

PEER REVIEW OF ADR MECHANISM FOR CIS KENYA

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Peer review of ADR mechanism for Credit Information Sharing Association of Kenya (CIS Kenya)

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The report was commissioned by FSD Kenya. The findings, interpretations and conclusions are those of the authors and do not necessarily represent those of FSD Kenya, its Trustees and partner development agencies.



The Kenya Financial Sector Deepening (FSD) programme was established in early 2005 to support the development of financial markets in Kenya as a means to stimulate wealth creation and reduce poverty. Working in partnership with the financial services industry, the programme's goal is to expand access to financial services among lower income households and smaller enterprises. It operates as an independent trust under the supervision of professional trustees, KPMG Kenya, with policy guidance from a Programme Investment Committee (PIC). In addition to the Government of Kenya, funders include the UK's Department for International Development (DFID), the World Bank, the Swedish International Development Agency (SIDA) and Agence Française de Développement (AFD).



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Abbreviations

ADR	Alternative Dispute Resolution
CBK	Central Bank of Kenya
CIS	Credit Information Sharing
CP	Credit Provider
CRB	Credit Reference Bureau
FOS	Financial Ombud Scheme
FSD	Financial Sector Deepening Kenya
FSP	Financial Service Provider
INFO	International Network for Financial Ombudsman
SC	Steering Committee
TC	Tatua Center

TATUA CENTER

KARIBU TATUA

Who we are

Tatua Center (link) is an independent body established pursuant to the CRB regulations 2013 to resolve all disputes that arise from credit information sharing (CIS), commonly referred to as the CRB mechanism. The Center uses alternative dispute resolution (ADR) mechanisms in addressing the disputes.

This service is offered free of charge to the parties.

The structure of Tatua Center consists of 2 main offices; the Registrar who runs the day to day operations and an Independent multi-sectoral Steering Committee that provides policy guidance. The Center further has an independent panel of mediators who resolve disputes that escalate to mediation.

The Steering Committee comprises of representation from the AG's Office, Consumer Federation of Kenya, the Judiciary, the Financial Sector Deepening Trust Kenya, the Interreligious Council of Kenya and the Credit Information Sharing Association of Kenya and independent members.

What we do

- We receive complaints against financial institutions and credit reference bureau. Through mediation, we engage the lenders and the bureaus to understand the cause of the complaint and facilitate expeditious resolution of these disputes. Since inception in 2015, we have successfully resolved hundreds of disputes that have arisen within the CIS mechanism. As a result Tatua has contributed to enhanced credibility of the credit information sharing mechanism.
- We undertake awareness campaigns that educate the public in general and consumers of credit in particular on matters of CIS.

Tatua is committed to accurate credit information sharing in both the lender and borrower's good interest.

Values

- Independence
- Impartiality
- Efficiency
- Approachability
- Honesty
- Credibility

We are guided by

The Constitution of the Republic of Kenya.
The World Bank Fundamentals of Financial Ombudsman.
International Network for Financial Services Ombudsman Schemes.

Partners/funders.



EXECUTIVE SUMMARY

Financial Sector Deepening Kenya (FSD) requested a peer review of the ADR mechanism for CIS Kenya. More specifically to review its operations, its current model of resolving disputes and benchmark it against international standards. These standards are captured in the principles developed by the International Network for Financial Ombudsman (INFO) which is based on the Worldbank Report on Fundamentals for Financial Ombudsman.

Further provide recommendations for improved efficiency and effectiveness. Finally provide recommendations on the possible expanding of the scope of disputes resolved by TC.

In preparing this review I familiarised myself with the processes, interviewed key staff members, the chairperson of the steering committee, the financial consultant, credit providers, credit reference bureaux, a mediator and a representative of the Central Bank of Kenya. I reviewed some case files and feedback from complainants. I facilitated a workshop on ADR with stakeholders and studied the Handbook for CIS Kenya dealing with alternative dispute resolution.

The context is that TC is an interim office to test the viability of ADR regarding credit information. The office is currently serving as a department within the CIS and in the process in registering a separate company to secure its independence

A. EVALUATION TC USING THE INFO PRINCIPLES

1.1 Independence and impartiality - TC fully compliant

ADR mechanisms are to be and seen to be independent from the industry it has jurisdiction over as well as consumer bodies. Independence is further tested by scrutinising how the founding documents are formulated, how cases are resolved, the appointment and term of the ombudsman, adequate staff and the governance body.

1.2 Clarity and scope of powers – TC not compliant

The Ombudsman should publish details of the scope of its jurisdiction; its enquiry and case-handling processes; its powers; the status of its decisions; any effect on the complainant's legal rights of using the ombudsman scheme; and what information is (or is not) kept confidential. The TC website was not accessible to stakeholders at the time of the review.

1.3 Accessibility – TC not compliant

Consumers must be aware of TC and know where to find it. Both the ombudsman and the industry must provide information to consumers, especially dissatisfied consumers.

1.4 Effectiveness – TC fully compliant

Complaints are clearly defined as well as the obligations on members to deal with complaints fairly and promptly.

TC has a flexible and informal process; skilled decision-makers; is properly resourced.

1.5 Fairness – TC fully compliant

TC does not deal with complaints that falls outside its' jurisdiction. Due process is followed, prompt and impartial decisions are made which are accepted by members.

1.6 Transparency and Accountability – TC not compliant

TC should consult publicly about its' scope, procedures, business plans and budgets; publish a report at least yearly, explaining the work that they have done.

2. VIEWS OF STAKEHOLDERS

- (a) Eight stakeholders were interviewed exploring; Confidence in TC, bias/fairness of decisions, consistency of decisions, quality of ADR, skills/professionalism/courtesy of staff, ability to challenge views of TC and publication of information
- (b) A stakeholder workshop provided perceptions of benefits and challenges of ADR. Although confidence is high in TC, the lack of engagement with the members requires action.

3. VIEWS OF CONSUMERS

Ten consumers provided their views on five areas of service provided by TC. Everybody will refer TC to family and friends (highest score). Extended time to resolve disputes attracted the lowest score.

4. REVIEW OF TC CASE FILES

Eight case files were reviewed and demonstrated well documented cases and clearly communicated outcomes to all parties. There was no evidence of any bias or unfair decisions.

B EXPANDING THE SCOPE OF DISPUTES RESOLVED BY THE CENTER

The Central Bank of Kenya confirmed the importance of ADR and the National Treasury is investigating the possibility of a Financial Ombud scheme. TC is providing an effective service and could be transformed to become the Financial Ombud Scheme in Kenya. A “hybrid financial ombud scheme” should be considered as it provides the necessary flexibility, but also compel participation of all FSP’s in the Ombud scheme. The jurisdiction should be determined by the industry in consultation with the regulator and all regulated FSP’s should participate in the ombud scheme as a licence requirement. The scheme must determine its own budget and funding mechanism with oversight from its governance body and attracts no costs from consumers. The Central Bank could provide initial seed capital to establish the expanded scheme and fund its first year of operations.

C. GENERAL COMMENTS AND OBSERVATIONS

I became aware of potential issues that could hamper the broad use and positioning of credit information. These comments falls outside the scope and serve as a guide for discussion:

1. The need to position the credit bureau in a positive light with consumers and for consumers to understand the positive impact of credit bureau in their financial lives.
2. Explore more advanced methods of verifying the identity of individuals than just using the national ID document. Alternatives will result that more consumers can access the ADR dispute process with CRB’s.
3. Explore a communication mechanism among credit bureaux to notify each other on changes of information, alternatively shift the onus onto CP’s to update any changes to all CRB’s once a dispute is resolved or a default account has been paid in full. This will assist the consumer not to interact with every credit bureau in the event of a dispute.
4. Thought should be given on the long terms sustainability of the use of credit information for employment purposes, it should be discouraged totally and only required in limited positions i.e. direct working with cash or finances.
5. The purpose, application and effectiveness of “clearance letters” should be investigated together with the impact of this requirement on rural Kenyans.
6. The need for the CBK to approve sources of data for CRB’s and potentially limit data sources for CRB’s could limit creativity within CRB’s and should be reconsidered.

Chapter 1

GLOBAL BEST PRACTICE

1.1. FUNDAMENTALS FOR FINANCIAL OMBUDSMAN

Financial Ombud Schemes (FOS) can be broadly defined as providing a free, informal, speedy and cost-effective alternative to court action. The ombudsman is an independent, impartial person with authority and responsibility to receive, investigate, or informally address complaints, and when appropriate, make findings and recommendations. In addition, the ombudsman makes recommendations for the improvement of the general administration of the entities over which it has jurisdiction.

In 2012, the World Bank published a report highlighting the fundamentals of financial ombudsmen when resolving disputes between consumers and financial business. The International Network for Financial Ombudsman (INFO) used these fundamentals and created guidelines and principles for ombudsman that serves as international best practice for Financial Ombudsman and/or ADR schemes, and these factors formed the platform in evaluating TC.

The report outlines the key issues to be borne in mind in creating a financial ombudsman, or developing an existing one – including governance, funding, coverage, procedure, accessibility, transparency and accountability.

While taking account of the relevant constitutional, legal and cultural circumstances in different countries, it is important to remain true to the basic ombudsman principles.

Characteristics of Effective Alternative Dispute Resolution Schemes

The need for effective ADR through a financial ombudsman is supported by nine previous World Bank reports on improving consumer confidence in financial services in individual countries. 12 Common themes included:¹

- Special attention should be paid to consumer complaints. Many are enquiries rather than disputes. If they are not satisfactorily addressed, they undermine public confidence.
- FSPs should be obliged to inform customers, in writing, on how to lodge complaint, and have a designated department/person to handle complaints. Regulators should frequently review the complaint files of FSPs.
- Consumers should have access to a fast, inexpensive and effective redress mechanism; ideally there should be one, clearly identified central location for complaints or enquiries.
- Consumers should be able to submit complaints by phone, email, post or personal visit. The central complaints office should have a free phone line.

¹ Worldbank Report 2012

- Going to court is not a viable alternative for most consumers; as such policy-makers should consider establishing a financial ombudsman.
- Statistics on consumer complaints should be analysed, published, and used to identify future improvements in the protection framework.
- Experience shows that an effective financial ombudsman benefits financial businesses, the state and consumers.
- Consumers have greater confidence in financial services when they are aware that should something go wrong their dispute will be heard by an independent body which will resolve the issue quickly and informally, without the need for legal counsel.
- FSPs benefit as (i) consumers are more likely to take up financial products; (ii) the cost of resolving disputes is kept to a minimum; and (iii) unscrupulous competitors are held to account.
- The state benefits because (i) redress can be provided at minimum cost; (ii) feedback from an ombudsman can help improve future regulation; and (iii) confident consumers are more likely to play a role in developing a sound financial market.
- Ombudsmen fulfil a wider role than the courts. Like the courts they resolve individual cases, but unlike the courts, they also deal with consumer enquiries, and proactively provide feedback to governments, regulators, FSPs and consumers to improve for the future.

While the Worldbank report identifies the principles for financial ombud schemes, these principles may be applied to any ADR scheme²:

Independence

The decision-maker must be independent to ensure impartiality. Individual decision-makers must have the necessary abilities, experience, and competence, and have security of tenure for a period sufficient to ensure independence. The individual appointed must not have worked for an FSP or industry professional body within the last three years. Alternatively, decisions can be made by a body with equal membership from consumers and professionals.

Transparency

The financial ombudsman should publish clear details about its powers and procedures, and about the type and effect of its decisions. It may also publish case studies and/or guidance notes to illustrate the financial ombudsman's approach to typical cases.

Anyone is entitled to ask for information about the types of disputes that are covered; the rules and procedures that apply; how decisions are made; whether decisions are based on strict law or on fairness; whether decisions

² Worldbank 2012

are binding; and any provisions about costs. An annual report should be published, showing the nature of disputes and the results obtained.

Effectiveness

The ombudsman must take an active role in investigating the complaint, so that the consumer does not need legal representation, and the ombudsman must provide a prompt decision. The procedure must be free for the consumer, or of moderate cost.

Accessibility

Consumers can only access the financial ombudsman if they know about it, and where to find it. In addition to the ombudsman making information widely available, FSPs should be required to inform dissatisfied consumers about the ombudsman. Ombud schemes should have a website to allow the parties to submit a complaint online and exchange information electronically.

