a second independent review reminds us that three years is a long time. While some of the characteristics and people of the OBSI are familiar to us, it is almost unrecognisable in many respects.

4.2 Markets post-GFC

The key driver of change for the OBSI, as for financial sector EDR around the world has been the economic downturn arising from the Global Financial Crisis (GFC). Like every country, investment performance is down, unemployment rates have driven more consumers to living on their savings and confidence in the financial markets has generally been shaken.

To join the long queues quoting Warren Buffett, "when the tide goes out, you see who is wearing a bathing suit". When the economic downturn hit, poor advice and sales practices, badly designed investment products, inadequate asset-backing, investor greed and over-borrowing were exposed – and with this came a flood of consumer complaints – some with merit, some not.

There are strong similarities between the Canadian and Australian environments, with both economies faring much better than most through the GFC. Although many in both countries clamour for the credit, this is in large measure because of the underlying strength of their resources sectors - and because of the dominance of a comparatively small number of financially strong, conservatively managed and regulated financial institutions. In both countries, these institutions have been able to leverage the crisis to strengthen their relative positions.

4.3 Complaint volumes

It would be easy to overlook the true impact of increased complaints volumes on financial sector EDR schemes. While it is true that the global downturn affected the whole economy, it did not affect all participants in the same way. Financial sector EDR schemes have been particularly affected worldwide by significant increases in volumes of complaints, with OBSI's overall complaint numbers doubling between 2007 and 2009 and its investment-related complaints increasing by some two and half times.

4.4 Nature of complaints

For financial sector EDR schemes, it is also true that the mix of types of complaints has changed – with a greater proportion of complaints being about investments and investment advice. In our experience, with the possible exception of certain types of health and life insurance complaints, investment-related complaints are on average more complex and costly to investigate than other financial services complaints.

The investment complaints that surface during an economic downturn are often about advice that dates back several years, investments that have been held for some time, with the complication of account withdrawals or top-ups, trading on the account, changes to

products, risk-ratings, the consumer's circumstances and the chain of responsible staff and documentation difficult to access.

It is also critical to appreciate the level of anxiety and distress that a consumer feels when facing a substantial loss of their family's retirement security – compared with the annoyance of a less important (say) complaint about application of a banking fee.

This anxiety also comes into play in investment complaints from the side of the participating firm. The amounts involved can be such that a compensation award might mean the end of a small investment firm business. Even in a larger business, the emotion can run high.

Critically, in an investment complaint, the amount the firm earned from the advice or transactions is frequently nowhere near the amount of the loss that is being claimed. If a compensation award is made, the money has to come from somewhere – someone's bottom line, someone's performance bonus, even from an individual broker or adviser's pocket.

In contrast, in a banking dispute, an award will often be a matter of repaying money already earned by the bank – fees collected, interest charged. In a similar way, a general insurance complaint award is typically ordering payment of a disputed policy claim – part of the regular day-to-day flow of cash.

The unique nature of investment complaints puts additional load and stress on staff trying to investigate the matter in both the financial institution and the EDR scheme – and on their relationships.

4.5 Hardening firm attitude

Another factor affecting EDR schemes' ability to handle the workload of complaints is that, anecdotally at least, the economic downturn has triggered a shift in the stance taken by many participating financial services firms. A number of EDR schemes report a toughening of attitude by firms in their internal handling of customer complaints and in taking a more hostile, adversarial attitude in discussions and correspondence with EDR schemes.

We clearly saw evidence of this in our review of case files at the OBSI. Although most firms continue to interact with OBSI in good faith, we saw a number of examples of quite adversarial tactics. These included repeated delays in responding to information requests, 'bucketing' (arguing every possible point however relevant), use of straw men (protesting about OBSI positions that had never been argued), low-ball offers, threats to leave the scheme, and in some cases open refusal to comply with recommended compensation.

Whatever the reasons for this, the conduct aggravates relationships with EDR staff and makes the resolution of cases slower, less efficient and more costly. Internal measures show that investment cases are now averaging more than double the time in the period after an OBSI settlement proposal or draft recommendation is provided (mostly involving back and forth communication with the investment firm) than the time being taken in investigation. It is also instructive that the comparable time figures for banking cases are about half that for investment cases.

This hardening attitude has also impacted the OBSI Board relationship with industry, with more overt hostility from industry towards the Board, the independent Chair and what appears to be pressure on industry appointed Directors to advocate for industry at the Board table. The impact of this is addressed further at Section 5.6.

4.6 Staff & organisation growth

This growth in complaint volume and complexity has put significant strain on financial sector EDR organisations. In many cases, the growth in workload has necessitated significant staff recruitment and training loads, and in some cases additional infrastructure investment such as office expansions, re-equipment and investment in case management systems.

In addition, the expansion of the EDR services has changed the nature of the management structures and style, with extra teams, greater span of control for some senior managers and in some cases additional layers of supervision in the structure. Although far from keeping pace with the workload, OBSI staffing has grown by over 80% from 2007 to today.

In OBSI's case, the file-based nature of the work means that skilled, highly experienced staff can be attracted by the ability to work part-time and from home offices around the country. This has been a significant overall benefit to OBSI, with some 21 staff working remotely (and in our view effectively), but is offset somewhat by added communication and management complexity. See also our comments about staff skills, support and training at Section 7.5.

4.7 Budget & resources

Around the world, resourcing of EDR schemes has been increased, but in general has not kept pace with the rapid growth in workload. The extent of this shortfall has differed between schemes – depending in large measure on their system of budget approval and the extent to which their systems of funding (levies and fees) have a 'natural' user-pays link with volumes and complexity.

(Some EDR schemes have a significant fee-per-transaction element to their funding. In these cases, revenue increases with workload – at least to some extent. For levies-funded schemes such as OBSI, it is only through Board-approved budget and project funding that workload increases can be covered. Inevitably, any such budget increases are up to 12 months late in responding and, in our experience, rarely fully cover the workload change.)

This resourcing 'lag' has been a significant issue for OBSI. We are conscious that this has been an issue of contention between industry stakeholders and OBSI and that OBSI has been the subject of an independent efficiency review. We have done our own calculations but do not propose to offer them here. It would only serve to confuse and potentially distract from the main point.

The budgeted funding increases for the OBSI have lagged behind the increases in real workload by some measure. Because of the increase in proportion of investigation complaints, the real workload is much greater than even the raw numbers of complaints would suggest.

Our estimates are that investment complaints are around 1.7 times more costly to investigate than banking complaints on average. By our reckoning, when measured against the actual workload, OBSI was being funded at around one-third less in 2009 compared with 2007. The result of this was a significant blow out in case completion times. We note that the Board responded to this in 2010 by funding a one-off project to clear the backlog of investment cases.

4.8 External support for OBSI

In our 2007 Review Report, in describing the dependence that EDR schemes have on their three stakeholder constituencies for support, we used the metaphor of the three-legged stool – without the support of each of the 'legs' (industry and member firms, consumers, regulators and government), the scheme would fail. We also identified the structural weaknesses in the support each of the legs then provided for OBSI.

This precisely describes the crisis of confidence that OBSI faces at the moment. All three legs are not providing the support that a healthy EDR scheme requires to fulfil its role.

Industry

The industry/member firm 'leg' is currently dominated by a number of vocal critics of OBSI. From some of our conversations, it is clear that the more extreme critics are not looking for improvements to OBSI's operation, there is an agenda calculated to permanently weaken OBSI – either through forcing OBSI to produce fewer and/or more favourable compensation decisions, or through introduction of a competitor EDR scheme which will presumably produce fewer/more favourable decisions and to which OBSI will lose its members.

Nor is it clear to us that many in industry think of OBSI as having a sufficient public interest role, such that consumers should be entitled to have a voice in the governance of the organisation.

Consumers

The consumer 'leg' is largely without the organisational structure or resources to provide a strong lobbying force to balance industry's power over OBSI – unlike the situation in other jurisdictions. In any case, we found that much of the consumer advocates' energy in the period leading up to our review was being expended in critiques of OBSI for its lack of independence, its slowness and its lack of power and authority. (We note that in the recent public debate over loss calculation methodology, and following public disclosure of the industry push for an alternative EDR scheme, there has been strong public support of OBSI from consumer and investor advocates.)

We think that the recently created OBSI Consumer and Investor Advisory Council is a very sensible initiative and shows some promise, but was still in establishment mode and yet to find its feet when we visited. We note that even this comparatively small step has been opposed by industry and its continuation is by no means certain. We discuss this further at Section 5.6.

Government/regulators

Finally, at the time of the review fieldwork, the regulatory and government stakeholder 'leg' had yet to assert itself vigorously enough to provide OBSI with the support it will need to survive. Faced with such contrary stakeholder positions, regulators and government must go through due process before taking a position. We also understand that with the spread of the web of regulatory agencies that have some accountability across OBSI's sphere of operation, this will take time.

We note that the self-regulatory organisations that mainly cover the problematic area of investment complaints are themselves put under significant pressure by the self-same critics of OBSI, their member organisations.

In short, OBSI can do its best to provide information, keep stakeholders informed, try and respond to stakeholder concerns, but must also accept that the outcomes of this debate about its future are largely out of its ability to control.

4.9 The perfect storm

In many ways, OBSI's environment has combined to create the 'perfect storm'. The combination of the aftermath of a tumultuous economic environment, tougher times and a 'hardening' of some consumer and member firm attitudes, an uncertain political environment, a backdrop of tortuous regulatory reform and the continuing structural weakness of OBSI's authority and regulatory backing have left the organisation struggling to grow internal capacity, respond to public attacks, steer and survive while being buffeted by forces beyond its control.

It is a difficult time to conduct a review that will be fair to all the parties. We understand that all concerned are under some pressure. Consumer advocates are under pressure from consumers. EDR schemes are under pressure from stakeholders on both sides. Although some firms have never been more profitable, others are struggling to perform (and some to survive) in a tough market. Regulators are, as ever, working to unrealistic stakeholder expectations. The OBSI Board is under pressure from all sides. Opponents may misuse any constructive criticism of OBSI. Endorsement of OBSI could be seen as partisan. Recommendations at a level of detail run the risk of being perceived as meaningless/ineffectual – because, while they might offer incremental improvement, they will not solve the significant 'headline' problems faced.

We are conscious that lots of smart, hardworking and committed people have been trying to resolve these problems for some time now. We apologise if we have not given due acknowledgement or are giving advice that others have given. We can only ask that stakeholders take the opportunity of this Review to consider these issues with fresh eyes.

5. Key Strategic Issues for OBSI

5.1 Introduction

As discussed in the introduction, we have elected to discuss the key 'headline' issues facing OBSI in this section. These issues are the most important in the current OBSI context, they are better understood together and require a multi-faceted, coordinated response. We separately provide in Section 7 our detailed assessment against each of the Joint Forum Guidelines.

The key strategic issues as we see them are:

i) OBSI investment loss methodology

ii) OBSI efficiency and effectiveness

iii) Competition/choice for EDR services

iv) Governance & accountability

v) Regulatory expectations and support

In Section 6 we put forward a package of recommendations to act as a 'circuit-breaker' for the current impasse with industry - that attempts to draw together and respond to each of these key strategic issues.

5.2 Investment loss methodology

We deal with this subject first, not because it is most important, but because OBSI's approach to investment complaints (particularly suitability and loss calculation) was the most contentious issue raised by industry stakeholders in our discussions and was recognised as critical by the industry regulators we spoke to. There were also related issues raised by consumer advocates – albeit without the same degree of emotion.

Because of the intense stakeholder interest in this specific aspect of OBSI's operations, we were asked to conduct a more in-depth review of the investment complaints methodology than we would normally expect to do in a review such as this one. The full results of our investigation are at Attachment 10 – and the findings are summarised below.

5.2.1 Industry concerns

Industry stakeholders raised a number of concerns with us, individually and in group discussions. These included criticisms that OBSI is failing to act consistently with Court decisions, that OBSI is going beyond regulatory standards when assessing an investment firm's approach to financial advice, that OBSI is applying hindsight, that OBSI is failing to assign adequate responsibility to the investor, that OBSI's methodology is too inflexible etc.

These criticisms of the OBSI are not of themselves unusual, we have seen most of them levelled by industry-side stakeholders at one EDR scheme or another in

past reviews. What is highly unusual in our experience is the wholesale spread of the criticism and the degree of emotional heat behind them.

5.2.2 Consumer concerns

From the consumer side, the issues raised with us about the OBSI were less about specific aspects of the methodology and more about a perception of a lack of independence, the conflict of industry funding and representation on the Board and a lack of power in dealing with financial institutions. The concerns that related to investment complaint methodology included a too-narrow interpretation of jurisdiction, 'tame' acceptance of unfair industry practice, failure to recognise the imbalance of power and knowledge between consumers and sophisticated financial institutions etc.

These consumer-side criticisms are also not unusual of themselves. What is different in the Canadian setting is the pervading cynicism about financial sector regulation, with consumer advocates tending to lump the OBSI in with the regulators as weak, disorganised and corrupted by the political power of Big Money.

It is our observation that consumer advocates in Canada are less well resourced, less organised and have much less political influence than in other jurisdictions we are familiar with. This is no doubt a factor in the resignation and cynicism that we encountered.

As with the specific industry criticisms, detail responses to the issues raised by consumer advocates are addressed in the Attachment at Section 10.

5.2.3 Summary of investment methodology findings

In response to these criticisms, we conducted additional interviews, sought out examples of illustrative cases, reviewed a number of additional investment case files and researched comparable data from other countries and conducted interviews with senior staff from other countries' EDR schemes.

In short, we found very little to criticise in OBSI's Investment Methodology and in particular its loss calculation approach. Specifically we found that:

a) OBSI's investment loss methodology is competent and highly consistent with that used in the other comparable jurisdictions.

b) There are some differences with other jurisdictions at a level of detail and in implementation of the methodology:

- Some (largely in the investigation process) reflect the different consumer demographic, financial market and regulatory framework in Canada – in our view appropriately;

- The approach to loss calculation differs (for some cases only) – where OBSI uses a notional portfolio approach and other schemes have tended to use a variety of simpler methods of calculation. The OBSI approach is in our view superior, providing a fairer and more accurate approach to calculating investment loss; and

- OBSI's use of trained in-house investment analysts is unique amongst the schemes we researched, however we found this provided a level of expertise and consistency that we thought was clearly superior.

c) These differences have diminished in the time we have been conducting this review. The Australian FOS has, after consultation and support from industry, recently adopted a revised methodology, which is virtually the same as OBSI, including the use of notional portfolios where appropriate.

d) OBSI's overall decision-making in investment complaints is competent and highly consistent with comparable EDR schemes in other countries, if anything producing a slightly lower proportion of decisions in favour of consumers.

We are conscious that these findings will be something of a surprise to the critics of OBSI from all ranks of stakeholders, however that is the unequivocal result of our investigation. To put it mildly, we were also somewhat surprised to discover so little evidence of the complaints alleged with such confidence by stakeholders.

Of course, this is not to say that all OBSI decisions are perfect – any scheme will always have decisions where a different view could quite reasonably have been reached. Rather our conclusion is that OBSI's approach to investment loss is based on sound logic, provides a fair and transparent platform for well-founded, consistent decision-making and is consistent with other jurisdictions.

Methodology consultation

After the completion of our fieldwork, OBSI released a discussion paper on its methodology – aimed at achieving some level of consensus about how the methodology should work.

At the time we supported this process – hoping that some informed discussion and refinement of the methodology where warranted might achieve some level of sustainable acceptance for the approach. We thought this was critical, in particular if it turned out that the regulators were not willing or not able to form a unified independent view that could be imposed on participants.

We were however sceptical about whether genuine common ground could be found. The stances taken were quite at odds and neither industry nor consumers were showing any signs of looking for a workable, mutually acceptable compromise resolution.

We have not had the opportunity to fully analyse the stakeholder input to the consultative paper, however other than noting a welcome shift from consumer advocates (OBSI is better than nothing!), our quick review has left us with little fresh cause for optimism.

Political realities

We think it would be unfortunate if the OBSI were forced to abandon their existing approach. We think it is actually delivering fairer outcomes for industry as well as consumers.

We understand however that an industry-funded ombudsman scheme, in particular one without binding powers over its members, can only operate with the support of its constituent stakeholders. Absent a clear regulatory signal to

the contrary, industry's continued criticism and pressure may ultimately leave OBSI with nowhere to go but to make a series of backward-stepping compromises. We would be surprised if emboldened industry critics would be satisfied with only one or two.

Our own view is that the methodology is only a 'lightning rod' for industry criticism. The real issue is industry's discomfort with the evolving role and independence of OBSI (see our discussion at 5.7.4). We are sceptical that any technical concession on methodology would purchase any lasting 'peace'.

5.3 Effectiveness and efficiency

We also received considerable feedback from industry stakeholders to the effect that OBSI is highly inefficient, complaints about the time taken to complete investigations (a concern shared by consumer advocates) and criticisms of the competence of OBSI staff.

We reflected on how to best assess these criticisms. We knew from both of our reviews and from our research into the investment complaint methodology that OBSI's processes and procedures are much the same as other competent EDR schemes. We were also aware that OBSI had experienced an expert, independent efficiency review during 2010. From our review of that project, it was clear to us that, consistent with our assessment, there are no hidden enormous productivity gains.

We thought that another and perhaps more useful way of assessing the OBSI effectiveness and overall efficiency would be to look at the overall cost and the outcomes. Is the OBSI producing results that are significantly different from other environments? Taking a macro view - does Canada have a problem?

5.3.1 Comparisons

The table below provides some rough comparisons for banking and investment complaints in three countries. We are conscious that to publish any figures and arithmetic is to invite criticism and correction. The figures in the table are necessarily approximate comparisons. We apologise for any mistakes or imprecision in advance.

Because each of the schemes we compared cover a different range of financial services, and even within the high-level categories of "banking and investments", there are detail differences in the range of specific financial products and services covered - we have done our best to approximate the proportion of the Australian and UK costs that equate to the OBSI coverage.

Comparison Data

	Canada	**Australia**	**UK**
Population Millions[1]	34	22	61
GDP USD Billions[2]	$1,563	$1,385	$2,246
B & I Complaints pa[3]. (approx)	1,024	6,250	96,280
Ratio: Complaints per GDP USD Billion	0.66	4.51	42.87
Ratio: Population per Complaint	33,203	3,520	634
Ratio: Overall decision win/loss for industry (approx)3	71/29	61/39	50/50
B & I EDR cost pa. USD Millions (approx)	$7.3	$27	$87
EDR Staff (B&I complaints, approx)	50	185	580
Ratio: B&I EDR Cost % of GDP	0.0005%	0.0019%	0.0039%
$ per complaint	$7,158	$4,320	$902
$ per staff	$146,600	$146,104	$149,729

*"B&I" = banking & investments

5.3.2 Complaint numbers

We first looked to see if the Canadian financial industry was carrying a greater burden of complaints from consumers going to EDR when compared with other jurisdictions.

Our assessment is that the definition of complaints is similar in Australia and Canada, but the very high numbers of complaints in the UK suggest some differences there that we have not been able to completely resolve.

