

**DEBORAH HART**  
CONSULTING

# BANKING OMBUDSMAN SCHEME TE WHARE RAMA TŌKEKE

INDEPENDENT REVIEW 2024





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# 1. INTRODUCTION

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This report is the result of an independent review undertaken by Deborah Hart Consulting Ltd on the Banking Ombudsman Scheme | Te Whare Rama Tōkeke (BOS). BOS is an approved scheme under the Financial Service Providers (Registration and Dispute Resolution) Act 2008. As such a review is required every 5 years and is provided to the Minister of Consumer Affairs. The Participation Agreement, which sets out the legal arrangements between banks and BOS, also requires such a review.<sup>1</sup>

The review is conducted in the context of the BOS Terms of Reference (TOR). See section 18.

BOS was established 32 years ago as an independent service to help consumers to resolve problems with their banks. It is one of four financial dispute resolution schemes, but the only one utilised by banks.

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# 2. EXECUTIVE SUMMARY

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It is the finding of this review that BOS well meets its strategic objectives to prevent and resolve complaints. It also meets the standards expected of a financial dispute resolution scheme. It lives its values of Manaakitanga – Respect; Ararau – Understanding; Kairangi – Honesty, Tauutuutu – Collaboration; and notably delivers Auahatanga – Excellence.

BOS is a modern ombudsman scheme that makes a valued and credible contribution to a fair banking sector.

Whether they were consumers, consumer representatives, banks, regulators or from other schemes, submitters were often highly complimentary of Banking Ombudsman Nicola Sladden and Chair Miriam Dean CNZM KC. There were also plenty of accolades for the BOS team more generally.

It is a feather in its cap that BOS is increasing the accessibility of its service, as shown by the demographic data on who is using BOS.

All recommendations from the last review have been actioned to the satisfaction of this review.

## Accessibility

BOS has been successful in helping to ensure that banks promote its services and that bank customers and the public know about BOS and its services. Over time its service has become more accessible to younger people and more closely reflective of the New Zealand population it serves. BOS is a scheme that is easy to use, including for those people who are vulnerable.

The review finds the following could make BOS more accessible:

- Permitting BOS to investigate complaints against payee banks.
- Amending its formal guidance to staff to reflect its usual practice where a significant loss is involved that bank offers and information about options are in writing.
- Ensuring the BOS whistleblowing service is more visible.
- Permitting complainants to waive the amount of their claims in excess of the jurisdictional limit.
- Considering the appointment of a community outreach officer.

## Independence

There is an appropriate separation between the board and the operational team, along normal governance and management lines.

The board sets strategy and appropriately ensures oversight that the strategy is operationalised. Operations are appropriate to deliver strategy.

Whilst the review finds the scheme's independence is currently sound, it considers that independence at the governance level should be safeguarded by a suite of rule changes that will bring greater independence to the board and its decision-making, and a greater perception of independence as well.

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<sup>1</sup> Participation Agreement, 1 January 2021, section 4.1.15.

## Fairness

BOS has a rigorous and credible approach to reaching its decisions and observes natural justice. It follows its own rules in making decisions that are fair and have regard to the law, relevant codes and good banking practice. It uses its fairness jurisdiction appropriately. BOS decision-making is fair in both processes and outcomes. Its treatment of parties is respectful and empathetic, which is particularly evident with those who are vulnerable.

The review finds that how BOS explains its fairness jurisdiction could be improved by amendments to BOS rules and operational guidance to clarify how it determines good banking practice and makes its decisions.

## Accountability

BOS provides excellent information to banks, the public and its board, in ways that are appropriate to the audience it is targeting. It sets its costs and fees reasonably under a process that is both fair and transparent. A recent levy increase of 25 percent was necessary with the large increase in the BOS workload especially as disputes increase in number and complexity.

Improvements to the way BOS undertakes complaints about itself are recommended for consideration.

## Efficiency

BOS provides a highly efficient service, fit for purpose quality assurance processes and its organisational design is appropriate to deliver on its strategic objectives.

## Effectiveness

BOS is adept not only in its dispute resolution work, but its ability to pinpoint the causes of complaints and share its insights and expertise widely. In so doing it well meets its strategic objectives to resolve and prevent complaints.

A recommendation to improve the searchability of its case notes and quick guides will super-charge the usability of these valuable resources.

BOS rules are reflective of modern ombudsman practice. The amendments to the rules suggested by this review will further strengthen its service.

There is a cultural capability programme that is delivering for staff and the scheme itself. A recommendation to ensure the tikanga-based dispute resolution service is supported by policies, procedures and promotion will help ensure its success.

Even given significant challenges, BOS is on track to be adequately resourced with a levy increase to fund additional resources needed to manage an increased workload. Its staff is motivated and dedicated, with BOS providing a happy and supportive work environment.

## 3. RECOMMENDATIONS

This review makes the following recommendations:

### Accessibility

1. BOS should amend its TOR so it can deal with complaints against recipient banks, provided banks amend the Code of Banking Practice to institute rules relating to recipient banks, which BOS should encourage them to do.
2. BOS should amend its formal guidance to staff to reflect its practice that where a significant loss is involved, bank offers and information about options are in writing, unless there are good reasons not to do so.
3. BOS should develop strategies to increase the visibility of its whistleblowing service within banks.
4. BOS should consider a rule change to enable claimants to waive the amount of their claims in excess of the jurisdictional limit.
5. BOS should consider the appointment of a community outreach officer.

### Independence

6. To improve independence, the following amendments should be made to the Constitution:
  - a. Amend clause 10.15.2 to decrease the percentage of board members needed to pass a resolution from 75% to 60%.
  - b. Amend clause 9.4 to increase the number of directors from five to six, the extra appointee being a consumer representative or an independent appointee.

- c. Amend clause 10.3 to ensure that at meetings the BOS board chair must always be an independent appointee or if not available, a consumer representative.
- d. Amend clause 10.8 to ensure the quorum of meetings must include two directors who are consumer representatives or independent appointees.

### Fairness

7. BOS should amend its rules and operational guidance to reflect that BOS may seek expert advice from a range of experts as it thinks fit.
8. BOS should amend its rules to change “principles of good banking practice” to “principles of good industry practice”.

### Accountability

9. BOS should consider improved ways to deal with complaints about itself.

### Effectiveness

10. BOS should improve the searchability of its case notes and quick guides.
11. BOS should plan and implement policies, processes and promotion of its tikanga- based dispute resolution service.

## 4. REVIEW APPROACH

### 4.1 Terms of reference

The review's main objective is to examine, and make recommendations about, how effectively and efficiently the scheme operates to achieve its strategic objectives and the principles listed in section 52(2) of the Financial Service Provider (Registration and Dispute Resolution) Act 2008, namely, accessibility, independence, fairness, accountability, efficiency and effectiveness.

The independent review measured BOS against its strategic framework 2023-2026. The strategic framework has two parts - to prevent complaints and to resolve complaints. In both areas, BOS is guided by its values of manaakitanga: respect; ararau: understanding; kairangi: honesty; tauutuutu: collaboration; and auahatanga: excellence.

The review was asked to also identify any improvements to help BOS achieve its aim of being a modern ombudsman scheme that makes a valued and credible contribution to a fair banking sector.

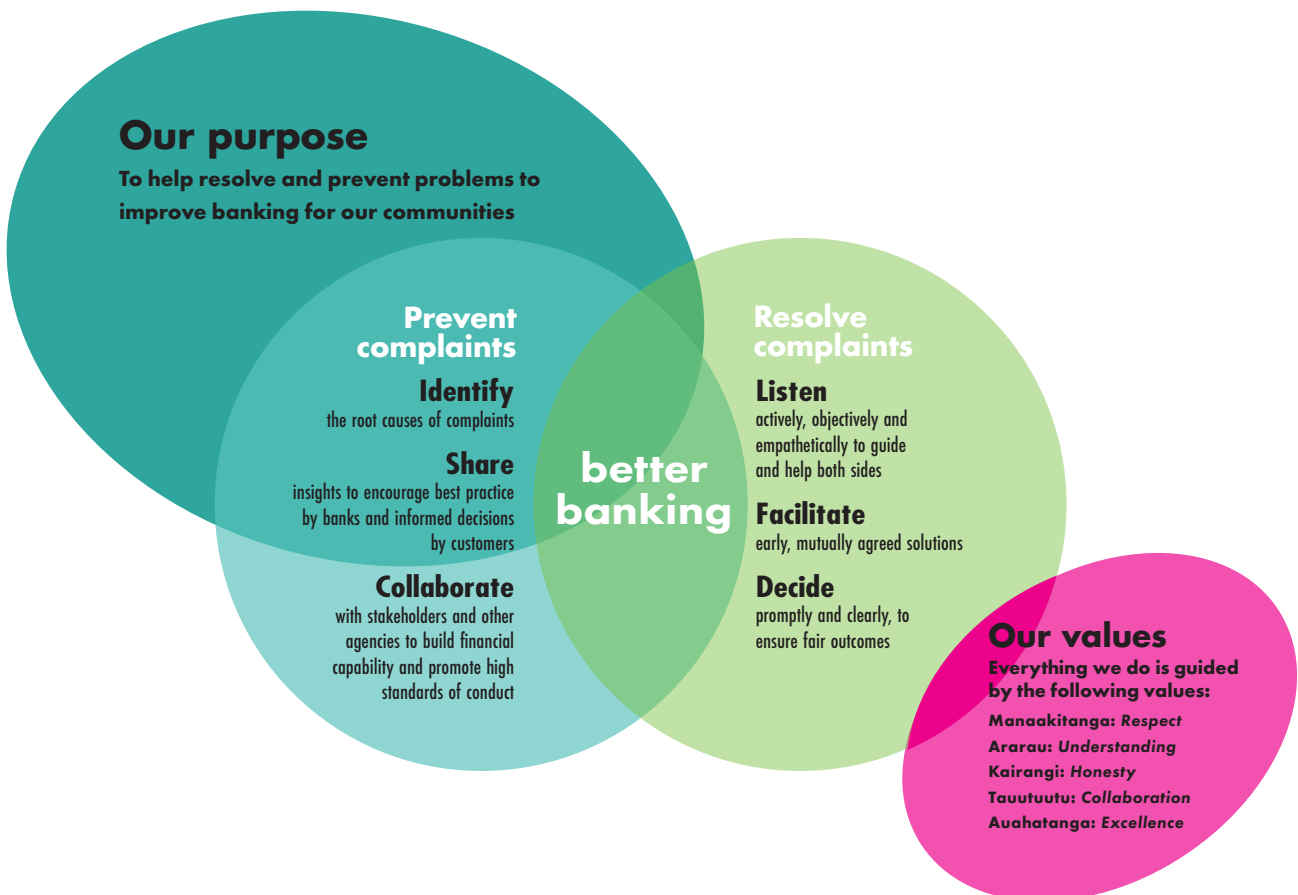
The review has not acted as an appeal authority from any of the Banking Ombudsman's decisions.

The full TOR is in section 18.



Te Whare  
Rama  
Tōkeke

### Strategic framework 2023 – 2026



## 4.2 Process

In mid-May 2024 the review was initiated with the engagement of Deborah Hart Consulting Ltd. Shortly thereafter, an issues paper was developed which was released publicly, including on the BOS website. At the same time a public survey was released.

The issues paper invited written, oral and survey responses. Information about the review's consultation can be found in section 13 of this report.

A desk-top review of documents and materials was conducted. Information about the documents and materials considered can be found in section 14 of this report.

Those contacted and interviewed included complainants, consumer representatives, bank representatives, other dispute resolution schemes, government institutions, including regulators, and BOS staff and board members.

A sample of 60 files, 30 closed complaints files and 30 closed disputes files were chosen at random by BOS for the review to consider. The list was built by assigning a random number (the function in Excel is '=RAND()') to each case and then sorting the list highest to lowest based on the random number, for complaints and disputes files. The top 60 were provided in a list. From this list, a representative sample of both the complaint and disputes files were selected by the review. The files were considered by the review in detail and complainants in these files were contacted and offered an interview. None wished to avail themselves of an interview, but at least 3 complainants responded to the online survey.

A register of complaints received against BOS, from October 2014 to 5 July 2024, was provided to the review. A random sample of these files were reviewed.

A draft report was issued to the Banking Ombudsman for comment on 2 August 2024, prior to finalisation of the report and release.

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## 5. BACKGROUND

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### 5.1 The New Zealand context

This review comes at a time of an increased caseload for BOS. The economic downturn has put significant pressure on many people. Banks are dealing with more customers in hardship. Under pressure, consumers and banks can experience more fractious relationships, which also result in increased complaints to BOS.

Many submissions revealed a changing attitude to rights in New Zealand generally. Submitters often observed that more people are willing to complain. Banks and BOS said more people exhibit challenging behaviours.

Scams and fraud cases have risen sharply. These cases are increasingly sophisticated, luring more people into suffering financial loss and/or data breaches. The number and complexity of these cases has markedly increased the caseload for BOS. They have also led to increased public scrutiny of banks and of BOS as to how they handle cases. Some of the media attention on BOS has been negative.

There is a changing regulatory environment, which has already resulted in changes for BOS and no doubt BOS will need to manage more change still.

The Financial Service Providers (Rules for Approved Dispute Resolution Schemes) Regulations 2024 commenced during this review on 18 July 2024. The regulations harmonise the jurisdiction of the four financial dispute resolution schemes and provide that:

- The limit for direct financial loss increases from \$350,000 to \$500,000.
- The maximum compensation payment for inconvenience increases from \$9,000 to \$10,000.
- The time for a bank to investigate a complaint before BOS can consider it decreases from 3 months to 2 months.
- The timeframe for a customer to refer a complaint to BOS remains 3 months but, if justified by exceptional circumstances, the timeframe can be extended by up to 9 months.

The Financial Markets (Conduct of Institutions) Amendment Act 2022, (CoFI Act) introduced a new regime to require financial institutions to comply with a fair conduct principle when interacting with and providing financial services to consumers. Financial institutions are required to have due regard to consumer interests and assist them in making informed decisions; to act ethically, transparently and in good faith; and not to subject consumers to unfair pressure or tactics or undue influence.

The CoFI Act requirements will come into force in March 2025 and bring the law much closer to the standards applied by BOS, which bases its decisions on what is fair, while having regard to the law, codes and principles of good banking practice.

There are calls for the overhaul of the fraud reimbursement framework. On 29 February 2024 the Minister of Commerce and Consumer Affairs, Hon Andrew Bayly wrote to the banking industry urging it to take “immediate and concerted action to enhance ... processes and protections to better safeguard ... customers from scams and fraud.”<sup>2</sup>

In particular, the Minister wanted: the introduction of a confirmation of payee system; an update to the Code of Banking Practice; an investigation of a voluntary reimbursement scheme; and work on further steps banks could undertake to protect customers from fraud and scams. This now sits with the New Zealand Banking Association (NZBA), but the Minister’s expectations are clear that he expects action. In relation to confirmation of payee, the Minister says it should have a “... roll-out commencing by the end of this year”; the updating of the Code within a year or he will consider a mandatory code; and he requested an update on a voluntary reimbursement scheme by September 2024.

There are two select committees investigating banking: the Finance and Expenditure Committee and Primary Production Committee. They have launched a joint inquiry into banking competition.

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<sup>2</sup> Available at <https://www.mbie.govt.nz/dmsdocument/28096-strengthening-bank-processes-and-consumer-protections-against-scams-open-letter-to-the-new-zealand-banking-industry-pdf>.

On 23 July 2024, the Government introduced the Customer and Product Data Bill, which aims to enable open banking and increased competition in the sector.

On 20 August 2024, the Commerce Commission released its final competition report into personal banking services.<sup>3</sup> It noted limited competition in retail banking. It commented on a lack of innovation and noted surprise at “the limited investment by the major banks and Kiwibank in upgrading to modern core banking systems and the low prioritisation given to this.”<sup>4</sup> It noted the sustained high levels of profitability in the banking sector and that some consumers are not well served by competition alone.

A review into financial dispute resolution is currently underway so the Government can:

“... understand how well New Zealand’s financial dispute resolution system is working for consumers and whether there are opportunities for improvements.”<sup>5</sup>

It is considering ease of access and effectiveness through improved oversight and accountability but is not considering amalgamation of the four financial dispute resolution schemes.

## 5.2 How BOS works

BOS has two primary functions: firstly to resolve and secondly to prevent complaints in banking and thereby improve banking in our communities.

Complainants contact BOS and someone from the Early Resolution Service (ERS) then deals with them. Sometimes the contact is just an enquiry; for example, the person needs to be referred to another dispute resolution service or they have contacted BOS with a banking inquiry rather than a complaint. The ERS provides referrals; for example, providing a telephone number of a bank’s complaints’ team or a formal referral to that team. It also provides advice and guidance including advising on bank obligations, BOS publications or other agencies that are better suited to address the concern. Banks and bank customers can both be provided with BOS guidance. The ERS may actively try to resolve any issue working with the bank and the bank customer.

Cases that are unable to be resolved by the ERS are escalated to the dispute stage. An investigator, usually new to the case, is appointed. More information is often sought, and the investigator may continue to try to facilitate a resolution. BOS will provide an initial view of the case. If it cannot be resolved, BOS provides the parties with its likely decision - a preliminary decision, and an opportunity to provide comments or further information. The Banking Ombudsman or the Deputy Banking Ombudsman (Resolution), under a delegated authority, then considers comments or further information provided in response and makes a final decision. A decision by BOS is binding on the bank, but the complainant is not bound by a decision and may continue to pursue their complaint via other avenues.

The BOS caseload largely comprises enquiries and complaints, rather than disputes. Although, as already noted, the number of disputes – which take the most time and resource – are increasing.

Consistent with being a modern ombudsman service, and given the equal footing that prevention is given alongside resolution, prevention is a significant workstream for BOS. The Deputy Banking Ombudsman, Prevention spearheads this work.

While some prevention work benefits both customers and banks, like the complaints dashboard, there are generally two parts to the prevention work undertaken by BOS: initiatives aimed at customers and those aimed at banks. Both are equally important.

Work to help consumers includes regular presentations to community groups and educational resources like regular social media posts, quick guides and case notes.

Work focused on banks includes regular monthly prevention insights, quarterly reports to bank CEOs and complaint workshops and training.