Governance

It is advisable for the financial ombudsman scheme to have an independent governance body in the form of a board or council. This may be the body that appoints the ombudsman, or a body that is equally independent of the financial industry (though the industry may have minority representation). The governance body should not be involved in deciding cases, or in the day-to-day management of the ombudsman scheme. Its function is to help safeguard the independence of the ombudsman; help ensure that the ombudsman scheme has adequate resources to handle its work; oversee the efficiency and effectiveness of the ombudsman scheme; and advise the ombudsman on the strategic direction of the ombudsman scheme.

Funding

While a financial ombudsman can be funded by the government from the budget vote, but it is more usual for the cost of the financial ombudsman to be borne by the financial industry from which the ombudsman's work arises. From the ombudsman's point of view, the important factor is that there is sufficient funding, rather than how the cost is divided among the financial industry. Several industry funding models exist, including:

- A levy payable by all the financial businesses covered by the ombudsman scheme, often apportioned according to their market share;
- Case fees payable by the financial businesses about which consumers actually refer complaints to the ombudsman scheme; or
- A combination of the two, with part of the funding coming from a levy payable by all financial businesses and part from case fees.

A levy reflects the fact that all financial businesses benefit from the increased consumer confidence created by the existence of the ombudsman. Case fees mean that more of the cost is borne by the financial businesses that have more cases. It is common for any case fee to be payable irrespective of the outcome of the case in order to avoid the complication of a further dispute about whether or not the case should be chargeable and because the emphasis should be on resolving the dispute rather than who is 'right'. The ombudsman scheme should consult publicly before fixing its yearly budget. Depending on the make-up of the governance body, it may be appropriate for the final budget to be approved by an impartial third party – such as a financial regulator – to ensure it is neither too little for the workload nor too much for the industry to pay.

Accountability

Accountability does not involve any restriction on the independence of the financial ombudsman. It involves the ombudsman paying due regard to the overall public interest in the forward-planning and day-to-day running of the ombudsman scheme. Financial ombudsmen should publish a report at least yearly, explaining the work that they have done. They should provide appropriate statistics about the disputes they have handled and the way in which they have handled them (including the arrangements for quality-control). Many ombudsman schemes also consult publicly in advance about their procedures, business plans and budgets. This provides an opportunity to obtain information that helps to estimate future workload, something that is often the most difficult aspect of managing a financial ombudsman scheme. Differing views are taken in different countries about the extent to which the financial ombudsman should share information (or not) with the financial regulator. Whatever the position is, it should be publicly documented. Where financial ombudsmen identify systemic issues that financial regulators would be better placed to tackle, it is helpful if the financial ombudsman can draw those issues to the attention of the financial regulators.

1.2 International Network of Financial Services Ombudsman Schemes (INFO)

The overall aim of the INFO Network is for member schemes/offices to work together to develop their expertise in dispute resolution, by exchanging experiences and information.

INFO developed a set of ombudsman principles in the form of a framework or a guide to strive for best practice through these fundamental principles. The principles have been developed by the INFO Network from work undertaken by INFO Network member representatives, David Thomas and Francis Frizon, for the World Bank, published in January 2012, which is described in this report above.³

³ <http://www.networkfso.org/principles.html>

1.2.1 Independence and impartiality

Fundamental Principle:

- Financial ombudsman schemes are an alternative to the courts and should therefore be, and be seen to be, independent and impartial, resolving cases on their merits without fear or favour.
- Financial ombudsman schemes should be established so that they are visibly and demonstrably independent of both the financial industry and consumer bodies.
- Decision-makers should be free from influence/direction by:
 - Parties to disputes (and those representing them); and
 - Regulators and governments

1.2.1.1 Constitution

The independence of the financial ombudsman scheme is established in law or in a constitution that is approved by a public-interest agency.

The parties to disputes should not be in a position to exert commercial or other influence over the financial ombudsman scheme, directly or indirectly.

The financial ombudsman scheme should be free to publish reports on its work and on issues that give rise to complaints.

1.2.1.2 Resolving cases

Case decisions are made by an ombudsman, or by a decision panel comprising an independent chair and an equal number of industry representatives and consumer representatives.

An ombudsman and a decision-panel chair have not worked, in the previous three years, in a financial business (or an industry association for the sector) covered by the ombudsman scheme.

Only an ombudsman or a decision panel:

- Decide whether any case is within jurisdiction;
- Choose the procedure for the resolution of any case; or
- Decide/recommend the outcome of any case

A binding decision or non-binding recommendation by an ombudsman or decision panel is not able to be overturned, or is only able to be overturned by the courts (or a tribunal with equivalent independence and standing).

Any decision-maker discloses any conflict of interest in relation to a case, and ceases to be involved in the case unless both parties agree.

1.2.1.3 Appointment and terms

- A decision-maker is appointed in a manner that commands public confidence in the relevant country
- The body appointing the ombudsman should not have a majority of industry representatives nor a majority of consumer representatives.
- Appointments of decision-makers are made by a transparent process, following a public advertisement.
- Whoever appoints them, a decision-maker is appointed on terms that secure their independence from:
 - the financial industry and consumer bodies;
 - the financial regulator(s) and the government; and
 - those who appointed the decision-maker
- A decision-maker is appointed (or reappointed) for a sufficient term to ensure independence (typically at least five years), and is not removable – except for incapacity, misconduct or other just cause.
- Any decision to remove a decision-maker is in the hands of a body that is independent of the financial industry and independent of consumer bodies.
- If a decision-maker can be reappointed, the process does not compromise the decision-maker's independence and he/she is told the outcome at least one year before the previous term ends.
- A decision maker's pay is not subject to reduction or suspension, and it is not influenced by the outcome of cases.

1.2.1.4 Staff and resources

The financial ombudsman scheme should be provided with sufficient resources to cope efficiently with its workload. It should operate on a not-for-profit basis.

The funding structure should be such that those providing the funds (whether from the public sector or private sector) cannot influence the work of the financial ombudsman scheme. The financial ombudsman scheme should be able to select and employ its own staff.

1.2.1.5 Governance body

It may be helpful, but not essential, for the financial ombudsman scheme to have an independent governance body, to appoint decision-makers; help safeguard the independence of the decision-makers; help ensure that the ombudsman scheme has adequate resources to handle its work; oversee the efficiency and effectiveness of the ombudsman scheme; and advise on the strategic direction of the ombudsman scheme.

Any governance body is not involved in deciding cases, nor the day-to-day management of the financial ombudsman scheme. Appointments of members of any governance body are made by a transparent process, following a public advertisement. The members of the governing body should be appointed on terms that require them to act in the public interest and secure their independence from those appointing them. Any member of any governance body should disclose any conflict of interest and cease to be involved in a discussion or decision. Any governance body does not have: a majority of industry representatives; nor a majority of consumer representatives.

1.2.2 Clarity of scope and powers

Fundamental principle:

The financial ombudsman scheme should publish details of the scope of its jurisdiction; its enquiry and case-handling processes; its powers; the status of its decisions; any effect on the complainant's legal rights of using the ombudsman scheme; and what information is (or is not) kept confidential.

1.2.2.1 Basics

The financial ombudsman scheme should publish details of its postal address, phone number, email address and website address; the basis of its authority; its decision makers, their method of appointment and term of office; and its membership of any national or international network.

1.2.2.2 Jurisdiction

The financial ombudsman scheme should publish details of the scope of its jurisdiction, including the financial businesses that are covered; the types of services that are covered; whether or not that includes services provided cross-border; whether or not the complainant must be a customer; whether any businesses can complain and, if they can, what types of business; any time limits within which a dispute must be brought to the ombudsman scheme; any minimum or maximum value of disputes that the ombudsman scheme can handle; and any grounds on which the ombudsman scheme may decline to deal with a dispute that is in its jurisdiction.

1.2.2.3 Processes

The financial ombudsman scheme should publish details of its enquiry and case-handling processes, including whether the complainant must first complain directly to the credit industry; any requirements on how the credit industry handle complaints; anything else the complainant must do before referring a dispute to the ombudsman scheme; whether or not the ombudsman scheme handles enquiries; whether or not the ombudsman scheme uses negotiation/conciliation/mediation; whether or not the

ombudsman scheme actively investigates cases; the language(s) in which disputes can be submitted and can be handled; and whether or not bringing a dispute to the ombudsman scheme suspends any time limit for taking the dispute to court.

1.2.2.4 Powers

The financial ombudsman scheme should **publish** details of its powers, including any power to demand information or documents from either of the parties; the basis on which disputes are decided – for example. fairness/equity; any maximum limit to the amount of compensation it can recommend/award; whether or not compensation is limited to financial loss; whether or not compensation can carry interest until the date it is paid; whether or not costs can be (and, if so, are likely to be) awarded; whether or not a CP or CRB can be required to do anything else to put things right for the complainant; and whether or not a CP or CRB can be required to change its processes.

1.2.2.5 Status of decisions

The financial ombudsman scheme should **publish** details of the status of its decisions, including whether or not they are published; whether or not they bind the financial business; if binding, how they can be enforced; if non-binding, the percentage of cases in which they are followed by CP's and/or CRB's; if non-binding and not followed, whether there are consequences (e.g. publicity); whether or not they bind the complainant; and whether or not there is the possibility of review by, or appeal to, the courts.

1.2.2.6 Confidentiality and Publication

The financial ombudsman scheme should **publish** details of whether or not the identities of the parties are kept confidential; other information about disputes is kept confidential; and a party can use information from the investigation/decision in subsequent court/arbitration proceedings. There should also be an explanation of whether or not the details are made publicly available on TC's own website and in any other appropriate way.

1.2.3 Accessibility

The fundamental principle:

CP's and CRB's should be required to tell customers about TC and TC should provide comprehensive information on its own website and in other appropriate ways; be easily available and accessible to complainants (without any cost barrier); communicate clearly; and make appropriate provision for vulnerable complainants.

1.2.3.1 Financial businesses (CP's and CRB's)

Financial businesses are required to tell customers in writing about the financial ombudsman scheme:

- on the financial business's website, if it has one;
- at the point of sale;
- in contracts;
- if the customer makes a complaint; and
- In its final written decision on a complaint.

The financial business's final written decision on the complaint includes details of:

- how to contact the financial ombudsman scheme; and
- Any time limits that apply.

1.2.3.2 Own website

On its own website, the financial ombudsman scheme should show at least the scope of its jurisdiction; its enquiry and case-handling processes; its powers; the status of its decisions; what information is kept confidential, and what may be published; its most recent annual report; any current consultations; and the outcome of any recent consultations.

1.2.3.3 Other sources of information

The financial ombudsman scheme should ensure that information is also readily available to potential complainants who do not have access to the internet. This may involve making information available through consumer advice organisations; local consumer advice centers; public libraries; local authorities; other places where consumers are used to receiving information; elected representatives; and the media.

1.2.3.4 Communication

The financial ombudsman scheme should be easily available and accessible to complainants for submission of disputes online, by post and by telephone. It should also be easily available and accessible to complainants who need face-to-face meetings. Complainants should be able to approach the scheme without having to go through any other person.

The financial ombudsman scheme should ensure that all its communications (including its letters and its decisions/recommendations) are in clear and jargon-free language; and makes appropriate provision for consumers who are particularly vulnerable because of disability, age, language, literacy or other reasons.

1.2.3.5 Free for complainants

The services rendered by the financial ombudsman scheme should as far as possible be free-of-charge for complainants.

1.2.3.6 Access to court

A complainant should have a free choice whether to take a dispute to court instead of the financial ombudsman scheme. No agreement concluded before the dispute materialised requires the complainant to go to the ombudsman scheme instead of the court.

1.2.4 Effectiveness

Fundamental principle

Clear definition of what constitutes a complaint and clear obligations on CP's and CRB's to deal with complaints fairly and promptly.

A financial ombud scheme should have a flexible and informal process (where parties do not need professional advisers); have skilled decision-makers; and be properly resourced.

1.2.4.1 Obligations on CP's and CRB's

What constitutes a complaint should be clear, and documented. For example can it be any oral/written expression of dissatisfaction; or does it have to be a formal complaint in writing?

Financial businesses within the financial ombudsman scheme's jurisdiction are required to have an accessible, effective and fair internal complaints process, which is published; issue a written response to a complaint, with reasons, within a specified time; tell complainants that, if they are still dissatisfied, they can go to the ombudsman scheme; have a single person with overall responsibility for the handling of complaints; respond promptly to communications from the ombudsman scheme; provide information and documents requested by the ombudsman scheme; and comply promptly with the ombudsman scheme's decisions.