We do know that some of the differences with the UK are a result of:

a) the active presence of no-win/no-pay commercial firms that will run consumers complaints for them – including through the UK Financial Ombudsman Service (FOS);

b) much higher levels of consumer activism including a number of high profile public awareness campaigns in recent years;

[1] OECD Statextract website <stats.oecd.org>
[2] OECD Statextract website <stats.oecd.org>
[3] All EDR stats from respective 2010 Annual Report data and queries of schemes themselves to establish comparability

c) an apparently higher propensity of UK citizens to complain compared with other European Union countries; and

d) a number of systemic issues that resulted in mass lodgement of individual complaints (also raising profile considerably).

We also deduce from the definitions that a significant number of the complaints recorded in the UK would be simply sent back to the participating firm in Canada, Australia and New Zealand and would not feature in the complaint count in the same way.

Leaving aside the UK's raw numbers, our assessment is that Canada's financial sector experiences something less than one-eighth the number of banking and investment complaints per population or per GDP that go to EDR in Australia and some much smaller fraction of the number in the UK.

No indication that the Canadian financial sector is being unreasonably hampered by complaints about its service.

5.3.3 Complaint outcomes

In 2010, OBSI found for the participating firm in just over 70% of investment complaints. That is a clear majority of cases – which is what we would expect to see.

The ratio is consistent with OBSI treatment of banking cases and a consistent if somewhat higher win ratio for industry in Canada compared with the figures coming out of Australia and New Zealand. The OBSI statistics are significantly more favourable to Canadian industry than the UK FOS statistics (50/50) indicate for the UK industry.

The figures suggest little for the Canadian financial industry to be concerned about in relation to outcomes of complaints.

5.3.4 Complaint costs

Although we searched for readily available comparable proxy indicators for each country's retail financial sectors, we have had to fall back on GDP. We do not pretend to be economists, but by our reckoning, as a proportion of GDP, banking and investment EDR costs the Canadian financial sector around one quarter of what it costs the Australian financial sector and around one-eighth of the cost to the UK financial sector.

Again, that seems to us to be little basis for complaint.

5.3.5 Efficiency

The OBSI per staff cost is almost exactly the same as in the other two countries, which taking into account OBSI's much smaller scale is a positive. We would normally expect to see higher per staff costs because a smaller scheme is less able to leverage support staff and systems.

The cost per complaint however is substantially higher than in Australia, which, given the industry interest, we examined more carefully.

On further analysis, the difference is not what it might seem. The Australian FOS is an organisation of almost six times the size (with its other divisions included) with all the benefits of scale (much superior call-centre scale and efficiency, significant IT infrastructure investment, shared services, lower infrastructure costs per person, etc), so we would expect it to be significantly more cost efficient.

There are also differences in the way complaints are counted, with some more of the very early settlements being counted as complaints in the Australian setting. We think that the remainder of the difference is easily accounted for by the fact that the Australian FOS has a per-case escalating fee scale that provides a strong commercial incentive to settle complaints early in the process and importantly, it has binding power over its members – also resulting in earlier, less costly acceptance of decisions by members.

Our reckoning, borne out by the external efficiency review of OBSI, is that OBSI's efficiency is about where we would expect it to be for its scale and environment. (Which is not to say that is incapable of efficiency improvements - we make a recommendation about efficiency in Section 6.1 below.)

Even on our admittedly limited analysis, the inescapable conclusion that we came to was that the big picture comparisons provided little or no evidence for the storm of criticism that we encountered.

5.4 Why the heat?

Which leaves the puzzle of why the high levels of anxiety and furious condemnation of OBSI? We think that the principle underlying reason is that industry are very uncomfortable and resistant to the evolving public interest role for OBSI – which we discuss at Section 5.7. Clearly, there are different conceptions of what role OBSI should have at play here.

We also think that the dynamics of industry members' interactions with each other about EDR complaints may be responsible for some anecdotal exaggeration of apparent problems with OBSI. Our experience is that when industry stakeholders share their concerns, they do so at a level of generality, typically without sharing the precise details of the case files on which they are basing their conclusions. We have found this apparently consistent experience can actually be quite different once the detail circumstances of the cases involved are examined.

Finally, we think that the frictions that inevitably exist between an EDR scheme and internal firm complaints staff are probably aggravating the effect of the above factors.

5.5 Competition/choice for EDR services

We discuss the question of competitive choice in provision of EDR services, although it is not strictly within the remit of an assessment against the Guidelines, because it was being raised as a potential solution to the current dissatisfaction in many of our stakeholder discussions.

We understand that this may become a policy matter for the Canadian Government, and we do not wish to be impertinent, however given the nature of the debates we were privy to while in Canada, we felt it might help to inform the discussion if we briefly commented on what we have observed in other environments.

5.5.1 Multiple EDR schemes

We understand that some parts of the financial industry in Canada are lobbying for action from the government and the self-regulatory authorities to create an environment where multiple EDR schemes will be approved – creating competition for OBSI. With financial services providers free to choose the EDR scheme of their preference – the objective is that, forced to compete, OBSI will have to become more efficient and more receptive to financial services firms demands with regard to procedures and policy.

This theory only takes into account the funder-to-supplier side of the EDR function. From the consumer/public interest side, the counter argument put to us is that consumers will have no choice but to accept whatever EDR service their FSP offers and that any competition will become a 'race to the bottom' with the 'winner' being the EDR service provider that costs the financial services firms the least (both in administration and in recommended compensation). It is also argued that multiple EDR schemes will act to confuse and diminish public awareness of their right to have their complaint heard independently.

The final argument put to us is that multiple EDR schemes will increase the oversight/consultation load on regulators and diminish the scale and professionalism of each EDR service and the clarity of market/consumer issue trend intelligence.

5.5.2 Market theory

Theory and regulatory experience makes it clear that this is not a 'natural market'. All the choice is on the side of the financial services firm – and there are no naturally occurring tensions that can be brought to bear to obtain an optimum balance of price and service. In the absence of choice for the consumer, in these 'quasi-markets', regulatory standards and supervision must serve as the proxy for consumer and public interest. More comprehensive and specific standards for EDR suppliers will be required along with more regular reporting and regulatory oversight.

5.5.3 An Australian example

There is newly some overlap of financial sector EDR coverage in Australia where the Australian FOS competes with the Credit Ombudsman Service Limited (COSL) for membership of firms in the consumer credit space (mortgage brokers, low-doc financiers, pay-day lenders, credit reference bureaux and others).

This overlap was created when some thousands of credit providers, previously regulated in a patchwork fashion by the eight States and Territories, came under a new national regulatory regime. Amongst other new licensing conditions, they were required to be members of an approved EDR scheme – of which there were two already in existence.

This is a very new environment and the experience of the two schemes operating in 'competition' is not yet clear. As The Navigator Company is currently contracted to conduct an independent review of COSL, we are not in a position to comment.

5.5.4 The New Zealand example

A more obvious and useful comparison is with the New Zealand financial sector, where their government's recent reforms have required some thousands of new licensees (financial advisers, brokers, etc) to establish satisfactory internal disputes resolution processes and to join an approved EDR scheme. Although in many ways it is too early to assess the New Zealand environment, (implementation only began in earnest on April 1st, 2011) some of the experience thus far is useful.

History

It is important to note that the competitive environment in New Zealand arose in quite different circumstances than the likely environment that will apply in Canada. Competition in EDR service provision arose, not as a policy intention but as a consequence of a need for a mechanism to accommodate some thousands of additional newly-licensed financial service providers who were going to need an approved EDR scheme to join.

In the planning and consultation stages and before legislation was enacted, it became clear that the two existing financial sector EDR schemes (Banking and Insurance & Savings) were not going to be willing to guarantee the government that all new licensees would be accepted as members. Their governors were concerned about the costs of changing to accommodate the new members, about the risk of poor standards of dispute resolution among the new entrants, that existing members' sunk investment in the service would not be recognised and that service would suffer for some time as a result of the change process. The existing schemes indicated that they may be willing to take on new members that met certain standards of professionalism, but did not want to take all comers.

As the legislative reforms progressed towards implementation, there was a more pressing need for the government to ensure that there would be a so-called 'reserve scheme'. This would have to be provided by the government, however it remained keen for a non-government player to enter the space and offer a competitive, high quality service to the new entrants. This in fact happened and the outcome is that a new independent EDR provider (FSCL) and a government-contracted reserve EDR scheme (FDR) are operating and actively competing for members, along with the established Banking and Insurance & Savings schemes.

Early experience - regulation

It is too early to conclude if the approach will be effective – but there are some early indicators of some of the issues. First, a more highly specified and more intrusive regulatory regime has been seen to be essential. EDR service providers (existing and new) must meet regulatory standards based on the Australia and New Zealand Benchmarks in order to be approved. In addition, they must provide the regulator with annual reports as to progress and issues confronted. Finally, the Ministry for Consumer Affairs is running 'roundtable' meetings to oversee implementation every few months.

Early experience - pricing

Second, the artificial nature of the 'market' has made its presence felt. The reserve scheme has had to set its prices (joining fees, annual fees and case fees) in consultation with the other independent schemes. In order to establish a so-called level playing field and avoid 'undercutting', it has had to set fees at a level that existing schemes could live with. This in effect created an artificial price 'floor'.

Initially, the reserve scheme had planned to have a lower compensation cap ($100k vs $200k for the existing schemes) – protests from existing schemes meant that it raised its compensation cap to $200k – only to have the new private sector entrant (FSCL) seize the opportunity to set its compensation cap to $100k, 'undercutting' all the other schemes.

Early experience – competition for members

While the Reserve scheme had started out with the aim of largely leaving the space to existing and new entrants – the reality of the costs of establishing and maintaining a fully functioning scheme (with fixed, advertised fees) has meant that it could not be financially viable without a healthy share of the market, so it has been competing vigorously for members – to the dismay of the existing schemes and new entrants.

The lower compensation cap permitted under the current legislation and regulations has proved to be a highly effective marketing tool for FSCL – capturing a majority of the small firm or individual licensees. This has also produced an unintended financial windfall for FSCL – with a floor under prices and a numerically very large membership base with very low numbers of complaints – FSCL will, initially at least, be very much more profitable than any of its competitors.

Local opinion

There are of course, already supporters and critics of the new regime. Some clearly see the tensions between schemes as healthy and offers of 'free' training and the lower compensation cap as evidence of competition improving the service. Others say that the proliferation of names and brands is already confusing consumers and diminishing awareness of where to go for external dispute resolution; that the system is excessively complex for a nation of only 4 million people and that the overhead costs of four schemes in a very small market will outweigh any overall efficiency gains from competition. These issues will of course take some time to work themselves out – so it is too early to form a judgement about its ultimate success.

Lessons for Canada

For Canada, there is as much to learn from what is different about New Zealand as there will be to learn from their experience (and Australia's) as it unfolds. The key difference is that in both cases the overlap evolved as one of the many responses to a much larger reform program. The expanding environment meant that there would be no immediate damage to an existing scheme – only a question of to where any new and additional workload and revenue would flow.

The Canadian scenario does not involve any significant financial sector reform or new inflow of workload. The addition of one or more competing schemes will necessarily result in loss of membership and some financial injury to OBSI. The clear intention of some of the industry critics is to 'punish' OBSI, and this scenario will undoubtedly achieve this. The question for the governments of Canada is whether the public interest will be better served under a multi-scheme environment.

5.6 Governance & accountability

There were some criticisms of the governance structure in 2007 and these were considerably louder in 2011. Consumer advocates complained about their lack of voice

on the Board, the influence of industry directors and the lack of transparency of Board appointments. Industry complained that their appointed Directors were being circumvented by the majority of Independents and that the Board was 'not listening' to industry concerns.

5.6.1 Comparisons

In Australia and New Zealand and in a number of other jurisdictions, industry schemes with unitary governance structures are typically made up of an independent Chair and equal numbers of directors from industry and from consumer organisations.

The occasional financial sector EDR scheme and a number of schemes in the telecommunications and energy and water sectors still retain a two-tier governance structure. In this structure, responsibilities are split, with a board typically having responsibility for rules and funding, and a council having oversight of the operations of the scheme (procedures, policy, caseload, performance, etc).

The principal policy intent of this split in governance responsibility was to underscore independence from industry in day-to-day oversight but to provide industry some level of control over costs and rules. The disadvantage is that key decision tensions/trade-offs (service standards vs. cost, fairness/complexity vs. keeping it simple, community interest vs. industry interest, etc) are split across the divide between two bodies.

Generally, in response to this dysfunction between the two bodies, as it became evident that operational independence was not at risk, and as industry trust in the maturity and skills of consumer advocates built, the trend over the past decade has been to dismantle two-tier structures and move to unitary governance by a representative, independent board.

5.6.2 OBSI structure

The OBSI has an apparently unitary governance structure – currently a Board of 10, with an independent Chair, three industry-appointed Directors and six independent, 'community' directors. There are no overtly 'consumer advocate' Directors, although we would not say that there is an absence of knowledge of consumer interests.

We say 'apparently unitary', because we observe that the Board in fact operates as a de-facto two-tier structure. This is in part because the rules require that certain decisions be made by the independent (non-industry) Directors. To meet this requirement, a committee of the independent Directors meets quarterly in conjunction with Board meetings – in general to discuss those matters that are reserved for them.

This formal separation has provided a fracture line in the Board. It has meant that as inevitable stresses emerge (eg. industry hostility towards OBSI, apparent disclosures of confidential Board discussions, inappropriate industry advocacy by Directors) the gradual breakdown of trust has emphasised that fracture line and has resulted in independent Directors discussing more Board business separately and the industry-appointed Directors feeling that they are being excluded from more and more of the Board's effective discussion time.

5.6.3 Industry role in governance

At the time of our 2007 review, one of the key stakeholder issues was a desire to remove industry-appointed Directors from the Board – and move to a fully independent Board. This, it was argued, would create greater actual independence of operation and improve the 'optics' or appearance of independence and hence strengthen consumer, community and regulator confidence in the independence of the OBSI.

We did not agree then, nor has anything that has occurred in the meantime persuaded us to change our minds. The OBSI itself has demonstrated a degree of operational independence that has withstood considerable pressure from industry participating firms – we are not concerned that its day-to-day decision-making will be compromised by the presence of industry-appointed Directors.

We are much more concerned about the consequences of having no meaningful engagement of industry with OBSI governance for strategic decision-making and strategic relationships. It is critical in our view that industry be part of OBSI's evolution and accepts that it too has a role in OBSI's public interest mandate. To play that role, all directors must be permitted to participate fully in OBSI's governance provided they do so in the best interest of the organization and its mandate.

We have elsewhere in this report expressed our concern about the suppression of the OBSI funding levels. We note that this has happened in spite of the decision being the exclusive domain of the independent Directors and in theory, not subject to industry influence. We think this perfectly illustrates why we do not think it is the directors who are to blame, rather it is the industry pressure of threats of non-compliance, walkouts and lobbying of regulators and government that the Board and OBSI management have had to respond to.

5.6.4 Natural tensions

Representative boards will, from time to time, inevitably confront problems arising from the natural tensions of the interests of their directors. Industry or consumer directors will, inadvertently or intentionally, act in the interests of their constituent groups ahead of the organisation they govern. This can be through disclosure of confidential information, through improperly trying to press their constituent group's interests, through passivity (not participating fully), etc. Even with the best effort, new Directors may not understand or agree and set protocols back again.

We are conscious that the OBSI Board members are fully aware of this, and have put a great deal of effort over the years into making a combined industry/independents Board work. We are also conscious that there have been repeated frustrations and backward steps over that time.

We have considerable sympathy for the OBSI Chair and both the industry and independent Directors placed in this situation. While the current hostilities persist in industry, regulatory and investor advocacy spheres, it puts a great deal of stress on the individuals and on the Board as a group. It was clear from our interviews that the individuals involved feel this external pressure and are genuinely doing their best to manage a very difficult situation.

5.6.5 Locating the tensions

We also fully understand why many would say an all-independent Board is the answer. Our concern is that without very strong government/regulator backing and enforcement of such a Board's decisions, the move would simply entrench industry's resentment of the 'imposition' of EDR and remove one of the few mechanisms that should be able to re-engage the strategic thinkers in industry.

As counter-intuitive as it may seem, we would move in the opposite direction. We would abolish the practice of the Independent Directors meeting in Committee and we would move to include consumer advocates as Directors. The aim is to force the issues to be aired and debated by all Directors and to locate the inevitable tensions in a group decision-making setting within the discipline of a unitary Board and clear fiduciary duty.

In environments where joint industry/consumer Boards have been successful, it has been in large measure because of the exposure over time of industry-appointed directors to the consumer perspective and equally the exposure of consumer directors to the industry perspective.

In OBSI's case, the Board has been in the past, and should be again, an agent for communication, understanding and resolution between industry and public interest. Instead, for understandable reasons, it has unwillingly become a part of the problem.

Given the criticisms that we heard from stakeholders, any solution found to resolve some of the current difficulties must also symbolically strengthen confidence in the governance of OBSI. This will require no small effort of goodwill but will also require a clear understanding of the joint responsibility that consumer, community and industry directors have to the OBSI as a public interest organisation. We make recommendations for change to the governance of OBSI at Section 6.1.

5.7 The context for role of regulators

This issue is problematic for OBSI – and strictly speaking, stretching the scope of this review. However, the stakeholder feedback is so strong and pointed and the OBSI position and performance is so bound up in the question of its relationship with the regulators that we are bound to comment.

We are also conscious that OBSI has been in detailed ongoing consultation with the regulators for some time and we do not want to be lamely recommending things that have been tried many times already.

5.7.1 Consumer advocates

As mentioned throughout this report, we received quite some feedback from consumer advocates during this review – significantly more than in 2007, which we are pleased to see. A great deal of the feedback was broadly about the regulation of the Canadian financial sector, so to some extent, we have had to distinguish that feedback which properly relates to OBSI.

A number of consumer advocates are committed to the view that an industry EDR scheme is inherently flawed and the only way to properly deal with financial sector consumer complaints is with a statutory scheme – something like that in the UK.

Others were less convinced and believed that with appropriate regulatory backing and support, the OBSI industry scheme model could continue and be successful. In particular, they saw adequate funding, compulsory membership of OBSI and granting OBSI binding powers as essential elements of a sustainable service that could be genuinely seen as independent.

5.7.2 Industry representatives

Interestingly, industry critics also sought a more active role from regulators in the EDR space – albeit with quite different outcomes in mind. The desire expressed was for OBSI to be more clearly accountable to some higher authority - who in turn could be relied on to keep OBSI in some check.

Some we spoke to thought this should be the courts, with the ability to challenge specific OBSI decisions, but most felt that it was the role of the regulators to hold OBSI to account and to keep it within its 'proper' remit.

Another avenue to accountability which had captured the interest of a number of industry stakeholders was the path of competitive approved EDR schemes, giving participating firms choice as to service provider. As an 'unnatural market', this would of course require greater levels of supervision by the regulators (discussed at Section 5.5 – Competition/choice) and therefore closer accountability.