<sup>3</sup> Personal banking services final competition report, available at [https://comcom.govt.nz/\\_data/assets/pdf\\_file/0019/362035/Final-report-Personal-banking-services-market-study-20-August-2024-Amended-27-August-2024.pdf](https://comcom.govt.nz/_data/assets/pdf_file/0019/362035/Final-report-Personal-banking-services-market-study-20-August-2024-Amended-27-August-2024.pdf).

<sup>4</sup> Personal banking services final competition report – Executive summary, available at [https://comcom.govt.nz/\\_data/assets/pdf\\_file/0018/362034/Executive-summary-Final-report-Personal-banking-services-market-study-20-August-2024.pdf](https://comcom.govt.nz/_data/assets/pdf_file/0018/362034/Executive-summary-Final-report-Personal-banking-services-market-study-20-August-2024.pdf), p.4.

<sup>5</sup> Effective financial dispute resolution, available at <https://www.mbie.govt.nz/assets/effective-financial-dispute-resolution-discussion-paper.pdf> p.8.

## 6. ACCESSIBILITY

### 6.1 Principle

The scheme makes itself readily available to customers by promoting awareness of its services and by ensuring its services are easy to use. In particular:

- Its outreach and awareness raising activities are adequate and appropriate.
- Its services are easy for all consumers, including vulnerable consumers, to use.
- It takes sufficient steps to ensure banks adequately inform customers about its services.

### 6.2 Findings

BOS has been successful in helping to ensure that banks promote its services and that bank customers and the public know about BOS and its services. Over time its service has become more accessible to younger people and more closely reflective of the New Zealand population it serves.

BOS is a scheme that is easy to use, including for those people who are vulnerable.

BOS stands out as the most recognised dispute resolution scheme. It has been actively working with other dispute resolution schemes and community organisations to ensure that vulnerable consumers can access banking and dispute resolution services. Customer satisfaction with BOS is notably high.

The review finds the following could make BOS more accessible:

- Permitting BOS to investigate complaints against recipient banks.
- Amending its formal guidance to staff to reflect its usual practice where a significant loss is involved that bank offers and information about options are in writing.
- Ensuring the BOS whistleblowing service is more visible.
- Permitting complainants to waive the amount of their claims in excess of the jurisdictional limit.
- Considering the appointment of a community outreach officer.

### 6.3 Information about BOS services

BOS has an obligation to promote the scheme.<sup>6</sup>

The 2019 review recommended that BOS consider producing and publishing more videos about its service, more advisory tools such as instructional videos and more in-person clinics around the country that can be attended by mentoring groups and individuals.

BOS has taken the recommendation of the last review and furthered its work to promote its services. It now encourages the use of the service to bank customers through many channels. These include its website, social media, general media and numerous outreach activities with presentations around the country.

Two areas of work deserve special mention. The first is social media where BOS has significantly increased its presence. BOS is on TikTok, Facebook and Instagram to proactively target different audiences. It posts regularly. Case notes that are thought to be of most educational value are turned into short videos for social media posts.

Secondly, last year BOS created the television series *You've Been Scammed* with Nigel Latta. The series showed how people could easily be defrauded or scammed, while also highlighting BOS and its services. It featured the Banking Ombudsman. There is more discussion about this series in section 11.4.

Banks also have an obligation to promote the scheme:

“Each participant acknowledges that it has its own internal complaints procedures and undertakes to ... publicise such procedures to customers and to inform customers of the details of the Scheme...”<sup>7</sup>

In the last review, it was recommended BOS develop strategies to increase its visibility to consumers through banks. In response it established and delivered a visibility project. Understanding the changing ways that people intersect with their banks, in 2021 BOS changed the participant criteria so that banks not only needed to promote BOS services in brochures at branches, but they were also required to ensure BOS was visible on their websites, apps and on internet banking sites.

<sup>6</sup> Banking Ombudsman Scheme Terms of Reference, rule 1.6.

<sup>7</sup> Participation Agreement, Section 6.1.

BOS undertook an audit of bank websites the following year. That audit confirmed inconsistent approaches, but most banks provided easy-to-find information about BOS. Banks that did not adequately promote BOS services were advised of actions needed to remedy the situation.

Consumers need to know about BOS when they have a complaint. BOS surveys of complainants' shows that there are varying levels of visibility given to BOS and its services by banks when complainants most need to know about it. BOS has worked to ensure visibility through banks and now each bank must ensure their customers know of the service, both generally and when customers might most need it.

## 6.4 Ease of use

### 6.4.1 Generally

BOS is free to consumers as it is entirely funded by participating banks.

There is an increase in the cases coming to BOS, apart from the 2021/2022 year when there was a slight reduction in cases compared with the previous year. In the 2023/2024 year BOS managed 6,106 cases.

Contact is still predominantly through the BOS 0800 number, but there are a range of other ways that complainants can contact BOS, underscoring the ease of initiating a complaint.

It is easy to make a complaint in writing or simply by talking to a staff member. The complaint process is described in te reo Māori, sign language, Chinese (simplified), Chinese (traditional), Hindi, Korean, Punjabi, Samoan and Tongan. Services are also available for those who are deaf, hearing impaired, blind or speech impaired via a 24-hour service. Interpreters are available throughout the process if necessary.

The ERS team members are welcoming and make it comfortable for complainants to talk with them. The ERS Manager said that there is a policy that the ERS team tries to contact people by phone, so that it is more of a "human process".

The BOS complainant survey feedback confirms the resolution team is empathetic and highly responsive.

Typical responses included:

"The person I spoke to was warm and understanding at a very difficult time"

"Quick, efficient and very easy to talk to"

"I got a real person on the phone immediately who listened carefully to my situation and gave me good advice"

95% of complainants surveyed said it was easy to use the service.<sup>8</sup> In the same survey 88% of complainants said staff listened and understood their concerns, and 89% said BOS staff were professional and competent. Overall satisfaction was 83%.

## How people contact BOS

	2019 - 2020	2020 - 2021	2021 - 2022	2022 - 2023	2023 - 2024
<b>Email</b>	20.47%	18.56%	20.34%	26.13%	26.55%
<b>Facebook</b>	0.42%	0.06%		0.18%	0.02%
<b>In person</b>	0.13%	0.04%	0.06%	0.07%	0.03%
<b>Letter</b>	1.06%	1.21%	0.99%	0.91%	0.93%
<b>Online complaints form</b>	22.94%	24.21%	24.17%	24.01%	25.91%
<b>Telephone</b>	51.88%	48.71%	48.12%	46.75%	44.28%
<b>Web chat</b>	3.09%	7.21%	6.32%	1.95%	2.28%

When the cases escalated to the dispute level, not unexpectedly the survey results showed a decrease in satisfaction with BOS, but approval was still high: 78% said it was easy to use the service and 70% said BOS was professional and competent. Overall satisfaction for complaints and disputes was 81%.

FinCap told the review that financial mentors find, “BOS is efficient and effective in helping them navigate what escalations at banks or other pathways to resolution are available ...” There are publicly available resources to help complainants including information sheets, which explain how BOS operates and what it can achieve for bank customers, case notes and quick guides.

### 6.4.2 Vulnerability

Anyone can be vulnerable at points in their life and all kinds of circumstances make people vulnerable when they interact with a bank and with BOS. Many complainants that BOS deals with are vulnerable, either generally or for a specific period.

The rise in cases coming to BOS as a result of fraud and scams means an increase in the number of complainants who are vulnerable, especially those complainants who have lost life-changing amounts of money due to criminal activity.

The last review recommended that BOS consider formalising its current process and procedure as regards vulnerability with an assessment tool to check for vulnerability, policies and procedures. Pleasingly, it launched a vulnerability policy and assessment tool in mid-2022. Understanding that vulnerable complainants need assistance both at the start and throughout the process, the guidelines say,

“It is important to ensure existing vulnerability is not exacerbated by our process and that consumers are supported to pursue complaints and participate in our process.”<sup>9</sup>

BOS now has a fast-track process in the ERS to expedite the complaints process for vulnerable consumers. In addition, it has separate guidance for suicidal and depressed complainants. It also provides staff training in vulnerability.

The Deputy Ombudsman, Resolution, described extra check-ins that she and other staff make with someone who appears to be vulnerable and make more time for them if necessary. For example, if there is an offer from a bank which is put to a complainant to accept within a timeframe, and the timeframe lapses without the bank having heard from the complainant, BOS staff ensure the offer does not simply expire. Instead, they try to contact the complainant to help them and to provide extra time as necessary. Staff also work with complainants’ support people and advocates. The ERS Manager explained that staff are alert to help complainants generally and when necessary, they are referred to social or support services. In the review of cases, the consideration and extra care that BOS staff take with those who are vulnerable was evident, and impressive, in correspondence and discussions with complainants.

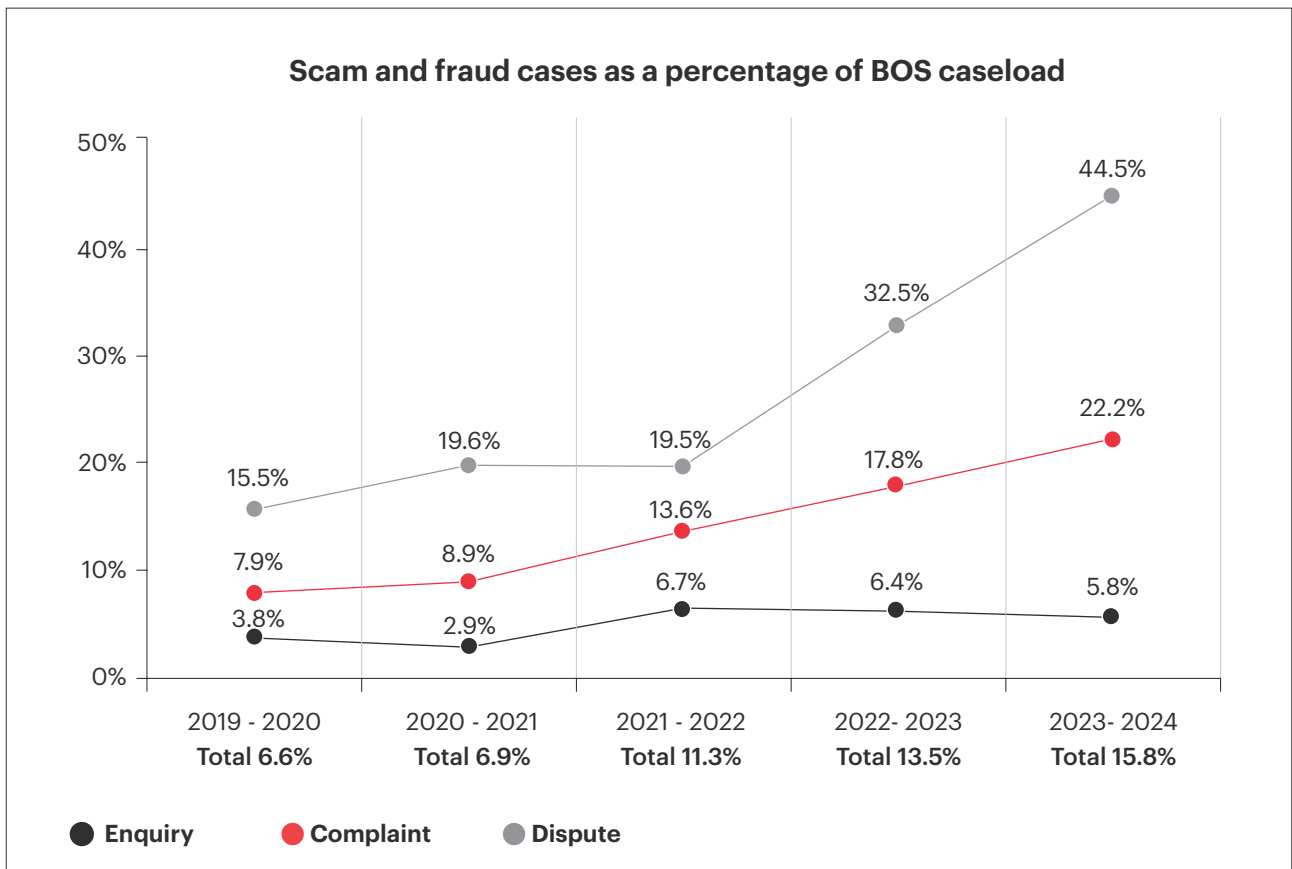
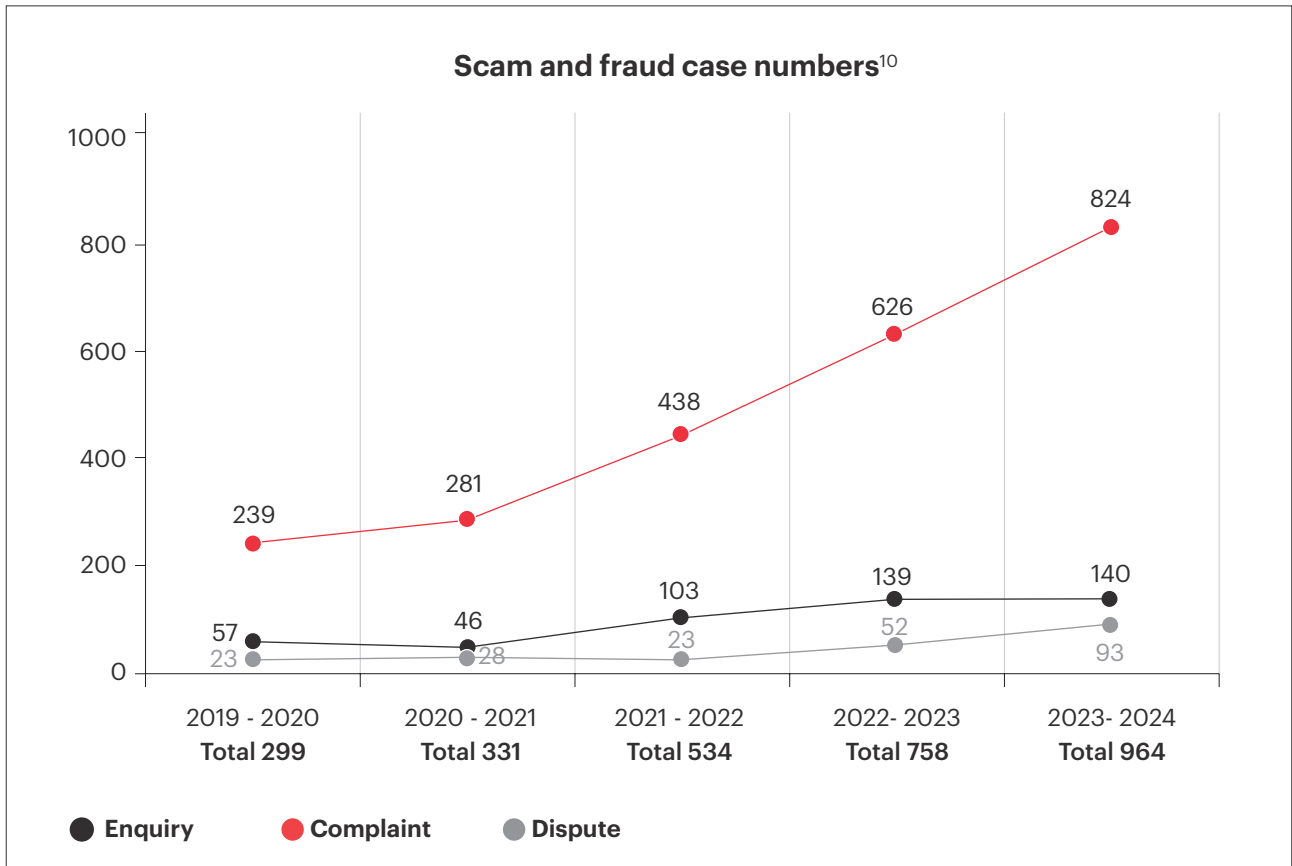
Vulnerability is taken into account in decision-making by BOS, as is made plain by its Practice Note: Fraud and Scams. It talks about vulnerability or financial hardship making it fair and reasonable for there to be cases for compensation of some sort from a bank.

### 6.4.3 Fraud and Scams

Year on year there are increases in fraud and scam cases for both complaints and disputes. Whereas in 2019–2020 these cases were 8% of all BOS cases, they now account for nearly 23% of the BOS caseload. In addition, there is more complexity in many of these cases, than was the case previously.

Financial Year	Total Complaints + Disputes	Fraud/scam volume	Fraud/scam %
<b>FY 2019-20</b>	3073	245	8.0%
<b>FY 2020-21</b>	3214	287	8.9%
<b>FY 2021-22</b>	3251	440	13.5%
<b>FY 2022-23</b>	3551	635	17.9%
<b>FY 2023-24</b>	3750	842	22.5%

<sup>9</sup> Banking Ombudsman Scheme, Vulnerability Guidelines, 30 June 2020, p.1.



<sup>10</sup> Each case is captured in the data as an enquiry, complaint and dispute, as necessary. For example, of the 93 disputes in 2023-2024, 75 were also complaints that year. Adding the total complaints (824) and disputes (93), the total is 824+93-75=842 unique cases, (as reported in the table of the preceding page of this report).

The review heard from a few submitters about the need for BOS to be more accessible for victims of fraud and scams by:

- Providing more support – covered in sections 6.4.2 and 8.7.
- Allowing complainants to waive amounts in excess of the jurisdictional limits – covered in section 6.5.
- Providing advocacy services – covered in section 6.8.
- Using its fairness jurisdiction more widely – covered in section 8.
- Ensuring BOS can investigate recipient banks – covered hereunder.
- Re-opening of cases – covered hereunder.

#### 6.4.3.1 Recipient Banks

The review heard from one complainant that in his view, his case included red flags for both the sending and receiving banks, yet there could only be a partial investigation, to investigate the actions of the sender bank, where the complainant had their banking relationship.

BOS does not currently have the power to consider a complaint about a recipient bank. To have their complaint considered, the complainant must be the person directly interacting with the bank. The relationship between the complainant and the recipient bank is not able to be investigated, a position which also applies in Australia. This frustrates cases being pursued when a complainant believes that a recipient bank has acted inappropriately.

Consumers rely upon banks, both their own and recipient banks, to act appropriately – fairly, lawfully, abiding by relevant codes and good banking practice. It seems incongruous to this review that under the current TOR, BOS is unable to consider the actions of recipient banks and whether they have exercised due care. This is especially the case as recipient banks are all members of BOS.

BOS informed the review that it supported appropriate steps so it could handle complaints about recipient banks.