1.2.4.2 Informal and flexible process

The financial ombudsman scheme should have an informal and flexible process, so that neither party needs a lawyer or adviser (though parties are not prohibited from using a lawyer/adviser if they want to)

The financial ombudsman scheme should handle enquiries, to resolve some problems before they turn into full-blown disputes; take an active role in

deciding what evidence is required and calling for it; obtain expert reports when these are necessary; use informal mediation to reach a fair settlement, where this is possible and appropriate; and issue a formal decision in cases that are not settled.

1.2.4.3 Information, advice and training

The financial ombudsman scheme should assist early resolution of complaints by publishing details of its approach to common disputes; giving advice to consumers and credit industry; and help train consumer advice centers and CP's and CRB's complaint departments.

1.2.4.4 Knowledge and skills

The financial ombudsman scheme's decision-makers should have the necessary knowledge and skills in resolving disputes; have a general understanding of law; have knowledge of relevant financial services; and should be appropriately trained.

1.2.4.5 Resources

The financial ombudsman scheme should be adequately staffed; adequately funded; efficient; and cost-effective so that disputes can be effectively and expeditiously investigated and resolved.

1.2.5 Fairness

Fundamental principle:

Financial ombudsman schemes should aspire to comply, is to be prompt, be impartial, proceed fairly and tell the parties in writing its decision and the reasons for it.

1.2.5.1 Disputes not handled

If a case is outside the jurisdiction of the financial ombudsman scheme, or if it is inappropriate for the ombudsman to deal with it for any other reason, it should promptly tell the complainant of that decision and the reasons for it.

1.2.5.2 Due process

The financial ombudsman scheme should ensure that the complainant and the member can put forward their information and arguments; can comment on the other party's information and arguments; see a copy of any expert statements/opinions obtained by the ombudsman scheme; can comment on any expert statements/opinions obtained by the ombudsman scheme; are told they do not need a lawyer or legal advisor; are told they may seek

independent advice or be represented/assisted by a third party; and are notified of the outcome, with reasons, in writing.

1.2.5.3 Prompt and impartial

The financial ombudsman scheme should deal promptly with all stages of its enquiry and dispute-resolution process; and should reach its decisions impartially.

1.2.5.4 Accepting a settlement or decision

Before asking the complainant to accept a settlement or a decision, the financial ombudsman scheme should tell the complainant the legal effect (if any) of accepting the settlement or decision and if applicable, that the solution is less advantageous to the complainant than a court would give; and gives the complainant a reasonable time to reflect.

1.2.6 Transparency and accountability

Fundamental principle:

Financial ombudsman schemes should pay due regard to the overall public interest in forward-planning and day-to-day operations; consult publicly about their scope, procedures, business plans and budgets; and publish a report at least yearly, explaining the work that they have done.

1.2.6.1 Consultation

The financial ombudsman scheme should consult publicly about its initial scope and procedures; any significant changes to its scope and/or procedures; and its business plans and budgets.

1.2.6.2 Report

The financial ombudsman scheme should publish a report at least yearly, providing information about the disputes it has handled and the way in which it has handled them.

The report should include details of the numbers and types of disputes that were received; were outside the ombudsman scheme's jurisdiction; the ombudsman scheme declined to deal with (even though in jurisdiction); were discontinued; were resolved by the ombudsman scheme; were resolved in favour of the complainant; and were resolved in favour of the financial business.

The report should also include the average time taken to resolve disputes; representative case studies; any systemic or significant problems identified

in the financial system; the ombudsman scheme's governance arrangements; how it preserves the independence of its decision makers; the ombudsman scheme's arrangements for control of quality; and cooperation with other ombudsman schemes, nationally (where applicable) and internationally.

The report should make clear whether the financial ombudsman scheme provides information directly to any financial regulator about any systemic or significant problems identified in:

- the financial system; and/or
- Individual financial businesses.

The report is made publicly available:

- on the financial ombudsman scheme's own website;
- in print; and
- In any other way appropriate in the relevant country.

1.2.6.3 Finance

The financial ombudsman scheme:

- publishes its annual accounts; and
- Has appropriate internal controls to demonstrate financial probity.

1.2.6.4 Service quality

The financial ombudsman scheme has a robust mechanism for:

- reviewing the quality of the service it provides; and
- Handling complaints about service quality.

Chapter 2

EVALUATION OF TATUA CENTER

(A) INFO developed a set of ombudsman principles in the form of a framework or a guide to strive for best practice through these fundamental principles. Each principle is supported by various approaches or sub-categories that contribute and strengthen the fundamental principle.

2.1 INDEPENDENCE AND IMPARTIALITY – TC FULLY COMPLIANT

Fundamental Principle:

- Financial ombudsman schemes are an alternative to the courts and should therefore be, and be seen to be, independent and impartial, resolving cases on their merits without fear or favour.
- Financial ombudsman schemes are an alternative to the courts and should therefore be, and be seen to be, independent and impartial, resolving cases on their merits without fear or favour.
- Financial ombudsman schemes should be established so that they are visibly and demonstrably independent of both the financial industry and consumer bodies.
- Decision-makers should be free from influence/direction by:
 - Parties to disputes (and those representing them); and
 - Regulators and governments

Approaches:

2.1.1 Constitution

2.1.1.1 The independence of the financial ombudsman scheme must be established in law or in a constitution that is approved by a public-interest agency.

The Tatu Center (TC) is a non-statutory association and is governed by an independent Steering Committee. TC is divided in two main offices, but have three distinct functions. (a) The Steering Committee (SC) who's purpose is to provide leadership and direction to TC and to secure TC's independence. (b) The Registrar whose main function is to explore prospects of resolving complaints through intervention, facilitation, or mediation and would attempt to resolve complaints between parties before it becomes necessary for mediation (c) the independent and qualified mediators who will, when all attempts by the Registrar failed to resolve a complaint, provide formal mediation services to parties and attempt to resolve complaints based on consensus.

This separation of the SC, registrar and mediators assists with public perceptions of independence of the Center. The Handbook developed for TC by Credit Information Sharing (CIS) is clear on the independence of the office as well as the need for neutrality of the mediators. This "Handbook" provides detailed information and clear guidelines and procedures on resolution of disputes.

Although TC does not completely comply with the requirement that its independence must either be established in law or in a constitution that is approved by a public-interest agency, there is no evidence that the office is not independent or biased towards any stakeholder. The INFO principles makes provision for alternative methods for establishing the independence an Ombud scheme and by considering the details of the "Handbook" it is clearly expressed in various sections for TC and mediators to demonstrate its independence and must be perceived to be independent, neutral and impartial.

2.1.1.2 The parties to disputes should not be in a position to exert commercial or other influence over the financial ombudsman scheme, directly or indirectly.

The founding documents make provisions that the Steering Committee, the governing body of TC, is composed of 4-7 members which may include representatives of CRB's, Attorney General's Office, credit providers, the Judiciary, the Law Society of Kenya, independent members, other consumer bodies, or any other key stakeholder groups that have special interest in CIS. Most importantly representatives of the credit industry should be a minority to enhance the perception of independence from the credit industry.

The actual Steering Committee is chaired by Mr Ephraim Kanake who is also serving as the chairperson of the Consumer Federation of Kenya. Other members on the SC are a representative of the Judiciary, a representative of the Inter Religious Council of Kenya, the Chairperson of Nairobi Center of International Arbitration, a representative of FSD Kenya, a representative of the CIS Kenya, a representative of the Attorney General Chambers and the Interim Registrar of TC. There are no representatives of the credit industry on the SC. As a body, the SC would appear to represent a diverse range of interests and have a wide range of valuable skills and experience, neither leaning in favour of the credit industry nor consumer activism. With the current composition of the SC there is no possibility for any party to attempt to exert any undue influence on TC.

2.1.1.3 The financial ombudsman scheme should be free to publish reports on its work and on issues that give rise to complaints.

All stakeholders are of the view that TC can publish any relevant information to enhance consumer capability, about trends in the market and even details of cases, but there is a definite reluctance from both TC and majority of members to publish the identity of the parties involved in the dispute. It is preferred that the identities of parties be kept confidential and that TC should not be "naming and shaming" members. This practice could inhibit members to refer consumers to TC as this could harm members' reputation in public.

I will recommend, after taking all the factors into consideration, for TC to report

on work done by the organisation including an annual report. Further report on complaint trends within the industry as well as details of complaints, without divulging the identity of the parties.

These reports should be published on TC website as well as the media. TC must alert the industry, the public and regulators of trends which may indicate irregular activity within the industry. Provision is made in the "Handbook" for the Registrar to advise institutions on systemic issues, report on consistent non-compliance of the laws to the SC and provide information to the Regulator which they may reasonably require. Any publication of information by TC should be done with the necessary restraint so that it is seen in a positive light, and as being helpful, instead of being perceived as a threat.

2.1.2 Resolving cases

2.1.2.1 Case decisions are made by an ombudsman, or by a decision panel comprising an independent chair and an equal number of industry representatives and consumer representatives

TC facilitates complaints to find voluntary resolution of disputes between parties. When this process fails, the case will be escalated to independent qualified mediators, who will assist parties to resolve the dispute based on consensus. It must be noted that the mediators are not employed by TC on a full time basis. No decisions on the outcome of a complaint is made without consent from both parties. It is clear that decisions are made independently and impartially as the independent mediators who are not in the full time employ of the TC can only take the merits of the case into account when entering into the mediation session.

2.1.2.2 An ombudsman and a decision-panel chair have not worked, in the previous three years, in a financial business (or an industry association for the sector) covered by the ombudsman scheme

Currently, TC has an interim Registrar as the office is in a test phase. As per the previous point, the Registrar or the independent mediators cannot make decisions without consent from both parties, thus the possible influence on outcomes of disputes are minimized. I did not become aware of any close ties or relationships, or any undue favouritism (or aggression) towards any specific credit provider. It is, however, important to be sensitive towards this issue.

2.1.2.3 Only an ombudsman or a decision panel:

- Decide whether any case is within jurisdiction;
- Choose the procedure for the resolution of any case; or
- Decide/recommend the outcome of any case

In order to place this within its proper perspective, the procedure in dealing with complaints needs to be analysed.

Consumers need to request a copy of their credit report directly from a CRB and report a complaint directly to the CRB if the data is incorrect. The CRB will verify the data with the relevant CP. If no changes are made to the data, and a consumer still feels aggrieved, they can contact TC to lodge a dispute.

All complaints are received at a single entry point, where it is assessed by the Registrar and determined if the dispute falls within its' jurisdiction. The Registrar will explore prospects of resolving the complaint through intervention, facilitation, or mediation. TC has the right to implement any procedure the Center deems appropriate. The "Handbook" is clear on these processes.

The Registrar can recommend to parties to resolve the issues at hand, but cannot decide the outcome of the case, as parties need to voluntarily agree to the outcome of the case. If agreement is not reached by the parties the case is referred for mediation. If the independent mediator conclude a case based on consent between the parties, the decisions are drafted in a consent order, which could become an order of the courts. If a case could not be concluded the consumer is made aware of his/her rights to approach a court of law or resolve to arbitration for relief.

Nowhere in this process can the Registrar or Mediators influence cases which could be construed as biased against any party.

2.1.2.4 A binding decision or non-binding recommendation by an ombudsman or decision panel is not able to be overturned, or is only able to be overturned by the courts (or a tribunal with equivalent independence and standing).

TC does not make binding decision or non-binding recommendations as all cases must be resolved based on consent between the parties.

2.1.2.5 Any decision-maker discloses any conflict of interest in relation to a case, and ceases to be involved in the case unless both parties agree.

The "Handbook" in various sections is emphasising the importance of impartiality, objectivity and neutrality and through this one can presuppose that any possible conflict of interest will be disclosed. It is important that the disclosure of any possible conflict of interest need to be clearly expressed in the "Handbook" or founding documents.

2.1.3 Appointment and terms

- 2.1.3.1 A decision-maker is appointed in a manner that commands public confidence in the relevant country
- 2.1.3.2 The body appointing the ombudsman should not have a majority of industry representatives nor a majority of consumer representatives.
- 2.1.3.3 Appointments of decision-makers are made by a transparent process, following a public advertisement.
- 2.1.3.4 Whoever appoints them, a decision-maker is appointed on terms that secure their independence from:
- the financial industry and consumer bodies;
 - the financial regulator(s) and the government; and
 - those who appointed the decision-maker
- 2.1.3.5 A decision-maker is appointed (or reappointed) for a sufficient term to ensure independence (typically at least five years), and is not removable – except for incapacity, misconduct or other just cause.
- 2.1.3.6 Any decision to remove a decision-maker is in the hands of a body that is independent of the financial industry and independent of consumer bodies.
- 2.1.3.7 If a decision-maker can be reappointed, the process does not compromise the decision-maker's independence and he/she is told the outcome at least one year before the previous term ends.
- 2.1.3.8 A decision maker's pay is not subject to reduction or suspension, and it is not influenced by the outcome of cases.