5.7.3 Other stakeholders

Regulators and policy-makers that we spoke to were understandably unwilling to commit to any early view about alternatives, but it is fair to say were first interested to understand what the real problems were with the current system and in seeing if there were improvements that could restore it to (less noisy) working order.

5.7.4 Natural evolution of EDR

We begin our observations by noting that we think what OBSI is going through is an inevitable (if painful) stage in its evolution.

We have been working with EDR schemes for 12 years and observing them for longer than that. Every scheme we know of has gone through evolutionary change - of its scale, professionalism, scope of activity, and authority. This change has occurred at different speeds and with different priorities but we see it as an inevitable consequence of the type of organisation that they are.

Industry EDR organisations are comparatively new institutions in our societies and their 'natural boundaries' have not yet been clearly defined.

They are public interest bodies but industry funded. They are service providers to industry, but a part of the consumer protection framework. They can be seen as a tool of customer service and as a tool of consumer protection. Today, they exist along a spectrum that runs between being an extension of industry customer service – all the way up to being a creature of government with quasi-regulatory powers.

Almost all EDR schemes began their lives at one end of the spectrum, typically very small in scale, limited in scope, available remedies and authority and focused on quick, low-cost complaints resolution.

However, what is often forgotten is that invariably the schemes were brought into existence to forestall government-imposed consumer protection regulation – as we understand was the case in Canada for banking, investments and insurance. So, even though the schemes may have been viewed with a proprietary eye by industry - from the outset, they had a public interest purpose. It is the evolving demands of that public interest that has been at the heart of much of the industry anxiety over the recent past.

Growth in expectations

Inevitably, all schemes grow – in size, scope of activity, range of remedies, authority and cost. This is simply a function of escalating stakeholder expectation and is the pattern in Canada as well as other jurisdictions we are familiar with.

Increased profile brings more consumer complainants – even if only by word of mouth. Industry, consumers and regulators add products/service lines to the EDR scheme remit. Government reform adds industry sectors to what is seen as a successful model.

Scandals over integrity problems or high profile firm collapses threaten increased government regulation; this drives more work to the EDR scheme or creates replica schemes.

Complaints about low-cost resolution techniques force schemes to adopt more procedural fairness and transparency. 'Outlier' complaints require schemes to innovate and at times stretch previous boundaries - often with the agreement of participating firms. Demands for greater accountability drive a move to appeal mechanisms and more costly processes.

Debates erupt about EDR performance and soon regulators are expected to set minimum standards and 'approve' schemes. It becomes evident that community expectation will not permit schemes to ignore systemic issues. Regulators and policy-makers begin to realise the value of the market intelligence in EDR scheme data and ask for more reporting.

Politicians begin to see EDR as an arms-length, low tax alternative to more government regulatory expenditure. The increasingly frequent result is that membership of an EDR scheme becomes compulsory under law or codes.

And so it goes.

The great challenge for EDR schemes everywhere, and for OBSI today, is to adapt to community expectations while bringing stakeholders along with that evolution and persuade them to adjust their part in interacting with the schemes.

5.7.1 Need for regulatory support

In this environment, inevitably these conflicting pressures of expectation place a demand on some 'higher authority' to take the responsibility for periodically making the call about what is and what is not reasonable to be expected of the EDR scheme. The implications of this for OBSI are set out in the next section.

6. Strategic Recommendations

As EDR schemes progress along this inevitable evolutionary path, they confront moments of crisis around their proper role and remit. They are caught between those that would push them along the spectrum towards the quasi-regulatory end and those that would drag them back towards their industry service origins.

We see the OBSI as being in one of those periods of crisis where tensions from misalignment of stakeholder expectations are at a breaking point. A significant 'circuit-breaker' to reset these tensions is now well and truly overdue.

Given the entrenched positions that industry and consumer stakeholders have taken, there is no alternative in our view but for OBSI to persuade the third 'leg', the regulators, to take the lead role in the resolution of the tensions through some agreed version of this 'circuit-breaker'.

We acknowledge that significant, protracted effort has already been put into this task and we apologise to the Board in advance for re-stating the blindingly obvious and re-raising arguments no doubt previously exhausted (some more than once). As mentioned, we can only hope that our report be offered as reason for stakeholders to revisit all of this with something of a fresh eye.

Although our advice can only properly be to the OBSI Board, we cannot in conscience, limit our recommendations to things within the OBSI's direct control – that would be too feeble. Our recommendations should therefore be seen as an agenda for the Board – to put forward a credible package of reforms that, with support from others, will act as a 'circuit-breaker' and enable OBSI to resume its important role in the Canadian financial sector.

6.1 Recommendations for a 'circuit-breaker'

The 'circuit breaker' will need to be multi-faceted - addressing issues of scope, methodology and authority at a minimum. Our recommended strategic reforms are aimed at addressing the structural weaknesses of OBSI's voluntary authority; improving the presence of the consumer voice; strengthening regulator engagement with OBSI's mission; establishing 'safety-valve' mechanisms for resolving issues of great contention between industry and OBSI and strengthening confidence in the governance of the OBSI through a changed model for the Board.

We recommend that the OBSI board put forward the following package of recommendations to resolve the current tensions and enable OBSI to return to its task:

Recommendation One.

Seek endorsement by the regulators and acceptance by industry of the basic framework of OBSI loss calculation methodology.

This unhelpful debate simply has to end. The overall framework is sound and any refinements desired can be resolved sensibly, provided there is an effective mechanism for balancing industry interest and the public interest.

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.

Controversial or 'grey' areas would be best dealt with if they could be referred to an expert panel that has the necessary industry technical expertise, but also sufficient public interest perspective to provide OBSI with credible independent advice. Panel expertise should include that of a qualified investor advocate and could possibly be chaired by (say) an independent academic. Ultimately it must still be the Board's decision, acting on the advice of the panel.

Recommendation Three.

Seek agreement of government and regulators to make membership of OBSI by all banks and investment firms compulsory.

The days of reputational risk being a sufficient deterrent and the assumption of voluntary compliance are clearly over. Neither industry nor regulators can afford to have disgruntled participating firms walking away from their EDR obligations.

Recommendation Four.

Seek regulatory backing and industry agreement to binding power for Ombudsman decisions over member firms.

Unless regulators wish to be in semi-permanent 'referee mode', they will have to empower OBSI (or any other scheme) with compulsory participation and binding powers. The system is unworkable if participating firms can simply reject an Ombudsman decision.

Recommendation Five.

Establish a limited appeal mechanism for Ombudsman decisions.

As part of the package for binding authority for OBSI, a final appeal mechanism should be introduced. This is to give confidence to industry and consumers that OBSI is prepared to have its decisions tested. To contain costs, and limit unnecessary prolonging of overall timeliness, we think grounds for appeal should be limited to matters with arguable errors or omissions and should involve a cost-based appeal fee for industry.

There are several appeal decision models that could be adapted. The most suitable of which in our view, would be 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.

In each case, the appeal mechanism would be supported by OBSI staff and resources, but the decision-makers would be clearly empowered to make independent decisions.

Recommendation Six.

That the OBSI Board be restructured to include an independent Chair, a consumer voice and to involve all Directors in all decisions.

The OBSI Board must be restored to its proper role of bringing stakeholder and the public interests together as governors of the scheme. Governance reforms should aim at strengthening stakeholder confidence in the Board.

This should include a reconstitution of the Board, an independent Chair selected from outside all constituent stakeholder groups, restoring industry's responsibility and place at the Board table, introducing seats for consumer/investor advocates, a clear Board charter that obliges directors to act in the interests of the organisation, not their constituents and improving transparency of the nominations process for all Directors.

Note that the most successful model we have seen is an independent Chair with equal numbers of industry and consumer directors. However we think that a better model for OBSI would be to establish a Board with an independent Chair, 3 Industry Directors, 3 Consumer/Investor advocates and 3 Community Directors.

This would ensure that the optics of independence are maintained with 4 'non-aligned' Directors including the Chair. Industry would retain its current number of seats. Consumers will be seen as having won a much stronger voice, but without the numbers for industry to fear that they will dominate.

We also suggest that a common nomination process be used to underscore the notion that the Directors bring unique perspectives and knowledge – but all of them have the same fiduciary duty to OBSI. Our preference would be a version of what has now become nominations best practice for not-for-profit and representative Boards.

As now, industry would have the right to appoint Directors but there should be a process of a Board nominations committee assessing the Board skills mix and putting desired skills, experience and availability criteria to constituent industry groups, receiving suggestions for Director nominees and then agreeing the best fit nominees for appointment.

A mirror process with similar criteria would take place for the consumer/investor advocate Directors, using the OBSI Consumer and Investor Advisory Council as the constituent interface. The nominations committee could itself seek out potential candidates for the Community Directors, once again with similar criteria - perhaps with some public process of calling for expressions of interest.

This would add some process overhead, but we think it would pay off in stakeholder confidence.

Recommendation Seven.

That OBSI establish regulatory oversight of annual funding/budgeting.

OBSI must restore public confidence that it is being funded to adequate levels. (Note this does not mean slavishly matching some overseas benchmark, nor abandoning fiscal responsibility, rather it means applying a rational resourcing model that will provide for adequate levels of service, meet agreed timeliness KPIs, assure stakeholders of

independence and provide appropriate incentives for efficiency and innovation.

For stakeholder confidence, an annual process should be established for discussing the expected workload and planned budget with the regulators (possibly through existing mechanisms like the DRC) before the Board meets to finalise the coming year's budget. The intention is that the regulators do not set the budget, nor do they need to be privy to every detail of every line item, but should be provided with some insight into the reasons for it and opportunity to have input to its adequacy.

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.

We found that OBSI was making significant efforts on the efficiency front, however it is an area that requires constant attention in EDR schemes. We would also suggest that there is much to learn from comparing the way different schemes approach complaint handling. OBSI would benefit from periodically seconding staff for short periods to and from schemes in other jurisdictions and other sectors.

We also think that with restoration of normal working relationships there will be opportunities to improve efficiency at the interface between firms and OBSI.

We stress that the above recommendations are put forward as a package. They are designed to put OBSI and its three 'legs' of external support into a sustainable form of balance. Selectively implementing the recommendations runs the very real risk of simply creating a new 'imbalance'. Even if there is some relief created in the short term, we are concerned that partial implementation will leave structural weaknesses intact and inevitably end in the next outbreak of hostilities.

7. Joint Forum Guidelines

7.1 Independence

GUIDELINE	1	Subject Matter:	Independence
A Objective of the Guideline	To assure financial sector consumers who refer complaints to the OmbudService of its independence.		
B Implementation Guidelines	For purposes of this Guideline, "independence" means the absence of relationships with the affected financial sector industry, or firms within it, which would cause a reasonable person to question whether the person can fairly and effectively resolve complaints (in the case of officers, staff or any person engaged by the OmbudService to deal with consumer complaints) or provide objective and disinterested oversight (in the case of directors).		

Assessment

We found that OBSI has the internal structures, procedures and processes in place to meet the Objective of this Guideline, however the public collapse of support from industry means that a largely voluntary scheme structure is not fully achieving it.

Note

The principles of this Guideline encompass two aspects of independence – those of operations and of oversight. We note that the specific requirements set out in the Guideline are largely focused on oversight (the role of the governance system with respect to independence). We mention this because with the deterioration of relationships between the OBSI and member firms, the question of operational independence has become an issue.

7.1.1 Consumer representatives input

Feedback from consumer representatives regarding Independence included concerns that:

- The OBSI Board is biased and has been captured by industry interests
- There has been insufficient turnover on Board, with the Chair and some Directors exceeding acceptable tenure limits
- There is a lack of transparency to the process of appointment of independent Directors to the Board, with no accessible nomination process
- Concern that many of the 'independent directors' have no track record or credibility as consumer-aware members of the community
- Generally positive reaction to the newly created Consumer and Investor Advisory Council – but some scepticism that it is a mechanism without authority designed to 'fob off' consumer interests

7.1.2 Industry representatives input

Feedback from industry representatives with respect to Independence included concerns that:

- Industry-appointed Directors on the OBSI Board have been effectively side-lined and excluded from information and critical debates
- There has been insufficient turnover on the Board, with the Chair and some Directors exceeding acceptable tenure limits
- There is a lack of transparency to the process of appointment of independent Directors to the Board
- The OBSI Board is not accountable – either to member firms or to regulators or government

7.1.3 Other stakeholders input

Feedback from other stakeholders (including community, government and regulators) with respect to Independence included concerns that:

- The 'optics' of having industry appointed Directors on the OBSI Board gives a perception of a lack of true independence (also a concern in 2007)

7.1.4 Findings

OBSI's Policy and Procedures Manual specifies that, to safeguard the independence of the Ombudsman and the dispute resolution process, the Board does not become involved with resolving disputes or hearing appeals from decisions of the Ombudsman.

From our discussions with staff and the Board, examination of case files and of Board minutes, we are satisfied that the Board very carefully monitors this issue.

We are also satisfied that the rules and protocols of the Board are consistent with the intent of the Guidelines and there is no structural bias that would limit the Board's capacity to be independent.

If anything, by comparison with schemes in other parts of the world, the OBSI has stronger controls over industry influence on the Board (some schemes have equal industry and consumer directors with an independent Chair, others have a two tier governance structure with the budget and the rules in the control of an industry-only Board).

However, it is clear that despite a clear Code of Conduct for Directors, the Board has had difficulty maintaining a sufficient level of trust and confidence to enable open discussion between independent and industry-appointed Directors. We recognise that this is a complex issue – and we do not suppose that there are simple solutions. Nonetheless, as part of recommended Board reforms, and to underscore the point, we make the following recommendation.

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.

The consumer voice

The OBSI Board does lack the presence of consumer advocates for which most other schemes that we know have reserved governance positions. The OBSI Consumer and Investor Advisory Council is a good step towards ensuring that consumers are confident that they have a voice with OBSI. We also recommend at Section 6.1 that the OBSI Board be reformed to incorporate an active presence of consumer advocates.

Accountability

As to questions of accountability raised by industry stakeholders, we should first be clear that as a public interest organisation with a specific mandate and an obligation to be independent, OBSI cannot be 'accountable to industry' in the way some would argue.

As with any EDR scheme, OBSI must be accountable to deliver its mandate, fairly taking into account the interests of all of its stakeholders, including industry. It is true that the OBSI has not been accountable to government and regulators in the same way as a statutory scheme such as the UK FOS, nor as a licensed or approved scheme such as in New Zealand or Australia. We note that this will soon change on the banking side.

That said, the reality is that OBSI depends on the confidence of the financial sector regulatory bodies and government policy makers every bit as much as any of the other EDR schemes we are aware of. It is also the case that in each of the alternate examples mentioned, the principal oversight mechanism is periodic independent reviews – just as OBSI does.

Further, as the current hostilities with industry illustrate, OBSI has the ever-present threat of the regulatory bodies withdrawing their support by allowing alternative EDR/ADR/arbitration systems to compete. In a practical sense, OBSI is more driven to continuously maintain the confidence of stakeholders than most other schemes we are aware of. Their challenge has been to achieve some appropriate balance in this.

Actual independence

We are satisfied that the rules, systems and processes support independence – however, we are concerned that the OBSI is not actually meeting the overall purpose of the Independence Guideline. This is evident in two critical areas – funding and participating firm compliance with OBSI decisions – and we think it is a direct consequence of the structural weakness of OBSI's position with respect to its stakeholders.

Funding

As discussed at Section 4.7, OBSI is not unique in experiencing its resourcing lagging workload following the GFC, however no other scheme that we are aware of experienced funding cuts of the same impact (in real terms) as a result of such concerted industry pressure.

There is no doubt in our minds that the Board's budget decisions were made more difficult because industry reacted to the mounting costs of the time, arguing that OBSI was 'hugely' inefficient and costly (we deal with this issue elsewhere), began threatening to leave the scheme and lobbying regulators to curtail the scheme's scope and independence. (Note that the efficiency review was OBSI's response to this industry pressure on costs).

We do not think that it is the Board that has failed in its duty. Any competent board must be cognizant of the environment and stakeholder concerns and the OBSI Board budget decisions over the last few years had to be taken in full knowledge of the charged and increasingly difficult relationship with member firms. (See also Section 5.6 on Governance.)

We think the funding outcomes have been a direct consequence of pressure from industry and in some measure, of the 'light-touch' regulatory backing for OBSI and for that reason we do not think that we can say that the Independence Guideline with respect to adequate funding is met.

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.

Participating firm compliance

Our second concern arising from the significant deterioration of goodwill and cooperation from member firms between 2007 and 2011 is the significant number of case files that have stalled at the end of the resolution process because some member firms are simply refusing to accept the Ombudsman's decision. To the OBSI's credit, it has not backed down in the face of this opposition, however the consumers involved remain uncompensated while the stand-off continues.

This has exposed the fundamental gap in the OBSI's ability to be truly independent in its complaints-handling - it does not ultimately have binding power over its participating firms. Its ultimate recourse, the 'naming and shaming' power only works as a deterrent when there is near complete goodwill and cooperation from industry – and when it is rarely or never used. Without that goodwill and cooperation, it is an untenable framework and cannot meet the Guideline as truly "independent".

(The current impasse with a number of firms that are refusing to comply with OBSI decisions clearly illustrates the limitations of 'naming and shaming' as a deterrent.)

We have discussed regulatory support in Section 5.7 and note there that it is not in our remit to make recommendations directly to the regulators. However we will record our view that following such a public showing of opposition and non-compliance by participating firms, for OBSI to continue to fulfil its public interest role, there is a compelling argument that regulators should reinforce OBSI's authority in some substantive way (see our recommendations at Section 6.)

7.1.5 Detail assessment

PRINCIPLES	COMMENTS
To achieve the objective:	
1. The governance structure of the OmbudService must be robust. To that end:	
(a) The Board of Directors of the OmbudService should meet evolving best practices of organizational governance, adapted to the special nature and purposes of the OmbudService.	Guideline not fully met. We found a Board of Directors with the rules, processes, protocols, and the individual commitment to meet best practice governance. Because of the currently fractured relationship with industry, it is not currently achieving best practice.
(b) The OmbudService should have a strong and committed Board of Directors a substantial majority of whose members meet the independence relationship standard. There should be an appropriate mechanism for the appointment of Board members, which ensures continued Board strength and commitment and independence from the industry.	Guideline met. The By-Laws require a majority of OBSI Directors to meet the independence relationship standard and a majority of independent Directors must be present for a decision-making quorum. The Independent Directors Committee is responsible for the process for nomination of Independent Board members.
(c) In accordance with good governance practice, all directors of the OmbudService need to act in the best interests of the OmbudService to achieve its public interest objectives, notwithstanding that they may not meet the independence relationship standard.	Guideline not fully met. There is something of a fracture in the Board between the industry directors and the independents, which was not a significant problem in 2007 but has now become sufficiently serious as to impact the Board's effectiveness. There is some disagreement about whether all are acting to the expected standard.
(d) The charter documents of the OmbudService should enshrine appropriate independence criteria.	Guideline met. This obligation is made clear in the constituent documents of OBSI and in its Code of Conduct for Directors.
(e) There should be a written mandate for the Board which clearly sets forth its responsibilities. They should include, among other things, the responsibility:	Guideline met. There is a clear written mandate (across a number of documents) for the Board to take responsibility for the matters in the list. We also noted evidence that the Board is in fact attending to its responsibilities.
(i) to engage, evaluate and dismiss the Ombudsperson and/or Senior Executive Officer,	Guideline met. Evidenced with the appointment of Doug Melville, following David Agnew's resignation, and a process of ongoing performance feedback for the Ombudsman.
(ii) to approve standards and policies,	Guideline met. Sighted a number of Board decisions establishing standards and policies.