The first bar to BOS dealing with complaints against recipient banks, however, is ensuring implementation of an applicable code or legislation setting out obligations on recipient banks to non-customers. In the review's opinion, banks should agree to allow their actions as recipients to be considered by their independent complaints' resolution scheme. BOS suggested, and the review agrees, a voluntary code change could be made as to the conduct of recipient banks, perhaps based on the code developed in the United Kingdom.

BOS could then seek an amendment to its TOR to permit it to deal with complaints against recipient banks. It is recommended that such changes be actively pursued by BOS.

#### Recommendation

1. BOS should amend its TOR so it can deal with complaints against recipient banks, provided banks amend the Code of Banking Practice to institute rules relating to recipient banks, which BOS should encourage them to do.

#### 6.4.3.2 Written decisions and reopening of cases

It was put to the review by two submitters that any offers of settlement or views on a scam or fraud case should be put into writing by BOS and it should allow for the reopening of cases at a later date.

Generally, offers by banks and any initial BOS views are put into writing to complainants for their consideration.

Once BOS has reviewed all information, it will come to an initial view. The usual practice is that BOS writes to the parties advising them of the bank's obligations and how BOS thinks the case fits into those obligations, together with options for the complainant to consider. At this point, BOS also invites the complainant to talk with them. The review understands that most often complainants take up the offer to talk, following which BOS confirms next steps in writing. That may be to accept an offer, end the case or BOS to proceed to a preliminary decision and possibly a final determination.

On occasion, there will be a conversation to share BOS views and provide options on next steps. One of those options is that complainants can ask BOS to formalise their views in a preliminary decision. BOS staff advised, and it was confirmed on a review of cases, it always confirmed a decision of the complainant in writing in any case. When complainants receive this confirmation, they can ask further questions or decide they in fact want to proceed to a decision.

Cases that involve large losses can be very hard on complainants. They often require extra support. BOS understands this and generally provides it in a variety of ways; however, it would be prudent in these cases to ensure that the complainant's options for pursuing the complaint further are always provided in writing, even by way of a brief email, unless there are good reasons not to do so; for example, if the complainant does not want written communications or if the case is very simple without a lot at stake. The review is satisfied that this is BOS's usual practice. However, that practice is not reflected in formal staff guidance, and it should be.

## Recommendation

2. BOS should amend its formal guidance to staff to reflect its practice that where a significant loss is involved, bank offers and information about options are in writing, unless there are good reasons not to do so.

It was put to the review by two submitters that BOS should not close a fraud or scam case when a view has been given and accepted by the complainant, and that complainants should be able to return and ask for a formal decision.

It is in the interests of both customers and banks that there is finality in cases. In the review's opinion there is not a strong argument to allow cases where complainants have been given the opportunity to present their cases and make decisions, and which have been considered by BOS, to have their cases reopened. This includes cases when the complainant has accepted BOS views. The review is satisfied that BOS provides extra time and support for those who are vulnerable – see section 6.4.2.

### 6.4.4 Whistleblowing

An agreement with BOS and New Zealand Bankers' Association, (NZBA) established a whistleblowing service in March 2021. All members of NZBA can avail themselves of the service. The service was established to provide "a safe and independent channel for reporting workplace wrongdoing."<sup>11</sup> The service:

"... enables current and former bank staff, contractors, secondees, directors and volunteers to report actual or suspected wrongdoing through a channel that is independent of the bank concerned."<sup>12</sup>

The service is free for whistleblowers. The NZBA funds the service. It is confidential and is available to bank employees, service providers, volunteers and others. It does not include concerns from bank customers.

BOS does not investigate; rather it forwards complaints to banks for investigation. The procedure includes follow-up after reporting to the bank and report-backs to the whistleblower. It also collects and shares trends from whistleblowing reports received through other whistleblowing services. It aims to identify trends to support good banking practice.

BOS has appropriately established the whistleblowing service distinct from its complaints service. It has a separate website and it is staffed by employees who are not part of the resolution team.

BOS is required to promote the whistleblowing service to banks.<sup>13</sup> It does this through a website and quarterly meetings with banks. Banks promote the service through their own channels.

In the time the service has been in existence six incidents have been reported to it. The service has therefore had a modest uptake. This lack of cases has flow-on effects for the service's efficacy: it is hard for BOS staff to provide a consistent service when there are so few cases; and it is difficult to identify any trends to assist better banking practice.

There may be several reasons for the limited use of the service, including that those affected have other avenues of complaint through internal whistleblowing services and external services provided by some banks.

BOS provides a reliable, independent service that provides a safe haven for whistleblowers. There is an opportunity to better promote the BOS whistleblowing service. The review was advised promotion was always intended to take place in the second phase of the service's establishment, once the proper systems were in place to support it. That has been achieved. Therefore, the review recommends that BOS now better ensures the visibility of the whistleblowing service.

## Recommendation

3. BOS should develop strategies to increase the visibility of its whistleblowing service within banks.

### 6.5 Reach of the scheme – financial cap

The recently increased financial jurisdiction of \$500,000 will make the services of BOS more accessible. The BOS TOR state,

#### "Outside scheme's powers

3. The scheme cannot consider a complaint about financial services a bank has provided, or failed to provide, if:
  - 3.1 The complainant could reasonably claim, more than \$500,000 (plus GST, if any) for direct loss and direct incidental expenses, or more than \$2,600 (plus GST, if any) per week where the claim relates to a product that provides regular payments (see Claims and compensation)

<sup>11</sup> Banking Ombudsman Whistleblowing Service Guide, July 2023.

<sup>12</sup> Operational Guidelines, Whistleblowing Service, May 2024, p.3.

<sup>13</sup> Ibid.

3.2 The claim is part of a bigger claim or is related to another claim the complainant has made, or could reasonably make, and the total amount of the claims for direct loss and direct incidental expenses is more than \$500,000 (plus GST, if any), or more than \$2,600 (plus GST, if any) per week where the claim relates to a product that provides regular payments<sup>14</sup>

Banks and complainants can agree to allow BOS to consider a complaint that exceeds the jurisdictional limit,<sup>15</sup> but the complainant cannot unilaterally agree to waive the excess amount and nor can BOS. This is similar to the rules of other dispute resolution schemes including Financial Services Complaints Ltd, (FSCL) and Insurance and Financial Service Ombudsman, (IFSO). However, the Disputes Tribunal, Financial Dispute Resolution Service (FDRS),<sup>16</sup> and the United Kingdom Financial Ombudsman Service (FOS) allows claims of any amount, but limits awards.

It was submitted in relation to fraud and scam cases that the jurisdictional limit of the scheme is problematic because:

- 1) These cases often involve an amount in excess of the jurisdictional limit.
- 2) By virtue of the fraud or scam, the complainant can have a significantly lessened financial ability or no financial ability to take the matter to court. Allied with this is the necessity in some cases to simply take what the complainant can get, rather than nothing.

It was put to the review that for large disputes, the arguments against allowing a complainant to waive the excess of their claim for the purpose of ensuring BOS has jurisdiction were:

- a) BOS could be used to facilitate discovery and perhaps a practice-run before court proceedings, in a cost-effective manner, as the complainant does not have to settle or accept a decision from BOS and could still issue court proceedings.
- b) There could be an influx of cases that involved sums over the jurisdictional limit.
- c) Courts are better able to deal with cases involving larger sums of money.
- d) Cases involving larger amounts were not envisaged to be part of a consumer dispute resolution scheme.
- e) It is unnecessary. One submitter advised that they were surprised that the jurisdiction had been so markedly increased and it was now "ample".

The review considers that the benefits of allowing the waiving of the amount in excess of the jurisdictional limit outweigh the arguments against it. In this review's judgment the scheme should be available for all claims that are within the jurisdictional limit or can be made to be within that limit, to increase the accessibility of the scheme and provide greater access to justice. The 2014 independent review of BOS came to a similar conclusion, recommending that BOS amend its TOR so customers could waive a limited amount in excess of the jurisdiction.

In coming to this determination, this review notes:

- i) Any awards will still be within the jurisdictional limit.
- ii) There is significant benefit to both banks and complainants to have disputes settled promptly and cost effectively, regardless of the value of the underlying disputes.
- iii) BOS has significant expertise in banking disputes. Plus, the notion that the courts are better suited to deal with banking cases involving larger amounts is not necessarily true, as the complexity of a case is not intrinsically linked to its financial quantum.
- iv) Court action is time consuming and delays in court proceedings is well documented.<sup>17</sup>
- v) Court proceedings are significantly more expensive and would be prohibitive for some complainants. There is an assumption that complaints involving amounts over the limit are economic to take to court. That assessment is better made by the complainant. But it would not be unreasonable for a complainant to elect to avail themselves of the BOS service, rather than be forced into expensive court litigation.
- vi) If a complainant used the scheme as a practice-run, there is no certainty that a court would deliver the same result as BOS, particularly as it has a broader mandate than the court to consider principles of good banking practice and fairness in decision-making. That in itself would be some disincentive for practice-runs; and a bank could make an offer to settle, thereby avoiding court altogether, if it thought the case was strong as evidenced by the BOS process. In that case, the complainant should be able to get a settlement or a decision within the BOS jurisdictional limits.

<sup>14</sup> Banking Ombudsman Scheme Terms of Reference, 18 July 2024, rule 3.

<sup>15</sup> Banking Ombudsman Scheme Terms of Reference, 18 July 2024, rule 4.

<sup>16</sup> Financial Dispute Resolution Scheme Rules – November 2021, rule 10.2.

<sup>17</sup> See Wayfinding for Justice, December 2023, available at <https://www.justice.govt.nz/assets/Documents/Publications/Wayfinding-for-Civil-Justice-English.pdf>.

- vii) It is unlikely that cases dealt with by BOS will then go to the courts. There are other schemes in which a decision-maker can make a decision and then a party or parties can elect to take the case to court. For example, construction adjudication pursuant to the Construction Contracts Act 2002, albeit which has no jurisdictional limit. Very few of these cases decided in adjudication ever proceed to court.
- viii) There is no evidence to believe there will be a significant influx of cases.
- ix) The fact that some dispute resolution schemes allow waiving the excess above the jurisdictional limit, including a scheme approved under the same legislation as BOS, provides precedent for BOS amending its rules.
- x) Allowing complainants to bring their disputes within the jurisdictional limit is consistent with the purpose of the scheme, to help resolve banking disputes.

The review therefore makes the recommendation to increase accessibility of the scheme to better ensure its benefits are available to complainants who agree to be within the jurisdictional limit. This would require an amendment of the TOR.

Complainants would need to be made aware that they can waive the excess of their claims above the jurisdictional limit, once the TOR has been amended. BOS will need to ensure that there are materials available promoting the ability of complainants to take advantage of the option.

### Recommendation

4. BOS should consider a rule change to enable claimants to waive the amount of their claims in excess of the jurisdictional limit.

## 6.6 Accessible to whom?

There are broadly two parts to the scheme's accessibility: who knows about it; and who uses it.

A survey by Consumer NZ in 2024 for BOS measured the proportion of New Zealanders who are aware that they can make a complaint about their bank and who are aware of BOS; and identified any sub-populations where awareness was low. It found overall awareness of BOS had increased to 53% over the period April 2022 to April 2024. BOS is the most well-known dispute resolution scheme in the country.<sup>18</sup>

Awareness of BOS is higher among more educated, older, higher-income-earning New Zealanders; and lower among younger, ethnically diverse, lower-income-earning New Zealanders. BOS notes that the hard-to-reach groups may have the highest need for free and independent support.

As a modestly sized organisation BOS cannot hope to get traction with all the different demographic groups on its own, although the Nigel Latta *You've Been Scammed* television series gave it very wide exposure.

Much of the awareness-raising activities BOS undertakes are sensibly done in concert with other groups, notably with the other three financial dispute resolution organisations through the Consumer Outreach Group (COG), which was formed in 2020. This group is doing solid work in community engagement, with one community group advising the review that BOS "... listened to the community."

An initiative by COG, called Faces to Places, provided 'meet and greets' with FinCap Communities of Practice via Zoom. Two representatives from COG (from different schemes) did provide direct contacts for each of the schemes to try to assure financial mentors that they could contact any of the schemes as soon as they see something "that just doesn't seem/feel right" and their concerns would get to the right place.

This year COG offered 'virtual cuppas' to a wider audience including Citizens Advice Bureau (CAB) and hui throughout the country.

COG provided training and advice sessions to FinCap, including through their regional hui, and collaborated with the Commerce Commission to provide joint training to lenders about responsible lending and making complaints.

In 2023, BOS partnered with Utilities Disputes Limited (UDL) to visit hard to reach, lower decile communities in Mangere, Gisborne, Porirua and Christchurch.

A senior investigator, who has a caseload, represents BOS on COG, and together with others in the resolution team undertakes the outreach work. The benefit of this is that at events questions can be answered easily by people who daily deal with real cases. However, other schemes, including UDL, have a dedicated community engagement staff member – a fact raised with the review by several submitters.

If BOS is to expand and embed awareness, especially with those demographics that are most vulnerable, having a dedicated community engagement officer could be beneficial. It could be that person's role to target engagement, work with COG, organise outreach and attend events with those in the resolution team. A dedicated community engagement officer could provide the resource to take outreach to vulnerable groups to a new level, a need that was identified by a few submitters.

It is therefore the recommendation of this review that consideration is given to the appointment of a community engagement officer.

### Recommendation

5. BOS should consider the appointment of a community outreach officer.

### Who uses BOS - age

Age	FY 2019/20	FY 2023/24	Trend use of BOS
<b>0-24</b>	2.3%	3.8%	↑
<b>25-34</b>	6.3%	15.4%	↑
<b>35-44</b>	12.1%	19.1%	↑
<b>45-54</b>	23.9%	18.8%	↓
<b>55-64</b>	24.9%	19.7%	↓
<b>65+</b>	30.5%	23.2%	↓

There has been a pleasing shift in the use of BOS by younger cohorts. In the last five years, BOS has actively tried to reach a younger demographic and was an early adopter of social media to enable a connection to younger people. It posts regularly on Facebook and Instagram and was the first financial dispute resolution scheme to have a TikTok channel. The Banking Ombudsman says, "we wanted to be relatable to a wider audience."

The Deputy Ombudsman, Prevention says, "... the scheme targets young people in a variety of ways, including to help them to understand banking generally, not just to provide them access to BOS."

It is clear to the review that the sustained work by BOS aimed at younger people is paying off.

### Who uses BOS - ethnicity<sup>19</sup>

Ethnicity	Census	FY 2019/20	FY 2023/24	Trend use of BOS
<b>NZ European / Pākehā</b>	67.8%	73.8%	66.7%	↓
<b>Māori</b>	17.8%	9.9%	13.8%	↑
<b>Pacific peoples</b>	8.9%	2.5%	5.0%	↑
<b>Asian</b>	17.3%	9.2%	12.3%	↑
<b>Other ethnicity</b>	3.0%	14.3%	15.7%	↑

Māori, Pacific peoples and Asians do not use the service commensurate with their population size, but since 2019/2020, their use of the service has increased significantly.

It is challenging for BOS to ensure both awareness and utilisation of its services by all ethnicities, relative to the population size. BOS is no different from other organisations, including dispute resolution schemes, in this regard, but it is a feather in its cap that it is increasing the accessibility of its service, as shown by the demographic data for ethnicity on who is using BOS.

BOS is aware of the challenge and aims to continue its work to make its service accessible to all. It has undertaken research into vulnerable groups with the understanding that these groups want more face-to-face engagement. It has therefore partnered with organisations and community groups that have the trust of diverse communities. In so doing, it has a focus on those who are not using BOS in sufficient numbers and who are vulnerable, pivoting its outreach and services more towards Māori and Pacific peoples.

BOS has done good work on forming a tikanga-based dispute resolution service and ensuring staff understand te Tiriti o Waitangi and have competency in te reo Māori. This will ensure its services are more usable by Māori. To read more about this, refer to section 11.5.

### Who uses BOS - gender

Age	FY 2019/20	FY 2023/24
<b>Male</b>	53.6%	54.2%
<b>Female</b>	45.7%	45.3%
<b>Gender diverse</b>	0.7%	0.6%

<sup>19</sup> The 2019/20 data and 2023/24 data do not provide a 1:1 match in ethnicities to match a change in census data categories, but the overall trend of the data is never-the-less reliable. Respondents could also select multiple ethnicities; hence the percentage totals add to more than 100%.

There has been fairly static use of the service by male, female and gender-diverse people over 5 years. This is something that BOS may well need to consider as to whether the demographics are reflective of the population and how to ensure the equitable gender reach of the scheme. It is clear to the review that BOS has this work within its sights.

## 6.7 Four Schemes

In New Zealand there are four separate schemes for financial dispute resolution: FSCL, IFSO, FDRS and BOS. They each are approved under the Financial Service Providers (Registration and Dispute Resolution) Act 2008 and have their own rules and operations.

At the time of writing two of the schemes, FSCL and the IFSO, look likely to merge, leaving three separate financial dispute resolution schemes.

All the banks participate in the BOS scheme. That brings clarity on which scheme to go to if a consumer has a complaint about a bank, particularly as BOS is reasonably well-known. Nevertheless, the review heard that some submitters were concerned about the number of financial dispute resolution schemes; that there was confusion for some consumers about who to go to; and that it is difficult for advocates to manoeuvre their way around the separate schemes.

In the last review a recommendation was made that BOS investigate ways to work with the other three financial dispute resolution schemes.<sup>20</sup> This recommendation has been taken up. Notably, there is now COG comprising representatives of the four schemes, which results in a breaking down of barriers between the schemes. Community outreach is often undertaken together and there are regular meetings and collaboration between the four schemes.

COG explored, and decided against, the concept of one 0800 number or website for all four schemes and potentially UDL. It is noted the “Complaintsline” website, established by the Ministry of Business, Innovation and Employment (MBIE), and which was meant to herald a one-stop shop for consumers with complaints, is now defunct. This issue is currently under review by the government.

Since May 2021, there has been implemented a “no wrong door policy”. That means whichever scheme a consumer calls, there is a “warm handover”. At BOS this means if a consumer wrongly calls BOS, it transfers them to another scheme, without them having to hang up and redial. The 0800 number is provided for any other scheme, should the complainant want to call directly or if there is no answer when a transfer is made. The review is satisfied that BOS has well trained staff and a good process to ensure these warm handovers are efficiently achieved.