TC is currently in testing phase and the Registrar has been appointed for an interim period only. Once the permanent TC or Ombud scheme is formed the appointment of the head of the organisation process will start. This appointment process is significant should not be overlooked when the recruitment process starts.

2.1.4 Staff and resources

- 2.1.4.1 The financial ombudsman scheme should be provided with sufficient resources to cope efficiently with its workload. It should operate on a not-for-profit basis.

Although TC runs on a tight budget and operates on a not-for-profit basis, the overall impression is that finances are well-managed. Currently the office has two full time staff members as the Interim Registrar and the deputy Registrar. This is adequate for the number of disputes that reach the office.

The office is currently not well known and as soon as the office launches formally, more effort should be made to create awareness of the office. Once this happens the office will have to pay attention to adequate human resources as well as adequate office space. I did not come across any instances of wastefulness.

- 2.1.4.2 The funding structure should be such that those providing the funds (whether from the public sector or private sector) cannot influence the work of the financial ombudsman scheme.

TC is a non-statutory ADR center and all credit providers that share information on the CRB contribute to finances of the CIS who in turn is paying TC. The CIS is a separate organisation with its own objectives, although overlaps exist within the two organisations. The members of TC or CIS have no influence whatsoever over the operations of the office, the appointment of the Registrar and the staff, including the mediators or on the determination of individual cases.

- 2.1.4.3 The financial ombudsman scheme should be able to select and employ its own staff.

TC selects and employs its own staff, without influence from participants in the scheme. As the organisation is in a test phase, limited staff are currently employed and some staff member have been seconded from CIS. This is a temporary arrangement until TC officially launch as a separate organisation.

One of the questions put to stakeholders during this review, has been about the depth of knowledge and professionalism of staff members. There seems to be overwhelming consensus that staff members are knowledgeable and professional in handling complaints. In reviewing a selected number of case files, no signs of aggression or lack of courtesy towards stakeholders could be found on the side of employees of TC.

2.1.5 Governance body

- 2.1.5.1 It may be helpful, but not essential, for the financial ombudsman scheme to have an independent governance body, to appoint decision-makers; help safeguard the independence of the decision-makers; help ensure that the ombudsman scheme has adequate resources to handle its work; oversee the efficiency and effectiveness of the ombudsman scheme; and advise on the strategic direction of the ombudsman scheme.

The SC fulfils all of these roles, and the “Handbook” is clear on all of these requirements.

2.1.5.2 Any governance body is not involved in deciding cases, nor the day-to-day management of the financial ombudsman scheme. Appointments of members of any governance body are made by a transparent process, following a public advertisement. The members of the governing body should be appointed on terms that require them to act in the public interest and secure their independence from those appointing them. Any member of any governance body should disclose any conflict of interest and cease to be involved in a discussion or decision. Any governance body does not have: a majority of industry representatives; nor a majority of consumer representatives.

The SC is not involved in deciding cases or the day-to-day management of TC. The SC exist for a limited period to assist TC in the test period. It should be kept in mind that when TC formally launches that the office adheres to requirements regarding the appointment of the SC. The current composition of the SC in in line with the requirements as there are no credit industry representation and only one representative of consumer bodies.

2.2 Clarity of scope and powers - TC not compliant

Fundamental principle:

The financial ombudsman scheme should publish details of the scope of its jurisdiction; its enquiry and case-handling processes; its powers; the status of its decisions; any effect on the complainant’s legal rights of using the ombudsman scheme; and what information is (or is not) kept confidential.

Approaches:

2.2.1 Basics

The financial ombudsman scheme should publish details of its postal address, phone number, email address and website address; the basis of its authority; its decision makers, their method of appointment and term of office; and its membership of any national or international network.

2.2.2 Jurisdiction

The financial ombudsman scheme should publish details of the scope of its jurisdiction, including the financial businesses that are covered; the types of services that are covered; whether or not that includes services provided cross-border; whether or not the complainant must be a customer; whether any businesses can complain and, if they can, what types of business; any time

limits within which a dispute must be brought to the ombudsman scheme; any minimum or maximum value of disputes that the ombudsman scheme can handle; and any grounds on which the ombudsman scheme may decline to deal with a dispute that is in its jurisdiction.

2.2.3 Processes

The financial ombudsman scheme should publish details of its enquiry and case-handling processes, including whether the complainant must first complain directly to the credit industry; any requirements on how the credit industry handle complaints; anything else the complainant must do before referring a dispute to the ombudsman scheme; whether or not the ombudsman scheme handles enquiries; whether or not the ombudsman scheme uses negotiation/conciliation/mediation; whether or not the ombudsman scheme actively investigates cases; the language(s) in which disputes can be submitted and can be handled; and whether or not bringing a dispute to the ombudsman scheme suspends any time limit for taking the dispute to court.

2.2.4 Powers

The financial ombudsman scheme should publish details of its powers, including any power to demand information or documents from either of the parties; the basis on which disputes are decided – for example. fairness/equity; any maximum limit to the amount of compensation it can recommend/award; whether or not compensation is limited to financial loss; whether or not compensation can carry interest until the date it is paid; whether or not costs can be (and, if so, are likely to be) awarded; whether or not a CP or CRB can be required to do anything else to put things right for the complainant; and whether or not a CP or CRB can be required to change its processes.

2.2.5 Status of decisions

The financial ombudsman scheme should publish details of the status of its decisions, including whether or not they are published; whether or not they bind the financial business; if binding, how they can be enforced; if non-binding, the percentage of cases in which they are followed by CP’s and/or CRB’s; if non-binding and not followed, whether there are consequences (e.g. publicity); whether or not they bind the complainant; and whether or not there is the possibility of review by, or appeal to, the courts.

2.2.6 Confidentiality and Publication

The financial ombudsman scheme should publish details of whether or not the identities of the parties are kept confidential; other information about disputes is kept confidential; and a party can use information from the investigation/decision in subsequent court/arbitration proceedings. There should also be an explanation of whether or not the details are made publicly available on TC’s own website and in any other appropriate way.

TC is in test phase and does not have an active and live website. The “Handbook” has been printed and distributed to give guidance to the credit industry as well as consumers as to the functioning of TC, including limited information on the scope and powers. The website is in test phase and should be available to all stakeholders soon. The information covered in this section should serve as a guide regarding the information that should be displayed on the website and the “Handbook”.

Alternative methods of communication should be developed to reach consumer who do not have access to the internet. Information brochures and articles in local newspapers, magazines, television and radio should be used to disseminate information to the public. More detailed information is provided in the recommendations.

2.3 Accessibility – TC not compliant

The fundamental principle:

CP's and CRB's should be required to tell customers about TC and TC should provide comprehensive information on its own website and in other appropriate ways; be easily available and accessible to complainants (without any cost barrier); communicate clearly; and make appropriate provision for vulnerable complainants.

Approaches:

2.3.1 Financial businesses (CP's and CRB's)

Financial businesses are required to tell customers in writing about the financial ombudsman scheme:

- on the financial business's website, if it has one;
- at the point of sale;
- in contracts;
- if the customer makes a complaint; and
- In its final written decision on a complaint.

The financial business's final written decision on the complaint includes details of:

- how to contact the financial ombudsman scheme; and
- Any time limits that apply.

2.3.2 Own website

2.3.2.1 On its own website, the financial ombudsman scheme should show at least the scope of its jurisdiction; its enquiry and case-handling processes; its powers; the status of its decisions; what information is kept confidential, and what

may be published; its most recent annual report; any current consultations; and the outcome of any recent consultations.

CRB's generally provide information of TC to consumers, but there is a large number of CP's who do not make their consumers aware of TC. It could be that they are simply not aware of the services of TC or there is a lack of trust of TC. TC needs to create an environment where the credit industry as a whole would gladly and proactively provide information about TC to consumers. This will only happen when the industry can trust TC to make objective and fair decisions and that these criteria is communicated to the industry.

As stated in a previous point, TC is in test phase and does not have an active and live website. The “Handbook” has been printed and distributed to give guidance to the credit industry as well as consumers as to the functioning of TC. The website is in test phase and should be available to all stakeholders soon. The information covered in this section should serve as a guide regarding the information that should be displayed on the website and the “Handbook”.

2.3.3 Other sources of information

2.3.3.1 The financial ombudsman scheme should ensure that information is also readily available to potential complainants who do not have access to the internet. This may involve making information available through consumer advice organisations; local consumer advice centers; public libraries; local authorities; other places where consumers are used to receiving information; elected representatives; and the media.

There is a responsibility on the CRB's and CP's together with TC to make consumers aware of the ADR services especially to people who do not have the luxury of internet access. The media plays a significant role as well as community outreach programmes, making it possible to take the message of TC to consumers and their communities. This will also provide TC with the opportunity to engage with consumers and communities directly and understand what issues exist within these communities. More information is provided in the recommendations of this report.

2.3.4 Communication

2.3.4.1 The financial ombudsman scheme should be easily available and accessible to complainants for submission of disputes online, by post and by telephone. It should also be easily available and accessible to complainants who need face-to-face meetings. Complainants should be able to approach the scheme without having to go through any other person.

TC “Handbook” makes provision for consumers to lodge a dispute by a visit, telephone call or by email. It is recommended that post, fax and online via the website should be included as options. During the test phase, TC makes provision for consumers to visit the office in Nairobi, but the physical location is out of reach for most consumers who live outside of the capital. It should be investigated if it is viable to utilise institutions with great footprint, i.e. Post Office, to act as a facilitator of complaints in other areas including the rural areas.

2.3.4.2 The financial ombudsman scheme should ensure that all its communications (including its letters and its decisions/recommendations) are in clear and jargon-free language; and makes appropriate provision for consumers who are particularly vulnerable because of disability, age, language, literacy or other reasons.

TC should be mindful not to make use of acronyms in any communication. Although these acronyms are understood by the credit industry, any parties outside of this direct network would not understand these acronyms and jargon.

TC makes provision for consumers to lodge disputes telephonically, which is very beneficial for vulnerable consumers. Attention should be given to a toll-free line or for TC to offer to phone consumers back to save consumers the expense of the telephone costs.

2.3.5 Free for complainants

The services rendered by the financial ombudsman scheme should as far as possible be free-of-charge for complainants.

There are currently no charges for lodging a complaint with TC. It is recommended that this practice should remain.

2.3.6 Access to court

A complainant should have a free choice whether to take a dispute to court instead of the financial ombudsman scheme. No agreement concluded before the dispute materialised requires the complainant to go to the ombudsman scheme instead of the court.

TC serves as an alternative to the courts and consumers are welcome to take their complaint to a court of law. If consensus is not reached between the parties during the mediation session, TC makes consumers aware of their rights to take the complaint for arbitration or to court.

2.4 Effectiveness - TC fully compliant

Fundamental principle:

There should be a clear definition of what constitutes a complaint and clear obligations on CP’s and CRB’s to deal with complaints fairly and promptly.

A financial ombud scheme should have a flexible and informal process (where parties do not need professional advisers); have skilled decision-makers; and be properly resourced.

Approaches:

2.4.1 Obligations on CP’s and CRB’s

2.4.1.1 What constitutes a complaint should be clear, and documented. For example can it be any oral/written expression of dissatisfaction; or does it have to be a formal complaint in writing?

The “Handbook” is clear that disputes are related to credit information. Consumers who are not satisfied with the information on the CRB report can lodge a dispute with the relevant CRB, thus there is no confusion of what constitutes a dispute. Timelines are dictated in the “Handbook” for CP’s and CRB’s to respond to parties in order to resolve disputes timeously. In the interviews done with consumers, a mention was made by a consumer of the extended time period it took to resolve the dispute. One should always consider the complexities of cases, and that some cases can take longer than others.

2.4.1.2 Financial businesses within the financial ombudsman scheme’s jurisdiction are required to have an accessible, effective and fair internal complaints process, which is published; issue a written response to a complaint, with reasons, within a specified time; tell complainants that, if they are still dissatisfied, they can go to the ombudsman scheme; have a single person with overall responsibility for the handling of complaints; respond promptly to communications from the ombudsman scheme; provide information and documents requested by the ombudsman scheme; and comply promptly with the ombudsman scheme’s decisions.