(iii) to establish and monitor human resource and compensation practices,	Guideline met. Sighted Board approval of a range of Human Resource policies and compensation decisions.
(iv) to approve funding levels and budgets which will provide adequate resources to the OmbudService,	Guideline not met. Sighted Board papers approving annual budgets – note that in our view, the recent budgets have not met the adequacy test.
(v) to establish appropriate funding assessments to member firms, and	Guideline met. Albeit out of our scope, we noted evidence of the Board consulting with industry and approving the calculation models for the annual levies for member firms.
(vi) to ensure sound relations with regulators and the accountability of the OmbudService, all with a view to providing sound oversight of the activities of the OmbudService so as to achieve the public interest objectives for which the OmbudService is created.	Guideline met. We found that OBSI has, at Board level and at management level done everything that could be expected of it to meet this Guideline. Regular consultative meetings are held with the relevant regulators, ad-hoc and informal contact over any issues of concern are held and while there are frustrations, the feedback from both OBSI and the regulators is positive about the quality of the relationship.
(f) The role of Board Chair is of special importance in fostering independence, and should be an independent director elected or appointed by the Board of Directors following a recommendation of a Nominating Committee of the Board consisting solely of independent directors.	Guideline met. The OBSI Board Chair is independent of industry and any organized consumer lobby and is elected in accordance with processes that meet the Guideline. Note that by some corporate governance standards, the length of the Chair's tenure would now exceed the definition of 'independent'. We understand that there must be some flexibility in applying these standards. We are satisfied that the Board has discussed and agreed on a succession plan to deal with this perception.
2. To ensure independence, the OmbudService should also be appropriately funded to achieve its objectives. Budgets and mandatory assessments to member firms should be approved by the Board of Directors on the recommendation of a Committee of the Board consisting solely of independent directors.	Guideline not fully met. The process and protocols for settling the OBSI budget meet the letter of the Guideline – however (see above) given the funding outcomes, we are concerned that the funding for the OBSI has shrunk too far in proportion to the workload increase and we are unable say that OBSI has been appropriately funded.

7.2 Accessibility

GUIDELINE 2	Subject Matter: Accessibility
A Objective of the Guideline	To articulate a framework in which the OmbudService will (a) take active steps to promote knowledge of its services, (b) ensure that consumers have convenient, well identified means of access to its services, and (c) provide its services at no cost to consumers.

Assessment

We found that OBSI meets the Objective of this Guideline.

7.2.1 Consumer representatives input

The main feedback from consumer representatives regarding Accessibility was that consumers are not aware of the OBSI because it is not being sufficiently promoted by member firms – despite the obligations of the industry rules for IROC and MFDA member firms and OBSI's Terms of Reference for banking firms.

7.2.2 Industry representatives input

Feedback from industry representatives regarding Accessibility included concerns that:

- OBSI is actively encouraging and 'coaching' consumers to pursue complaints
- OBSI is dealing with too many meritless matters – that should be excluded earlier

7.2.3 Other stakeholders input

Other stakeholders (including community, government and regulators) also expressed some concern that the option of going to the OBSI was not sufficiently well known by consumers.

7.2.4 Findings

Whilst general consumer awareness was outside of scope for the Review, we are able to report that all specific measures required by the Guideline are present and functioning and that OBSI meets the Guideline.

OBSI's website is of a comparable standard with other EDR services we have seen, providing all the customary advice. There is an excellent telephone enquiry service and staff are commendably active in using the telephone to communicate with the parties to the dispute (a weakness of many other schemes we have reviewed).

We saw no evidence of OBSI 'fishing' for complaints or 'coaching' consumers to pursue their complaints. We also thought that OBSI was appropriately balancing the need to – on the one hand, listen to consumers and give them a chance to make their case – with, on the other hand, the need to advise them as early as possible if their complaint had no prospect of success (and to avoid wasted effort and cost).

OBSI is active in promoting the scheme and running financial awareness campaigns – without being publicity-driven. Note that general consumer awareness was specifically excluded from the scope of this review. We accept that consumer awareness of the OBSI is not as high as it could be, however this is a universal problem for EDR schemes and in the course of our investigations, we did not identify anything that OBSI was not doing that we thought it should.

We discussed this issue in our 2007 report, as we have with many other EDR schemes and our view is unchanged. The reality is that there are practical limits to what EDR schemes can do to maintain a high profile in a very crowded world of information.

7.2.5 Detail assessment

PRINCIPLES	COMMENTS
To achieve the objective:	
1. The OmbudService should ensure that its existence, processes and the services it provides are well-known to financial services consumers within the scope of its operating mandate. To achieve this goal the OmbudService should provide the firms in the financial services sector it serves with illustrative information	Guideline met. OBSI is diligent in raising its profile to consumers of financial services. We sighted materials and communications to participating firms to enable them to refer consumers.
2. The OmbudService should provide consumers who have complaints with ready means of access including:	
(a) toll-free telephone;	Guideline met. Provided.
(b) email and regular mail; and	Guideline met. Provided.
(c) fax lines and internet.	Guideline met. Provided, including the ability to lodge complaints on-line. Consumers reported that they had found the OBSI by internet search and had found the website helpful.

3. The in-take process should provide the consumer with prompt direct personal contact with a competent staff member, whatever means of access may have been used by the consumer in the first instance.	Guideline met. OBSI provides an excellent 'front-end' telephone service with staff that are trained and experienced in customer service and with sufficient knowledge of EDR and financial products to assist consumers with enquiries. The service is provided in both Canada's official languages and a service for the deaf and a translation service for some 170 languages is available. The telephone service is rated highly by consumers we spoke with.
4. Clear information on the services provided by the OmbudService should be made available through brochures and a website. The OmbudService should request the member firms to provide a clear description of the recourse available to the OmbudService for consumers and the means of access. Services should be delivered consistently across Canada.	Guideline met. OBSI provides printed brochures and a bilingual website that is of an equivalent standard to comparable EDR schemes. Member firms are provided with referral material. A fully national service is provided. Although we understand there are continuing problems, we noticed that the correspondence on file from member firms was much more consistent about informing the consumer than in 2007 (this obligation was being introduced by some of the self-regulatory organizations at the time of our last review). Effort is made to be accessible across Canada and the OBSI reports on volumes of complaints by province in its annual report.
5. The OmbudService should be fully funded by its member firms with the result that all of its services are provided to consumers at no cost.	Guideline met (note discussion re: adequacy of funding under Independence).
6. All services of the OmbudService must be made available in both English and French.	Guideline met. We sighted evidence of bilingual service delivery from the website through to investigations, recommendations and internal appeals.
7. The OmbudServices, should ensure that the FSON continues to host singlewindow telephone and internet services that can direct complaints to the appropriate OmbudService for attention.	Guideline met. OBSI contributes and ensures that it plays its part in referring consumers to the correct service.

7.3 Scope of Services

GUIDELINE	3	Subject Matter:	Scope of Services
A Objective of the Guideline	To identify terms of reference to provide both participating firms and their consumers with a clear understanding of the range of activities and nature of consumer complaints which will be taken up by the OmbudService.		

Assessment

We found that OBSI meets the Objective of this Guideline.

7.3.1 Consumer representatives input

Feedback from consumer representatives regarding the scope of services included concerns that:

- Too many complaints being excluded because they are out-of-mandate
- OBSI should be more active on systemic issues
- OBSI should be backed up more forcefully by regulators (some believe that OBSI should be a statutory scheme)

7.3.1 Industry representatives input

Feedback from industry representatives regarding the scope of services included concerns that:

- Systemic powers are too close to being 'regulatory'
- Scope-creep is taking OBSI away from its original conception as a low-cost simple way to resolve disputes

7.3.2 Other stakeholders input

Feedback from some of the regulators echoed industry concerns about the OBSI becoming a 'quasi-regulator' – an understandable concern about confusion of roles and the risk of overlap.

7.3.3 Findings

We note that the Joint Forum Guidelines oblige the scheme to err on the side of generosity to the consumer in judging whether complaints should fall in or out of mandate. This is entirely consistent with the philosophy underpinning regulatory requirements of EDR schemes elsewhere.

OBSI files revealed occasional criticisms by consumers that OBSI has failed to take a sufficiently generous interpretation of its Terms of Reference. Some

industry representatives complained that OBSI had taken too generous an interpretation. The Policy & Procedures Manual contains sensible guidance as to how 'grey area' complaints should be dealt with, our file review showed consistent application of that guidance and we saw no files that we thought had been unfairly excluded or included. Practice was as we expect to find in any quality scheme.

We found OBSI's willingness to exclude out-of-mandate complaints to be very similar to other Ombudsman schemes we have reviewed, with some flexibility and common sense applied.

Systemic issues

The Terms of Reference require OBSI to investigate issues that are systemic to a participating firm where OBSI identifies these. Neither OBSI's Terms of Reference or its Policy and Procedures Manual specifically contemplate the possibility of issues that are systemic across a sector – for example selling practices, badly designed products. This is an area that has become part of EDR scheme practice in other parts of the world - albeit not without some resistance from industry and allegations of scope-creep.

This is a seemingly inevitable and difficult part of the evolution of EDR schemes given the differences in expectations of external stakeholders. At one end of the spectrum – a systemic investigation is a natural extension of an investigation of a single matter. It is logical and importantly is exactly what consumers and the community would expect. We often hear from consumers during our interviews "if it happened to me, it must have happened to lots of other people - will the scheme investigate that?"

Once an EDR scheme has identified a system or practice that is problematic in one firm, the principles that underpinned that finding must inevitably similarly (not slavishly) apply if an equivalent set of circumstances arises in another firm. It is a fundamental fairness obligation on the scheme - to both consumer and participating firms.

Over time, it becomes clear that it is a matter of fairness that other participating firms should be advised about the likely outcomes in a complaint scenario - if similar circumstances arise. In effect, the sector is being advised as to what the Ombudsman will see as acceptable practice – if and when a complaint should arise.

(This is not an obligation on the sector to immediately adopt the Ombudsman's suggested practice. The Ombudsman is not a regulator. Firms are free to accept the risk that the occasional matter will result in a dissatisfied customer and then in a complaint to the Ombudsman. An example of this from past Australian experience is unsolicited extensions to credit limits – where many credit providers, in full knowledge of the Ombudsman's likely view, continued to offer consumers extensions to credit card limits without any process to determine their capacity to pay. It was just accepted as a business risk that some may end in complaints which the Ombudsman would uphold.)

Experience first

It is now common practice for EDR schemes in other parts of the world to pursue systemic issues across industry sector, however the authority to investigate systemic issues is quite new to OBSI and was opposed by industry. OBSI is currently investigating a number of systemic matters - and at the time of writing these were still under investigation.

Given the current environment, we would not recommend that OBSI open up hostilities on yet another front by extending its systemic perspective across an industry sector at this stage. It is important for industry (and OBSI) that some experience is gained with systemic issues before attempting to redefine or expand the organisation's remit. We note however that this is the evolutionary trend for EDR schemes and the community expectation will not go away.

7.3.4 Detail assessment

PRINCIPLES	COMMENTS
To achieve the objective:	
1. Each OmbudService should have terms of reference that permit access to its services by consumers of all firms which meet the OmbudService's membership criteria and which provide products of a similar nature, regardless of the jurisdiction of incorporation and regulation of the firm and regardless of its membership in a particular industry association.	Guideline met. The OBSI Terms of Reference meet this Guideline. Note however that the current regulatory environment does not equally oblige participation. Gaps in OBSI coverage occur in banking (credit unions and provincially regulated trust companies), in some other provincially regulated financial services. Investment industry participation remains a function of membership in a self-regulatory body – not a requirement of all investment sector firms.
2. The terms of reference should be comprehensive enabling the OmbudService to deal with substantially all complaints within a sector except where there is a compelling policy or practical reason to exclude them from the services offered, or the complaint exceeds a published dollar threshold set by the Board of Directors.	Guideline met. OBSI Terms of Reference are comprehensive, with a set of exclusions that are reasonable and consistent with other EDR schemes. OBSI has a dollar limit of $350,000, which is comparable to other jurisdictions (Australia - $288k CAD, UK - $160k CAD;) and in practice is rarely approached.
3. As an operating principle, the OmbudService should adopt a generous interpretation of its terms of reference so that, if doubt exists as to jurisdiction in a particular case, the doubt would be resolved in favour of dealing with the complaint rather than rejecting it.	Guideline met. We saw evidence of OBSI procedures requiring this and evidence of files that were treated consistently with this Guideline.
4. The terms of reference of the OmbudService should include the authority to identify and investigate systemic or widespread issues an OmbudService may find in the course of its work arising from complaints regarding an individual firm or more broadly in a sector.	Guideline met. The OBSI Board added this authority to its Terms of Reference recently and had commenced the first systemic investigations (limited to individual firms – see comments under Systemic Issues above) at the time of the fieldwork for this Review.
5. Where an OmbudService does not accept a complaint because it concludes that it is beyond its terms of reference, it should communicate that fact to the consumer, with a full explanation for its decision, where requested.	Guideline met. OBSI communicates fully with a consumer whose complaint is found to be beyond its Terms of Reference. We examined example files and correspondence to confirm.

6. An OmbudService should provide assistance to consumers to help them register and, where necessary, articulate their complaint, or to guide them to services or agencies which could help them if their issue is beyond the mandate of the OmbudService.	Guideline met. OBSI is compliant with this requirement. We saw examples where consumers were provided with assistance to lodge and explain their complaint. We were satisfied that this assistance did not extend to 'coaching' or inappropriate encouragement of complaints.
7. Substantive changes to the terms of reference should be approved by the Board of Directors of the OmbudService after consultation with appropriate stakeholders and the DR Committee.	Guideline met. OBSI meets this Guideline with evidence of due process followed during the changes made in early 2010. We note that 'consultation' has not meant power of veto and not all changes have been supported by stakeholders.

7.4 Fairness

GUIDELINE	4	Subject Matter:	Fairness

A Objective of the Guideline

To ensure that

(a) the OmbudService approaches its work in respect of consumer complaints and makes its recommendations by reference to the standard of what is fair to both the firm and the consumer in the circumstances, and

(b) that the processes employed by the OmbudService are demonstrably fair to both parties.

Assessment

We found that OBSI meets the Objective of this Guideline.

7.4.1 Consumer representatives input

Feedback from consumer representatives regarding the scope of services included concerns that OBSI:

- Has been too accepting of poor FSP practice in cases
- Has not been sufficiently active in publicly challenging bad industry practice and publicly advocating for higher standards

7.4.2 Industry representatives input

Feedback from industry representatives regarding the scope of services included concerns that OBSI:

- Is inconsistent in applying policy to decision-making
- Is unfairly applying 20/20 hindsight to loss calculation issues
- Is drifting from its proper role as impartial decision-maker into consumer advocacy
- Has been seeking settlement offers from firms where this is not warranted

7.4.3 Other stakeholders input

Other stakeholders, notably regulators and policy makers expressed concern about the loss of industry support and wanted some perspective as to whether the complaints about OBSI are well-founded.

7.4.4 Findings

OBSI is required by its Terms of Reference to resolve complaints based on "fairness in all the circumstances". OBSI's Policy and Procedures Manual, requires OBSI to be a neutral party, to be neither an advocate for industry nor for the consumer. The Manual states that, as an alternative to the legal system, OBSI's process is accessible and informal.

Our review of files found that OBSI carries out its complaint resolution service in a way that is fair, consistent with its mandate and without undue legalism. Both sides to a complaint are provided with a fair opportunity to provide their views and supporting information. We found the OBSI obligations, procedures and practice to be highly consistent with what is expected of EDR schemes internationally.

Complaints against OBSI

We also reviewed a number of complaints about OBSI – both complaints made by the firm and complaints made by consumers - where assertions were made that OBSI had not been fair. Most of these complaints pertained to investment loss matters, something discussed at length in the Attachment at Section 10. These complaints highlighted the difficult issues of judgement that can arise in complaints handling, with the consequent scope for the parties to disagree and to label the result unfair. These complaints did not leave us with any concern as to the impartiality of OBSI's processes or its decision-making.

We also heard from firms that they felt OBSI was unfairly using '20/20 hindsight' to unfairly assess complaints about conduct from some time ago – in the light of today's standards. We were satisfied this was not the case, however we acknowledge that this impression can easily be inadvertently created. We discuss this in some detail in the Attachment at Section 10.

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.

We also noticed that there were a few files where OBSI had investigated matters that had originated many years ago (as far back as the '90s). We do not think this is reasonable. In these cases, the evidence is so old that the chances of a fair and reasonable outcome are severely diminished.

We understand that there are different periods of limitation in Canada depending on the province, however as a matter of good practice, OBSI itself should refuse to deal with complaints about matters that are practically too old to investigate. Based on our experience in other jurisdictions, we would suggest six years as the limit.

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.

Loss calculation

We examined the OBSI Investments Policy & Procedures Manual, read a number of files that involved investment loss calculation, spoke with the OBSI managers, investigators and analysts about their practices, spoke with industry representatives, a number of participating firms, investor advocates, staff from the regulators and have followed the OBSI consultative process (since our review) with interest, reviewing the stakeholder input with some care. We also spoke with regulators, EDR staff, stakeholders and policy staff from ombudsmen/EDR schemes in the UK, Australia and New Zealand to compare investment loss methodologies.

Our detail views are set out in the front section of this report, however, for completeness, our conclusion was that the OBSI loss calculation approach is sound, is consistent with international practice in principle and to the extent that it differs in implementation, it is a superior methodology – for both consumers and industry.

Seeking 'unfair' settlement offers

We did see evidence of OBSI investigators initiating contact with participating firms with a view to achieving a settlement offer prior to initiating a full investigation. This is something that we encouraged in the last review in the interests of quicker, less costly complaints resolution where appropriate. The Policy and Procedures Manual sets out a sound basis for assessing if the matter is suitable for early settlement and the files we saw were done appropriately. We acknowledge that it can be easy to create an impression of 'fishing' on behalf of a consumer, however we thought in this respect the procedures, training and supervision were sound.

Accepting industry practice

We did have one concern with respect to this Guideline. We found a couple of examples of banking services complaints where OBSI had found in favour of the bank, because the investigator was satisfied that the bank had adhered to its own procedures. In these examples, we thought OBSI had been too accepting of the bank's customary practice – without apparently testing if those procedures were consistent with the relevant law, regulatory or code of practice requirement – or even objectively fair.

It may be that in those cases that we saw, that it is our ignorance of the local environment that is at fault and that the investigator was aware of these considerations. Even if that was the case, we think OBSI should be more expressly satisfying itself that the practice is fair and showing the consumer that it has been tested. In other banking EDR environments, we would have expected to see more of this analysis before simply accepting the member firm practice.