However, there are limitations to the warm handover process, because no one scheme has control over any other scheme as to how they ensure the handover. The review heard that there is no consistent approach across all of the schemes. In the review’s opinion, this needs to be rectified with an agreed policy and consistent process for all four schemes.

Amalgamation of the four schemes is not the subject of this review, but two comments are pertinent to the accessibility of a complaints dispute resolution service to banking customers.

With the likely amalgamation of the two largest schemes for financial dispute resolution and BOS being a bank-only scheme, and well-known, the problems associated with four schemes diminishes greatly.

While there are potential benefits of a single scheme, including possible cost savings and ease of entry, that does not mean that a single scheme will be automatically better for consumers. BOS has developed considerable expertise in banking and that could potentially be lost if the schemes were amalgamated into a single entity.

## 6.8 Advocacy services

Access to advocacy services can help make dispute resolution schemes work by ensuring complainants understand the process, their rights and how to put their best case to BOS. BOS staff cannot fulfill the role for either banks or complainants because they need to safeguard the independence of their role.

Unlike in the last review, the issue of advocacy services was not routinely raised by consumers or consumer advocates. The 2019 review recommended that BOS consider providing, or supporting, more advocacy services. In response it has formed the Consumer Advisory Group, (CAG). This comprises representatives from key groups including Consumer NZ, Citizens Advice, Christians Against Poverty, Salvation Army, Debtfix and FinCap. BOS has regular meetings with CAG, and it has gone further to ensure it works effectively with community and advocacy services.

BOS has many materials that support complainants to understand the process, what BOS considers and how it makes decisions. The staff are well trained and expert in helping complainants advocate for themselves. This is reflected in the very high rates of complainant and disputant satisfaction in survey results. See sections 6.4.1 and 10.4.

The review heard from a submitter that fraud and scam cases are different from other cases that BOS deals with. They are often complex and complainants can be in shock and / or suffering mental ill health because of the sudden, life-changing effects of criminality, so are less able to advocate for themselves. They can also have lost significant amounts of money, which makes recourse to a lawyer less possible for some people.

One complainant and a consumer representative noted that there is a need for better advocacy for fraud and scam cases. A complainant said they felt “alone” when they went to BOS and reliant on BOS, believing

somehow that BOS was their advocate. They talked of needing “someone with knowledge” at their side to help them put their case together and understand the ramifications of decisions made during the process. It was not until after the case was over that they said they realised they had needed an advocate.

BOS says complainants do not generally need lawyers to have a complaint fairly considered by it because it is an informal and inquisitorial process. BOS works to equalise power imbalances and it proactively investigates complaints. The Banking Ombudsman noted that “we don’t treat parties equally, we treat them equitably... so for instance vulnerable consumers get far more care and support than the banks.” Not many complainants have lawyers represent them. At the time of drafting this report fewer than 5% of complainants at the disputes stage were legally represented.

The Deputy Ombudsman, Resolution told the review if they identified a vulnerability, which they actively look for, they will proactively suggest complainants have someone, like whānau or friends, support them.

While it remains outside the remit of BOS to advocate for fraud and scam complainants, it is clear to the review that victims of fraud and scams, like all those who are vulnerable, are given special and sensitive attention by BOS staff. BOS has also provided support for organisations which undertake advocacy. See also section 6.4.2 as to vulnerability.

## 7. INDEPENDENCE

### 7.1 Principle

The scheme's structure, systems and decision-making are independent of the banks. In particular:

- Its board composition is appropriate to deliver its strategic objectives, and that composition ensures both its independence and the public perception of its independence.
- Its operations are appropriate to deliver its strategic objectives and ensure both its independence and the public perception of its independence.

### 7.2 Findings

There is appropriate separation between the board and the operational team, along normal governance and management lines.

The board sets strategy and appropriately ensures oversight that the strategy is operationalised. Operations are appropriate to deliver strategy.

Whilst the review finds the scheme's independence is currently sound, it considers that independence at the governance level should be safeguarded by a suite of rule changes that will bring greater independence to the board and its decision-making, and a greater perception of independence as well.

### 7.3 Board composition and funding

#### 7.3.1 Board composition

The BOS Constitution stipulates the composition of the board.<sup>21</sup> It provides for an independent chair, two representatives of participant banks appointed by the NZBA and two consumer representatives, one of whom is appointed by the Crown and the other is the CEO of Consumer NZ. They act as directors of the Banking Ombudsman Scheme Limited. As such their duties are to act in the best interests of BOS, regardless of their other roles or how they are appointed. This is made clear by the Constitution:

"A director of the Company, when exercising powers or performing duties, must act in good faith and in what the director believes to be the best interests of the Company."<sup>22</sup>

As with any governance entity, the board sets strategy. The review has considered board reports and minutes and is satisfied that the board has robust and appropriate oversight that ensures delivery of the strategy. And moreover, that all directors act, as required, in the best interests of the scheme and not their bank or consumer organisation.

The Constitution has specific requirements to deal with conflicts of interest.<sup>23</sup> These look to be adhered to. In particular, board members disclose any conflicts of interest at the start of each board meeting.

The quorum<sup>24</sup> for meetings is three directors, but a bank representative and a consumer representative must be in attendance.<sup>25</sup> That could mean in theory that business could be conducted with only one consumer representative and two banking representatives present, and vice versa.

Recommendations on amendments to the Constitution are made by special resolution and a majority 75% of directors making recommendations to the shareholder – the chair.<sup>26</sup>

There are benefits in bank and consumer representatives being on the board. They bring expertise of the banking sector and consumers respectively, to enable the board to better understand the sector, the needs of consumers and to make practical decisions. Bank representatives provide an efficient conduit to the banks, which is useful to ensure the positive changes that BOS wishes to make. This was well put to the review by the BOS Chair Miriam Dean. She said that the access that was given to BOS by having senior bank personnel and senior consumer representatives on the board opened doors to get things done particularly in the scheme's important prevention work. In having senior bank executives on the board, Ms Dean said, it also gives BOS added credibility with its participants.

<sup>21</sup> Banking Ombudsman Scheme Constitution, Clause 9.4.

<sup>22</sup> Clause 7.1.

<sup>23</sup> Clause 8.

<sup>24</sup> Part A, clause IV.

<sup>25</sup> Clause 10.8.

<sup>26</sup> Clauses 10.16 and 15.

An accusation was heard by the review that BOS is not just funded by the banks but does the banks' bidding. A submitter told the review that even if decisions never come to a vote, being on the board provides the banks with influence over decisions and that is inappropriate. The optics of bank executives being on the board and funding the scheme is said to be detrimental to BOS and its credibility. It was put to the review by financial commentator, Janine Starks that the current structure will "...ensure that public trust in BOS will become more damaged and that it needed to mirror those schemes that have only independent appointees."

A review also heard from two submitters that all appointments to the board should be independent of banks and consumers.

There are various models of governance for similar institutions, some of which are below.

FSCL and IFSO have a similar board structure as BOS. FSCL has two industry representatives, two consumer representatives and an independent chair. IFSO has three industry representatives, three consumer representatives and an independent chair.

AFCA (Australian Financial Complaints Authority) is a not-for-profit company governed by a board of directors, which includes equal numbers of industry and consumer representatives.

UDL has a board of six directors independent of industry and consumer groups. UDL also has advisory groups<sup>27</sup> that inform and advise the board on issues that affect the industry and its customers. Industry and consumer representatives are on these advisory groups.

The BOS equivalent in the United Kingdom, is Financial Ombudsman Service, (FOS), which has a non-executive board appointed by the regulator, the Financial Conduct Authority.

Governance independence could be improved by adoption of the UDL or the FOS model: having no bank representatives on the board; bringing the bank and consumer views through in advisory groups and through the operational work that the Banking Ombudsman does liaising with banks and consumer groups. Another option could be providing more consumer representatives on the board, ensuring that consumer interests can never be outvoted by the bank representatives. Alternatively, the BOS constitution could be amended to strengthen the independence of governance arrangements.

BOS has structured its operations to ensure that decision-making is the Banking Ombudsman's alone. The Constitution provides: "The Banking Ombudsman is responsible for the day-to-day administration and conduct the business of the Banking Ombudsman."<sup>28</sup>

The review could find no evidence of the board overstepping into the role of the Banking Ombudsman in cases, decisions, operational procedures, board papers, minutes, or anywhere else. Board members, including the Consumer NZ CEO Jon Duffy and the Banking Ombudsman, were clear that the board and board members do not take part in operational matters. BOS staff were adamant that they never had conversations with board members about individual cases.

With the current Banking Ombudsman and chair, such is their individual understanding of, and commitment to, governance, management, roles and responsibilities, and independence, there is, in the review's opinion, little prospect that the board or board members would take part in operational matters. But the governance settings are not fully protective of that independence.

Independence of the board has been increasingly under the spotlight because of the increase in fraud and scam cases and the necessity for BOS to clearly show that it is impartial and independent. The long-term credibility of BOS requires that the board and its stakeholders look at governance afresh and make changes to ensure its independence is more assured.

The review recommends a suite of measures that would improve the independence of governance arrangements and the perceptions of independence as well.

The review stops short of recommending that the board is stripped of bank, or indeed consumer, representatives. While this would improve the perception of independence, negative repercussions would flow from this move. Most notably, the board would lack up-to-date banking experience and risk a more tortuous route in its decision-making to ensure its decisions are practical, implementable and do not produce unintended consequences. In a scheme focused on banking, current banking knowledge is a key skill for the board. Independent board members could have past experience in banking and so be unconflicted and independent, but the nature of their being involved in banking in the past, means that they may not have the current expertise in what is a fast-moving industry. The skills that are required by the board are notably improved by allowing bank representatives, and indeed consumer representatives, on the board.

<sup>27</sup> Energy Complaints Scheme Advisory Committee, Broadband Shared Property Access Disputes Advisory Committee, Water Complaints Scheme Advisory Committee.

<sup>28</sup> Clause 2.7.

The review would not have come to this conclusion if there were no other mechanisms to markedly improve governance and independence. But the independence of the board can be significantly improved in other ways, while ensuring the expertise on the board remains, just as IFSO and FSCL have some industry and consumer representatives on their boards.

There are four matters that are potentially problematic and the review deals with each separately, but they are the subject of a single recommendation. Pleasingly two of these are in train already.

### 7.3.1.1 Amending Terms of Reference and Participation Agreement

The board needs 75% agreement to amend its TOR or the Participation Agreement.<sup>29</sup> This means that the two bank representatives could, in theory at least, prevent amendments.

The review understands that at its July 2024 meeting, the board resolved to investigate an amendment to the Constitution that would only require a 60% agreement of the board to amend the TOR or the Participation Agreement, meaning bank representatives could not veto any amendments. This is a positive development, as it is the review's recommendation that this change be implemented.

### 7.3.1.2 Bank influence

It was put to the review that although board decisions may not need a vote because the decisions to date have been by consensus, bank representatives have influence to benefit banks, on those decisions. This could undoubtedly be the case, although as noted earlier the Constitution makes plain directors' duties to BOS when part of the board and the review has seen nothing to suggest directors don't do exactly this.

Having equal number of bank and consumer representatives was put to the review by a banking representative as one of fairness. But the power imbalance in favour of banks is such that fairness in equal numbers of representatives on the board is a lesser concern than ensuring public confidence in BOS.

The chair informed the review that the board was "alive" to issues of perception and were keen to address the issues. The review understands, at its July meeting, the board resolved to increase the board size to six directors. It considered that an appropriate mix would be two independents, two consumer representatives and two banking directors.

This is pleasing as the review recommends that the board is expanded by an extra member and that

member is either a consumer representative or an independent appointment. This would assist public perception in having bank representatives in a minority because either option (whether a consumer or independent appointee) would ensure that the BOS board has influencers and decision-makers that could out-vote bank representatives.

### 7.3.1.3 Chairing of meetings

If the chair is not present at a meeting, the board appoints someone from the board in their place.<sup>30</sup> This could mean that a bank representative could hold the chair and make a casting vote. The optics of this are detrimental to BOS.

The review therefore recommends that the Constitution is amended to ensure that if the chair is unavailable, the role is taken by an independent appointee or if that person is unavailable, a consumer representative.

### 7.3.1.4 Quorum

The quorum for meetings is three directors.<sup>31</sup> That could mean that business is conducted with two bank representatives and a third person. Although the review understands that this has never happened in the history of the scheme, it could occur under the current TOR. That would not be an acceptable governance arrangement from the perspective of independence.

The review recommends that the quorum is amended to be three directors, two of whom must be consumer representatives or independent appointments.

## Recommendation

6. To improve independence, the following amendments should be made to the Constitution:
  - a. Amend clause 10.15.2 to decrease the percentage of board members needed to pass a resolution from 75% to 60%.
  - b. Amend clause 9.4 to increase the number of directors from five to six, the extra appointee being a consumer representative or an independent appointee.
  - c. Amend clause 10.3 to ensure that at meetings the BOS board chair must always be an independent appointee or if not available, a consumer representative.
  - d. Amend clause 10.8 to ensure the quorum of meetings must include two directors who are consumer representatives or independent appointees.

<sup>29</sup> Clause 10.15.2.

<sup>30</sup> Clause 10.3.

<sup>31</sup> Part A, IV.

### 7.3.2 Funding

BOS is entirely funded by banks through an annual levy and is a free service to consumers.

Dispute resolution schemes often attract criticism as being funded by industry, as BOS does from time to time. As discussed in the 2019 independent review, BOS must be funded in some manner and the levy mechanism is common to many dispute resolution schemes. The mechanism to change this approach could be legislation enabling a regulator to levy banks and provide funding to BOS through the regulator. This is outside the scope of this review.

This review finds no basis on which to infer a lack of independence of BOS because of the funding mechanism. Also see section 9.5.

### 7.4 Operations

BOS is aware of the need to ensure it is independent in all its interactions. One BOS staff member told the review, "...we need to be showing our independence in every conversation we have." The Deputy Ombudsman, Resolution said, "We pride ourselves on being fiercely independent."

BOS has recently undertaken training with staff in the Resolution and ERS teams as to how to maintain independence, weighting of evidence and how to challenge banks to be clear about taking responsibility for mistakes. That has been incorporated into induction processes for new staff.

In reviewing cases, procedures and talking with staff, this review is satisfied that BOS has operations to ensure its independence – both real and perceived.

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## 8. FAIRNESS

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### 8.1 Principle

The scheme makes decisions that are fair and seen to be fair. In particular:

- It observes the principles of natural justice and adopts a rigorous, credible approach reaching decisions.
- It makes decisions having regard to the law, relevant codes of practice and the principles of good banking practice.
- It treats parties to complaints and disputes with empathy.

### 8.2 Findings

BOS has a rigorous and credible approach to reaching its decisions and observes natural justice. It follows its own rules in making decisions that are fair and have regard to the law, relevant codes and good banking practice. It uses its fairness jurisdiction appropriately. BOS decision-making is fair in both processes and outcomes. Its treatment of parties is respectful and empathetic, which is particularly evident with those who are vulnerable.

The review finds that how BOS explains its fairness jurisdiction could be improved by amendments to BOS rules and operational guidance to clarify how it determines good banking practice and makes its decisions.

### 8.3 BOS and other scheme approaches to decision-making

Before BOS can investigate a complaint, it must be satisfied of certain preconditions, including that:

“The complaint is about the bank’s breach of a contract, statutory obligation, industry code or principles of good banking practice.”<sup>32</sup>

BOS must determine cases according to the decision-making criteria in Rule 9 of its TOR:

“9. In making any decision, the scheme must be fair in all the circumstances, having regard to the law, any relevant code of practice, and principles of good banking practice. (The scheme must consult the banking industry in determining these principles.)”

The 2014 independent review recommended that the BOS TOR be amended to give primacy to fairness, whilst requiring it to have regard to the law, general principles of good banking practice and any relevant code of practice. Rule 9 of the TOR was amended consequently to reflect that recommendation.

The way in which the BOS TOR are phrased is similar to other financial dispute resolution schemes, both in New Zealand and internationally as set out below.

The AFCA Complaint Resolution Scheme Rules (1 July 2024) state:

“... the AFCA Decision Maker must do what the AFCA Decision Maker considers is fair in all the circumstances having regard to:

- a) legal principles,
- b) applicable industry codes or guidance,
- c) good industry practice and
- d) previous relevant Determinations of AFCA or Predecessor Schemes.”<sup>33</sup>

The FSCL Terms of Reference (March 2022) state:

“FSCL must deal with a case on its merits and do what is fair in all the circumstances.

We must:

- » have regard to the law, any relevant code of practice and the principles of good industry practice ...”<sup>34</sup>

The IFSO scheme has rules that provide criteria on how it will assess fairness and says that final determinations are based on what is, “... in its opinion, fair and reasonable in all the circumstances.”<sup>35</sup> It has regard to any applicable rule of law, the rules of natural justice, relevant industry practice and any codes applicable.<sup>36</sup>

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<sup>32</sup> Banking Ombudsman Scheme Terms of Reference, 1 January 2021, rule 2.3.

<sup>33</sup> Australian Financial Complaints Authority Complaints Resolution Scheme Rules, rule A.14.2.

<sup>34</sup> Financial Services Complaints Limited, Terms of Reference, rule 34.

<sup>35</sup> Insurance and Financial Services Ombudsman Scheme Rules, R.12.1, available at [2024-IFSO-Scheme-Terms-of-Reference.pdf](#).

<sup>36</sup> R. 12.2.

## 8.4 What fairness means

Fairness is a key principle in any modern dispute resolution scheme. BOS often talks about fairness in its decision-making and in guidance materials, it says: "Fairness is at the heart of effective complaint handling."<sup>37</sup> The Banking Ombudsman described it as the scheme's "north star".

Fairness is also included in the NZBA Code of Banking Practice, which says:

"We'll act fairly, reasonably, and in good faith, in a consistent and ethical way... What's fair and reasonable depends on the circumstances, including our conduct and yours, and our terms and conditions, the law, and good banking practice."<sup>38</sup>

In any dispute resolution scheme, fairness takes two forms: first, procedural fairness; and second, fairness in the substance of the decision.

The first relates primarily in concepts such as providing the parties the opportunity to be heard; to determine the issue on relevant considerations on which the parties have been able to make representations; and for the decision-maker to be free of any conflict of interest – real or perceived. Procedural fairness is discussed in section 8.7, and independence in operations is discussed in section 7.4.