There seems to be less emphasis by CP’s in general of the value of having an effective internal complaints infrastructure, headed by a single person with overall responsibility for the handling of complaints. This is a development area where the entire sector will benefit, as when done effectively will

secure customer retention and better customer service. As the author Janelle Barlow's gallantly mentions that "Every complaint is a gift" as the customer is making the organisation aware of the problems and have not taken his/her business to the competitor. Complaints by consumers should be welcomed and resolved within the spirit of customer service. I got the feeling from some CP's that complaints are perceived to be negative and as if the consumer is in conflict with the organisation, hence almost always being referred to the legal department. It will be important for TC to make organisations aware of this value and reach agreement to implement or adjust systems and organograms to fulfil the above requirement.

I spent some time in the reception area of one of the CRB's, where several consumers walked in and requested their credit report and/or dispute information on their credit report. I also overheard several conversations between the receptionist and consumers who were not happy with information on their credit profile. Not once did she mention the possibility to dispute the information with TC. When asking her why she is not referring the consumers to TC, she stated that she was not aware of the services provided by the TC. This is by no means an indication of a trend in this sector, but it illustrates the importance of TC to train the members' staff about TC, but also the onus on the organisations (member) to train their own staff.

2.4.2 Informal and flexible process

2.4.2.1 The financial ombudsman scheme should have an informal and flexible process, so that neither party needs a lawyer or adviser (though parties are not prohibited from using a lawyer/adviser if they want to)

TC process is of such a nature that no legal representation is necessary from either party, although it seems that a number of CP's and CRB's use their legal department to resolve consumer complaints.

2.4.2.2 The financial ombudsman scheme should handle enquiries, to resolve some problems before they turn into full-blown disputes; take an active role in deciding what evidence is required and calling for it; obtain expert reports when these are necessary; use informal mediation to reach a fair settlement, where this is possible and appropriate; and issue a formal decision in cases that are not settled.

There seems to be a strong focus to resolve disputes informally with CP's and CRB's before a disputes is referred for mediation. This leaves the parties to reach informal agreement through the intervention and facilitation processes. The Registrar is tasked to call for relevant evidence and is actively encouraging parties to reach informal agreement. When informal agreement is not possible,

TC refers the matter for formal mediation where agreements between parties is sought by a professional mediator. No formal decisions are issued by TC.

2.4.3 Information, advice and training

2.4.3.1 The financial ombudsman scheme should assist early resolution of complaints by publishing details of its approach to common disputes; giving advice to consumers and credit industry; and help train consumer advice centers and CP's and CRB's complaint departments.

Early resolution by providing advice on matters is important, but one should be careful to assume that once advice was given that the problem is resolved. I overheard some telephone conversations between TC staff and consumers, where the credit information rules were explained to consumers on the retention period of the data, but the option is not given to consumers to dispute this formally, if they are not satisfied with the answer. There could be very valid reasons why the information should not appear at the CRB, but without a registered dispute the facts could never be tested.

2.4.4 Knowledge and skills

2.4.4.1 The financial ombudsman scheme's decision-makers should have the necessary knowledge and skills in resolving disputes; have a general understanding of law; have knowledge of relevant financial services; and should be appropriately trained.

Both staff member in the Registrar are qualified attorneys. As part of the research on the quality of ADR, all the stakeholders indicated that the staff have a good understanding and have the necessary qualifications to do the work. The mediators have the necessary qualifications as well. All staff and mediators were handsomely complimented for their knowledge and skills.

2.4.5 Resources

2.4.5.1 The financial ombudsman scheme should be adequately staffed; adequately funded; efficient; and cost-effective so that disputes can be effectively and expeditiously investigated and resolved.

Although working on a tight budget, TC would appear to be adequately staffed and funded, taking into consideration its temporary nature. Once the organisation becomes more permanent in nature, the SC should ensure adequate funding for the office which will receive more disputes as a result of greater consumer awareness programmes.

2.5 Fairness – TC fully compliant

Fundamental principle:

Financial ombudsman schemes should be prompt, be impartial, proceed fairly and tell the parties in writing its decision and the reasons for it.

Approaches:

2.5.1 Disputes not handled

If a case is outside the jurisdiction of the financial ombudsman scheme, or if it is inappropriate for the ombudsman to deal with it for any other reason, it should promptly tell the complainant of that decision and the reasons for it. The “Handbook” is clear on the need to determine jurisdiction before a dispute is accepted.

2.5.2 At the Outset:

2.5.2.1 If the financial ombudsman scheme’s decision will not bind the financial business, even if accepted by the complainant, the ombudsman scheme tells the complainant at the outset that:

- the ombudsman scheme’s decision will not bind the financial business;
- the complainant can withdraw at any stage; and
- if applicable, the complainant could go to court (subject to any time limits) instead.

2.5.2.2 If the financial ombudsman scheme’s decision will bind the complainant, even if rejected by the complainant, the ombudsman scheme tells the complainant at the outset that:

- the ombudsman scheme’s decision will bind the complainant;
- the complaint can withdraw at any stage before the decision is issued; and
- if applicable, the complainant could go to court (subject to any time limits) instead;
- and secures the complainant’s specific agreement to proceed.

2.5.3 Due process

2.5.3.1 The financial ombudsman scheme should ensure that the complainant and the member can put forward their information and arguments; can comment on the other party’s information and arguments; see a copy of any expert statements/opinions obtained by the ombudsman scheme;

can comment on any expert statements/opinions obtained by the ombudsman scheme; are told they do not need a lawyer or legal advisor; are told they may seek independent advice or be represented/assisted by a third party; and are notified of the outcome, with reasons, in writing.

The “Handbook” makes provisions for all the points and when reviewing the case files it is clear that due process is followed with all the cases.

2.5.4 Prompt and impartial

2.5.4.1 The financial ombudsman scheme should deal promptly with all stages of its enquiry and dispute-resolution process; and should reach its decisions impartially.

TC deals with all stages of an enquiry promptly and in fair manner and no evidence is prevalent to suggest the contrary.

2.5.5 Accepting a settlement or decision

2.5.5.1 Before asking the complainant to accept a settlement or a decision, the financial ombudsman scheme should tell the complainant the legal effect (if any) of accepting the settlement or decision and if applicable, that the solution is less advantageous to the complainant than a court would give; and gives the complainant a reasonable time to reflect.

TC grants the parties sufficient time to reflect on the decision and if necessary, to submit further evidence. The Mediators explain to consumer the effect of consenting to settlements during mediation and would make consumers aware of their right to address the courts if they were not satisfied with the outcome of the ADR.

2.6 Transparency and accountability – TC not compliant

Fundamental principle:

Financial ombudsman schemes should pay due regard to the overall public interest in forward-planning and day-to-day operations; consult publicly about their scope, procedures, business plans and budgets; and publish a report at least yearly, explaining the work that they have done.

Approaches:**2.6.1 Consultation**

2.6.1.1 The financial ombudsman scheme should consult publicly about its initial scope and procedures; any significant changes to its scope and/or procedures; and its business plans and budgets.

The plans and strategy of TC is agreed after discussions with the SC, which represents the broader public interests. Although the SC assist with the strategic vision of the organisation, it is very important for TC to consult broadly with the credit industry, including CP's and CRB's, on the strategy of the organisation. The members is a significant stakeholder for TC and without their support and cooperation the long term sustainability of TC will not be secure. Feedback forums should be instituted where constructive consultation can take place with the credit industry. More information will be provided in the recommendations.

2.6.2 Report

2.6.2.1 The financial ombudsman scheme should publish a report at least yearly, providing information about the disputes it has handled and the way in which it has handled them.

2.6.2.2 The report should include details of the numbers and types of disputes that were received; were outside the ombudsman scheme's jurisdiction; the ombudsman scheme declined to deal with (even though in jurisdiction); were discontinued; were resolved by the ombudsman scheme; were resolved in favour of the complainant; and were resolved in favour of the financial business.

2.6.2.3 The report should also include the average time taken to resolve disputes; representative case studies; any systemic or significant problems identified in the financial system; the ombudsman scheme's governance arrangements; how it preserves the independence of its decision makers; the ombudsman scheme's arrangements for control of quality; and cooperation with other ombudsman schemes, nationally (where applicable) and internationally.

2.6.2.4 The report should make clear whether the financial ombudsman scheme provides information directly to any financial regulator about any systemic or significant problems identified in:

- the financial system; and/or
- Individual financial businesses.

- The report is made publicly available:
- on the financial ombudsman scheme's own website;
- in print; and
- In any other way appropriate in the relevant country.

2.6.3 Finance

2.6.3.1 The financial ombudsman scheme:

- publishes its annual accounts; and
- Has appropriate internal controls to demonstrate financial probity.

2.6.4 Service quality

2.6.4.1 The financial ombudsman scheme has a robust mechanism for:

- reviewing the quality of the service it provides; and
- Handling complaints about service quality.

TC is operating on a temporary basis and has not published an annual report. This section serves as an indication of the information what should be included in an annual report.

B. VIEWS OF STAKEHOLDERS

Views of various stakeholders were canvassed and (1) Interviews were held with stakeholders (2) A workshop provided information on Benefits and Challenges of ADR perceived by the stakeholders (3) Consumers' opinion was searched regarding the quality of ADR provided to them and finally (4) case files were reviewed.

1. Interviews

The following eight organisations/individuals, representing various stakeholders, were interviewed to canvas their opinions on a variety of topics;

- CRB's: TransUnion, Metropol, Credit Info
- CP's: AAR Kenya, HELB, Equity Bank
- The Chairperson of the SC
- Mediator

Topics of discussion were: their confidence in TC, bias and fairness of decisions by TC, consistency of decisions, quality of the dispute resolution service, skills and professionalism of staff members, whether stakeholders feel inhibited in challenging views expressed by TC, courtesy of staff members and publication of information on disputes.

1.1 Confidence in TC

There is an admirably high level of confidence in TC by all stakeholders.

1.2 Bias and Fairness of Decisions

All respondents, except one, stated that they could not comment if decisions were biased and fair. Upon prodding a bit further it became clear that stakeholders could not comment as they did not know what criteria is used to make decisions and that there is limited interaction with TC. The majority of respondents suggest that TC provide feedback and reasons for decisions to the organisations so that they can learn from the experiences. Stakeholders expressed an eagerness to engage and participate with TC and this should be utilised to the advantage of TC.

One respondent agreed that the decisions were unbiased and fair.

1.3 Consistency of decisions

All respondents, except one, stated that they could not comment if decisions were consistent, and the same reason as above were provided.

One respondent agreed that decisions were consistent.

Quality of the dispute resolution service

All respondents, except two, stated that they could not comment on the quality of ADR, and the same reason as above were provided.

1.4 Skills and professionalism of staff members

All respondents were satisfied that the Registrar and Mediators have the adequate skills and have great appreciation of the high level of professionalism of TC.

1.5 Whether or not stakeholders felt inhibited in challenging views expressed by TC

The response to this question differed, half of the respondents felt that they could challenge TC views, while the other could not express an opinion as their interactions with TC is too limited to allow for an opinion.

1.6 Courtesy of staff members

There were no issues relating to courtesy of TC staff members. All stakeholders were complimentary of the staff's level of courtesy towards them.

1.7 Publication of information of complaints

The response to this question differed, half of the respondents agreed to the fact that details of dispute information should be published, including the names of the organisations party to the dispute. The other half of

respondents felt that TC could publish the fact and principles of cases, but by publishing the identity of the parties, could inhibit the informal nature of ADR, as organisations will be less eager to settle with consumers, as it could be perceived that they are guilty. Comments were also made that by publishing all the information including the identity of the parties, could inhibit CP's to refer consumers for ADR.

I will recommend that as part of the early stages of TC, the names of parties should be kept confidential and that only the facts and principles of complaints should be published for educational purposes.

2. BENEFITS AND CHALLENGES OF ADR

A workshop was held with stakeholders. Part of the workshop included discussions on benefits and challenges of ADR. Some of the views are shared:

2.1 Benefits for Consumers

2.1.1 Disputes are resolved by an independent and impartial body that is not the same organisation which consumer is having a dispute with.