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.

7.4.5 Detail assessment

PRINCIPLES	COMMENTS
To achieve the objective:	
1. The OmbudService should, as it assesses complaints, guard against adopting an unduly legalistic approach to complaint resolution. The objective of complaint resolution through the OmbudService is not to provide a parallel court system, but to establish a dispute resolution framework which will encourage fair business dealings, broadly and reasonably conceived.	Guideline is met. OBSI procedures are of a high standard and while taking relevant good financial services and business practices, law, regulatory policies and guidance, professional body standards and relevant codes of practice into account - provide for an appropriately informal, accessible approach based on fairness.
2. Accordingly, the OmbudService should publish a clear fairness standard it will use to assess complaints. The fairness standard should be approved by the OmbudService Board of Directors and should be harmonized across participating OmbudServices in the Financial Services Ombuds Network where possible.	Guideline is partially met. OBSI has developed, approved and published a Fairness Standard that is clear and accessible for consumers and participating firms. We understand that efforts to harmonize across the Ombudservices have not yet been successful, however the regulators have accepted this for the time being.
3. The procedures employed in resolving complaints should be impartial with a clear framework which provides a fair and balanced opportunity for both the firm and the consumer to present documents and other information to the OmbudService in support of their respective positions in a non-legalistic manner. Neither the firm nor the consumer should have special access to the staff of the OmbudService.	Guideline is met. The OBSI procedures are of a high standard with appropriate emphasis on fairness and balance. In particular, OBSI procedures strike a good balance between efficiency and procedural fairness. There was no evidence of any inappropriate 'special access' contact between staff and the parties.

7.5 Methods and Remedies

GUIDELINE 5	Subject Matter:	Methods and Remedies
A Objective of the Guideline	To articulate (a) the nature of dispute resolution methods to be employed by the OmbudService, (b) the result to be expected by a consumer from complaint resolution work of the OmbudService, including the remedies which should be available to a consumer whose complaint is assessed by the OmbudService, and (c) the consequences which should follow from non-compliance by the firm with the remedy recommended or non-cooperation by the firm with the inquiries of the OmbudService.	

Assessment

We found that OBSI meets the Objective of this Guideline.

Note

Note that this Guideline is the only part of the Joint Forum Guidelines that addresses timeliness – in Requirement 2 below. This requirement does not really adequately cover the interests of the parties in a speedy outcome, understandably focusing more on the requirement from a regulatory perspective.

For completeness, we have recorded stakeholder feedback regarding speed and efficiency under this heading. It is also addressed in the section at the front of the report.

7.5.1 Consumer representatives input

The Consumer representatives we spoke with were very concerned about the delays in achieving resolution through OBSI. They were aware of the impact of the jump in workload, but suspected on anecdotal evidence that resourcing had not kept pace with workload and that participating firms may be delaying the complaints process.

7.5.2 Industry representatives input

Industry stakeholders expressed considerable concern over the length of time OBSI is taking to achieve resolution and argued that OBSI is highly inefficient – asserting that OBSI needs around four times the resources to handle a complaint compared with the internal ombudsmen in the larger firms.

Some were aware of the external efficiency review (which did not find any major potential for efficiency) – but argued that the efficiency review had not questioned the OBSI process at its most fundamental.

7.5.3 Other stakeholder input

We received mixed input from other stakeholders – with some echoing industry views of suspected gross inefficiency and others more concerned to gain a view as to whether resourcing was adequate and whether industry resistance was adding to delays.

7.5.4 Findings

Consistent with its Terms of Reference, OBSI employs a range of approaches to resolve complaints. These approaches are communicated to stakeholders and from our investigation are utilised appropriately.

There are appropriate milestones and time limitations specified in the complaints-handling process and common sense flexibility used in applying them to individual cases.

Management of confidentiality and protecting the legitimate interests of both consumer and participating firm during the complaints process is consistent with good practice in other schemes we have reviewed.

Settlements

Like other schemes, OBSI encourages the settlement of complaints where possible. Staff are not permitted to play a 'gatekeeper' role as to whether consumers accept an offer, however will reasonably assist the consumer to figure out how to assess the fairness of an offer for themselves.

There was some evidence that member firm staff were not comfortable with the balance struck and felt that OBSI staff had lost some degree of independence and were acting too much as consumer advocates. Most acknowledged that OBSI had to provide some more assistance to consumers because of the knowledge disparity – but nonetheless felt that the OBSI sometimes 'went too far'.

We were satisfied that OBSI was getting the balance of its role about right. We saw examples of consumers choosing to accept a settlement offer that the OBSI felt was probably inadequate; and the converse – opting to refuse a settlement that the OBSI felt was reasonable.

We did not see any examples of settlements in files that seemed grossly unfair in either direction, however we did notice a number of files where the participating firm had made very low initial offers of compensation, followed by a number of progressively greater offers until eventually offering an amount that the consumer accepted. In some cases the initial offer was less than one-tenth of the amount ultimately agreed on. This does not give the impression of good faith acceptance of the independent decision-maker's role.

This pattern of firm behaviour undermines the consumer perspective of the OBSI as a credible independent arbiter. If the trend continues, this will also increase the frequency with which OBSI staff will be asked to offer some guidance to consumers regarding settlement offers. For the sake of internal consistency and for OBSI's own protection, we think that procedures should require staff to keep a record on file of any opinion or guidance offered to consumers and what the basis for that may have been.

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.

Non-compliance

Consistent with its Terms of Reference, OBSI's final recourse for non-compliance is to make public any refusal by a firm to accept OBSI's recommendation (the consumer's name is not however disclosed). The effectiveness of this 'weapon' is only of utility where there is widespread goodwill and cooperation and being 'named' has a significant reputational cost. Discussed in more detail at Section 7.1 – Independence Guideline.

Timeliness and efficiency

The dramatic increase in workload, budget tensions and blowouts in timeliness discussed elsewhere have together brought the OBSI's efficiency into question. This apparent inefficiency has been used as supporting argument for other propositions, such as the desirability of competition for EDR services, OBSI becoming a consumer advocate, etc.

Unfortunately, this debate appears to have got off to a somewhat unreal start - with industry stakeholders asserting gross OBSI inefficiency with claims that member firms were 4 times as efficient in handling consumer complaints.

First, we can say from experience that comparisons between external disputes resolution and firms' internal disputes resolution (IDR) are simply not valid. To name just a few typical differences; IDR staff usually begin with a substantial body of existing knowledge and do not have to do a baseline collection of information, IDR staff have access to any number of other internal resources to carry out research, obtain reports, provide advice, IDR teams do not have the same level of obligation to provide the consumer with their 'day in court', IDR teams do not have procedural fairness obligations, IDR teams do not have the same level of obligation to have tested all the assertions and evidence, compared the facts with similar situations at other firms, etc.

We did not attempt to do our own detailed analysis of productivity and efficiency in our review this time – because OBSI had been already been put to considerable expense with the efficiency review of 2010.

However, we did review the efficiency analysis provided by the external experts, examined OBSI's performance statistics, discussed performance monitoring and timeliness initiatives with OBSI management and did some comparisons with other EDR schemes.

We concluded:

a) The efficiency experts conducted a professional, thorough study, using modern analysis techniques;

b) OBSI management took the study seriously and implemented a number of the proposed efficiency improvements;

c) OBSI management have appropriate measures in place for overseeing performance and pay a great deal of attention to this aspect of the business;

d) OBSI complaint resolution processes are on a par with other schemes we have reviewed – neither significantly over or under doing the steps involved; and

e) Like any scheme, we have no doubt there are efficiencies that can be unlocked by persistence of management and staff effort over time – however they are incremental – and might release gains of a few percent at a time.

We have recommended development of a budget to workload model based on achieving acceptable level of performance and timeliness at Section 7.1 Independence. It will be important for industry confidence that close Board monitoring of efficiency and timeliness gains is maintained.

7.5.5 Detail assessment

PRINCIPLES	COMMENTS
To achieve the objectives:	
1. The OmbudService should adopt clearly stated complaint resolution methods which are well-suited to the nature of the dispute including conciliation, mediation, investigation or non-binding adjudication. The OmbudService may employ a variety of methods in attempting to resolve the same dispute including, for example, a facilitative method (such as conciliation or mediation) followed by an assessment method (including investigation and non-binding adjudication).	Guideline is met. OBSI practices provide for an appropriate mix of approaches including facilitated settlements through shuttle negotiation. Although it has been considered, and piloted, formal mediation is not a feature of OBSI processes, with most banking complaints being resolved through facilitated settlements, and few investment cases lending themselves to mediation.
2. The OmbudService should establish working protocols describing reasonable and practical time frames for the completion of relevant milestones in the dispute resolution process and should communicate these to both the firm and the consumer. Time frames should be sufficiently flexible to take into account the differences in the complexity of disputes.	Guideline is met. OBSI has a framework of milestones and performance standards for timeliness. OBSI's website provides information about how long dispute resolution usually takes and the factors that bear on the timeframe. We note that workload and deteriorating relations with some firms over the past 2-3 years has been such that performance against timeliness standards has fallen significantly. We found a high level of management and staff focus on efficiency and timeliness and a temporary team has been employed to clear the backlog.

3. The OmbudService's services are an alternative to recourse available through other available means such as the legal process. As such,	
(a) the firm and the consumer should confirm in writing that the OmbudService's files and work product will be confidential and not admissible in any legal proceedings, and that staff of the OmbudService will not be required to testify in any legal proceedings.	Guideline is met. Standard OBSI procedures require such releases from both consumer and firm.
(b) to promote recourse to alternative dispute resolution, where a statutory limitations period issue may arise, the firm and the consumer should agree in writing that they will suspend the application of the limitations period until the OmbudService has had an opportunity to attempt to resolve the dispute(where the law permits).	Guideline is met. OBSI has agreements in place with member firms for suspension of the limitations periods – where the law permits. We note with some concern that there is an emerging problem with some firms refusing to agree to the suspension in some cases.
4. The complaint resolution methods employed by the OmbudService should lead either to (a) a result acceptable to both parties or (b) a written recommendation by the OmbudService for the resolution of the complaint.	Guideline is met. Note elsewhere in report that there is an increasing problem with firms refusing to comply with the Ombudsman's written decision.
5. The staff of the OmbudService and any consultants engaged by it to deal with consumers should be competent and well trained, with expertise suitable to the nature of the complaint in question.	Guideline is met. OBSI has sound human resources practices in place covering recruitment and staff training. Staff are skilled, supported and resourced to a standard equivalent or better than practice we have seen in other EDR schemes. We were impressed with the expertise and grasp of the issues exhibited by staff we interviewed.
6. If the process leads to a settlement, the OmbudService should take reasonable steps to ensure that the consumer understands it and has accepted it in an atmosphere free from any reasonable impression of coercion.	Guideline is met. OBSI has practices in place to inform the consumer of offers from the member firm and to provide them with sufficient explanation of the process and their rights.
7. A recommendation of the OmbudService should specify a proposed remedy or remedies suitable to the nature of the dispute, which may include (a) a nonbinding recommendation for financial restitution for direct loss and/or (b) a nonbinding recommendation that the firm take a particular course of action to resolve the matter, which may include compensation for non-financial loss.	Guideline is met. OBSI employs an appropriate range of remedies including non-financial remedies and infrequently, compensation for non-financial loss.

8. If a firm does not follow a recommendation within a reasonable time, or does not cooperate with an OmbudService in an inquiry or investigation within a reasonable time, the OmbudService should publicly disclose that the firm has failed to comply or cooperate. The disclosure should be made in a way that preserves the confidentiality of the consumer.	Guideline is met. OBSI has policy and procedures in place for this Guideline and has 'named' firms that have refused to comply with a decision. Under the Independence Guideline, we raise our concern with the limitations of this as an incentive for participating firm compliance.
9. These methods and remedies are equally applicable to systemic or widespread issues an OmbudService may find in the course of its work arising from complaints regarding an individual firm or more broadly in an industry.	Guideline is met. OBSI has systemic investigation authority, and has commenced but not yet completed its first banking-related systemic investigations.

7.6 Accountability and Transparency

GUIDELINE 6	Subject Matter: Accountability and Transparency
A Objective of the Guideline	To provide an appropriate framework for accountability of the OmbudService in achieving its mission including (a) accountability to the public in respect of the public interest goals which the OmbudService is established to achieve, (b) accountability to regulators in meeting their reasonable information needs in respect of consumer complaint handling, and (c) transparency in provision of information regarding its operations and structures.

Assessment

We found that OBSI meets the Objective of this Guideline.

7.6.1 Consumer representatives input

Some of the consumer advocates/investor advocates that we spoke to are unhappy with what they see as a 'closed' process for appointing all Board members to OBSI. They also see OBSI as too beholden to industry.

7.6.2 Industry representatives input

Accountability was also a hot topic with industry representatives that we spoke to, with some complaint that industry-appointed Directors were being side-lined (see also Section 5.6 Governance & Accountability) and that there was no body to which OBSI was properly accountable.

Many we spoke to mentioned that the Ombudsman was very accessible and willing to listen – however they were not satisfied that their views were being implemented by OBSI.

7.6.3 Other stakeholder input

Regulators and policy-makers were understandably less keen on a push to greater 'accountability' – particularly if it was to turn regulators into a quasi 'court of appeal', however some could see merit in enhanced transparency – if it would calm some of the aggravation.

7.6.4 Findings

We found OBSI's transparency and accountability to be of a high standard and significantly improved since 2007. It is consistent with international practice and where it is weaker, this reflects the Canadian context.

It provides good practice public reporting (annual report and website), publishing performance information in a clear, accessible and frank way. OBSI's annual public financial reporting is a model of transparency compared with most EDR schemes. Its Terms of Reference, By-laws, Quarterly Board Minutes and selection criteria for independent Directors are published on the website along with FAQs and special publications.

OBSI holds regular consultation with stakeholders to the standard we would expect of a modern EDR scheme.

Direct consumer activist representation on the OBSI Board is one area of difference – although the establishment of the Consumer and Investor Advisory Council will go some way to correcting that.

Accountability to regulatory authorities and/or government is weaker for OBSI than in other jurisdictions we are familiar with. The UK FOS is of course a statutory body and is subject to all the accountability mechanisms of government. Australian and New Zealand EDR schemes are approved by their respective regulators, with a more specific set of obligations and requirements than the equivalent Joint Forum Guidelines in Canada.

Greater scrutiny and accountability is more justifiable because those schemes have proportionally greater authority (binding power over members, the ability to expel a participating member - and thereby, in effect remove their license to operate, systemic investigation powers and more extensive reporting to regulators).

It must also be said that the primary method of checking operational performance of all industry EDR schemes is actually by independent reviews – just as for OBSI. In fact, the Australian schemes have recently retreated from a 3 year interval to a required five-year interval for their independent reviews.

In no case that we are aware of, are regulatory bodies attempting to act as a real-time 'referee', available as a place of appeal each time a consumer or a participating firm is unhappy with the outcomes they achieve at EDR.

There are ways in which the system of accountability for OBSI and the other Canadian Ombudservices could be strengthened. For example, we would support strengthened Joint Forum Guidelines and a re-think and re-establishment of OBSI governance. We do not think that accountability of itself is a significant performance issue, that it prevents OBSI from meeting the Joint Forum Guidelines or that changes to accountability in isolation will have any practical impact on the dissatisfaction being expressed by stakeholders.

We think that accountability measures should properly be part of a package of changes designed to be a circuit-breaker to the current challenges facing OBSI and we address those in Section 6.1.

7.6.5 Detail Assessment

PRINCIPLES	COMMENTS
To achieve the objectives:	
1. The OmbudService should publish, and widely disseminate, an annual report in respect of its activities, including the dispute resolution process.	Guideline is met. The OBSI report is a very good example of EDR public accountability – providing consumer information and a professional standard of performance information, year on year comparisons and financial reporting (unusual in EDR).
2. The OmbudService should also make periodic efforts to consult with stakeholders, including member firms and consumer organizations, to discuss its success in fulfilling its mission and to identify opportunities for improvement.	Guideline is met. OBSI regularly consults with stakeholders including member firms, industry associations, regulators and consumer organizations. It has recently established a formal Consumer and Investor Advisory Council.
3. The OmbudService should enter into an information protocol with the regulators of its member firms describing in a mutually acceptable fashion the nature and extent of information to be provided by the OmbudService to regulators, all having regard to consumer confidentiality and privacy. The protocol should be reviewed and updated to the satisfaction of both the OmbudService and regulators on a regular basis.	Guideline is met. The OBSI has informal protocols in place with the various regulators and regular and ad-hoc meetings are held.
4. The Board of Directors of the OmbudService should meet on a regularly scheduled basis with the DR Committee. The purpose of these meetings will be to discuss:	Guideline is met. The OBSI Board meets annually with the Joint Forum Dispute Resolution Committee.
(a) material operating issues which are specific to the OmbudService in question (b) the governance of the OmbudService (c) the maintenance of consistency of services and harmonization of best practices in dispute resolution and (d) gaps in coverage of consumers of regulated financial services products.	Guideline is met. OBSI has been involved in regular meetings with the Dispute Resolution Committee over the past 4 years to our knowledge - and have comprehensive agendas that cover these and other issues.
5. The OmbuService should publish, and make available appropriate documents regarding its operating structure, including the Terms of Reference, its governance practices and its Standards.	Guideline is met. The OBSI website holds copies of its By-laws, Terms of Reference and a range of other information relevant to this Guideline.

7.7 Third Party Evaluation

GUIDELINE	7	Subject Matter:	Third Party Evaluation

A Objective of the Guideline	To provide a framework in which the structure and operations of the OmbudService will be the subject of knowledgeable, independent third party evaluations on a regular basis to validate the effectiveness of the OmbudService in achieving its purpose and to identify opportunities for improvement.

Assessment

We found that OBSI meets the Objective of this Guideline.

7.7.1 Consumer representatives input

Consumer representatives that we spoke with and received correspondence from expressed support for the process of independent review and support for OBSI's transparency with the previous 2007 Review.

Some expressed concern that the reviews are too limited in scope, constrained by the existing model and rules and should really be addressing the issue of the overall effectiveness of consumer protection in the financial sector.

7.7.2 Industry representatives input

Industry stakeholder groups that we spoke to expressed great interest that the review would not simply run through the checklist of Guidelines – but provide a perspective of the big issues confronted by the sector regarding EDR. There was a particular interest in international comparisons of investment loss calculation methodologies, systems of accountability and the use of competitive choice in EDR.

We also understand – albeit not raised with us directly – that some industry stakeholders were sceptical about OBSI's choice of The Navigator Company to conduct a second independent Review. We understand that they believed we had not been sufficiently critical of OBSI in 2007 and disapproved of our recommendations to expand OBSI's mandate to review systemic issues.

7.7.3 Other stakeholder input

Regulatory bodies and government policy makers similarly expressed a great interest in the international comparisons raised by industry.

7.7.4 Findings

We understand that OBSI had led the way in Canada with its approach to independent evaluation, setting and publishing its own standards before the Joint Forum Guidelines were established.