Fairness in the outcome of a disputes process, despite the efforts of the courts to put structure around it by reference to the independent person armed with the information and expertise of the parties, remains subjective. There will likely be some disconnect between the reasonable knowledge of a bank and that of its customers. In most disputes, there is a fundamental disconnect between the parties about the fairness of the outcome of the matter being investigated. That is most often why the matter is escalated for determination by an independent dispute resolution service.

What constitutes fairness or a fair decision in particular circumstances is the core issue for a financial dispute resolution scheme. Fraud and scam cases have thrown this into sharp relief. The review heard differing views on what fairness means in this context. Fraud and scam victims charge that the consumer protection framework has not kept pace and results in unfairness outcomes for scam victims.

Consumers made the case that dispute resolution schemes, such as BOS, do not just have to apply the law strictly but should have the ability to depart from it to make decisions that are fair. They say fairness needs to be given pre-eminent weight; that BOS needs to "stretch" to use all its possible tools, in light of fraud and scam cases. It was put to the review that, "At its very heart, the lack of law was supposed to be replaced by the BOS making a decision based on fairness ..."<sup>39</sup>

A bank representative described fairness as "shifting goalposts". Another stated that "BOS decisions risked moving outside of its remit." Yet another referred to the fairness jurisdiction and then said that BOS should just apply "the settled law."

BOS says that in every case it considers what is fair in all the circumstances, having regard to the relevant law, codes and good banking practice, as its rules require. It also seeks expert advice on these factors as it sees fit.

For example, BOS says in recent cases about investment scams, the scheme had regard to the bank's legal duty to act in accordance with the instructions of the customer when processing payments, as well as its broader obligations. The scheme had regard to a well-settled good banking practice to act on red flags. In some cases, those red flags were not present; in others they were. BOS did not consider it was fair to hold the bank liable for the investment scam losses when it was not on notice of a real possibility a customer may be being defrauded. There was no requirement on banks at the time – regulatory or having regard to good banking practice – to have an account name matching system. BOS noted its approach and decisions on these authorised scam cases is consistent with Australia, Canada and other jurisdictions.

BOS acknowledges the differing views and is satisfied its decisions are fair and in accordance with its mandate. This review notes a confidential 2023 audit of case handling agreed with the outcomes of all reviewed disputes.

BOS further says it is not a regulator or a lawmaker and cannot, by way of its fairness jurisdiction, create a new standard of conduct for banks. Like other dispute resolution bodies using a fairness jurisdiction, it says it requires some benchmark by way of law, code or principles of good banking practice. It has repeatedly asked for law and code changes, as discussed in section 11.4.

<sup>37</sup> Banking Ombudsman Scheme, Effective Complaint Handling: A Guide, p.4.

<sup>38</sup> New Zealand Banking Association, The Code of Banking Practice, p.3.

<sup>39</sup> Submission of financial commentator, Janine Starks.

AFCA instituted a fairness jurisdiction project between 2019–2022, publishing criteria and resources it developed as to how it determines “what is fair in all the circumstances.” It has a similar approach to fairness as BOS.

The AFCA Fairness Jurisdiction Project said:

“In reviewing the University of Melbourne research and in assessing recent court decisions about our jurisdiction, we identified the following key considerations to help us deliver fair outcomes in our decision making:

- Were the relevant issues properly identified and assessed?
- Did the decision address the key assertions made by the parties?
- Did the decision clearly set out the relevant facts? Did the decision take into account relevant law, regulatory guidelines, industry practice, and AFCA’s approach?
- Was the outcome fair in all the circumstances?
- Was the decision accessible, clear and persuasive?”<sup>40</sup>

While the guide’s navigation tools support AFCA to “describe how it will consider what is fair in all the circumstances” and “helps AFCA deliver a fair process and a fair outcome” it does not “set a new standard of conduct for financial firms.” It says that “Consumers must still satisfy AFCA that the financial firm has breached its obligations which has in turn caused loss.”<sup>41</sup> This is the same point BOS makes and its position on why it cannot do so is no different from that taken by its Australian counterpart.

How far AFCA will go in using its fairness jurisdiction is usefully underlined by an AFCA case from September 2023. The decision-maker said:

“In response to the increasing prevalence of scams and fraudulent activity, financial firms have developed their own fraud detection systems to try to minimise the impact of fraud on their customers. These systems are designed to assess the risk of a transaction based on certain parameters or ‘rules’ set by the financial firm, and by using behavioural data analysis to detect patterns of fraud. It is up to each financial firm to determine what its risk appetite is appropriate when processing payments for its customers. In the absence of any legislative framework, AFCA cannot compel financial firms to have particular fraud detection systems.

A financial firm’s use of fraud detection systems does

not mean it will detect every fraudulent transaction. It may also detect false positives where a genuine transaction is flagged as potentially fraudulent. False positives may interfere with a customer’s entitlement to spend their own money as they please and expose the financial firm to liability for loss arising from failing to repay the customer’s own money on demand. To balance these competing interests, it is up to each financial firm to decide what parameters it uses in its fraud detection systems and what steps it takes when unusual activity is detected.

Although AFCA cannot review the adequacy of a financial firm’s fraud detection system, it is reasonable to expect a bank to take steps where its system picks up unusual account activity. This may include flagging the transaction for manual review by the financial firm’s fraud team, requiring the customer to verify the transaction, notifying the customer of the unusual activity, or delaying or otherwise blocking the transaction.

In this case, the disputed transfers were performed by the complainant. The fact the disputed transfers were made to Platform K is not an unusual circumstance in and of itself. Indeed, company K is a legitimate cryptocurrency exchange platform. Investing in cryptocurrency is a legitimate form of investment that many consumers engage in. There was nothing known to the bank that ought to have alerted it to a third party acting in the background. When a person decides to invest their funds, it is up to them to conduct appropriate due diligence and ensure the people they are dealing with are reputable.”<sup>42</sup>

In September 2022 IFSO issued guidance as to its fairness jurisdiction.<sup>43</sup> IFSO’s TOR set out factors the Scheme will consider, and factors the Scheme shall have regard to, when deciding a complaint:

## “12. Decision-making criteria

- 12.1 When making a decision about a Complaint, the Scheme will do so by reference to what is, in its opinion, fair and reasonable in all the circumstances. In determining what is fair and reasonable, the Scheme may consider:
- a) The educational, cultural and personal circumstances of the Complainant as are relevant to the Complaint;
  - b) the manner in which the Complainant has been dealt with by the Participant;
  - c) the manner in which the Complainant has dealt with the Participant;

<sup>40</sup> Australian Financial Complaints Authority, Report on outcomes: Fairness Jurisdiction Project, p.33.

<sup>41</sup> Fairness Jurisdiction Project, page 14.

<sup>42</sup> AFCA Case number 917926.

<sup>43</sup> Guidance on the Fair and Reasonable Jurisdiction of the Insurance & Financial Services Ombudsman (IFSO) Scheme.

- d) the degree to which the Participant was in control of the systems and procedures which are the subject of the Complaint; and
- e) any other matter the Scheme considers relevant.

12.2 While the Scheme is not bound by the legal rules of evidence or by its previous decisions, the Scheme shall have regard to:

- a) any applicable role of law;
- b) the rules of natural justice, insofar as they apply to the procedure adopted by the Scheme in relation to the Complaint;
- c) relevant industry practice; and
- d) any Codes applicable to the subject matter of the Complaint.”<sup>44</sup>

The IFSO TOR provide more specificity than the BOS TOR and other dispute resolution schemes’ TOR as to how fairness will be considered. The IFSO guidance states that the scheme “must consider the law, but is able to depart from it, if it is fair and reasonable to do so.”

The BOS practice note on fraud and scams takes a wide view as to fairness, like IFSO. It says,

“In some cases, there may be compelling circumstances beyond the legalities of liability which suggest it would be fair and reasonable for the bank to compensate the customer. Examples include where the customer is vulnerable or suffering financial hardship, or where the bank has met minimum conduct standards but fallen below its own service expectations. While such circumstances may not warrant full reimbursement, the bank should consider whether apportionment of the loss may be appropriate.”<sup>45</sup>

BOS deals with each case on its merits but it also tries to ensure a consistent approach. BOS operational guidance provides:

“The scheme bases its decisions on what it considers to be fair in all the circumstances of a case. The scheme can take a broader approach than the courts. The scheme not only considers the law but also any code and any other principles of good banking practice.”<sup>46</sup>

This review finds that considering case law and comparing other similar schemes, in similar regulatory environments, as discussed above, that BOS is taking an appropriate path in its understanding of the place of fairness in its decision-making. Further, based on an analysis of BOS policies and procedures, as well as 60 cases reviewed, BOS decision-making is fair in both their processes and outcomes.

Fairness does not stand remote from the law, any relevant code of practice, or principles of good banking practice. Rather, it requires BOS to undertake its decision-making and its fairness jurisdiction with regard to these. This begs the question of how BOS deals with law, codes and principles of good banking practice and whether its approach is appropriate.

## 8.5 Law and Codes

Law, as well as relevant codes of practice, are generally discernible, and must be given regard. Each is described briefly below.

### 8.5.1 Law

In the 2018 High Court of New Zealand decision *Contact Energy Ltd v Moreau*, the Court helpfully discussed the necessity to have regard to the law:

“... the Commissioner was not actually required to apply the law, merely to have regard to it. The obligation to ‘have regard to’ a specified matter is commonly imposed on administrative decision-makers and its meaning is well settled as requiring the decision-maker only to give genuine attention and thought to the specified matter, rather than actually give effect to it.”<sup>47</sup>

The Court discussed what is meant by “having regard to” the law. It said,

“The settled approach is that the defined criteria must be considered but the weight to be given to any particular criterion is for the decision-maker to decide.”<sup>48</sup>

The Court noted that the jurisprudence in this matter was consistent in the United Kingdom and Australia,<sup>49</sup> and also that:

“the Commissioner may depart from the relevant law if it is fair and reasonable to do so.”<sup>50</sup>

<sup>44</sup> Insurance & Financial Services Ombudsman Terms of Reference, R.12.

<sup>45</sup> Banking Ombudsman Scheme Practice Note Fraud and Scams, May 2024, p.9.

<sup>46</sup> Operational Guidelines, 1 June 2022, p.19.

<sup>47</sup> *Contact Energy Ltd v Moreau* [2018] NZHC 2884, [9]

<sup>48</sup> At [93]

<sup>49</sup> At [99] - [106]

<sup>50</sup> At [121]

In an application by an insurance company for a declaration on an issue of law arising in a complaint investigation by IFSO, the High Court of New Zealand found that the Ombudsman had, “some latitude to depart from a strict legal approach when considering a complaint and making recommendations.”<sup>51</sup>

### 8.5.2 Codes

BOS operational guidance provides:

#### “Codes of practice

Industry codes of practice typically contain obligations and require standards of service that are higher than those required by the law. Statutory codes of practice contain principles and standards of professional conduct required of financial service providers. The code of practice most relevant to the scheme’s work is the New Zealand Bankers’ Association’s Code of Banking Practice, to which all banks in the scheme agree to adhere. Others include:

- Responsible Lending Code.
- Fair Insurance Code.
- Code for Financial Advertising.
- Code of Professional Conduct for Authorised Financial Advisers.

The scheme has the power to investigate a complaint about a breach of a code.”<sup>52</sup>

## 8.6 Principles of good banking practice

Good banking practice is by its very nature changeable as the business of banking changes. The BOS TOR state,

*“The scheme must consult the banking industry in determining these principles.”*

While it is understandable that BOS would consult the banking industry as to what good banking practice is, their input should not limit BOS in looking elsewhere to determine good banking practice - the banking industry view is not necessarily determinative. It is clear to the review that BOS has wider considerations that inform it of good banking practice, including seeking expert advice, and it does not view the banking industry as the sole determiner of good banking practice.

The BOS operational guidelines state:

#### “Principles of good banking practice

If the law or codes of practice do not establish what is good banking practice in a particular case, the scheme may seek the industry’s view on what is good practice. This can take the form of an industry survey or seeking independent expert advice.”<sup>53</sup>

One submitter said that BOS should pull banks towards better banking practice, rather than passively receive principles of good banking practice from banks. In the review’s judgment the way BOS operates already does exactly this and influences better banking practice as a result.

In its prevention work, BOS often notifies banks on how it intends to make decisions and, in this way, indicates what it considers is good banking practice. For example, in its August 2023 prevention insights, BOS told banks they ought to improve the warnings provided to customers making payments that account names aren’t matched. Similarly, its guides and practice notes set out what BOS considers is good banking practice and how it makes decisions.

The way BOS determines principles of good banking practice is not, however, adequately reflected in its TOR and operational guidance. It should be. Indeed the TOR are unhelpful as they give an incorrect impression about how good banking practice is determined by BOS.

The AFCA Rule states:

“When considering a complaint, AFCA may consult with industry and consumer advisors as AFCA thinks fit”<sup>54</sup>

The AFCA guidance states:

“When considering good industry practice, we may draw on the expertise of AFCA staff, ombudsman, adjudicators or panel members.

On occasions, we may obtain expert advice as to what is good industry practice.”<sup>55</sup>

The AFCA rule and guidance are excellent and reflect the way in which BOS actually goes about its work in understanding good banking practice. A change along similar lines would clarify how BOS can and does seek expertise. The expertise could include academics, bankers, legal advisers, consumer advocates and international banking experts.

<sup>51</sup> IAG *New Zealand Limited v Bryan William* [2020] NZHC 3233, [11].

<sup>52</sup> Responsible Lending Code, issued by the Minister of Commerce and Consumer Affairs; Fair Insurance Code, developed by the Insurance Council of New Zealand; Code for Financial Advertising, developed by the Advertising Standards Authority; Code of Professional Conduct for Authorised Financial Advisers, developed by the Code Working Group in accordance with the Financial Markets Conduct Act 2013, part 4, schedule 5.

<sup>53</sup> BOS Operational Guidelines, 1 June 2022, p.19.

<sup>54</sup> AFCA Rule 9.6.

<sup>55</sup> AFCA Guidance, A14.2.

BOS advised that it is already considering the AFCA rules and guidance as a better formulation to adopt than what is currently in rule 9 of the TOR. Such a change would provide confidence that BOS is not necessarily bound by the standards set by the industry. This review therefore recommends an amendment is made to rules and guidance.

### Recommendation

7. BOS should amend its rules and operational guidance to reflect that BOS may seek expert advice from a range of experts as it thinks fit.

Finally, a change in Rule 9 of the TOR from the word “banking” to “industry” would be appropriate. The main work for BOS is in banking, but it deals, on occasion, with other kinds of banking related disputes – insurance and finance, for example.

### Recommendation

8. BOS should amend its rules to change “principles of good banking practice” to “principles of good industry practice”.

## 8.7 Natural justice

BOS is directed by its Rules to ensure natural justice:

- “10. In making any decision, included whether to consider, or continue considering, a complaint, the scheme must follow the rules of natural justice, which include giving both sides:
  - 10.1 Adequate notice of important steps and decisions
  - 10.2 The opportunity to provide information, express their views, and to have those views considered, before a decision

10.3 The reasons for the decision in writing and within a reasonable time.

11. The scheme is not bound by legal rules of evidence when arriving at decisions.”<sup>56</sup>

BOS has a range of operational procedures for complaints and disputes that direct that it utilises natural justice. It is clear to the review that these give ample opportunity for parties to put their cases. In addition, the review did not hear any suggestion that the Banking Ombudsman or her staff were conflicted in any way.

The review heard generally from both consumers and banks that BOS had a rigorous and credible process that allowed all parties to understand the process and be heard. The 2023 audit into case handling concluded that, “BOS provides a fair service which gives both parties ample opportunity to present their evidence and points of view”.

In considering a selection of cases, the review found that parties were advised about important steps and decisions and that they had opportunities to be heard.

## 8.8 Treatment of parties

The word that came up most often in the review to describe BOS staff was “approachable”. Many bank and consumer representatives used this adjective.

One consumer representative told the review that BOS staff are empathetic and that they had customer service “nailed”.

It is clear from the review’s consideration of those who engage with BOS, case notes, recordings and emails, that BOS staff go to great lengths to treat parties respectfully, considerately and with empathy. The excellent treatment of parties is evident throughout the organisation.

<sup>56</sup> Banking Ombudsman Scheme Terms of Reference, rules 10 and 11.

## 9. ACCOUNTABILITY

### 9.1 Principle

The scheme gives a public account of itself by publishing adequate information about its operations. In particular:

- It provides adequate statistical and general reporting to the board, banks and public.
- It has appropriate processes for managing complaints about itself.
- It has a fair, transparent and appropriate process for setting fees and allocating costs.

### 9.2 Findings

BOS provides excellent information to banks, the public and its board, in ways that are appropriate to the audience it is targeting. It sets its costs and fees reasonably under a process that is both fair and transparent. A recent levy increase of 25 percent was necessary with the large increase in the BOS workload especially as disputes increase in number and complexity.

Improvements to the way BOS undertakes complaints about itself are recommended for consideration.

### 9.3 Reporting

BOS provides its Annual Report and financial statements on its website. Both provide comprehensive reporting of its operations. Also available on its website are the BOS independent reviews since 2006.

In relation to governance reporting, the review considered a range of board reports and minutes. The reporting to the board is extensive and excellent with both qualitative and quantitative information to enable decision-making by the board.

Other reporting is discussed in section 11 of this report and includes:

- Case notes.
- Guidelines.
- Complaints dashboard.
- Monthly prevention insights.
- Systemic and material issues reporting.
- Information to select committees and government.

### 9.4 Complaints about BOS

Complaints can be made to any BOS staff member and reported to the Banking Ombudsman. The Banking Ombudsman or her deputy reviews and responds to complaints. Complaints are not an avenue for an appeal or reconsideration process. All complaints are reported to the board, and there is a process for initiating a chaired review where appropriate.

There were 29 complaints about BOS in the four-and-a-half-year period 1 January 2020 to 5 July 2024.

Both submitters on behalf of consumers and banks said there could be improvements made in how BOS enables complaints against itself. Some submitters complained of the lack of ability in finding the complaints process and what it entailed, whilst one said there was a lack of reporting on complaints about BOS.

A submitter said that there was no-one other than BOS itself to complain to, which they said would provide a self-serving response; that the Minister, could only use a sledge-hammer approach of withdrawing approval for the scheme; and that a complainant otherwise had to await the five-yearly annual review.