2.1.2 The processes are informal, and consumer does not need a legal representation. The informal processes also makes it less intimidating for consumers

2.1.3 The ADR service is free, so everybody can access it

2.1.4 It does not take as long as court processes

2.1.5 ADR makes provision to implement fairness and not only the laws

2.1.6 The outcomes is flexible that will accommodate both parties, there is not always a right or wrong answer.

2.1.7 Benefits for the Credit Industry

2.1.8 ADR promote confidence in the industry and consumers are more willing to participate in an industry if they know that there is an independent mechanism to assist them if a problem arises

2.1.9 ADR investigate complaints objectively with regard to the law, good industry practice, fairness – Industry focus on managing risk and generate profit

2.1.10 When ADR is positioned correctly, it can be seen as providing the consumer with value added service

2.1.11 ADR provide feedback to the organisation on non-compliance areas which can be investigated and rectified

2.1.12 When problem organisations exist in the industry, this can be quickly identified by ADR and the industry can take action

2.1.13 Benefits for Regulators

2.1.14 Regulators are informed of complaint trends in industry

2.1.15 ADR releases the Regulators from complaints handling to focus on regulation

2.2 Challenges of ADR

2.2.1 CP's, CRB and consumers have limited knowledge of ADR

- 2.2.2 No documented processes exist within organisations on ADR
- 2.2.3 Hard line positions by legal departments (they focus on litigation)
- 2.2.4 Lack of properly trained personnel on ADR
- 2.2.5 CP's and CRB's feel that they don't have accessibility to the ADR Center
- 2.2.6 Sensitization of the ADR process should be done by TC
- 2.2.7 Confidentiality of customers' information
- 2.2.8 Training/ capacity building
- 2.2.9 Choice of arbitrator / conciliator/ ombudsmen
- 2.2.10 Credibility of information held by CRB's
- 2.2.11 Lack of knowledge on existence of Tatua Center
- 2.2.12 Lack of feedback mechanism from Tatua Center to all parties on resolution
- 2.2.13 Absence of structured dispute resolution mechanism within the organization
- 2.2.14 The Center is located far from the CBD where most customers have easy access
- 2.2.15 How binding is the decision?
- 2.2.16 The officers handling disputes need to be knowledgeable on ADR as well as CIS practices
- 2.2.17 Cost of changing documentation

- 2.2.18 Trust/ independence
- 2.2.19 Lack of awareness- to consumers and organizations
- 2.2.20 Legitimacy and Regulation of the ADR systems
- 2.2.21 Enforcement of decisions- are they legally binding?
- 2.2.22 Who implements the decisions?

It is my opinion that the majority of challenges will be resolved when TC engages constructively with the industry. Most of these challenges is a result of the lack of knowledge and understanding on how ADR works, and this creates fear and concerns regarding trust. TC should engage with the credit industry to create a good working relationship. The industry is fundamental to the long term sustainability of TC. The credit industry must trust TC to such an extent that they refer customer willingly to TC for dispute resolution.

3. VIEWS OF CONSUMERS

In preparing this section of the review, ten consumers were contacted to get their view of the quality of ADR received by TC. The questionnaire covered five areas of service and each service was rated between one and five and each question was scored.

The table below indicate a total score expressed as a percentage.

Area of service	Percentage Satisfaction
It was quick and easy to open a case	86%
I was treated with courtesy and respect	92%
My case Manager was knowledgeable	92%
I am satisfied with the time it took to resolve the case	78%
I would refer TC to family and friends	94%

It is clear that consumers had a positive experience with TC and that they experience value in the service provided, as they indicated that they will refer TC to family and friends. This part of the research achieved the highest score. The lowest score was related to the time it took to resolve the case. This could be as a result of misguided expectations, or a real problem with the time that it took to conclude cases. It is important to refer to the Worldbank guide of 90 days to conclude a case as well as to manage perceptions of consumers.

4. Review of Case Files

Documentation on eight case files were provided. All the files were well documented and outcomes clearly communicated to both parties to the dispute.

The mediation files were well documented. It seems that all processes were followed by TC and mediators. Evaluation sheets were attached to the files and generally both parties were very complimentary towards TC and the mediators for service well done. There were no evidence of any bias or unfair decisions.

In one of the cases the consumer was so delightful with the outcome of the mediation and the process that he introduced his friend to the CP for a loan. This is exactly the kind of confidence that effective ADR brings to consumers. The CP benefitted by not only retaining a customer, but also received a new customer. The CP stated that if this case was settled in court, he could have won the case, but with significant legal costs and he would not have retained the customer or the new business.

Chapter 3

EXPANDING THE SCOPE OF THE TATUA CENTER

3.1 CONTEXT AND BACKGROUND

Part of the scope is to investigate the possibilities of expanding the scope of the current jurisdiction of TC.

An interview with the Central Bank of Kenya confirmed the importance of ADR as there is a significant backlog in the court system, which is expensive. The National Treasury is currently investigating the possibility to establish a Financial Ombud scheme. The sectors that will be covered by the Ombud scheme will include Banks, Insurance, Capital Markets, Pension Funds and SACCO's

Consumer recourse and redress are important components of a consumer protection framework in financial services and has been identified as an area of focus by the Organisation of Economic Co-operation and Development (OECD) in the G20 High-level Principles on Financial Consumer Protection:

“Jurisdictions should ensure that consumers have access to adequate complaints handling and redress mechanisms that are accessible, affordable, independent, fair, accountable, timely and efficient. Such mechanisms should not impose unreasonable cost, delays or burdens on consumers. In accordance with the above, financial services providers and authorised agents should have in place mechanisms for complaint handling and redress. Recourse to an independent redress process should be available to address complaints that are not efficiently resolved via the financial services providers’ and authorised agents’ internal dispute resolution mechanisms. At a minimum, aggregate information with respect to complaints and their resolutions should be made public.”

Effective consumer empowerment and education are some of the main drivers to improve financial inclusion and the establishment of an ombud for financial services will assist to reduce the cost of, and improve access to, dispute resolution and fair treatment.

The main purpose of this section of the report is to assess the feasibility to expand the services of TC to that of a fully-fledged financial ombud scheme in Kenya and to make recommendations on the structure, governance and funding.

3.2 Models of Financial Alternative Dispute Resolution (ADR) Schemes

Although there are a number of models for financial ADR schemes in existence, the preferred form is the establishment of financial ombud schemes (FOS). FOS can be broadly defined as providing a free, informal, speedy and cost-effective alternative to court action.

The ombudsman is an independent, impartial person with authority and responsibility to receive, investigate, or informally address complaints, and when appropriate, make findings and recommendations. In addition, the ombudsman makes recommendations for the improvement of the general administration of the entities over which it has jurisdiction.

Several other ADR models exist, with the variations of the models as a result of the history and development of ADR in a particular country. The most effective ADR scheme occurs when a combination of ADR methodologies (i.e. Facilitation, Mediation and Arbitration etc.) can be used, together with the flexibility to change the scope of the scheme when required. Where there is no existing ADR scheme in a country, a FOS should be the preferred ADR model to be implemented.

In 2012, the World Bank published a report highlighting the fundamental principles of financial ombudsmen (discussed earlier in this report) when resolving disputes between consumers and financial business. The report also highlights the value of FOS:

“Governments and financial businesses benefit if consumers have confidence in financial markets. A common theme of previous reports from The World Bank is that one key way to increase consumer confidence is to provide accessible and user-friendly arrangements to resolve disputes. Like the courts, financial ombudsmen resolve individual disputes. Unlike the courts, they can also deal with consumer enquiries, and proactively feedback the lessons from their work to help governments, regulators, financial businesses and consumers improve things for the future.

Financial ombudsmen: help to support improvements and reduce disputes; help financial businesses themselves to resolve disputes with consumers; resolve any consumer disputes that financial businesses fail to resolve themselves; and reduce the burden on the courts.”

According to the World Bank report, while the precise form of the ombud may vary, the FOS is the dominant kind of financial ADR in Western Europe, with trend towards a single financial ombudsman covering all financial sectors. While financial ombuds should take into account the relevant constitutional, legal and cultural circumstances, they must remain true to the fundamental principles of an ombudsman.

3.2.1 Types of FOS

3.2.1.1 Voluntary schemes are created by industry players, who join the scheme voluntarily, decide on the terms of reference and rules of the ombud scheme, appoint the ombudsman, and

create a governance structure to ensure that the ombudsman operates independently. It is also usually easier to form such a voluntary scheme when the industry consists of a small number of players whose businesses operate in a similar manner.

One of the most significant advantages of a voluntary scheme, especially a newly formed ombud scheme, is that the rules and terms of reference may be easily adapted as the scheme evolves and matures.

This is important as a variety of problems, which may not have been anticipated in the initial establishment of the scheme, may arise over time.

The main criticism of the model is that participation is not compulsory and some may view the schemes as not being independent from industry. Voluntary schemes are always funded by industry contributions.

3.2.1.2 Statutory schemes are created by law and are formal by nature. The rules and terms of reference are established through a legal process, and the scheme is mandatory for all industry players. Statutory schemes are often implemented in sectors with a large number of players that are diverse in nature. While the most significant advantage of this model is that all players in the industry are forced to participate in the scheme, the disadvantage is the inflexibility of the rules and terms of reference, which can only be changed through the legislative process, which time consuming and bureaucratic. Such as ombud is funded by government through taxes, and in some cases, these funds are recovered from industry.

3.2.1.3 A third option exists, combining elements from both voluntary and statutory schemes; entitled hybrid schemes, or voluntary schemes with statutory backing or recognition. In this model, the regulator provides statutory recognition by:

- Approving an ombud scheme based on minimum requirements; and
- Compel industry participation in the ombud scheme by including it as a licensing requirement.

The voluntary aspects of the model include that the industry determines (with the oversight of the regulator) the jurisdiction, process and powers of the ombudsman. Importantly, the model retains the flexibility of voluntary schemes. This model is usually funded by industry, but the regulator may assist by collecting funds from industry in the form of levies and distributed to the Ombud scheme.

3.3 The South African Model

While the World Bank report focused primarily on the FOS in Europe, the South Africa model of FOS is unique in many ways, illustrating a range of structural and legislative change needed to ensure that consumers receive effective redress in the financial services sector. There are six FOS in South Africa, each specializing in a subsection of the financial sector:

1. Ombudsman for Banking Services – a voluntary scheme;
2. Ombudsman for Long Term Insurance – a voluntary scheme;
3. Ombudsman for Short Term Insurance a voluntary scheme;
4. Financial Advisory and Intermediary Services Ombud – a statutory scheme;
5. Credit Ombud – a voluntary scheme; and
6. Pension Funds Adjudicator – a statutory scheme.

3.3.1 Financial Services Ombud Schemes Act

The Financial Services Ombud Schemes (FSOS) Act was introduced in South Africa to provide for the recognition of financial services ombud schemes and to lay down the minimum requirements for such schemes. The Act promotes consumer education, co-ordinates the activities of ombuds, and develops and promotes best practices for complaint resolution. The Act also provides statutory recognition to all ombud schemes, even the voluntary schemes.

But, there is still a gap as the legislation does not compel FSPs to participate in an ombud scheme. As a result, when FSPs are not part of an ombudsman scheme, consumers have limited access to redress.

In order to address these gaps, South Africa has introduced the Financial Services Regulatory Bill, which requires, inter alia, compulsory membership to ombud schemes for all financial institutions (including both banks and non-bank credit providers, i.e. micro-lenders and retailers), and this compulsory participation with ombud schemes will be part of their licencing requirement.

Once enacted, the legislation will bring a new and imperative dynamic to the ombudsman landscape, as it creates the possibility for hybrid schemes; voluntary ombud schemes with statutory backing and FSPs will be compelled to participate in an ombud scheme).

Such a hybrid arrangement where voluntary schemes are supported by a statute, is the optimal environment for ombud schemes, as it provides the necessary flexibility, lack of complexity, and efficiency to create the structures necessary to resolve consumer complaints.

3.4 Characteristics of Effective Alternative Dispute Resolution Schemes

The need for effective ADR through a financial ombudsman is supported by nine previous World Bank reports on improving consumer confidence in financial services in individual countries. 12 Common themes included:

- Special attention should be paid to consumer complaints. Many are enquiries rather than disputes. If they are not satisfactorily addressed, they undermine public confidence.
- FSPs should be obliged to inform customers, in writing, on how to lodge complaint, and have a designated department/person to handle complaints. Regulators should frequently review the complaint files of FSPs.
- Consumers should have access to a fast, inexpensive and effective redress mechanism; ideally there should be one, clearly identified central location for complaints or enquiries.
- Consumers should be able to submit complaints by phone, email, post or personal visit. The central complaints office should have a free phone line.
- Going to court is not a viable alternative for most consumers; as such policy-makers should consider establishing a financial ombudsman.
- Statistics on consumer complaints should be analysed, published, and used to identify future improvements in the protection framework. Experience shows that an effective financial ombudsman benefits financial businesses, the state and consumers.
- Consumers have greater confidence in financial services when they are aware, that should something go wrong, their dispute will be heard by an independent body which will resolve the issue quickly and informally, without the need for legal counsel.
- FSPs benefit as (i) consumers are more likely to take up financial products; (ii) the cost of resolving disputes is kept to a minimum; and (iii) unscrupulous competitors are held to account.
- The state benefits because (i) redress can be provided at minimum cost; (ii) feedback from an ombudsman can help improve future regulation; and (iii) confident consumers are more likely to play a role in developing a sound financial market. Ombudsmen fulfil a wider role than the courts. Like the courts they resolve individual cases, but unlike the courts, they also deal with consumer enquiries, and proactively provide feedback to governments, regulators, FSPs and consumers to improve for the future.