The conduct of both Independent Reviews have been in the spirit intended, with evident goodwill, serious intent, transparency, proper resourcing and at a standard the equal or better than other EDR schemes around the world.

We understand the consumer representatives ambition to have a wider-ranging review of the model of consumer protection in the Canadian financial services markets, however that is a beast of different scale altogether. No EDR scheme to our knowledge has ever commissioned such a review – that is a task for a wider community – probably only government.

We also note that from our perspective at least, it has been invaluable to be able to build on our experience gained in the first review and to be able to judge progress in this second review. We could not have attempted as in-depth a study if we had been completely new to the organisation and environment.

That said, we think that the next independent review of OBSI should be conducted by a Reviewer with a fresh perspective.

7.7.5 Detail assessment

PRINCIPLES	COMMENTS
To achieve the objectives:	
1. At least every three years the Board of Directors of the OmbudService should appoint an independent third party evaluator to conduct a review of the operations of the OmbudService since the last evaluation (or in the case of the first evaluation, to set a baseline for future evaluations). The DR Committee should be kept informed by the OmbudService of the process of selecting and engaging the evaluator.	Guideline is met. OBSI's previous independent review was concluded in late 2007. It was presented to and considered by the Board of Directors and was published in full on OBSI's website.
2. The OmbudService's governance practices and Standards should facilitate clear and meaningful assessments of its operations as required to determine that the objectives of these Guidelines are being met.	Guideline is met. OBSI publishes its By-laws and Terms of Reference. Prior to agreement of the Joint Forum Guidelines, the OBSI had its own published Standards.
3. The evaluator should have access to all materials and personnel, including the Board of Directors and its minutes.	Guideline is met. In both 2007 and 2011 OBSI has provided the reviewers with fully open access to information, case files, Board minutes and to staff, managers, governors and stakeholders.

4. The evaluator should assess the extent to which the operations of the OmbudService (a) have achieved its public interest purpose, having reference among other things to the Guidelines of the DR Committee, and (b) the working protocols and standards of the Board of Directors of the OmbudService. Where the evaluator concludes that shortfalls exist, the evaluator should make recommendations for improvement.	Guideline is met. Both the first and this Independent Review assessed the OBSI against the specific requirements and spirit of externally transparent guidelines (OBSI's own performance standards and the Joint Forum Guidelines). The reviews also addressed the strategic issues identified through stakeholder consultation and through appropriate comparisons with EDR schemes in other jurisdictions. Both reviews provided recommendations for improvement.
5. The Board of Directors of the OmbudService and the DR Committee should, at their next meeting following the delivery of the evaluator's report, discuss the report and any response to it by the OmbudService.	Guideline is met. The 2007 Review was presented and discussed at a Board meeting and the Board responded to each Recommendation and tracked implementation over the next 3 years.
6. The OmbudService should publish the evaluator's report and any response by the OmbudService.	Guideline is met. The 2007 Independent Review was published in its entirety on the OBSI website and the Board made public its decisions regarding implementation.

8. Progress Report - 2007 Recommendations

The 2007 Independent Review made 24 Recommendations. We were asked to assess progress made by OBSI in implementing those recommendations. They are shown below in the groupings as they were summarised in 2007.

Note also that we do not expect that organisations will necessarily implement all recommendations. First, it is open to the Board and management to disagree! Second, we fully expect that recommendations will be implemented over a digestible period of time. Third, some recommendations may become less urgent or less relevant as circumstances change.

8.1 Scope of operations

2007 RECOMMENDATIONS	PROGRESS
RECOMMENDATION 10 *That OBSI amend its Terms of Reference to allow it to take on systemic investigations and, in consultation with participating firms, develop policies and procedures for these types of investigations.*	Being implemented. Terms of Reference empowered in February 2010. Still developing and refining the approach. A few banking complaint systemic investigations had commenced at time of fieldwork.
RECOMMENDATION 6 *That OBSI continue to look for opportunities to conciliate or mediate early settlements of complaints - and to develop and document a body of knowledge as to what circumstances are best suited to these alternate approaches. Relevant factors are likely to include the amount of money involved, the specificity of the matters in dispute, whether the customer is still open to an ongoing relationship with the firm and the extent of documented evidence readily available. The OBSI's Practices and Procedures Manual should progressively reflect this knowledge.*	Implemented. Revised procedures give greater emphasis to attempting a facilitated settlement.

8.2 Awareness and accessibility

2007 RECOMMENDATIONS	PROGRESS
RECOMMENDATION 2 *That OBSI actively support industry initiatives to oblige participating firms to make consumers aware of their right to access to OBSI - at an early stage.* *Further, that OBSI actively work for an obligation on participating firms to provide OBSI-generated materials to consumers when informing them of their right to access to OBSI.*	Implemented. OBSI supported industry self-regulatory organization (SRO) rule changes (February 2010) obliging greater communication of the avenue of OBSI. Banking services firms similarly obliged under 2010 revisions to OBSI Terms of Reference. Latter not implemented due to strong industry opposition – proposed clauses withdrawn from revised Terms of Reference in 2010.
RECOMMENDATION 3 *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/re-description of the internal function to reduce confusion by consumers between the firm's internal function and OBSI.*	Not implemented due to strong industry opposition.
RECOMMENDATION 1 *That OBSI conduct periodic research to test the availability and accuracy of referral information. This research and the development of strategies to improve referral information might be conducted jointly with industry associations or regulators. Strategies might include joint awareness-raising activities, production of joint referral material or joint education initiatives.*	Partly implemented. Liaison conducted with referral points to improve information and referral processes. Co-publishing brochure with regulators in Ontario. Conducting Investor forums.

8.3 Stakeholder relations

2007 RECOMMENDATIONS	PROGRESS
RECOMMENDATION 11 *That OBSI develop its own program of stakeholder liaison with participating firms - supplementing existing industry-driven forums. These forums would enable OBSI to have greater control over the agendas and to involve more of its own staff.*	Implemented. OBSI now has extensive program of consultation with all key stakeholder groups.
RECOMMENDATION 24 That OBSI continue with and expand its one-to-one liaison activity with participating firms, with a view to continuously improving cooperation and complaint-handling between the two parties.	Implemented on ad-hoc basis. Resource constraints and deterioration in relationship with industry limiting this activity.

RECOMMENDATION 22 *That OBSI periodically consult with participating firms about the types of information that they would like OBSI to share with them and within reason, to make every effort to meet that need.*	Implemented. After consultation with major financial firms, improved transparency of reporting of performance figures, financials.
RECOMMENDATION 23 *That OBSI progressively publish on its website a collection of de-personalized Investigation Reports to be used as a resource by stakeholders.*	Not implemented. OBSI continue practice of publishing de-personalized case summaries.

8.4 Operational improvements

2007 RECOMMENDATIONS	PROGRESS
RECOMMENDATION 4 *That OBSI adopt a meeting approach to reviewing matters for early closure and progressively develop documented criteria for matters suitable for early closure*	Implemented. Revised assessment procedures identify candidate cases suitable for early closure. Quality controls in place to prevent any inappropriate early closure.
RECOMMENDATION 5 *That OBSI amend its early closure letters to clearly explain that early closure was determined on the basis "of the information available". Without falsely encouraging clients, the letters should allow for clients to respond with additional information.*	Implemented. New template letters in use.
RECOMMENDATION 7 *That OBSI continue to develop initiatives to detect and minimize inconsistencies in its approach to complaints-handling between matters with similar facts, between investigators and over time.* *Consistency should be a specific focus of its on-going training program – case based training is likely to assist.* *A program of file reviews – the full file, not just the Report - should be established. This could include regular peer reviews and/or periodic audits of files.*	Partly implemented. Improved quality assurance and oversight processes in place. Investment teams using group discussion reviews of cases for teaching and building consistency. Full case file reviews not yet implemented due to resourcing/workload constraints.

RECOMMENDATION 8 *That OBSI periodically review its processes against the following three tests for clarity and completeness:* • *The client, the participating firm and the OBSI should have a shared understanding of all of the issues under consideration in the complaint;* • *The client and the participating firm should understand in advance, how the OBSI is going to approach the decision-making;* • *The final letter issued by the OBSI should clearly tie the findings back to all of the original aspects of the complaint and to the issues on which the finding or recommendation turned.*	Implemented. Improved standard letters in use, generally more comprehensive letters to the parties observed, improved use of telephone to keep parties up to date. Procedures Manual gives stronger focus to communication with parties.
RECOMMENDATION 9 *That OBSI review its Report writing practices to ensure that:* • *it provides sufficient explanation of key findings and references these findings to what written records establish - the aim should be that participating firms can understand the thinking sufficiently to be able to differentiate decisions, and a client should be able to see that their contentions have been considered and, where they have been discounted, what the basis is for this; and* • *it explicitly references its decisions to its mandate to strive for fairness in all the circumstances and gives reasons why it considers that this decision is consistent with that mandate.*	Implemented. Evidence on files of more active review of letters by team leaders/managers. More supervisory/on-job training effort now evident.
RECOMMENDATION 14 *That OBSI develop tighter office protocols for file management. These protocols should ensure the security of documents throughout the life of the file and facilitate later file review.*	Implemented. Significant improvement in quality and consistency of iSight database entries. Most paper files at higher standard than in 2007 – still some inconsistency.
RECOMMENDATION 13 *That OBSI develop a program of ongoing systematic group-delivered training for staff - to supplement the existing individual needs-driven training. This should include specific skills appropriate to complaint-handling and investigation, and current industry practice*	Implemented. Semi-annual staff meetings used to train and reinforce policy and procedures. More group training feasible in larger scale organisation. Information sessions from industry conducted.
RECOMMENDATION 12 *That in due course, OBSI acquire the technology to enable supervisory monitoring of telephone calls.*	Implemented.

8.5 Timeliness Issues

2007 RECOMMENDATIONS	PROGRESS
RECOMMENDATION 15 *That OBSI develop a program of staff-driven continuous improvement activity aimed at improving its time performance generally and ensuring that its target investigation timeframes are met. Amongst other things, there should include:* • *regular reporting of timeframes to Management;* • *modification of iSight to provide more detailed time usage information;* • *prompt action where an investigation timeframe starts to slip; and* • *looking for opportunities for any parallel processes that may save elapsed time.*	Implementation continuing. Workload surge/resourcing issues have prevented as much progress as would be preferred. File tracking and timeliness reporting much improved. iSight enhanced to record more accurate file progress information and to deliver better timeliness alerts/reporting. Efficiency Review projects being implemented through continuous improvement approach.
RECOMMENDATION 20 *That OBSI actively support initiatives for industry to apply time limits to the internal handling of complaints.*	Implemented. SRO rule changes now permit files that are more than 90 days old to come to OBSI.
RECOMMENDATION 21 *That OBSI publish in its Annual Reports statistics showing the length of time to resolve complaints – both early resolution matters and investigations, starting the clock from the point of acceptance of an in-mandate complaint*	Implemented. Reporting on key performance indicator of 80% of files within 180 days.
RECOMMENDATION 19 *That OBSI review its procedures and standard letters for setting timeframes for response from external parties - with a view to adopting an "after the deadline, we will act" approach.*	Not generally applied due to industry relationship issues. Some templates now refer to OBSI action within set period. A few matters dealt with in this way on a case-by-case basis.
RECOMMENDATION 17 *That OBSI develop system prompts to ensure that clients and participating firms are kept informed of the progress of matters, consistent of course with confidentiality constraints.*	Not implemented as system prompts, however management processes and Procedures are producing improved communication with parties on progress.
RECOMMENDATION 18 *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.*	Not implemented.

RECOMMENDATION 16 *That OBSI periodically monitor complaints acknowledgement timeframes so as to ensure continuing focus on achieving OBSI's 1 business day service standard.*	Implemented. Acknowledgement system and tracking now tighter and performance highly consistent.

8.6 Renewed effort

We were very pleased to see the significant progress made on our 2007 recommendations, and would not ordinarily revisit those that did not succeed. After all it is entirely at the discretion of the OBSI Board which recommendations, it accepts or how vigorously they are pursued. That said, there are a few of the 2007 recommendations that we feel compelled to revisit and recommend them again for consideration by the Board.

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/re-description of the internal function to reduce confusion by consumers between the firm's internal function and OBSI.

We are aware that this met with stiff opposition from the participating firm's ombudsmen, however the problem with consumer confusion over the terminology persists with consumers we called in 2011 every bit as confused as they were in 2007 over 'which ombudsman' they had been dealing with.

We are aware of moves in other jurisdictions to protect the term 'ombudsman', reserving it for those who meet the standard of independence implied by the term. We would not go so far, but remain sceptical about what could possibly be gained by the confusion in terminology. We think it is worth pursuing again.

Recommendation Sixteen.

That OBSI progressively publish on its website a collection of de-personalized Investigation Reports to be used as a resource by stakeholders.

We understand that workload and resource issues have prevented progress on this front, however our experience is that it is a resource that is welcomed by both industry and consumer users of the EDR service and would be an investment that would pay dividends in goodwill.

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.

Again, we understand why cost and priority pressures may have kept this from implementation – however we think that this (and other iSight timeliness enhancements) are worth keeping on the agenda.

9. Summary of 2011 Recommendations

The following is a summary of the recommendations that appear throughout the body of the report.

9.1 Strategic Recommendations

Recommendation One.

Seek endorsement by the regulators and acceptance by industry of the basic framework of OBSI loss calculation methodology.

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.

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.

Recommendation Five.

Establish a limited appeal mechanism for Ombudsman decisions.

Recommendation Six.

That the OBSI Board be restructured to include an independent Chair, a consumer voice and to involve all Directors in all decisions.

Recommendation Seven.

That OBSI establish regulatory oversight of annual funding/budgeting.

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.

9.2 Continuous improvement Recommendations

Recommendation Nine.

That the proposed reform of the OBSI Board be used as an opportunity to clearly communicate to 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.

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.

Recommendation Eleven.

That the OBSI Policy & Procedures Manual, templates and staff training materials be reviewed to 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.

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.

Recommendation Thirteen.

That OBSI refine its procedures and templates to ensure that where relevant, OBSI has satisfied itself that 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.

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.

9.3 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/re-description of the internal function to reduce confusion by consumers between the firm's internal function and OBSI.

Recommendation Sixteen

That OBSI progressively publish on its website a collection of de-personalized Investigation Reports to be used as a resource by stakeholders.

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.

10. Attachment – Investment Methodology

the navigator company

Ombudsman for Banking Services and Investments

Review of Investment Complaints Methodology 2011

This document provides a Review of the methodology used by the Ombudsman for Banking Services and Investments (OBSI) for assessing complaints about Investments.

We were asked to do a separate, more in-depth analysis of the investment complaint methodology because of the great focus that stakeholders were placing on this aspect of OBSI's operations at the time of the 2011 Independent Review of OBSI.

The findings below are summarised in the main Independent Review Report. This document is included as an attachment for completeness.

10.1 Introduction

OBSI's approach to investment complaints (particularly suitability and loss calculation) was the most contentious issue raised by industry stakeholders in our discussions and was recognised as critical by the industry regulators we spoke to. There were also related issues raised by consumer advocates.

This review is informed by our detailed review of a number of OBSI case files, discussions with OBSI staff, discussions with some of the complainants and discussions with representatives of participating firms both about general concerns and specific cases. We have spent some time researching international comparisons but we have confined those comparisons to the United Kingdom, Australia and New Zealand – because we have greater familiarity with those jurisdictions and because they have some important similarities arising from their Commonwealth/common-law histories.

For all those similarities, comparisons remain fraught with difficulty – there are many differences in environment, history, law, regulatory frameworks, and so forth that mean any comparisons must be carefully framed and qualified – in order to avoid misleading. If that makes for a tedious experience for the reader – we apologise in advance.

We have also chosen to deal with the issues raised with us in some detail – deciding that dealing with the allegations comprehensively in one place was worth the price paid in lengthiness.

10.2 Summary of findings

In our enquiries of stakeholders from both industry and consumers, we were confronted with a wide range of strongly held and quite serious complaints about the perceived failings of the OBSI; in particular with respect to its investment complaints methodology.

In response, we conducted additional interviews, sought out examples of illustrative cases, reviewed a number of additional investment case files and researched comparable data from other countries and conducted interviews with senior staff from other countries' external disputes resolution (EDR) schemes.

In short, we found very little to criticise in OBSI's investment complaints methodology and in particular its loss calculation approach. Specifically:

i) OBSI's overall methodology is competent and highly consistent with that used in the other comparable jurisdictions.

ii) There are some differences at a level of detail and in implementation of the methodology:

iii) Some reflect the different consumer demographic, financial market and regulatory framework in Canada – in our view appropriately;

a) The approach to loss calculation (for some cases only) – where OBSI uses a notional portfolio approach and other schemes have tended to use a variety of simpler methods of calculation. The OBSI approach is in our

view superior, providing a fairer and more accurate approach to calculating investment loss; and

b) OBSI's use of trained in-house investment analysts is unique amongst the schemes we researched, however we found this provided a level of expertise and consistency that we thought was clearly superior.

iv) These differences have diminished in the time we have been conducting this review. The Australian FOS has, after consultation and support from industry, recently adopted a new methodology which is virtually the same as OBSI, including the use of notional portfolios where appropriate.

v) OBSI's decision-making in investment complaints is competent and highly consistent with comparable EDR schemes in other countries, if anything producing a slightly lower proportion of decisions in favour of consumers.

We are conscious that these findings may be something of a surprise to stakeholders who have been critical of OBSI, however that is the unequivocal result of our investigation. We were also somewhat surprised that our investigation found so little evidence of the criticisms made with such confidence by stakeholders.

We think that one possible explanation for that is that when stakeholders (industry and consumer) share concerns, we have found that they do so at a high level, typically without sharing the precise details of the case files on which they are basing their conclusions. This apparently consistent experience can actually be quite different once we examine the detail circumstances of the cases involved.

10.3 Industry concerns - findings

Industry stakeholders raised a number of concerns with us, individually and in group discussions. These included criticisms that OBSI is failing to act consistently with Court decisions, that OBSI is going beyond regulatory standards when assessing an investment firm's approach to financial advice, that OBSI is applying hindsight, that OBSI is failing to assign adequate responsibility to the investor, that OBSI's methodology is too inflexible etc.

These criticisms of the OBSI are not of themselves unusual, we have seen most of them levelled by industry-side stakeholders at one EDR scheme or another in past reviews. What is highly unusual in our experience is the wholesale spread of the criticism and the degree of emotional heat behind them.

The section below details each issue raised with us, and what we found.

a) OBSI is going beyond the regulatory standards when assessing whether a firm correctly assessed a clients' investment objectives

b) OBSI is going beyond the regulatory standards in assessing whether recommended investments were suitable

A full review/reconciliation of the OBSI procedures against the regulatory standards was not possible within our remit.

Awareness of regulatory standards

We did note that the OBSI investments investigations policies and procedures referred at a number of places to the applicable regulatory standards set by MFDA, IIROC and the provincial securities regulators.

We also noted that in our interviews with staff around procedures generally and in relation to specific cases, there was a high degree of awareness of the regulatory standards, which were quoted a number of times without prompting.