While the review has seen complaints about BOS and its services, BOS complaint policies and board reports on the complaints, it could not easily find information about making a complaint about BOS on its website. During the review the complaint information was moved from "Contact us" to the "About us" page" on the website where it is more accessible.

Other similarly sized dispute resolution schemes have similar approaches to receiving complaints about themselves. For example, FSCL and IFSO have a comparable process to BOS. UDL provides information about how complaints can be made direct to the Commissioner and board. Larger schemes, like FOS in the UK can escalate a complaint to an independent assessor, who provides an annual report to the board, which is published. It must be emphasised that none of the schemes use the complaints as a review of ultimate decisions. Rather, they are used to ensure that cases have been fairly dealt with, looking at the manner in which the case was handled, issues of timeliness and the way the parties were treated.

The board of BOS conducted a comprehensive review of the BOS process for dealing with complaints about itself in 2019. It is now timely to review the way BOS communicates its process for dealing with complaints about itself to ensure it is clear and accessible. This could include improved information about how the complaints will be dealt with.

**Recommendation**

9. BOS should consider improved ways to deal with complaints about itself.

**9.5 Fees and costs**

BOS sets its levies annually. The process that is followed is that the Banking Ombudsman prepares a draft budget for the board, based on the costs of the previous year and the likely future costs. The board then determines the budget, based on the draft and using a formula in the constitution determines what each bank pays by way of levy. Banks are advised of their levy.

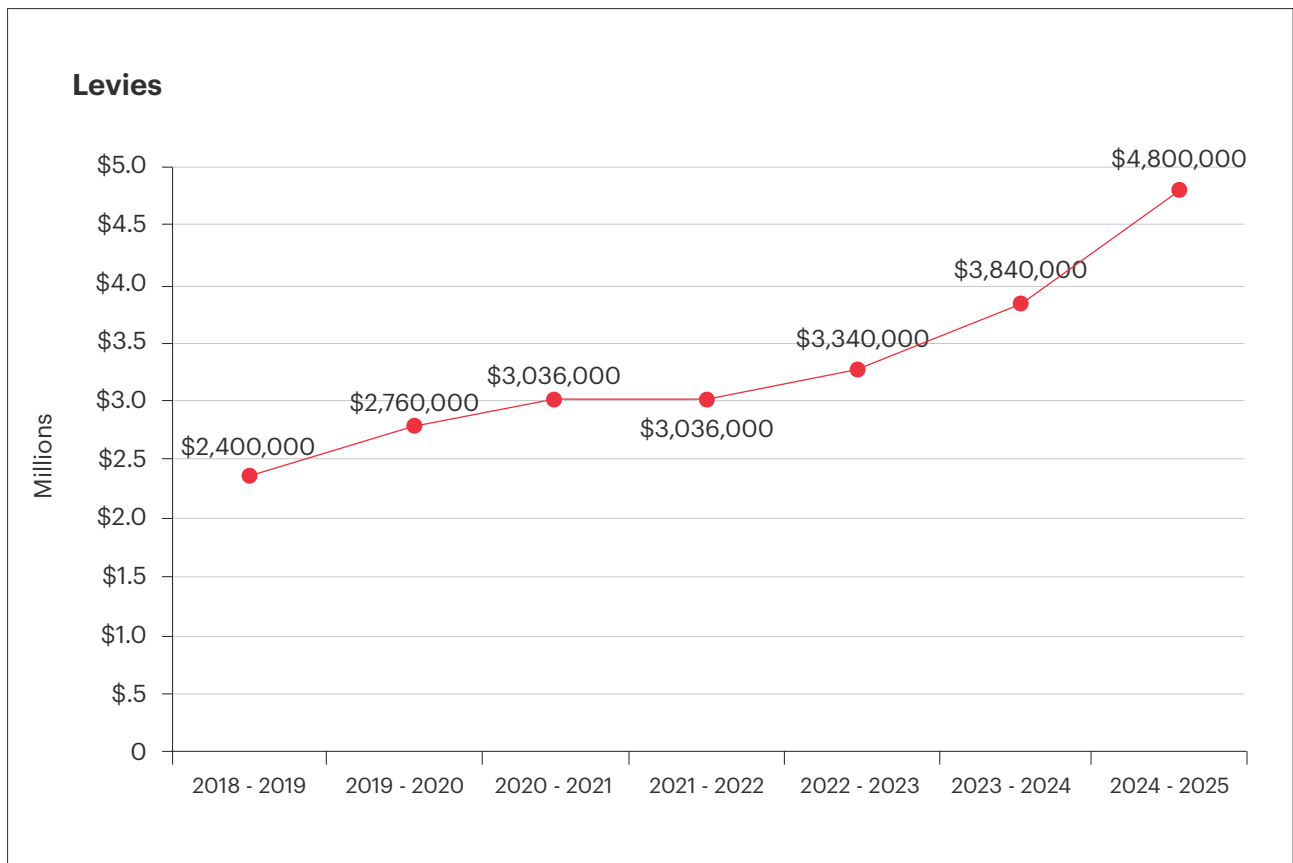
The last review recommended that BOS consider, at a minimum, modest rises in fees to ensure nil balance budgets and the retention of reserves. A levy and reserves policy is now in place.

Last year, BOS noted in its third quarter advisory to bank chief executives that its budget would feature “... a significant increase in expenditure” and therefore the levy on banks was likely to rise “...by 20% at the very least”. In the end, the levies rose by some 25%.

This was unlikely to have surprised anyone, given the significant increase in cases, complexity and the increased scrutiny on BOS. To ensure that BOS could maintain service levels, a large increase in levies was inevitable.

It was put to the review by some banks that there should be a consultative process regarding levies.

While the increase in levies can pose some issues for banks, particularly if the increase is significant, as it was this year, the review does not agree that this necessitates consultation. Usually, any increases are modest. This year’s increase presents as an outlier. The independence of the scheme necessitates that levies are set by the BOS board. It is best placed to know what the scheme needs for it to be resourced properly. It should not have any pressure put upon it by banks, or indeed any other stakeholder.



# 10. EFFICIENCY

## 10.1 Principle

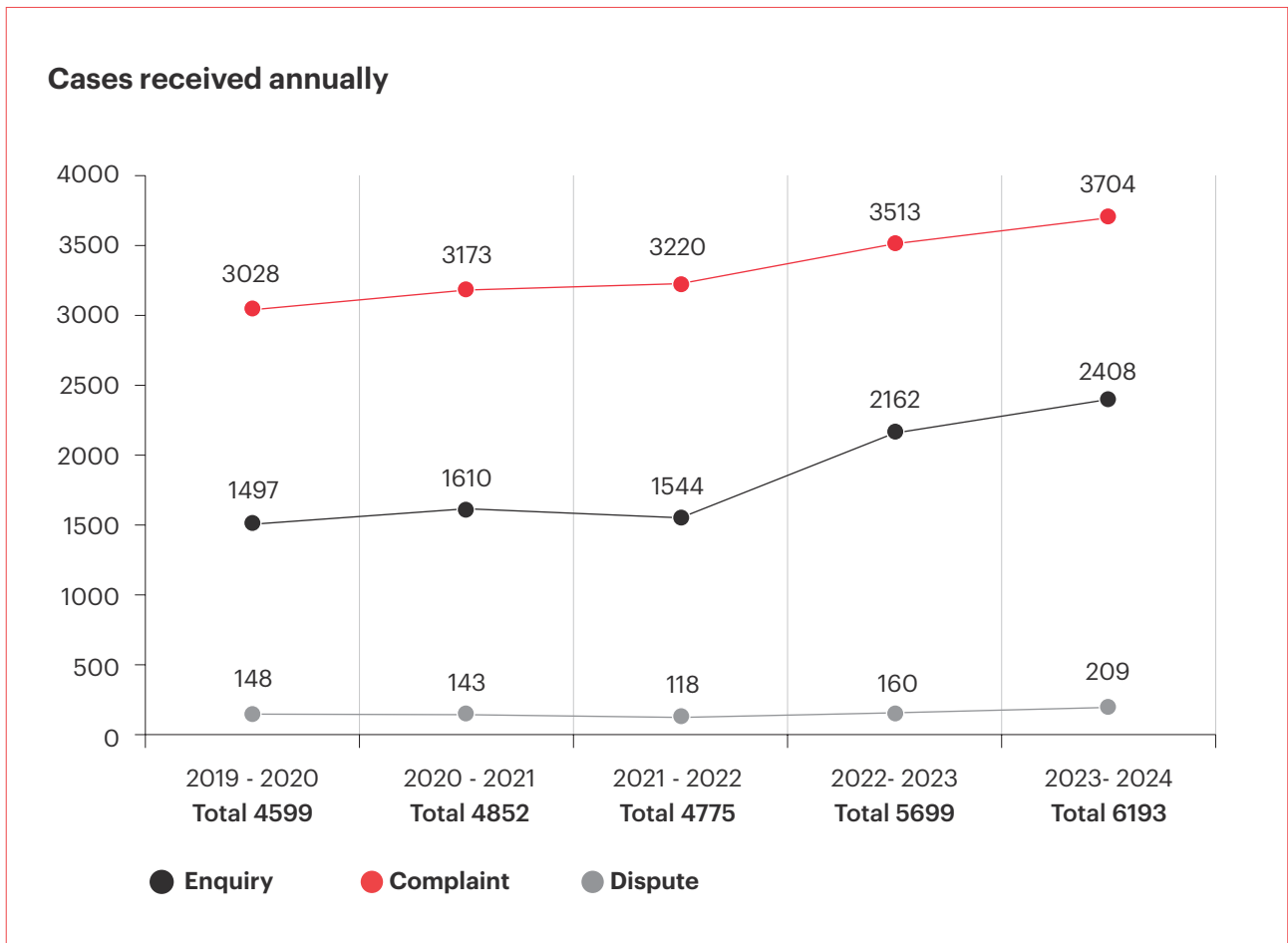
The scheme provides an efficient service. In particular:

- Its case management process and decision-making is efficient, especially given its more complex caseload and other commitments.
- Its quality assurance processes are adequate.
- Its organisational design, including the composition of its leadership team, is appropriate.

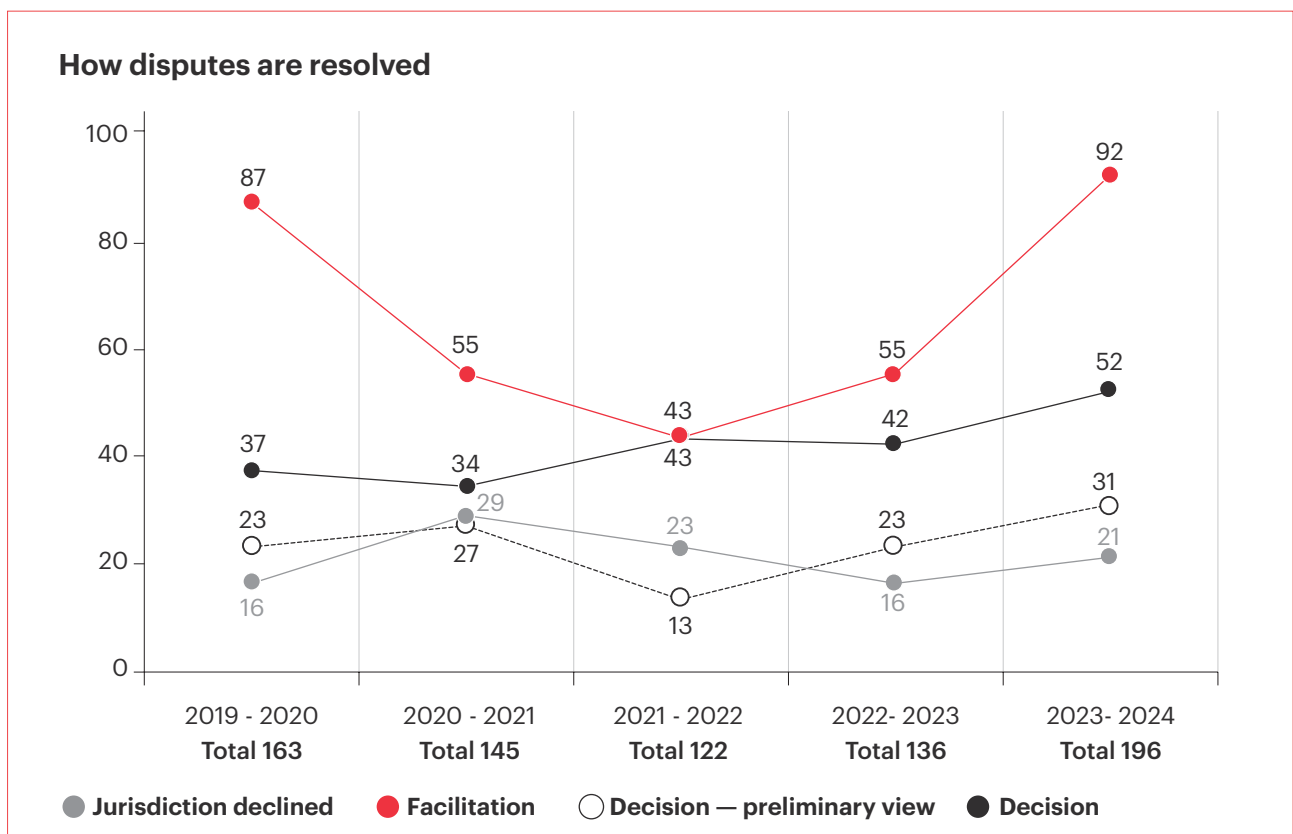
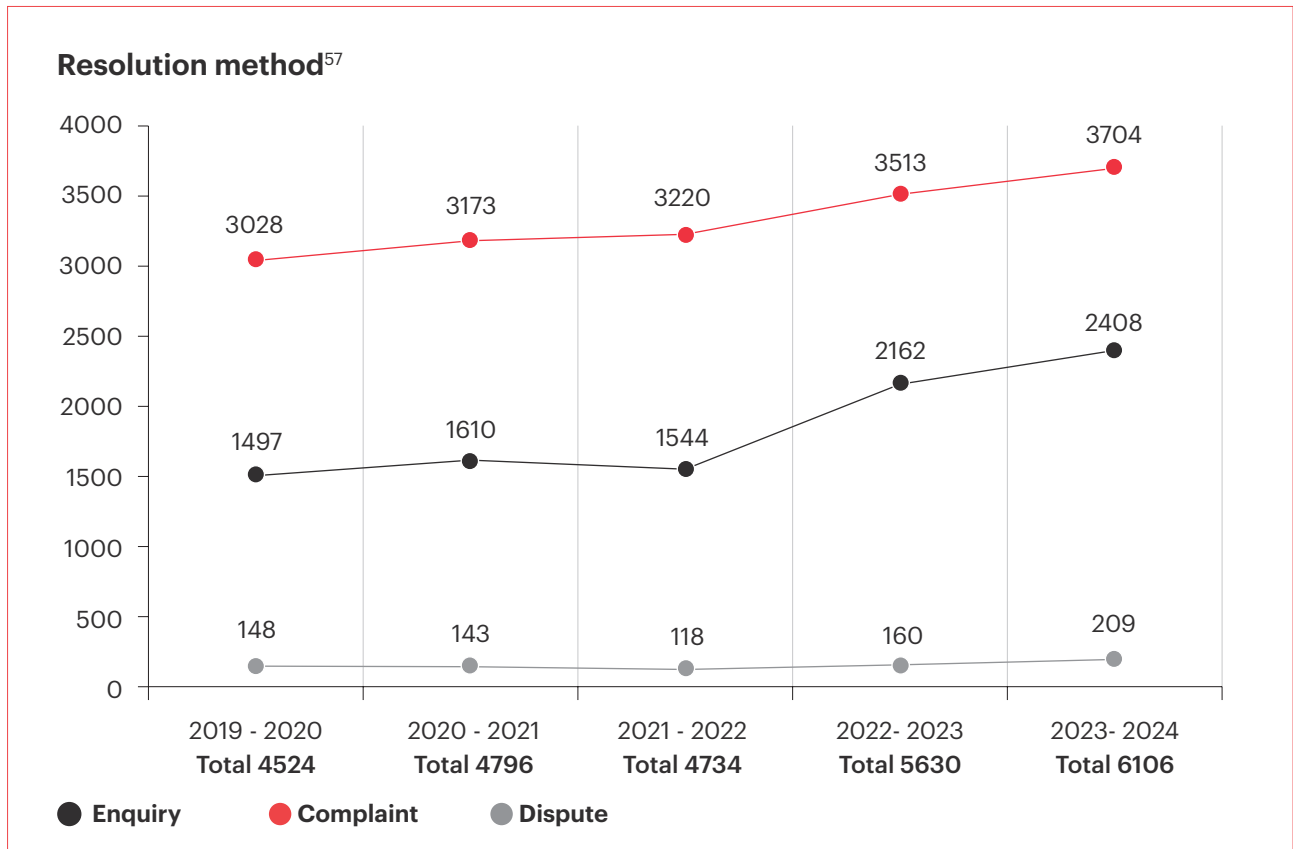
## 10.2 Findings

BOS provides a highly efficient service, fit for purpose quality assurance processes and its organisational design is appropriate to deliver on its strategic objectives.

## 10.3 Efficiency in case management and decision-making



Apart from the 2021/2022 year, when BOS dealt with slightly fewer cases, there has been a general increase in caseload, such that between the 2019/2020 and 2022/2023 years there was an almost 35% increase in caseload. This is reflected in increases in enquiries, complaints and disputes.



<sup>57</sup> BOS captures each life cycle, so a case that has escalated through all stages would count in each Enquiry, Complaint and Dispute. However, this case would only count once in the total as this records unique cases, hence the total is 6,106 for the 2023/2024 year, but the ECD sections add up to 6,321.

Most matters that come to BOS are dealt with at the enquiry and complaint stages, with less than 4% of all matters progressing to the dispute stage. Nevertheless, the cases that do progress are often more complex than they have previously been. Nearly a quarter of disputes progress to a final decision.

## Complaint and dispute timeliness

	KPI	2019 - 2020	2020 - 2021	2021 - 2022	2022 - 2023
<b>Complaints</b>	90% to be resolved in 1 working day	90%	99%	99%	95%
<b>Simple disputes</b>	90% to be completed in 25 working days	88%	90%	100%	92%
<b>Standard disputes</b>	90% to be completed in 55 days	81%	97%	90%	92%
<b>Complex disputes</b>	80% to be completed in 120	70%	80%	93%	90%

BOS has set for itself challenging timing targets to meet when dealing with cases. It is exceeding those targets.