3.4.1. While the World Bank report identifies the fundamentals for financial ombud schemes, these fundamentals may be applied to any ADR scheme:

Independence

The decision-maker must be independent to ensure impartiality. Individual decision-makers must have the necessary abilities, experience, and competence, and have security of tenure for a period sufficient to ensure independence. The individual appointed must not have worked for an FSP or industry professional body (or any of its members) within the last three years. Alternatively, decisions can be made by a body with equal membership from consumers and professionals.

Transparency

The financial ombudsman should publish clear details about its powers and procedures, and about the type and effect of its decisions. It may also publish case studies and/or guidance notes to illustrate the financial ombudsman's approach to typical cases. Anyone is entitled to ask for information about the types of disputes that are covered; the rules and procedures that apply; how decisions are made; whether decisions are based on strict law or on fairness; whether decisions are binding; and any provisions about costs. An annual report should be published, showing the nature of disputes and the results obtained.

Effectiveness

The ombudsman must take an active role in investigating the complaint, so that the consumer does not need legal representation, and the ombudsman must provide a prompt decision. The procedure must be free for the consumer, or of moderate cost.

Accessibility

Consumers can only access the financial ombudsman if they know about it, and where to find it. In addition to the ombudsman making information widely available, FSPs should be required to inform dissatisfied consumers about the ombudsman. Ombud schemes should have a website to allow the parties to submit a complaint online and exchange information electronically.

Governance

It is advisable for the financial ombudsman scheme to have an independent governance body in the form of a board or council. This may be the body that appoints the ombudsman, or a body that is equally independent of the financial industry (though the industry may have minority representation). The governance body should not be involved in deciding cases, or in the day-to-

day management of the ombudsman scheme. Its function is to help safeguard the independence of the ombudsman; help ensure that the ombudsman scheme has adequate resources to handle its work; oversee the efficiency and effectiveness of the ombudsman scheme; and advise the ombudsman on the strategic direction of the ombudsman scheme.

Funding

While a financial ombudsman can be funded by the government from the budget vote, but is more usual for the cost of the financial ombudsman to be borne by the financial industry from which the ombudsman's work arises. From the ombudsman's point of view, the important factor is that there is sufficient funding, rather than how the cost is divided among the financial industry.

Several industry funding models exist, including:

- A levy payable by all the financial businesses covered by the ombudsman scheme, often apportioned according to their market share;
- Case fees payable by the financial businesses about which consumers actually refer complaints to the ombudsman scheme; or
- A combination of the two, with part of the funding coming from a levy payable by all financial businesses and part from case fees.

A levy reflects the fact that all financial businesses benefit from the increased consumer confidence created by the existence of the ombudsman. Case fees mean that more of the cost is borne by the financial businesses that have more

cases. It is common for any case fee to be payable irrespective of the outcome of the case in order to avoid the complication of a further dispute about whether or not the case should be chargeable and because the emphasis should be on resolving the dispute rather than who is 'right'. The ombudsman scheme should consult publicly before fixing its yearly budget. Depending on the make-up of the governance body, it may be appropriate for the final budget to be approved by an impartial third party – such as a financial regulator – to ensure it is neither too little for the workload nor too much for the industry to pay.

Accountability

Accountability does not involve any restriction on the independence of the financial ombudsman. It involves the ombudsman paying due regard to the overall public interest in the forward-planning and day-to-day running of the ombudsman scheme. Financial ombudsmen should publish a report at least yearly, explaining the work that they have done. They should provide appropriate statistics about the disputes they have handled and the way in which they have handled them (including the arrangements for quality-control). Many ombudsman schemes also consult publicly in advance about their procedures, business plans and budgets. This provides an opportunity to obtain information that helps to estimate future workload, something that is often the most difficult aspect of managing a financial ombudsman scheme. Differing views are taken in different countries about the extent to which the financial ombudsman should share information (or not) with the financial regulator. Whatever the position is, it should be publicly documented. Where financial ombudsmen identify systemic issues that financial regulators would be better placed to tackle, it is helpful if the financial ombudsman can draw those issues to the attention of the financial regulators.

Chapter 4

RECOMMENDATIONS OF THE CURRENT TATUA CENTER AND FUTURE FINANCIAL OMBUD SCHEME

TC has been in operations for some time and successfully mediated cases on behalf the credit industry. The organisation, although small and with limited cases under its belt, has learned valuable lessons during the test phase of the organisation. Besides these facts TC, based on international best practice plus feedback from the industry and feedback from consumers, is providing a very effective and valuable service to the credit industry and consumers. It is feasible that the current ADR scheme, with some changes could become the Financial Ombud Scheme in Kenya.

Detailed recommendations about the current and possible future structure, jurisdiction, operations, governance and funding are outlined below:

4.1 Structure of the Ombud Scheme

Given the context, it is recommended that with some changes the current ADR scheme could become the Financial Ombud Scheme in Kenya, and should strongly consider the hybrid financial ombud scheme discussed earlier in the document. The Central Bank of Kenya should use its licensing conditions to provide the statutory backing for the ombud scheme. It is important that the Central Bank of Kenya to approve the ombud scheme, to ensure that the scheme complies with minimum criteria. The Central Bank will need to consider the possible competition issues which may arise if only one ombud scheme were to be approved and will need to consult with the relevant competition authorities in this regard.

Certainly, it is important that all resources are focused on one effective ombud scheme in the financial sector. Given the current volume of consumer complaints and the level of financial sector development and financial inclusion, it is unlikely that a competing ombud scheme could be justified in Kenya. Furthermore, it may result in forum shopping by FSPs which violates conduct rules and could be damaging to the overall consumer confidence in the ombud scheme in Kenya.

The hybrid model will give the ombud the necessary flexibility to shape the processes in ways that will allow disputes to be resolved in the most appropriate fashion. As there is no clarity about the number of complaints that the office, with an extended mandate, can expect in the short term, it is recommended that the scheme begin with the current human resources of TC and build on this. This office will grow organically as the volume of complaints increase. As stated earlier, it is important to gain the trust of both consumers and industry, and the most effective way to gain such trust is to act independently, and to be seen to be independent.

4.2 Jurisdiction of the Ombud Scheme

The jurisdiction of the ombud office should be determined by the industry in consultation with the regulator and should be well documented in the Terms of Reference of the office. As a guide to determining the jurisdiction, the scheme should enforce the relevant legislation in the country, as well as any codes of conduct and good practice within the industry, including cases related to fraud and identity theft. The office should be able to use both fairness and legislation to make decisions.

All FSP's that are regulated by the Central Bank should be required to participate in the ombud scheme (as a licence requirement). This encompasses banking, microfinance, SACCO's, insurance, pension fund managers and administrators, securities dealers and brokers, intermediaries and advisors, mobile payment services and CRB's. All FSP's regardless of size should be part of the scheme to ensure that all consumers of financial products are covered by the ombud scheme. Final rulings by the ombudsman should be binding on all regulated FSP's but not on consumers. Consumers must have the option to approach the regulator or the court in the event that they are not satisfied with the outcome of the ombudsman.

The Ombuds scheme should deal with enquiries, complaints and disputes, which must all be properly documented. This not only provides for effective record keeping, but also forms the basis of constructive financial literacy.

4.3 Operations of the Ombud Scheme

4.3.1 Access

Consumers from all over the country need to be able to communicate with the ombud scheme, which is currently, and most likely, when an Ombud scheme is formed, to be situated in Nairobi.

TC's/Ombud's website must be available for the benefit of both consumers and industry. All relevant information as per the requirements of INFO should be available on the website in plain jargon free English. The website should make provision for consumers to submit enquiries and disputes online.

Cases should be managed telephonically with consumers submitting the necessary documentation either in person or by courier, post, fax or email. It is recommended that an agreement be reached with the Post Office to provide free communication infrastructure to all consumers who wish to communicate with the ombud scheme. In addition, a toll free helpline would assist consumers to easily access the scheme at little or no cost.

In addition, the use of other infrastructure as possible touch-points or channels for more vulnerable consumers should be explored. It is critical that the ombud is not perceived to be a mechanism only for the privileged few, but rather that it is accessible widely to all consumers.

4.3.2 Processes

The members of the ombud scheme would be required to make provision for the Ombud scheme in their internal dispute resolution processes. Consumers would be required to first lodge a complaint to the member FSP, giving them sufficient time to resolve the complaint, before the complaint can be escalated to the ombud scheme.

As earlier stated in this report, credit providers would benefit if they respond to the opportunity that exists within a complaints-handling process. It provides the CP with a platform to understand their customers' frustration and window of opportunity to deal with the problem and when possible mend the relationship. This was very eloquently demonstrated in a dispute which TC successfully resolved between parties. The customer was so satisfied with the outcome of the dispute that he introduced his friend to the organisation, which is also now a client; this despite the fact that TC found that the consumer had to pay an outstanding amount. The process instilled confidence in the consumer in dealing with the organisation. This example does not only demonstrate the value of ADR, but also the power of resolving complaints and disputes with customers. In the absence of a platform for consumers to raise complaints, they will simply leave and find another service or product supplier.

I would recommend to TC/Ombud to encourage CP's to invest in an effective internal complaints infrastructure, headed by a single person with overall responsibility for the handling of complaints. The industry should engage with complaints and treat them as if "Every complaint is a gift". An effective internal complaints platform is not only beneficial to the relevant organisation, but it also a requirement for effective ADR as per the INFO requirements.

If the consumer is not satisfied with the outcome of the dispute with the CP or CRB, complaints should be escalated to TC/Ombud. The ombud scheme should accept complaints in person, telephonically, in writing by post, fax or email and in any language that the consumer requires.

Members should be notified of the complaint and given the opportunity to respond. The ombud scheme should attempt to resolve the complaint using the methods of intervention, facilitation, negotiation and mediation. If these processes have been exhausted, and the dispute has still not been resolved, the ombudsman may make a recommendation and if not successful, a ruling which is binding on the member. Processes should be well documented and be easily accessible to all stakeholders.

4.3.3 Time limits

Although TC has successfully agreed time limits with the credit industry, other sectors (when expanding its jurisdiction) need to be considered as well. A number of time limits need to be introduced, including time limits on when the consumer can refer a matter to the ombud scheme, after the exhausting the FSP's internal complaints handling process, as well as maximum time after the event causing the dispute has occurred. It is recommended that the time limit should be three months after the internal complaints handling process has been concluded and three years after the occurrence of the event that generated the dispute.

In addition, there should be time limits for the ombuds scheme to finalise complaints. The resolution of uncomplicated complaints should not take more than 90 days, but provision should also be made for the quick resolution of urgent matters.

Consideration should be given to how the complaint process affects the enforcement and contractual obligations towards the consumer while a complaint is with the ombud scheme. The recommendation is that no legal action should be taken once a dispute process has started, and that the ombud scheme be given a maximum time of six months to conclude a complaint. If the complaint is not finalised after six months, the FSP may continue with enforcement activities.

TC and CRB's were concerned about the long time periods that some CP's take to resolve complaints. It emerged that both CRB's and TC are not always sure who to contact within a CP to manage the disputes. It is recommended that TC, CRB's and CP's work together on a database which is shared among all the parties with the relevant contact persons per organisation. When the correct person is contacted when a complaint arises, it will have a positive impact on the timelines to resolve disputes.

4.3.4 Governance

The current composition of the SC is properly constituted with no representation of the credit industry, and the SC is totally independent. Although this complies and exceeds all requirements of best practice, the absence of the industry on the SC could create a gap in terms of communication between the industry and TC as no formal feedback platforms exists. It is recommended to include some industry members as part of the SC or to create a separate forum that will serve as a formal feedback platform. Please see comments in the section "Reporting", which provides more information on this matter.

If TC expands its mandate, the current composition should be tested with other sectors in the financial industry. A governance structure representing the most important stakeholders will ensure the independence and effectiveness of the

office. The ombudsman must report to a board or council on a regular basis, on both the effectiveness of the scheme, as well as on trends and systemic issues.