Our review of case files showed that correspondence setting out the reasoning for a decision frequently quoted from the applicable regulatory standards.

Given that with the diffuse regulatory frameworks in Canada, OBSI staff have a more complex set of regulatory standards to be aware of than most EDR schemes – we thought that the attention paid to these standards was the equal of or better than other schemes we have seen.

Exceptions to the Standards

We did have a couple of examples drawn to our attention where the firm felt that the regulatory standards had not been used as the absolute arbiter for the decision. In both instances, the OBSI had some doubts over the risk-rating that had been applied to a range of investment products - a concern that others in the market had shared. In these cases, OBSI looked 'behind' the risk-rating in the regulator-approved prospectus, found that the recommended investments were not suitable and recommended compensation against the firm.

This is a classic example of some of the difficult decisions that EDR schemes frequently face.

The Firm's view

The firm understandably felt that it had 'played by the rules', had done nothing wrong and that it was unfair for it to be penalised. It felt that OBSI was 'raising the bar' and setting de facto higher standards than the regulator imposes. The firm felt that not consistently relying on the regulatory rules in every instance was a recipe for chaos – that the market needs certainty to operate efficiently.

The Consumer's view

On the other hand, the consumers had also played by the rules, had done nothing wrong either – but had suffered financial harm by being sold investments that they had no way of assessing themselves, that turned out to be higher risk than their tolerance. From their perspective, they had trusted the advisory firm and there was little comfort to be had from the advisory firm pointing the finger at the product provider (which was a related company of the advisory firm) and the regulator who had originally approved the prospectus (but not the risk-rating within).

Each party to the dispute is thinking about fairness from their own perspective. In this case, the OBSI made a call that the firm saw as unfair. Had the OBSI made no compensation recommendation, the consumers would have seen it as unfair.

The nature of EDR

First, we should point out that these two examples (from 2008) aside, we did not see any other cases from the past 12 months where OBSI had gone 'beyond' the regulatory standard. We were satisfied that OBSI was dealing with these cases as exceptions. We did see many cases where OBSI did refer to the relevant regulatory standard and found against the complainant.

Second, the particular facts of the matters that we saw were such that we thought there was an arguable case to consider other evidence, not just the industry practice with respect to risk-rating. (We aim never to second-guess particular decisions, however in the case we describe above, we believe that once OBSI was aware that the risk rating in the prospectus was doubtful, it was obliged to take that into account in its investigation. Regulatory approval of a prospectus is not a considered endorsement of every aspect of the content. While the firm might feel that its advisor was entitled to rely on the document, OBSI is not compelled for that reason alone to ignore relevant evidence.)

Third, we have seen decisions such as these, with similar tensions, made in the dozen or so other EDR schemes that we have worked with. It is infrequent but not extraordinary. EDR schemes are specifically empowered to be flexible in their consideration and to take into account the law, regulatory standards, industry practice and what is fair and reasonable.

This issue highlights something of a misunderstanding of the role of EDR. Many from industry that we spoke to view EDR quite narrowly, as quasi-regulatory, with the accompanying notion that if a firm can produce evidence of having met the minimum standard of documentation or process, then the firm should be automatically absolved of any responsibility. Of course that evidence should be taken into account, but the EDR scheme is supposed to determine what is fair and reasonable in the circumstances – including whether the firm or advisor substantively did the right thing as well as ticked all the boxes.

Political realities

OBSI could consider pacifying industry concerns by adopting 'hard' rules limiting their discretion in areas such as these, but we would not recommend it. The ability to determine "fairness in all the circumstances" is one of the defining characteristics and great strengths of an EDR scheme and it would put OBSI out of step with international EDR to lose those discretions.

We are cognizant that the degree of industry dissatisfaction makes this anything but a 'normal' EDR environment. On the one hand, industry support for OBSI is essential for its continued viability – and on the other hand OBSI must be independent and cannot risk appearing to be pressured into loss of its independence through tactical concessions to industry.

This is another example where some policy signal from the regulators would be of great value to all concerned.

c) OBSI is incorrectly applying a fiduciary standard to the obligation on advisors to act in the client's interest

A number of stakeholders put to us – and have separately put to the OBSI and others – that the standards that OBSI is applying to advisors are those that would apply to fiduciaries (the highest standard of duty to act in the interests of the client). The argument is that absent formal fiduciary responsibility, advisers are only required to provide a reasonable standard of care and to fully disclose.

We found no evidence of this. OBSI has made it clear that they do not rely on fiduciary obligations to assess participating firm conduct. The OBSI Policy and Procedures do not rely on the principles of fiduciary duty or use that language. We did not see any decisions in which OBSI relied on a fiduciary standard. Further, we saw an extensive legal opinion that quoted from the decisions of Canadian Courts specifically rejecting the argument that only those with a formal fiduciary duty could be held to account for the advice they gave clients.

d) OBSI is failing to assign an adequate proportion of the responsibility for losses to the investor

This is a widely held view amongst industry critics of the OBSI – and we were confidently advised by industry stakeholders (and some regulatory staff) that the OBSI approach to assessing consumer responsibility for loss flew in the face of the consistent view of the Courts. We were a little surprised by the assertion, but given the confidence with which it was made, looked more carefully to see whether there was in fact substance to it.

Procedures

We did not see evidence to support the proposition. The OBSI Policy & Procedures Manual clearly requires OBSI staff to assess and take into account consumer responsibility for losses – by taking into account their sophistication and knowledge, their history of investing, their conduct with their investments over time, their behaviour once losses have occurred, the date at which they could or should have acted to mitigate the losses, etc.

What the OBSI procedures do not do, as is advocated by a few industry stakeholders, is to assume that the starting point for assessing loss is a 50/50 split of responsibility between the firm and the consumer.

We cannot understand on what possible basis OBSI could be expected to. By no measure that we can think of, do the consumers who come to OBSI and the firms have equal (50/50) knowledge, experience, expertise or resources. The fact that they approached the firm as a customer almost rules that out by definition. The assured view that a 50/50 default is the consistent practice of the courts is not correct either (see commentary about legal precedent below).

Application

We do not contend that OBSI is faultless in its judgements and no doubt there are examples in which one could legitimately differ with their apportionment of responsibility. What our investigation showed is that the OBSI takes into account consumer responsibility and attempts to assess each case on its merits – without any presumption of responsibility, which is exactly what all other competent financial EDR schemes do.

Further, we found ample evidence of the application of the relevant policy & procedures in the case files. There were a number of files sighted in which the complaint was dismissed because OBSI found that the consumer was fully responsible for their loss and others where a proportion of the losses were deemed to be the responsibility of the consumer.

e) OBSI is applying 20/20 hindsight on decisions made in good faith by the FSP at the time

f) OBSI is applying today's standards retrospectively, ignoring the lower standards that applied at the time of the complaint conduct

These are common complaints that we hear from industry in other jurisdictions and that we sympathize with. We are very aware of the frustration that can be felt by employees of financial services providers who are being asked to remember and justify events of many years ago. They often feel that they made their original recommendation in good faith and along with many others making the same recommendations. It is easy to understand why they feel that they are being judged with 20/20 hindsight.

It is also true that the benefit of hindsight is very difficult to completely correct for – ie. for an investigator or decision-maker to try and put themselves completely in the shoes of the parties to the dispute – at the time of the events.

However, we concluded that there was more than reasonable effort being made to assess complaints based on the standards that applied at the time. OBSI has high quality investment data services such as Bloomberg that enable it to consider what information was available at the time of the recommendation. We saw a number of files where the OBSI and the firms had gone to considerable lengths to find obsolete product information and old staff procedures/guidance that applied at the time of the conduct being investigated.

We also saw a couple of files where the original material could not be found and where best estimates had been made about the prevailing practice of the time. This is clearly not ideal – but difficult to see how any other approach could be taken.

We did not see any files where the correspondence or interview records could be directly faulted for failing to take into account the environment of the times – however it is very easy to see how the sense of being judged with 20/20 hindsight could be fuelled. This is an area where EDR schemes probably need to 'overcorrect' to ensure that this impression is not created. We have made a recommendation to this effect in the main report.

g) OBSI is acting inconsistently with decisions of courts of law

It was put to us by industry stakeholders and some staff from the regulators that we spoke with, that OBSI was acting inconsistently with the clear precedent of Canadian Courts. For example, it was put to us that the Courts do not award damages for opportunity cost; that the Courts' default position was that consumers should bear 50% of responsibility for any investment losses; that the Courts would only ever restore an investor to their pre-conduct position plus a nominal interest award in rare cases; that Courts never applied compound interest, and so forth.

Legal Opinions

We were not in a position to exhaustively canvas the case law. We do not claim sufficient familiarity with Canadian law and in any event that task would, of itself, dwarf the scale of this review. Nonetheless we read legal opinions that extensively canvassed these issues – provided to us by OBSI and by industry stakeholders.

They were enough to persuade us that Canada's case law with respect to investment matters is no different to that we are familiar with in other jurisdictions – ie. the courts draw factual distinctions between individual matters and that outcomes can vary considerably.

OBSI Approach

EDR schemes are deliberately not courts of law, they are not bound to follow case law, but they are bound to take it into account. To the extent that understanding the law and legal precedent is an important part of an EDR schemes consideration, we saw that the OBSI has made appropriate effort to obtain and understand what guidance is available from the Courts.

Although the OBSI does not place the same emphasis on recruiting its investigation staff from the ranks of lawyers as some other EDR schemes we have seen (a sound policy in our view), there is ready access to a number of staff

with legal skills within the organisation and evidence that external legal resources are drawn on when required.

That is not to say that everyone is going to agree with the OBSI view of how any relevant legal precedent should be taken into account. Rather, that is to say that in our view, their approach is reasonable and as we would expect to see in any financial sector EDR scheme.

h) OBSI should never recommend compensation for opportunity cost (earnings foregone)

Perhaps the most extreme view put to us with respect to the OBSI methodology was that at no time should the OBSI award compensation for foregone earnings – ie. opportunity cost. The argument is that any investment is inherently risky and the only legitimate basis for compensation, if warranted, is to restore any actual cash losses – plus some token interest element in those cases where there have been delays in achieving the recompense.

We understand that it can be very frustrating - and for small firms, potentially devastating - to be held to account for investment losses that might outweigh the fees and profits on the original service by many times. However, it seems to us that this is one of the operating risks of providing financial investment services.

The entire financial services sector business model is built on the fundamental principle of the earning value of money over time in different combinations of risk and reward. It is the returns that are being sold to consumers and it would be quite some special treatment if financial services providers could not be held accountable for the consequences.

i) OBSI is inflexibly applying a one-size-fits-all methodology

This proposition was put by a number of stakeholders – with a number of examples provided to us to illustrate how this was impacting.

Role of policy

From the perspective of managing an EDR scheme, the problem of dealing with large numbers of complex complaints with a range of different detail circumstances -– naturally drives schemes toward trying to establish consistent approaches, standardised methodologies and principles-based policy for dealing with difficult issues. It is exactly how insurance companies deal with underwriting and claims, how banks deal with loan approvals and credit card applications and so on.

It is easy to see how that natural management pursuit of repeatable process and consistency can be seen as inflexible and unreasonable – and 'one-size-fits-all'. It is one of the most common complaints against large financial institutions – and against EDR schemes - and at times, in other schemes we have found it to be justified. We found no evidence of inappropriate inflexibility in our review of the OBSI cases.

OBSI flexibility

In our review, we found that the OBSI's approach was anything but inflexible. In fact, if we had a criticism of the Policy & Procedures Manual, it is that it has become quite lengthy – precisely because of the detailed discussion of the many exceptions to the standard processes and procedures. We could not fault the

logic or appropriateness of the exceptions – but we are concerned that it does make it harder to explain to stakeholders.

In the example case files that we reviewed, where there was pressure from the firm for flexibility or to vary from the standard approach – this was frequently not couched as a matter of principle – but presented as a series of tactical arguments in support of lower compensation. To illustrate, we saw correspondence from firms arguing that the standard approach to applying the mitigation date (the date that the consumer should have acted to reduce the losses) should be varied to either a much earlier date or a much later date – in each case with the effect of reducing the compensation that might be payable.

OBSI – as a public interest organisation with a stated objective of being 'fair in all the circumstances' – must approach its dispute resolution from a set of principles and apply these as consistently and fairly as it can. Any variation from the usual approach needs to be for sound, defensible reason.

j) OBSI's methodology for loss calculation is technically flawed (in a number of different detail ways)

Stakeholders made clear that they were unhappy with a number of technical aspects of the OBSI's loss calculation methodology.

There were detailed complaints about the assessment of suitability, how OBSI assessed suitability when the documentation was incomplete or where staff were no longer available for interview, the construction of notional portfolios, the choice of benchmark indices, how portfolio approaches to risk are assessed and so on.

After some thought, we do not propose to buy into a detailed analysis of the pros and cons of each these detail aspects of the OBSI loss calculation methodology. We are not financial analysts. It is an area that does not want for opinions – and the addition of ours at this level of detail would be of little help.

We will however make some general observations that may help to set these controversies in context.

Reasonable methodology

First, to a pair of consultants of ordinary intelligence, with some experience of financial sector EDR, with some background in consulting to financial institutions, in financial sector regulation and with the benefit of having read over 60 OBSI investment case files during our last two reviews, the methodology is logical and reasonable. If there are technical flaws that we missed, they will be at the margin, are clearly having negligible impact overall and certainly capable of being refined over time at a policy level.

Consistent with international practice

Since our Canadian fieldwork in February, we have revisited our notes from past reviews of other EDR schemes and interviewed staff from financial ombudsman schemes in Australia, New Zealand and the United Kingdom. There are differences of scale (the UK is much bigger and New Zealand much smaller), of decision-making mechanisms (the other schemes have binding powers, Australia uses tripartite decision-making panels) and of calculation methodology (no other scheme uses in-house investment analysts to benchmark and calculate losses).

While it differs in some details from the approach adopted by other EDR schemes, it is highly consistent overall (the more so with the new FOS Australia

approach) and to the extent that it differs, it is in order to produce fairer, more accurate and more consistent outcomes. For the past couple of years, this has mostly actually been to the benefit of financial services providers.

Skills and resources

From our observation, OBSI's analysts are qualified, externally trained, competent, credible, supervised and provided with the resources and tools to do justice to the task of loss calculation. In this respect, OBSI is well ahead of other financial sector EDR schemes we have reviewed.

More complex

The downside of the OBSI method is of course, it is more complex and there is much more to argue about. The immediate temptation is of course to simplify – but we think this should be approached with great care. Investments are not a simple matter and simplification should not be at the cost of fairness.

Inconsistent feedback

When we examined the letters of disagreement from firms, relating to specific case files, we found that many of the detailed arguments put by different firms against the OBSI methodology are at odds with each other and some are not even consistent over time involving the same firm.

By way of example, some firms object outright to the use of notional portfolios, whereas other firms have internal notional portfolio methodologies that are quite similar to OBSI's and their objection is to the parameters used. A couple of stakeholders argued that they supported the use of notional portfolios – but only where they had the effect of reducing the compensation payable – certainly not if they had the effect of increasing compensation payable.

10.4 Consumer advocate concerns - findings

From the consumer side, the issues raised with us about the OBSI were less about specific aspects of the methodology and more about a perception of a lack of independence, the conflict of industry funding and representation on the Board and a lack of power in dealing with financial institutions. The concerns that related to investment complaint methodology included a too-narrow interpretation of jurisdiction, 'tame' acceptance of unfair industry practice, failure to recognise the imbalance of power and knowledge between consumers and sophisticated financial institutions etc.

These consumer-side criticisms are also not unusual of themselves. What is different in the Canadian setting is the pervading cynicism about financial sector regulation, with some consumer advocates tending to lump the OBSI in with the regulators as weak, disorganised and corrupted by the political power of Big Money.

It is our observation that consumer advocates in Canada are less well resourced; less organised and have much less direct political influence than in other jurisdictions we are familiar with. This is no doubt a factor in some of the resignation and cynicism that we encountered.

Below, we summarise our findings on the issues put by consumer advocates about the OBSI Investment Loss methodology.

a) ***A too-narrow interpretation of its jurisdiction – ruling valid complaints as outside the Terms of Reference***

Consumer advocates that we spoke with raised concerns that the OBSI was unfairly excluding complaints that should have been dealt with. Our investigation of case files included some examples of complaints that were ruled out of jurisdiction – and we sought out a few additional files for completeness.

We did not find any evidence of exclusion of complaints that was not consistent with the OBSI's Terms of Reference and in general found their approach to jurisdictional issues to be consistent with other financial EDR schemes we are familiar with. That is not to say that the matters did not involve some perceived injustice – rather that EDR, like any such mechanism cannot hope to accommodate every matter that comes before it.

b) ***Dismay at 'tame' acceptance of unfair industry practice – simply because it is widespread***

This issue often arises in consumer criticisms of EDR schemes, most often in relationship to banking and insurance practice. This is one of the natural limitations of EDR schemes, in that they are not regulators, they are there to resolve disputes, and while their capacity to challenge common, but unfair industry practice is not zero – it is limited; by resources, by expertise and often by their Terms of Reference.

We did not find any evidence of 'tame' acceptance of industry practice in the OBSI's handling of investment complaints. In fact, much of the current industry criticism of the OBSI is precisely because it is refusing to bow to industry pressure.

n.b We discuss the same issue of acceptance of industry practice in relation to the OBSI's approach to banking complaints in the main Report.

c) ***Failing to recognise the imbalance of power and knowledge between individual consumers and large, sophisticated financial institutions***

Our review did not find this criticism justified. The Policy & Procedures Manual sets out in some detail the requirement for staff to explain the processes to consumers and to keep them informed along the steps of the process.

The OBSI process also requires staff to provide consumers with some guidance when they are presented with a settlement offer by a firm (discussed in some detail in the main Report).

From our review of case files and telephone interviews with consumers who had complaints with OBSI, the staff are explaining and assisting consumers in a way that is consistent with the Procedures and this is much appreciated by consumers.

There was some evidence that member firm staff were not comfortable with the balance struck and felt that OBSI staff had lost some degree of independence and were acting too much as consumer advocates. Most acknowledged that to some extent the OBSI had to provide more assistance to consumers – because of the knowledge disparity – but nonetheless felt that the OBSI sometimes 'went too far'.

Elsewhere in this report, we discuss the importance of the OBSI maintaining its position as an independent organisation – especially with industry.

d) "Blaming the victim" by unfairly discounting compensation for consumer responsibility for some part of the losses

As mentioned in discussion elsewhere in this Report, we did find a number of cases where the OBSI had found the consumer should bear all or some responsibility for the losses incurred.

We did not see any investment complaints decisions where we felt that responsibility was being unfairly ascribed to consumers or that were inconsistent with the Policy & Procedures Manual. We also found that this aspect of OBSI practice was consistent with what we have observed at other EDR schemes.

e) Being 'bullied' by firm pressure into accepting reduced offers of compensation

This is a criticism which EDR schemes must be particularly sensitive to. OBSI, like all EDR schemes, looks for opportunities for facilitated settlements in investment complaints, to improve efficiency for both OBSI and the firms and to speed up resolution of matters for the consumer. In an environment of increasing numbers of settlements, it is very easy to be criticised for 'settling low'.