Surveys of complainants in the last 5 years showed between 69% and 75% of respondents thought BOS had resolved their dispute within a reasonable timeframe. In the last two years the rates had been consistently measured at 75%.

In the 2022/2023 year, 77% of banks thought BOS resolved disputes quickly, (compared to 43% the prior year).<sup>58</sup>

It is a balance to meet efficiency targets and ensure that all cases are dealt with appropriately. The review considers that the obvious efficiency of the scheme has not come at the cost of other metrics which could be adversely affected if cases are dealt with faster than is prudent. Notably customer and bank satisfaction remain high. See section 10.4.

### 10.4 Quality assurance

The BOS office is set up to ensure a free flow of information generally and there are informal structures that support quality control, such as senior resolution team members “buddying up” with more junior members, mentoring them and providing oversight.

There are also regular team meetings. For example, the ERS team members meet daily to talk about cases. The manager of the ERS team told the review that the

meetings help to “hold each other accountable” and provide an opportunity for the manager to ensure cases are treated appropriately. The dispute team meet each week.

There is a formal reporting and oversight that has been instituted to ensure quality control, including for all decisions.

Weekly reports on case volumes are provided to the leadership team of the Banking Ombudsman, her two deputies, as well as the operations manager and the ERS manager.

There is monthly reporting on customer satisfaction established by surveying complainants.

BOS aims for at least 75% overall satisfaction with its service. In the 2023-2024 year,<sup>59</sup> BOS achieved an 81% satisfaction score with the process and the same percentage overall satisfaction with BOS. Data from the last 5 years of surveying shows overall customer satisfaction rates consistently between 76–83%.

Usually in between independent reviews, BOS undertakes a confidential quality assurance review for internal purposes, which is to be commended. Consistent with that practice in 2023 BOS commissioned an external quality review of how it handled cases. Twelve recommendations were made, and BOS has responded by instituting the recommendations or is working on them.

<sup>58</sup> Annual Participant Survey 2022-2023.

<sup>59</sup> Customer Satisfaction Report, 2023-2024.

## 10.5 Organisational design

The Banking Ombudsman is "... responsible for the day-to-day administration and conduct of the business of the Banking Ombudsman."<sup>60</sup>

The organisation is structured into three teams: resolution, prevention and operations. The Banking Ombudsman oversees the entire operation and there are two ombudsman deputies, one for prevention and another for resolution, as well as a manager for operations. Some 25-plus people work at BOS.

The Deputy Banking Ombudsman, Resolution oversees all the enquiries, complaints and disputes. She has oversight of the ERS team which has a manager as well as resolution advisers, two of whom are senior advisers. She also oversees other staff who manage disputes, some of whom are senior.

The Deputy Ombudsman, Prevention oversees a smaller team, which includes a senior prevention adviser, data analyst and communications assistant. The senior investigator on the resolution team also undertakes some of the prevention work. More broadly, however, the prevention and resolution teams must, and do, work closely together because of the interrelationship between the areas. Insights and learnings from cases are one of the scheme's most powerful prevention tools.

An operations manager has an operations coordinator and operations assistant in her team. She is responsible for general operations and also administers the whistleblowing service.

The team is augmented with contractors as necessary; for example, legal advice and communications support are sometimes obtained.

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<sup>60</sup> Banking Ombudsman Scheme Constitution, clause 2.7.

# 11. EFFECTIVENESS

## 11.1 Principle

The scheme is effective. In particular:

- Its rules are clear and effective.
- Its achieving its strategic objectives to resolve and prevent complaints.
- Its adequately identifying root causes of complaints, sharing insights and collaborating with stakeholders.
- Its successfully implementing its cultural capability programme.
- Its rules reflect modern ombudsman practice.
- Its adequately resourced to fulfil dual functions of resolving and preventing complaints.
- It advises banks, the public, regulators and/or the government about how to improve banking for our communities.

## 11.2 Findings

BOS is adept not only in its dispute resolution work, but its ability to pinpoint the causes of complaints and share its insights and expertise widely. In so doing it well meets its strategic objectives to resolve and prevent complaints.

A recommendation to improve the searchability of its case notes and quick guides will super-charge the usability of these valuable resources.

BOS rules are reflective of modern ombudsman practice. The amendments to the rules suggested by this review will further strengthen its service.

There is a cultural capability programme that is delivering for staff and the scheme itself. A recommendation to ensure the tikanga-based dispute resolution service is supported by policies, procedures and promotion will help ensure its success.

Even given significant challenges, BOS is on track to be adequately resourced with a levy increase to fund additional resources needed to manage an increased workload. Its staff is motivated and dedicated, with BOS providing a happy and supportive work environment.

## 11.3 Rules

BOS has clear rules in its TOR, but there are some areas where those rules are not as effective as they could be for a modern ombudsman scheme. This review has made comment regarding the rules on jurisdiction, section 6.5, and decision-making, section 8.

## 11.4 Identification and sharing of complaint causes

BOS has a large prevention remit to identify and share the causes of complaints. This in turn helps banks to improve their services and for customers to understand their part in preventing issues that may cause issues with their banks.

BOS creates case notes about complaints and its decisions. These aid both banks and complainants to better understand the way in which BOS determines cases. The case notes are based on actual cases and are anonymised to protect the parties.

BOS also provides quick guides on various areas of banking. These are touted as “guides containing practical, easy to understand information on all aspects of banking.” BOS says they are meant to be “ideal to help you sort out a problem, or a simple way to get smarter about banking.”<sup>61</sup>

The guides cover a range of topics on such things as investments, bank accounts and lending, as well as common scams targeting bank customers. The information in the quick guides are as they are advertised by BOS and make use of the rich information BOS receives in its work to help educate bank customers.

Case notes and quick guides on the BOS website are shared under various headings. This is helpful, but it would be much improved if it were possible to put in a keyword like “fraud” or “fairness” and search all the cases or quick guides. These keyword searches would super-charge the quick guides and case notes. It should also be possible to search cases and quick guides over a certain period.

### Recommendation

10. BOS should improve the searchability of its case notes and quick guides.

The complaints dashboard at the time of the last review was in its formation. In the last review there were two recommendations in relation to the dashboard. The first was to include it in scheme documents and the second was to ensure dashboard information was available publicly and not in the form of aggregated data.

The TOR have been amended to include the dashboard. From January 2022 the dashboard became publicly available on the BOS website. It is updated every three months and gives an overview, complaints data by bank, by service and products, by issues and by who complains in terms of gender, region, consumer type and how they make contact to complain.

The complaints dashboard uses data gathered by BOS about complaints to give an industry-wide picture of what is causing complaints, who is affected, and the banks involved. Comparisons can be made between banks. The FMA advised that the complaints dashboard was “an incredibly useful tool.” A bank advised that the dashboard “helps us to strive to do better.” It is an excellent initiative that continues to provide transparent insights into banking complaints to banks and consumers.

BOS writes quarterly insights reports to bank CEOs. One bank advised that these are always shared with its board. The insights draw on the complaints dashboard and the information BOS has on recent complaints and disputes. They are tailored to give the bank information about itself and comparisons with other banks. They provide commentary on expectations of banks by BOS and what it believes is good banking practice. BOS is explicit about the changes it expects of banks to fulfill their obligation of good banking practice. In this way BOS actively encourages banks to increase their protections.

BOS will also advise banks – at a senior level – what it sees as gaps in protections. For instance, it has advised:

“We are concerned about the increase in fraud and scams and the significant impact these crimes have on people’s lives and on trust in the banking sector. As an independent dispute resolution body, we apply current fraud reimbursement rules – the law, code and principles of good banking practice – and will continue to do so.

We have been open in our view that the current reimbursement rules need to be reviewed and welcome Minister Bayly’s recent announcement. Our view is comprehensive, mandatory codes of practice are needed for banks, telecommunications companies and digital platforms governing their responsibilities in preventing scams and their liability in the event of a scam.”<sup>62</sup>

The review has also sighted numerous monthly prevention insight reports. They are short, pithy, with robust information about select topics, after which BOS provides the bank with the prevention insight so they know the expectation to fulfill good banking practice, in the opinion of BOS. For example, in the April 2024 prevention insight BOS alerted banks to how it will deal with fraud and scams in certain circumstances and urged the banks to have better systems. It advised:

#### “Phishing scams

We continue to see large increases in the number and size of scams – a sign that more needs to be done. We have recently experienced a surge in phishing scams. The sophisticated nature of these scams means that many customers will be entitled to the protections set out in the online fraud guarantee in the Code of Banking Practice, as the customers are often acting reasonably in the circumstances.

**Prevention insight:** Banks need to continue to evolve system ability to identify and respond to these increasingly sophisticated scams. In Australia, the regulator has set out their six priorities to address scams.”

Most bank representatives said they appreciated the prevention insights, one saying they were “really useful”, another saying they were “spot on”, and yet another stating they had helped “... lift the standard for the industry”. The review has no doubt the prevention insights encourage banks to provide better banking.

The Nigel Latta television series *You’ve Been Scammed* was a significant undertaking last year. It was a project initiated and commissioned independently by BOS and aimed to help prevent fraud and scams by educating the public on how to protect themselves.

Notably, the four-episode series:

- Reached more than 1.1 million New Zealanders during its four-week run in July 2023.
- Attained an average audience of each episode of 411,000 viewers.
- Ranked fourth among all free-to-air programmes in July 2023.
- Received extensive media coverage.
- Was positively reviewed.

A Consumer NZ survey in October 2023 found the television series has been influential in educating viewers about scams, prompting many to adopt safer online behaviours.

<sup>62</sup> Letter from the Banking Ombudsman to bank chief executives, 12 April 2024.

The television series was part of the preventative work BOS undertakes. Short excerpts from the series were translated into videos and utilised on social media for Fraud Awareness Week.

It was put to the review by a single submitter that the series showed an institutional bias in favour of banks, and a lack of independence, by BOS. The criticism is three-fold:

- 1) As well as a special levy BOS used some of its normal levies to fund the series.
- 2) The series blamed victims of criminality by promoting the idea that scammers target consumers due to their weaknesses.
- 3) The series did not point to the lack of processes and security in banks to prevent fraud and scams. In so doing BOS adopted the messaging of the banks and damaged its independence.

BOS raised a special levy of over \$473,000 for the documentary. In addition, nearly \$200,000 was spent from normal levies to augment the special levy. Whether the money came from a special or general levy, it was all paid by banks. The review has no criticism of BOS in using a special levy and the general levy to fund an educational programme to help prevent fraud and scams.

It is difficult to imagine how bank customers could be educated about frauds and scams and how they can better protect themselves without creating the inference that customers must play a part in protecting themselves. It is a public good that customers are given this information. It is noted that not all consumer submitters thought the series was problematic, including one who works with those in debt and said that the series was “awesome”.

Banks have a significant role to play in preventing fraud and scams (as do other entities including telcos and social media platforms). The series was aimed at empowering bank customers, but it is not the only work BOS does to help prevent fraud and scams. BOS has been clear about the changes that it thinks need to be made and has encouraged government to introduce stronger regulatory settings. BOS has also tried to ensure banks increase measures to prevent fraud and scams and to better protect their customers. These include:

- Issuing a practice note on fraud and scams that clarifies how it will use its fairness and good banking practice remits. For example, BOS said, in relation to authentication, “In cases where the extra authentication measures fall short of industry standards, a bank may be liable for the full loss if the loss wouldn’t have otherwise happened.”<sup>63</sup>
- Submitting to the Finance and Expenditure Select Committee advising it of consumer protections for fraud and scams in other jurisdictions and asking it to review the consumer protection framework for online payments.<sup>64</sup>
- Publicly supporting a range of measures to prevent fraud and scams, including the urgent introduction of confirmation of payee technology.<sup>65</sup>
- Writing to the Minister of Commerce and Consumer Affairs to advise him that BOS supported the implementation of a confirmation of payee scheme, a review of the Code of Banking Practice, and an investigation into a voluntary compensation or reimbursement scheme, along the lines of the scheme operating in the United Kingdom. BOS also recommended a review of the consumer protection framework for online payments, including strengthening fraud detection and fund recovery measures.<sup>66</sup>
- Advocacy for an anti scams centre.
- Production and publication of monthly prevention insights.

## 11.5 Cultural capability

A cultural capability programme has been instituted, which has improved BOS cultural capability since the last review. It has included a diversity workshop for staff on improving cultural intelligence and liaising with other organisations to collaborate on initiatives. For more information, refer to section 6.6.

Consistent with its business plan, BOS has given priority to enhancing its cultural capability vis-à-vis Māori. The review notes the following:

- BOS partnered with Māori leaders and received cultural advice and support, as well as engaging with staff.

<sup>63</sup> BOS Fraud Practice Note, May 2024, p.5.

<sup>64</sup> 20 June 2022.

<sup>65</sup> 19 September 2023 media release: <https://bankomb.org.nz/media-releases/2023-media-releases>.

<sup>66</sup> 12 December 2023.

- BOS adopted the te reo Māori name, Te Whare Rama Tōkeke.
- There are now tikanga-based values for BOS and these values are pervasive throughout the organisation.
- Weekly te reo Māori lessons have been provided for staff and they are actively encouraged to take part in these classes. The Banking Ombudsman said cultural capability “is seen as a core competency”.
- A te Tiriti o Waitangi workshop for staff.
- Training regarding tikanga-based dispute resolution.
- In June 2023, BOS engaged Laidlaw Law & Consultancy to facilitate and / or support tikanga-based dispute resolution services.

The tikanga-based dispute resolution service has not yet been actively promoted but is advertised at the bottom of the BOS website page, “How we consider disputes.”<sup>67</sup> The review understands that the service has not been taken up by any complainants.

It is pleasing that BOS has now identified and engaged an external provider of tikanga- based dispute resolution. As BOS is advertising the service, albeit modestly, and especially as the provider may provide the service external to BOS, policies, procedures and promotion are now essential to ensure appropriate service levels, oversight and guidance for BOS staff, as well as take-up of the service. It is the subject of a recommendation.

### Recommendation

11. BOS should plan and implement policies, processes and promotion of its tikanga- based dispute resolution service.

For more information about initiatives targeting other ethnicities, refer to section 6.6.

## 11.6 Resourcing

There are 23 permanent or fixed-term staff members and further staff work variable hours. There are approximately 22+ full-time equivalent staff at BOS. See section 10.5 for discussion on the organisational design of BOS.

There is generally high job satisfaction at BOS. A December 2023 staff survey found that 83% of staff thought BOS was a great place to work. It is evident that the staff is dedicated and working well as a team to ensure better banking. Its staff is motivated, with BOS providing a happy and supportive work environment.

The review was told by one staff member that it is “getting hard day to day”. Another said it is hard on staff to hear some of the devastating stories or to deliver bad news to complainants.

There has been considerable pressure on BOS because of:

- An increase in cases.
- Staffing changes.
- Increased media engagement and along with it increased public scrutiny.
- An increase in complainants who exhibit difficult behaviours or are abusive to staff.
- The increase in fraud and scam cases has brought more complainants who have been victims to life-changing criminal activity and who are looking to BOS and its staff for help. Staff advised the review that some of the fraud and scam cases can be particularly harrowing and challenging to deal with.

BOS has responded to the work pressures at both governance and operational levels.

The chair of the board, and board members are acutely aware of the pressures on the Banking Ombudsman and her team. The board chair says in the last 12 months she has been more involved as chair, making herself available to the Banking Ombudsman, “almost any time of the day” to provide support. The Banking Ombudsman said she was “ably and well-supported” by the chair.

This year the board approved an increase in resourcing for the 2024/2025 year in excess of that proposed by the Banking Ombudsman. Funding covers an Employee Assistance Programme (EAP), extra staffing, resourcing for more senior staff and salary increases.

There are numerous ways in which BOS supports staff including regular team meetings and the availability of EAP. The ERS members meet each day and share difficult conversations and can support each other in real time. The dispute team meet regularly as well.

Because of the impact of fraud and scam cases and the volume of these cases, the workload is proactively shared, but complex cases are given to more senior team members.

The scheme has altered the team to separate the resolution team into ERS and for the escalated cases, dispute resolution, which often needs team members with a different skill set including legal skills. This is in the review’s opinion a good step for BOS to have taken.

<sup>67</sup> <https://bankomb.org.nz/about-us/information-sheets/how-we-consider-disputes>

The Banking Ombudsman said,

“Responding to the intense media interest in our work has consumed considerable time and effort, and this has required us to be disciplined in prioritising our other tasks. We have made a lot of progress despite these challenges, and I am proud of the way the team has continued to perform to a high level.”<sup>68</sup>

In addition, BOS fosters a good working environment in a variety of ways including an active social committee, flexible working practices and a light and spacious office.

The last review recommended that BOS should consider how it can better embrace diversity, particularly as regards recruitment policies and procedures.

There is markedly improved diversity represented in the office than was previously the case. While it is difficult in a relatively small office to maintain a diverse ethnic make-up proportional to the population, BOS promotes diversity and inclusion in recruitment processes and fosters a culture of inclusion within the organisation. It has developed an Equal Employment Opportunities, Diversity, Harassment, Bullying and Discrimination Policy.

At the time of the last review there were changing conditions for BOS to contend with, and it was nimble in responding to those changes to ensure a quality service. So it is now, which is impressive. Given the shifting landscape, it will require the office structure and resourcing to be further reviewed to ensure BOS has the people and skills to continue to implement its strategy. Given past experience, the review considers BOS is well-placed to continue to adapt as necessary.

## 11.7 Advisory functions

In section 11.3 the review outlines how BOS shares causes of complaints and insights with banks, the public and its board. But BOS also advises regulators and government about how to improve banking for our communities. Those advisory functions are as follows.

Systemic issues are defined as:

“Systemic issues are concerns about banking services which have the potential to affect more than one individual complainant. They may affect the customers of one bank, a class of customers or banks, or they may be industry wide. Some examples are:

- Inadequate disclosure or communication
- Administrative or technical errors
- Inaccurate interpretation of standard terms and conditions
- Inadequate processes to ensure lending is affordable.”<sup>69</sup>

Systemic reporting is important because it can bring benefits to large numbers of consumers. It was the subject of a recommendation of the last review to ensure BOS had the power to investigate made clear in its TOR. This has been accomplished and there is now a systemic issues protocol. It requires BOS to notify relevant bank/s of a possible systemic issue and seek information about it. If the bank response leads BOS to believe the issue is systemic, it will work with the bank to resolve the issue. In so doing BOS may ask the bank to identify affected customers, remediate any negative impact for customers and/or prevent future occurrences.