The composition of the board could include both industry and consumer representatives, but the number of industry members should always be in the minority on the board or council.

Careful consideration should be given not to allow the Central Bank to serve on the board, as their presence could undermine the effectiveness of the scheme, seeing that they will have insight into complaints and also serve as the Registrar. The fact that the authority who decides on issuing and renewing operating licences of financial institutions, has significant insights into the complaints of those licence holders and because of this insight potentially decide not to renew the licence could motivate reluctance on the FSP's side to refer consumers to TC.

The duties of the board or council should be focused on oversight over the Ombud, and should not extend to the actual cases themselves.

4.3.4.1 Constitution

The founding documents for the ombud scheme should be agreed by all stakeholders. While such a document can appear in several forms (Most often, a constitution is adopted), the following aspects must be included:

- The powers and limitations to the scheme,
- The participants in the scheme,
- The funding and fees,
- The liabilities, Duties, Rights and privileges of members,
- The termination and suspension of members,
- The composition of the Board or Council,
- The appointment and removal of Board or Council members;
- The role of the chairperson and committees of the Board or Council;
- The powers and responsibilities of Board or Council members;
- The conduct and frequency of Board or Council meetings;
- The role, responsibility and powers of the ombudsman.

Other matters for consideration include succession and emergency planning, monitoring of operational activities, dissolving of the organisation, and the misconduct of members.

4.3.4.2 Terms of Reference

The Terms of Reference is the critical founding document that clarifies the role and independence of the ombud. It summarises the mandate given to the ombudsman, and must be agreed on by the board or council members. It should include the following:

- Mission and values of the ombud scheme,
- The appointment of the ombudsman and the term of employment,
- Powers and duties of the ombudsman,
- Maintaining independence,
- Criteria to resolve disputes,
- Member obligations, jurisdiction and limits,
- The complaint process, and
- The enforcement of outcomes.
- Conflict of interest disclosures

4.3.4.3 Other relevant factors

To gain the confidence of consumers, the following factors should be considered when establishing the ombud scheme:

- The ombudsman should be appointed by a body which consists only of public interest members, or a body where industry representatives are in a minority and can be outvoted. In the case of Kenya, this could be the Central Bank in the first instance, or the Board or Council that it is correctly constituted.
- The person appointed as financial ombudsman should not have worked in the financial industry, nor for a financial industry association, within the previous three years.
- To preserve the ombudsman's independence, the term of office should be sufficiently long. A term of five (5) years with a renewal of additional three (3) years is recommended. Renewal should be made at least one year before the term ends so as not to undermine the ombudsman's independence in his/her last year.
- It should not be possible to remove the ombudsman early except for incapacity, misconduct or other good cause. The decision should be in the hands of the independent body that appointed the ombudsman, or a body that is equally independent of the financial services industry.
- The industry should not have the ability to put pressure on the ombudsman by influencing any reduction or suspension in the ombudsman's salary. To ensure this, it may be useful to link the salary to the ombud to that of a judge or other public official.
- Only the ombudsman (or a staff member duly appointed and authorised) should have the power to decide whether a complaint falls within the jurisdiction of the ombudsman, and this decision should be final.

4.3.5 Funding

It is important that the ombudsman determine its budget independently, with the governance body approving this budget. While the Central Bank could be utilized as a channel to recover money on behalf of the ombud scheme, it should not have any say in determining the budget of the ombud.

The mechanism for funding the ombud scheme can be based on levies collected from all FSP's, the value of which is dependent on the size of the organisation, as well as the number of cases against the FSP reported to the ombud scheme. It is important to ensure that these fees are not prohibitive to any members of the ombud, especially the smaller FSP's. Instead the system should make provision for all financial institutions (regulated or not) that all consumers can access the ombud scheme, irrespective of whether the FSP to which the complaint relates, even if this means that smaller members pay little or no fees.

The services of the ombud scheme must be provided at no cost to the consumers.

It is recommended that the Central Bank provide the initial seed capital to establishment the expanded scheme and fund its first year of operations. The industry would then take over the funding of the ombud in year two of operation, with the Central Bank serving as the channel via which such funding is to be collected from the industry and funnelled to the ombud.

4.3.6 Awareness and Positioning of the Ombud Scheme

Awareness of, and the positioning of the ombud scheme is important to obtain support from both consumers and FSPs. The governance structure and the funding mechanisms for the scheme are key factors in ensuring that it can be positioned as independent of industry, but that it is also not a stick with which to beat industry.

To be successful, the ombud scheme must have the support of its members (FSP's and CRB's); this only occurs when member FSPs view the ombud scheme as an additional service provided to customers. When members do not perceive this value, they will not actively use the scheme or inform consumers of its existence.

One of the measures of a successful ombud scheme is the level of awareness consumers have of its existence, as well as the extent to which they make use of its services. The most important time for the consumer to be aware of the ombud is when they wish to escalate a complaint. As such, the ombud relies heavily on the FSP's to inform consumers about the scheme. FSP's should be required to make provision within their policies and in their internal dispute resolution processes to create awareness of the ombud, both in their branches, as well as when the consumer raises a dispute. This is the most effective and inexpensive way to promote an ombud scheme, as the consumer is notified at the time of need. It is further recommended that consumers are made aware of the ombud when contracting with members and that the details of the ombud are included in the contract. Further, create awareness of the ombud at the start of the complaint/dispute process, and finally when the CP/CRB failed to resolve the complaint, and this is escalated to ombud/TC.

The ombud scheme is also responsible for informing consumers of its existence and mandate through the media – electronic (television and radio) and print (newspapers and magazines). While advertising is very expensive, the ombud office could issue press releases on topical and relevant issues. The media will then invite the Ombudsman to discuss these topics on radio, television and print media. These interviews do not carry any cost.

Consumer forums and community outreach meetings are also effective to create awareness and a demand for the service. They also provide the ombudsman with the opportunity to understand the community issues more clearly. Community leaders should be included in such outreach activities, thus giving these community meetings the necessary social standing.

A further way to increase awareness of the ombud scheme is to include the existence of the scheme, its processes and procedures and relevant information in all financial literacy education to consumers.

The ombudsman should also engage in broader consumer education activities relating to the financial sector, providing information and knowledge to consumers about broader financial sector issues. During my interviews with stakeholders, all the respondents were of the view that the ombudsman should play a more active role in general financial literacy projects.

4.3.7 Reporting

The ombudsman should report to the council at least every three months, including aspects such as caseload, trends, time taken to complete cases, systemic issues and industry-wide problems, financial management, internal and external challenges, and opportunities.

The ombudsman should report to the regulator periodically about systemic issues, habitual repeat offenders, and blatant consumer abuse and exploitation. A delicate balance exists when reporting issues to the regulator, as participants in the scheme should not be discouraged from participating in the scheme. As previously mentioned, the ombud scheme should not be used as a witch-hunt to expose wrongdoing in an industry, but rather to give consumers redress.

The ombudsman should issue an annual report which include the following:

- details of the numbers and types of disputes that:
 - were received;
 - were outside the ombudsman scheme's jurisdiction;
 - the ombudsman scheme declined to deal with (even though in jurisdiction);
 - were discontinued;
 - were resolved by the ombudsman scheme;
 - were resolved in favour of the complainant; and
 - were resolved in favour of the financial business.

- Average time taken to resolve disputes,
- Representative case studies,
- Systemic or significant problems identified in the financial system,
- Governance of the ombudsman scheme;
- The independence of its decision makers;
- The arrangements for control of quality for the ombudsman scheme; and
- Co-operation with other ombudsman schemes, nationally (where applicable) and internationally.

All stakeholders should have access to annual reports and it should be accessible on the ombud scheme's websites and in the media.

It is further recommended that TC/Ombud creates platforms to report and communicate with the credit industry. An observation was that the industry is willing and eager to engage with TC/Ombud, but that the relevant platforms do not exist. Feedback sessions with the CP's/CRB's and other stakeholders could include discussions on case volumes, trends, budget spend, criteria of decision making within the Ombud, challenges experienced by the industry and Ombud, industry related news i.e. new legislation or changes within the industry.

TC/Ombud should invest in a quarterly newsletter to serve as a platform of communication with the credit industry. It is important to engage and communicate freely with the industry as an important stakeholder of TC/Ombud without compromising on independence and impartiality.

It is recommended that, when reporting case trends and case detail in the annual report, media or any other platform, the identity of the parties be kept confidential. Although this is not in line with the INFO requirements, it is my opinion that by publishing the identity of the parties, the industry would not participate and support the ombud scheme in full. The risk of the member's potential reputational damage is perceived to be high, and the publication of the identity of the members could harm the eagerness of participation in the scheme.

Through my interactions with all the stakeholders I was made aware of potential issues that could hamper the broad use and positioning of credit information. These comments are not part of my terms of reference or scope and could serve as a guide for discussion for the stakeholders.

Chapter 5

OBSERVATIONS AND GENERAL COMMENT

5.1 POSITIONING OF CREDIT BUREAU

Currently credit bureaux are mainly positioned and used as a collections tool and generally as a threat to consumers who do not pay regularly. The problem is that the consumers' perception is always negative when dealing with credit bureaux, and consumers do not understand the tremendous value that credit information holds for them.

Credit information, especially positive data sharing, enables consumers to receive the credit that they deserve. When the consumer receives credit to buy a car or house, it is because the information on the CRB was of such a nature that the CP could make an informed risk decision. When consumers understand the value of positive data, they can start to negotiate better terms with CP's i.e. better interest rates on their loans.

Positive credit information should result in better interest rates and when consumers understand this benefit, they will see credit bureaux in a much more positive light. CIS together with the CRB's should position the credit information and CRB's, especially the positive information sharing, in a positive light with consumers.

5.2 Disputing data with credit bureaux

When a consumer wants to dispute data on the credit bureau, the process allows for the consumer to first get a copy of his credit bureau report. Before the CRB issues a credit bureau report, the consumer needs to positively identify himself/herself, by using a national ID document. The only way to verify the ID document is for the individual to appear in person so the CRB can verify that the photo and consumer who holds the ID document is the same person. Only after this verification can the CRB issue a credit bureau report and the dispute process can start. If verification is happening by fax or email, it is not a true verification of the identity of the person. Consumers would have to travel long distances and take leave from work to provide their ID document to the CRB's and start a dispute process.

There are more advanced methods of verification than just the national ID document that could make the dispute process more accessible.

CRB's have a significant amount of information about individuals, which is privy to only the individual whose data it belongs to, i.e. home address, previous home address, account numbers, bankers, employers, previous employers, other credit facilities etc. This kind of information could be used to verify the identity of consumers telephonically.

I suggest a discussion among stakeholders to investigate how accessible, time-consuming and complicated the dispute process is to consumers, especially those who do not reside in Nairobi. Mystery complainers can be used to test this process.

5.3 Credit bureau notification

When information is removed from one credit bureau it may still reflect on other credit bureaux and the consumer must now provide proof to all credit bureaux that an issue has been resolved or an outstanding amount has been paid.

There should be a mechanism between credit bureau to notify each other on changes of information, alternatively the onus must be on credit providers to update changes to all credit bureaux once a dispute is resolved or a default account has been paid in full.

5.4 Credit Bureau information for employment purposes

Thought should be given on the use of credit information for employment purposes. Currently there is a requirement for the consumer to provide a clearance certificate when applying for a job – this means the consumer must go to the credit bureau and receive a certificate which indicates if they had been listed before, have paid the debt, are paying the debt, or not paying the debt – Clearly this is used in the recruitment process and should be discouraged totally. It should only be a requirement for financial and cash handling positions and should be outlawed for any other positions.

5.5 Clearance Letters

It is my understanding that clearance letters is a standard request from credit providers, especially banks, to prove that a default with another credit provider was paid in full. This information should be available on the credit bureau and serves no value for the consumer to take leave from work, stand in a queue and pay for information which is already available on the credit bureau and accessible to the credit providers.

5.6 Sources of data

All sources of data used by CRB's must be approved by the central bank and could inhibit creativity from credit bureaux. One of the main advantages of having competing credit bureaux in a country is not only the competition on price, but also the ability to develop various and competing products to assist credit providers with risk assessment which in turn will influence competitive pricing. Various sources should be used by credit bureaux to maximise creativity so that the market and consumers can benefit.

Conclusion

TC is an effective ADR scheme which delivers a valuable service to both the credit industry and consumers. The office has all the necessary principles in place and is well positioned to transform with minimum effort to become a fully-fledged financial o