During our review, we did not find settled case files that gave us concern about OBSI advising consumers to accept reduced offers of compensation, however we are aware that there are currently several OBSI recommendations where the firm involved has simply refused to comply with the OBSI recommended compensation. (The deterrent of having the refusal made public is clearly not working - a matter that we understand is currently in discussion with regulators).

In these situations, OBSI is of course, compelled to inform the consumer of the firms' refusal, and that even if OBSI 'names and shames' the firm, the consumer may receive no compensation at all. In these cases, understandably, there is a high likelihood that the consumer will accept an offer to settle that is less than OBSI considers fair and reasonable under the circumstances.

This degree of non-compliance by firms is clearly unsustainable for OBSI, and some basis for a return to compliance has to be found. In the meantime, the issue highlighted for us that it is not always evident from a review of the file what was taken into account in considering an offer for settlement from the firm.

When a recommendation for compensation is made, the investigation report includes a detailed analysis of the case and the factors that were taken into account in arriving at the loss compensation figure. A settlement offer however, may come at any point in the investigation process – perhaps before a detailed analysis has been completed and written up, or a different amount may be offered after the initial OBSI estimate. In these cases, the reasons for OBSI's assessment of its reasonableness are not always documented.

As a matter of staff training and quality assurance, it would be good practice to ensure that some note is entered on a file or case record as to the OBSI view of the reasonableness of the settlement offer. A recommendation to this effect is included in the 2011 Independent Review.

f) Failure to deal with widespread investment-related industry failings as systemic issues

The OBSI has only recently (February 2010) acquired the powers in its Terms of Reference to conduct systemic investigations (this was a recommendation of our

2007 Review). It is too early to form a view as to whether it is effectively using these powers. We did see the first (banking) cases being referred as systemic investigations, so we can confirm that some progress is being made – but cannot provide an assessment of its effectiveness as yet.

10.5 Comparisons

10.5.1 What is consistent - investigation

To begin with what is consistent with other jurisdictions; all EDR schemes that we canvassed follow essentially the same steps in investigating complaints about investments.

As appropriate to the particular circumstances of the matter and the service being provided, the EDR scheme will determine if the firm took appropriate steps to understand the client's needs, to research potential investments, to recommend investments that properly matched the investor's needs and risk/reward tolerance, to adequately explain the risks and terms associated with the investments, the potential for loss, any financial benefit to the adviser/product supplier, etc.

The EDR scheme will investigate to make sure that any implementation was in accordance with the agreed plan, that any changes or re-investments are matched to the investor's needs, that there is periodic re-assessment of the investor's circumstances and so forth.

10.5.2 What is consistent – decision-making approach

Whilst the performance standards that firms will be held to are not precisely comparable across jurisdictions, nor is it reasonable to expect them to be precisely the same in every individual circumstance, all EDR schemes must make their decisions according to their view of what is fair in the particular circumstances, taking the various standards (the law, good industry practice, self-regulatory codes and regulation, internal procedures) into account, but not completely bound by a narrow interpretation of any one of them.

For investment complaints, all EDR schemes follow the principle of 'making whole' – ie. where awarding compensation, as nearly as possible, returning the consumer to where they would have been but for the impugned conduct. All schemes also take into account earnings foregone, however this is done in different ways and to different degrees by different schemes – see below.

10.5.3 What is different – local retail investment market

When making comparisons, it is important to note that the OBSI operates in the North American environment where there are proportionally many more unsophisticated, low-to-medium net worth individuals directly participating in the retail investment market. This undoubtedly affects the nature of investment complaints and the degree of reliance upon investment advisors in the Canadian marketplace relative to other jurisdictions. In Australia and New Zealand and we understand in the UK, typically consumers in that economic demographic would

be much more reliant on government pensions and employer-provided saving/pension plans (superannuation).

10.5.4 What is different – local regulatory practice

Because EDR schemes are obliged to consider the law and industry practice in their decision-making, inevitably they evolve to reflect their particular regulatory environment. Like all schemes, the OBSI's methodology reflects local regulatory practice in the Canadian investment and advice industry.

Canadian self-regulation

In a self-regulatory environment such as Canada's, committees of industry practitioners such as brokers, advisers and dealers are closely involved in developing regulatory standards. By comparison with most government regulated environments, these standards then tend to reflect a level of confidence in what should be the correct technical approach and will tend to be expressed in the specific, practical terms that industry needs to guide its everyday operations.

Possibly because of this history of reliance on self-regulation, by comparison with other jurisdictions, from our observation of case files there seems to be much more of a 'lingua franca' of specific terminology, standards and processes in use in the Canadian investment and advice industry.

For example, the key elements of Know Your Client forms are more consistent, terminology for risk/reward assessment is more consistent and investment product risk-ratings are in common language and use similar scales.

That is not to say that there are not 'grey areas' or considerable differences of interpretation in Canada – all the usual debates and disagreements are in full evidence.

Principles-based regulation

In other jurisdictions we are familiar with, government policy-makers and regulators set the regulatory requirements of industry conduct – in consultation with industry. For the last couple of decades, these have increasingly been set at a higher, principles-based level. When set by government regulators, there is typically far less confidence in what the correct technical approach ought to be, less robust consultative mechanisms for ironing out competing views of what should be specified as best practice and a greater focus on what might be enforceable in a court of law.

This approach to standards tends to permit competing approaches, retreat from controversy and settle for what is defensible in the more politically charged world of government-imposed regulation. As a consequence, in recent years, regulatory requirements are more typically expressed as higher-level statements of principle, with an emphasis on the inarguable and the easily verifiable such as staff qualifications, disclosure, documentation, adherence to system and procedure, insurance cover and so forth – leaving firms some flexibility for their specific practices.

Impact on EDR

This difference at the EDR scheme level means that the OBSI, in Canada's largely self-regulatory environment, is able to be more technical and precise in evaluating whether a customer's complaint is justified – than is typical for EDR schemes operating in other jurisdictions. A typical Know Your Client form

provides specific requirements; a client's risk appetite can be expressed to a standardised scale; and a recommended investment or portfolio of investments can be more precisely checked for risk-rating and suitability.

As a generalisation, in other jurisdictions, the EDR schemes are more likely to rely on whether there was adequate disclosure and adherence to procedure (whatever it may be) and less likely to be in a position to check the specifics of a KYC process, the risk-rating of particular investment products and their suitability.

(n.b. Our observations should not be taken to be some endorsement or criticism of either self-regulation or government regulation. Both have their particular characteristics, both can be done well and badly – and in practice, they must work in concert with each other.)

10.5.5 What is different – EDR decision-making model

The New Zealand and UK EDR schemes that cover investment complaints are both Ombudsman schemes – where the powers of the scheme are vested in a single person and then to a degree, delegated to more junior Ombudsmen and investigatory staff. In these schemes, consistency of decision-making is achieved through normal office-based management systems of training, oversight & supervision, quality control and escalation for approval. This is exactly as the Canadian OBSI operates.

Australian FOS and Panels

The Australian Financial Ombudsman Service (FOS) is a little different. As a recent merger of several antecedent schemes, it maintains a mix of decision-making models. Its Banking Division operates as an Ombudsman scheme, equivalent to the OBSI. Its Investments and Life Insurance Division, which handles investment complaints, (and its General Insurance Division) directs its complaints according to their dollar value and complexity to either single decision-makers (Adjudicators) or to a tripartite Panel. There are multiple panels, each made up of an industry representative, a consumer representative and an independent Panel Chair. Usually, the Panel Chair is a retired judge or very experienced senior lawyer.

Panel strengths include that they tend to engender stronger stakeholder support through the presence of industry and consumer representatives. This support is also strengthened by the greater appearance of independence. It is also true that the Panels provide for fresh perspectives when new members are appointed and they have been quite innovative at times.

On the other hand, they are much more expensive, not only for payment of the multiple decision-makers, but for the degree of double and triple-handling that must occur in the preparation of cases and the hand-offs along the process.

In our observation, there is also somewhat less consistency in both approach and decisions. Panels operate independently from the EDR organisation and are not supervised or subjected to the same consistency mechanisms that an Ombudsman scheme applies. The result is that each Panel tends to develop its own approaches and emphases in decision-making – and as a generalisation, they tend to be more legalistic in their treatment and expression of decisions than other schemes. At FOS, 60-80 page Panel decisions are not unusual.

10.5.6 What is different – loss calculation

Although at an overall level, all schemes take the same basic approach, this is the area of greatest difference between the OBSI approach and the approach that has been historically taken in the three comparative schemes we examined.

As set out in its consultation paper of 2011, OBSI uses a number of ways to establish loss. The difference in methodology that has become controversial is that once the investigator has established that the consumer was wrongly invested, one of the approaches that the OBSI may take is to construct a notional portfolio of what would reasonably have been the investments if the consumer had been suitably invested. The actual historical performance of that notional portfolio is compared with the actual portfolio's performance over the same time period to determine the loss, if any.

The other schemes, in slightly different ways, have taken a simpler approach. Once satisfied that the consumer was wrongly invested, the schemes may themselves calculate the loss, may require the participating firm to propose a loss calculation (often a version of the OBSI notional portfolio concept) or, in some cases simply add an annual interest component (as a proxy for the earnings foregone) to the original capital invested to arrive at the loss.

The basis for the annual interest rate used by the other schemes has varied over time. Some use an investment-related standard such as the central bank's long-term base rate plus one percent; other decision-makers have used a consumer-related inflation figure such as the consumer price index. Still others have simply picked a figure that seemed reasonable at the time – such as 5%.

Recent change – towards OBSI's approach

Subsequent to our fieldwork, the Australian FOS completed an extensive consultation and redevelopment of its loss calculation methodology and – we understand with industry support - has moved to a methodology which is now very close to the OBSI approach, including the use of notional portfolios in some cases. This is designed to eliminate what they describe as 'market losses or gains' which otherwise occur if any compensation does not take into account general market movement during the period in question. (Note that we have not had an opportunity as yet to see the new FOS methodology applied.)

Who does the calculations

A significant difference in practice is that the OBSI uses its own in-house analysts to assess investment risk, to construct notional portfolios and to estimate the loss. Other schemes usually rely on their investigators to calculate loss or to assess a calculation provided by the participating firm. In some cases, the EDR scheme may require the participating firm to pay for independent actuarial advice to verify their calculations of loss.

We understand that the current approach was adopted by the OBSI several years ago to improve consistency and efficiency. It also addressed previous criticism from industry of inconsistency of detailed loss calculation as between individual investigators. Our observation is that the OBSI structure of using in-house analysts is producing significantly more expert and more consistent approaches to loss calculation than we have seen elsewhere. We also note that it is an approach that has been used by the Australian FOS for banking complaints, where more complex calculations such as loan reconstructions are performed by an internal expert seconded from industry.

Dates, duration of loss periods

Loss calculations are of course, significantly impacted by the effective start date for the losses, the end date or date of mitigation and the degree of responsibility accorded the consumer. All the schemes we are familiar with, including OBSI, use similar principles and practices for determining these variables.

Differences in outcomes

It is important to note that the OBSI approach (and we expect, the new Australian FOS approach) does actually produce different outcomes. Simple logic suggests that in a falling market (such as the past few years), the OBSI methodology would have generally produced lower compensation for investors than they would have received using one of the simple interest methodologies.

Our review of recent investment complaint files confirms this. Often, investors were compensated for losses but were ultimately awarded less than the full amount lost (leaving aside redemptions/further investments) – reflecting the fact that the market fell and most investors lost money over that period. Under the alternative methodologies, they would have received a windfall gain.

Equally, in an investments market that is rising and out-performing basic bank rates, the OBSI methodology (and the new Australian FOS approach) would be more likely to produce a higher level of compensation than the simple interest approach. This would again place the complainant investor in a position more consistent with most investors who would also have been reaping higher rewards over that period. (Of course, investment complaints are much less frequent in a rising market – again limiting possible impact on participating firms.)

Summary

If the difference were to be expressed at a level of principle – it would be that OBSI places greater emphasis on arriving at the most accurate analysis of the loss, taking into account comparable investment market performance during the period of loss – whereas the other schemes use a number of ways to keep the calculation process simpler.

10.6 Conclusions

After exhaustively considering the specific industry and consumer criticisms that were put to us about the OBSI methodology and the alternatives in use in some other jurisdictions, we conclude that the OBSI methodology is superior. It goes to greater effort to be fair; it is transparent; it more accurately reflects actual investment performance; it is the most expert in terms of investment analysis and our review of files found that it was being applied in a reasonable and defensible way.

Of course, this is not to say that all OBSI decisions are perfect – any scheme will always have decisions where a somewhat different view could quite reasonably have been reached. Rather, our conclusion is that OBSI's general approach to investment loss is based on sound logic and provides a fair and transparent platform for well-founded, consistent decision-making – which we think is all that can be asked of an EDR scheme.

10.7 Complexity

One downside to OBSI's methodology is that its comparative complexity makes it difficult to explain to those new to the issues or not financially literate. At the other end of the knowledge spectrum, because it is technically based, and transparently uses investment elements such as notional portfolios, product and sector benchmarks and risk-ratings, OBSI's methodology is open to disagreement and criticism at a number of levels of detail.

In short, without broad-based industry goodwill and/or stronger regulatory support – in the Canadian setting, it is high maintenance. The current tensions illustrate graphically why other EDR schemes have in the past opted for simplicity at the expense of some fairness and accuracy. It is interesting to observe that FOS in Australia has apparently received industry support for what is essentially the OBSI approach – which is what we would logically have expected.

10.8 Consultation

After the completion of our fieldwork, OBSI released a discussion paper on its methodology – aimed at achieving some level of consensus about how the methodology should work.

At the time we supported this process – hoping that some informed discussion and refinement of the methodology where warranted, might achieve some level of sustainable acceptance for the approach. We thought this was critical, in particular if it turned out that the regulators were not willing or not able to form a unified independent view that could be imposed on participant firms.

We were however sceptical about whether genuine common ground could be found. The stances taken were quite at odds and neither industry nor consumers were showing any signs of looking for a workable, mutually acceptable compromise resolution.

We have not yet had the opportunity to fully analyse the stakeholder input to the OBSI consultative paper, however our quick review left us with little fresh cause for optimism.

10.9 Political realities

We think it would be unfortunate if the OBSI were forced to abandon their existing approach. We think it is a genuine attempt to be as accurate and as fair as possible, it is world-leading in its commercial sophistication and we think it is actually delivering fairer outcomes for industry as well as consumers. In general, we think the other EDR schemes we compared would be better served to adopt the OBSI approach than the reverse.

We understand however that an industry-funded ombudsman scheme, in particular one without binding powers over its members, can only operate with the support of its constituent stakeholders. Absent a clear regulatory signal to the contrary, industry's continued criticism and pressure may ultimately leave OBSI with nowhere to go but to make a series of backward-stepping compromises. We would be surprised if emboldened industry critics would be satisfied with only one or two.

Our own view is that the methodology is only a 'lightning rod' for industry criticism. The real bone of contention is industry's discomfort with the evolving role and independence of OBSI. Fuelled by that discomfort and in an environment with low OBSI authority, a limited consumer voice, limited regulator engagement and oversight, the

debate over the methodology has been allowed to grow out of all proportion. Absent a change in the fundamental structure and in particular the regulatory framework for OBSI, we are sceptical that any technical concession on methodology will purchase any lasting 'peace'.

11. Attachment - Review Process

11.1 Documents reviewed

We examined a range of documents provided by OBSI and some provided by stakeholders. These included:

i) OBSI Annual Reports

ii) OBSI Statistical Reports

iii) OBSI Policy and Procedures Manual

iv) OBSI Investment Suitability Policies

v) OBSI Board Agendas and Minutes

vi) OBSI CEO Reports to the Board

vii) OBSI Board and Director Assessments

viii) OBSI Strategic Plan

ix) OBSI Lean Efficiency Diagnostic Report (Efficiency)

x) Several legal opinions relating to OBSI policy and methodology

xi) OBSI Newsletters

xii) OBSI Press Releases and press clippings

xiii) OBSI Fairness Statement

xiv) OBSI Brochures, website

xv) Correspondence from participating firms to OBSI

xvi) Correspondence with Regulatory Authorities

xvii) Board paper summarising progress on implementation of 2007 Review Recommendations

xviii) OBSI Corporate By-Laws and its Terms of Reference

xix) Report of Independent Review of CLHIO

xx) OBSI Consultation Paper on Investment Suitability and Loss Calculation

xxi) Published formal Reviews and commentaries on consumer and investor protection in Canada

xxii) Investment complaint methodologies from EDR schemes in UK, Australia and New Zealand

11.2 Stakeholders consulted

i) Several participating firms

ii) Investment Industry Association of Canada (IIAC) and Investment Funds Institute of Canada (IFIC) including representatives of complaints managers and internal Ombudsmen

iii) Investment Industry Regulatory Organization of Canada (IIROC

iv) Mutual Fund Dealers Association of Canada (MFDA)

v) Canadian Bankers Association including representatives of complaints managers and internal ombudsmen

vi) Representatives of the Department of Finance

vii) Representatives of the Financial Consumer Agency of Canada (FCAC)

viii) A group of Investor Advocates, some individual and some representing advocacy organisations

ix) A number of individual consumer advocates

x) Members of the OBSI Consumer and Investor Advisory Council

xi) Directors of the OBSI Board

11.3 Case files reviewed

We reviewed 17 investments and 11 banking case files in detail and reviewed particular aspects of another 8 files. Where we were able to reach the consumers involved, we interviewed them by telephone.

We also reviewed several additional files that were suggested to us by stakeholders as illustrating examples of their criticisms.

11.4 Comparison research

In the course of researching international comparisons, we were able to interview senior staff from the UK FOS, the Australian FOS (Banking and Investments Divisions), New Zealand Investments and Savings Ombudsman, the New Zealand Banking Ombudsman, and policy staff from the New Zealand Department of Consumer Affairs.

11.5 Consultants experience

To the extent that this makes a difference to the credibility of this report, the consultants from The Navigator Company have some experience with consulting, advising and reviewing a number of external disputes resolution (EDR) schemes.

They include:

a) Canadian OBSI

b) New Zealand Investments and Savings Ombudsman

c) Energy and Water Ombudsman of NSW

d) Telecommunication Industry Ombudsman

e) Financial Ombudsman Service (FOS)

f) Public Transport Ombudsman of Victoria

g) Credit Ombudsman Service Limited

h) Insurance Brokers Disputes Resolution Service

i) Credit Union Disputes Resolution Centre

j) Victorian Department of Public Transport

k) Banking & Financial Services Ombudsman

l) Insurance Ombudsman Service Ltd

m) Law Institute of Victoria

n) Financial Industry Complaints Service

o) Financial Services Complaints Resolution Scheme

The consultants also have an extensive background in consulting to financial sector commercial firms on risk, compliance and governance and in financial sector regulation, having consulted to:

a) Australian Securities & Investments Commission

b) Hong Kong Securities & Futures Commission

c) NSW Independent Commission Against Corruption

d) Australian Taxation Office

e) Australian Bankers Association

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