BOS has a register of systemic and material reporting. It evidences that 38 systemic issues have been logged in the period 26 July 2022 to 26 July 2024.

The review is satisfied that BOS identifies possible systemic issues and investigates, putting banks on notice, seeking action and monitoring compliance. In some cases, when it has not gained necessary assurances, it maintains a watching brief. For example, in one case early this year, BOS identified that a bank had a “continuing pattern of unreasonable delays in response to fraud claims.” It contacted the bank and gained assurances of increased resources and initiatives to reduce the backlog. Not satisfied, it has retained oversight of the issue and some seven months later treats the matter as “ongoing” and continues to monitor the bank to help ensure that the response times, which are decreasing, continue to do so.

Amendments in 2021 to the Act require BOS,<sup>70</sup> to report material contraventions of relevant legislation<sup>71</sup> to the relevant regulatory body. This is more than reporting systemic issues; it could be required if BOS has “reasonable grounds to believe” that a material breach has occurred or is likely to occur. BOS advises that one material contravention has been reported to a regulator.

<sup>68</sup> BOS board pack, 14 February 2024.

<sup>69</sup> BOS Systemic Issues Protocol 2022.

<sup>70</sup> Financial Service Providers (Registration and Dispute Resolution) Act 2008, sections 67 and 67A; Banking Ombudsman Scheme Terms of Reference, clause 47.

<sup>71</sup> The Reserve Bank Act 1989 (RBNZ); The Insurance (Prudential Supervision) Act 2010 (RBNZ); The Non-Bank Deposit Takers Act 2013 (RBNZ); The Credit Contracts and Consumer Finance Act 2003 (Commerce Commission); any of the Acts listed in schedule 1 of the Financial Markets Authority Act 2011 (FMA).

BOS has a guide to regulator reporting. It provides that,

“all BOS resolution staff are expected to be alert for issues that raise concerns about a bank’s contravention of relevant legislation.”<sup>72</sup>

This new form of reporting has needed to be bedded in to ensure regulator expectations align with BOS reporting to the regulator. The Commerce Commission held a workshop with all dispute resolution bodies to assist with regulator expectations and BOS staff undertook that training. The Commerce Commission says it is working with BOS on when and how to share appropriate information with the regulator.

The last review recommended BOS should have an MOU with the Reserve Bank of New Zealand (RBNZ) and the Commerce Commission. (There was already an MOU with the Financial Markets Authority (FMA)). This has been achieved and the MOUs provide operational guidance on how the organisations will cooperate with one another.

In discussions with regulators, it was clear that BOS has good working relationships with each of the regulators. One talked of a “... positive and constructive relationship that is valued”. Another said that BOS was “a very important stakeholder” and that they saw “real value in BOS”. These relationships have clearly enabled a useful dialogue to develop on how to ensure better banking for New Zealanders.

BOS has actively advised a range of decision-makers, using its knowledge of complaint causes. The review has seen numerous submissions made by BOS, including to MBIE, the FMA and RBNZ.

On 20 June 2022 BOS submitted to the Finance and Expenditure Select Committee, providing its weight to a review of consumer protections for fraud and scam victims. It provided an appraisal of cases and compared the protections in New Zealand with the enhanced protections available in Australia and the United Kingdom. It said,

“We support a review of the consumer protection framework for online payments. The framework should give customers and banks alike an incentive to be vigilant to scams, and to respond effectively and promptly when they do happen. For banks, this includes strengthening fraud detection and fraud recovery measures.”

In the review’s opinion BOS uses the rich information it holds and proficiently advises a range of critical organisations, so that they have the benefit of BOS expertise.

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## 12. PROGRESS

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Discussion where necessary on past recommendations has been included in this report.

All recommendations from the 2019 independent review have been actioned to the satisfaction of this review.

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<sup>72</sup> BOS Regulator Reporting Guidelines, 2024.

## 13. WHO WAS CONSULTED

### Written submissions received

ANZ

FinCap

Paul King

Richard Pagan Janine Starks

Utilities Disputes Ltd | Tautohetohe Whaipainga

### Consumer Groups

Age Concern NZ | Natasha Muir – Manager, Fundraising, Communications and Marketing

Consumer NZ | Jon Duffy – Chief Executive

Debtfix | Christine Liggins – Co-founder

FinCap | Jake Lilley – Senior Policy Adviser

Salvation Army | Andrew Mitchell – Financial Mentor and Paul Forster – National Financial Mentoring Coordinator

Utilities Disputes Ltd | Tautohetohe Whaipainga | Neil Mallon – Commissioner

Utilities Disputes Ltd | Tautohetohe Whaipainga | Heather Roy – Board Chair

### Banks

ANZ | Antonia Watson – Chief Executive Officer

ANZ | Georgiana Harper – Head of Customer Relations

ASB | Glen Martin – General Manager Direct Channels; Charlotte Murphy – Head of Customer Care

Kiwibank | Steve Jurkovich – Chief Executive; Justine Hastings – General Manager Enterprise Operations

Rabobank | Todd Charteris – Chief Executive SBS | Mark McLean – Chief Executive

Unity Credit Union | Roanna Vining – Senior Risk Manager; Carrissa Tarrant – Senior Risk and Compliance Adviser

Westpac | Emma Coutts – Senior Manager, Customer Solutions

### New Zealand Institutions

Banking Ombudsman, staff and board members

Commerce Commission | Te Komihana Tauhokohoko | William Rutherford – Principal Policy Analyst; Jill Pitches – Certification Services Manager; Lezanne Gibbs – Senior Advisor Community; Denise Traill – Kaitohutohu Matua; Rachel Mantann – Fair Trading Investigations and Compliance Manager.

Financial Services Complaints Ltd | Susan Taylor – Financial Ombudsman and Chief Executive Officer

Financial Services Complaints Ltd | Jane Meares – Chairperson

Financial Markets Authority | Liam Mason – Director Evaluation and Oversight / General Counsel; Michael Hewes – Director Deposit Taking, Insurance and Advice; Anita Frazer – Head of Licensing and Regulatory Services

Ministry of Business, Innovation and Employment | Hikina Whakatutuki | Emma Moore – Senior Policy Advisor

Ministry of Business, Innovation and Employment | Hikina Whakatutuki | Andrew Palmer – Senior Policy Advisor

Ombudsman New Zealand | Kaitiaki Mana Tangata | Peter Boshier – Chief Ombudsman

New Zealand Banking Association | Te Rangapū Pēke | Roger Beaumont – and Chief Executive Officer; Antony Buick-Constable – Deputy Chief Executive and General Counsel

Payments NZ | Steve Wiggins – Chief Executive Officer

Reserve Bank of New Zealand | Scott McKinnon – Director of Prudential Supervision Retirement Commission | Jane Wrightson – Retirement Commissioner

### Individuals

Hon. Andrew Bayly | Minister Commerce and Consumer Affairs

Kenina Court | BOS board member

Heather Lear

Dan McGuire

Tim Michalick

Janine Starks

### Survey respondents

Anonymous | three respondents BNZ | Shane Cuthbert

Lisa Cowe | Consumer Ian Falconer | Consumer

Heartland Bank | Leanne Lazarus Jo Hurley | Consumer

Dan McGuire | Consumer Tim Michalick | Consumer TSB | Caroline Knight

Unity Credit Union | Roanna Vining

# 14. DOCUMENTS AND MATERIAL CONSIDERED

In addition to submissions and survey responses, material considered included:

## BOS

- Actions since last review 2019 report
- Annual Participant Survey, 2022–2023
- Annual Reports
- Audited Financial Report, 2023 (BDO)
- Values
- Website
- Case notes
- Classification of Cases – Definitions of Enquiries, Complaints and Advice
- Complaint Complexity Guidelines
- Complaints Register – complaints against the Banking Ombudsman Scheme
- Constitution
- Dispute Complexity Guidelines
- Dispute Handling Procedure
- Effective Compliant Handling – a guide
- Fraud Workshop
- How we consider disputes
- Independent reviews of BOS – previous years
- Managing Unreasonable Complainant Conduct
- MOU with the Financial Markets Authority, 2 December 2021
- MOU with Reserve Bank of New Zealand, 16 June 2020
- Nigel Latta TV series, *You've Been Scammed*
- Operational Guidelines, 1 June 2022
- Operational Guidelines – Whistleblowing Service, May 2024
- Practice Note: Fraud and Scams
- Participation Agreement, 2023
- Prevention Insights – various monthly reports
- Quarterly Review of Case-Handling by Steve Townsley, January 2023
- Quick Guides
- Quick Guide to Scams
- Social media channels
- Strategic Plan and Budget
- Submission on Scheme Rules discussion paper, 6 December 2021
- Suicidal or Depressed Guidance
- Systemic Issues Protocol, 2022

- Terms of Reference
- Vulnerability Guidelines, 30 June 2020
- Whistleblowing Service Guide, July 2023
- Whistleblowing – Industry data 22–23 Q4 (full year)
- Whistleblowing Terms of Reference

## Other Dispute Resolution Organisations

- AFCA Case #917926
- AFCA Complaints Resolution Scheme Rules, 1 July 2024
- AFCA's Fairness Jurisdiction Project
- Financial Services Complaints Limited TOR
- Insurance and Financial Services Ombudsman Guidance on Fair and Reasonable Jurisdiction
- Insurance and Financial Services Ombudsman Independent Review, 2023
- Insurance and Financial Services Ombudsman TOR
- International Ombudsman Self-Assessment Tool

## Banks

- New Zealand Banking Association Guidelines
- Code of Banking Practice

## Miscellaneous

- Briefing on banks processes and consumer protections for scams. Report of the Finance and Expenditure Committee, August 2023
- Commerce Commission Draft Report – Personal Banking Services Market Study
- Commerce Commission Final report -Personal Banking Services
- Fact Sheet "When to contact the Commerce Commission about breaches"
- Financial Service Providers (Registration and Dispute Resolution) Act 2008
- Media – various
- Outsourcing Policy, September 2022
- Open letter from Minister Bayly to New Zealand Banking industry, 29 February 2024
- Reserve Bank policy on outsourcing, BS11

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## 15. GLOSSARY

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### Levels of dispute

For consistency terms used by BOS in dealing with consumers are used throughout this report.

**Complaint:** any expression of dissatisfaction about a bank which requires a response.

**Dispute:** Any case that has been considered by the bank, but there has been no resolution and the customer has requested BOS investigates.

**Enquiry:** any other contact, such as a general query about banking.

**Australian Financial Complaints Authority** is referred to as AFCA

**Banking Ombudsman Scheme** is referred to as BOS or the scheme

**Complainant** is referred to as the person making the complaint

**Consumer Outreach Group** is referred to as COG

**Customer** is referred to as anyone who obtains a service from a bank. They may have made an enquiry of BOS or lodged a complaint.

**Early Resolution Service** is referred to as ERS.

**Financial Ombudsman Service** is referred to as FOS

**Financial Service Providers (Registration and Dispute Resolution) Act 2008** is referred to as the Act

**Financial Services Complaints Ltd** is referred to as FSCL

**Insurance and Financial services Ombudsman Scheme** is referred to as IFSO

**Memorandum of Understanding** is referred to as MOU

**New Zealand Banking Association** is referred to as NZBA

**Terms of Reference** are referred to as TOR

**Utilities Disputes Ltd** is referred to as UDL

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## 16. ACKNOWLEDGEMENTS

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Many people put considerable thought into their submissions. This review greatly benefitted from, and is grateful to, all those who submitted by way of the survey, written submissions and meetings with the reviewer.

Not all matters advised by submitters could be covered in this report, either because some matters were outside the terms of reference or because the review had to deal with only the major concerns, but all submissions were considered.

The Banking Ombudsman and her team were open and helpful with all requests. The review is grateful for all assistance that was provided by BOS.

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## 17. ABOUT THE REVIEWER

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Deborah Hart Consulting Ltd was appointed to conduct the review. Its principal, Deborah Hart, undertook the last independent review of BOS in 2019, and has undertaken other reviews, including chairing the independent review of Aotearoa New Zealand's electoral laws.

With a legal background, she is a panel member of the Human Rights Review Tribunal, Chair of the Holocaust Centre of New Zealand and the independent chair of the Retirement Villages' Residents' Council. She chaired the Consumer Advocacy Council, which advocated for residential and small business electricity consumers.

Deborah Hart was the long-time former executive director of the Arbitrators' and Mediators' Institute of New Zealand. She advises on best practice for dispute resolution schemes and has established and overseen a number of dispute resolutions schemes for consumers.

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## 18. TERMS OF REFERENCE

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### Background

The Banking Ombudsman Scheme is an approved external dispute resolution provider, and as such is required to commission an independent review of its operations every five years and report back to the Minister in accordance with section 63(q) of the Financial Service Provider (Registration and Dispute Resolution) Act 2008. The scheme's participation agreement also requires such a review. The scheme will be reviewed against the strategic plan 2023-2026 and the principles listed in section 52(2) of that Act, namely, accessibility, independence, fairness, accountability, efficiency and effectiveness.

### Details of our work

Our scheme was established 30 years ago as an independent service for bank customers to use to resolve problems with their bank. Our 2022-23 annual report can be found [here](#).

The strategic plan 2023-26 sets out the scheme's vision and purpose. The strategy has two overarching – and interdependent – objectives: resolution and prevention. Consistent with our vision of better banking, we employ a preventive model of dispute resolution. The strategy also sets out the scheme's updated values.

### Resolving problems

We try to sort out most problems immediately and refer the rest to the bank concerned. If the customer is not happy with the bank's response, we investigate and try to facilitate a solution or, failing that, make a formal decision. When considering complaints, we apply the relevant laws and industry standards in force at the time of the complaint.

We can award compensation for direct financial loss, and for inconvenience, stress or other intangible impacts. Banks are bound by our decisions, but customers can choose whether to accept them. Customer satisfaction with our service has averaged at least 80 per cent over the past five years.

### Preventing problems

We share lessons from our cases in a variety of ways. We publish cases and guidance on our website and send insights to banks so they can improve their systems and services. We also share insights through presentations to consumer and community groups, at industry and consumer forums, via the news and social media, and through submissions on policy matters. We publish detailed information about all complaints received by banks on a [dashboard](#) accessible via our website.

We actively monitor our cases to identify issues that could have a wider impact for other bank customers. We share complaints data with regulators so they can maintain an industry-wide view of complaint trends. We also meet regularly to discuss emerging trends.

### Fraud and scams

We have experienced an increase in complaints involving scams. It is not only the volume of complaints about scams that is increasing, but also the sophistication and sums involved. Generally speaking, banks are required to refund customers' losses if the scam payment is unauthorised and if customers take reasonable care of their banking – but not if it is authorised. There are exceptions to this. The scheme has been actively involved in promoting fraud awareness and seeking a review of the fraud reimbursement rules to protect customers better.

### General objectives

The review's main objective is to examine, and make recommendations about, how effectively and efficiently the scheme operates to achieve its strategic objectives, particularly to resolve and prevent complaints as set out in the strategic framework. The review will also identify any improvements to help it achieve its aim of being a modern ombudsman scheme that makes a valued and credible contribution to a fair banking sector. The independent reviewer will not act as an appeal authority from the Banking Ombudsman's decisions.

### Specific objectives

The review will examine the principles listed in section 52(2) of the Act:

*Accessibility:* whether the scheme makes itself readily available to customers by promoting awareness of its services and by ensuring its services are easy to use. Is the scheme sufficiently accessible to those who may need its services? In particular:

- Are its outreach and awareness raising activities adequate and appropriate?
- Are its services easy for all consumers, including vulnerable consumers, to use?
- Does it take sufficient steps to ensure banks adequately inform customers about its services?

*Independence:* whether the scheme's structure, systems and decision-making are independent of banks. In particular:

- Is its board composition appropriate to deliver its strategic objectives, and does that composition ensure both its independence and the public's perception of its independence?
- Are its operations appropriate to deliver its strategic objectives and ensure both its independence and the public's perception of its independence?

*Fairness:* whether the scheme makes decisions that are fair and seen to be fair. In particular:

- Does it observe the principles of natural justice and adopt a rigorous, credible approach to reaching decisions?
- Does it make decisions having regard to the law, relevant codes of practice and the principles of good banking practice?
- Does it treat the parties to complaints and disputes with empathy?

*Accountability:* whether the scheme gives a public account of itself by publishing adequate information about its operations. In particular:

- Does it provide adequate statistical and general reporting to the board, banks and public?
- Does it have appropriate processes for managing complaints about itself?
- Does it have a fair, transparent and appropriate process for setting fees and allocating costs?

*Efficiency:* whether the scheme provides an efficient service? In particular:

- Is its case management process and decision-making efficient, especially given its more complex caseload and other commitments?
- Are its quality assurance processes adequate?
- Is its organisational design, including the composition of its leadership team, appropriate?

*Effectiveness:* whether the scheme is effective? In particular:

- Are its rules clear and effective?
- Is it achieving its strategic objectives to resolve and prevent complaints?
- Is it adequately identifying root causes of complaints, sharing insights and collaborating with stakeholders?

- Is it successfully implementing its cultural capability programme?
- Do its roles reflect modern ombudsman practice?
- Is it adequately resourced to fulfill its dual functions of resolving and preventing complaints?
- Does it advise banks, the public, regulators and/or the government about how to improve banking for our communities?

### Review resources

The scheme will provide the following information to assist the reviewer:

- website material, including publications and other resources
- procedural guidance for its staff, banks and complainants
- stakeholder surveys and reports (including customer, bank and staff surveys)
- previous external reviews
- complaint and dispute files
- strategic and business plans
- board papers and operational reports
- dashboard data
- whistleblowing reports.

### Review process

In reporting against the above criteria, the reviewer will:

- provide a balanced analysis of the key issues identified during the review process
- make recommendations in keeping with the fundamental nature of a modern financial ombudsman scheme
- provide a record of issues raised that were not covered by the criteria set out in the terms of reference.
- keep any private information provided to the review strictly confidential.

### Timing

The reviewer should begin work by 17 May and present a draft report to the scheme by 30 August, and a final report by no later than 1 November.

[www.deborahhartconsulting.co.nz](http://www.deborahhartconsulting.co.nz)

