Systemic Issue Resolution in Two Dimensions: A Reflection Based on a Ten-Year Review of the Australian Financial Ombudsman Service

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Ombudsmen are alternate dispute resolution practitioners that resolve individual complaints and use the outcomes of those resolutions to identify and rectify systemic problems. These practitioners originated in the public sector and are expanding to the private sector because of their specialty in dealing with systemic issues. As a ten-year review of the activities of the Australian Financial Ombudsman Service indicates, the Ombudsmen's systemic issue resolution practices focus on the individual characteristics of each complaint. Consequently, recommended solutions are limited to active errors that arise from factors laying outside of a system, such as the system's clients and workers. Thus, Ombudsmen should expand their focus from the analysis of such extra-system factors to the evaluation of their intra-system counterparts. This focus on the intra-system dimension of systemic issues will enable Ombudsmen to identify and resolve the root-causes of systemic issues that lay within a system in addition to those that lay outside of it.

CONTENTS

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I. INTRODUCTION

The position of the Financial Ombudsman is becoming an indispensable Alternative Dispute Resolution ("ADR")[2] tool in the financial community.[3] Similar to other ADR mechanisms, such as mediation and arbitration, Financial Ombudsman offices handle complaints independently, impartially, and confidentially.[4] However, these offices are also problem-solving mechanisms with the ability to identify and remedy systemic issues.[5] For example, an Ombudsman may receive a complaint about the overcharging of fees by a car insurer. Similar to other ADR mechanisms, the Ombudsman will adjudicate the complaint and issue a compensation order if the complaint was meritorious. Unique to the role of an Ombudsman, however, is

2. ADR broadly refers to any dispute resolution method other than a court proceeding before judges or juries. *See* Alternative Dispute Resolution Act of 1998 § 3, 28 U.S.C. § 651(a) (2018) (defining the "alternative dispute resolution process" as "any process or procedure, other than an adjudication by a presiding judge, in which a neutral third party participates to assist in the resolution of issues in controversy, through processes such as early neutral evaluation, mediation, minitrial, and arbitration").

3. *See* Walter Merricks, *The Financial Ombudsman Service: Not Just an Alternative to Court*, 15 J. FIN. REG. & COMPLIANCE 135, 135–36 (2007) (discussing the growing role played by the Financial Ombudsman Service in implementing ADR techniques in the British financial sector); *see also* Vicki Waye & Vince Morabito, *Collective Forms of Consumer Redress: Financial Ombudsman Service Case Study*, 12 J. CORP. L. STUD. 1, 6 (2012) (noting that Australia's Financial Ombudsman Service, UK's Financial Ombudsman Service, and Canada's Ombudsman for Banking and Investment Services are examples of dispute resolution services across the globe); Iris Benöhr, *Alternative Dispute Resolution for Consumers in the European Union*, *in* CONSUMER ADR IN EUROPE 1, 1 (2012) (arguing that ADR, including the role of "an ombudsman," is "regarded as an important element in the attempt to provide simple and efficient redress at [the] EU level").

4. *See* Ben Bradford & Naomi Creutzfeldt, *Procedural Justice in Alternative Dispute Resolution: Fairness Judgements Among Users of Financial Ombudsman Services in Germany and the United Kingdom*, 7 J. EUR. CONSUMER & MKT. L. 188, 188–89 (2018).

5. *See* C. Hodges, *Collective Redress: The Need for New Technologies*, 42 J. CONSUMER POL'Y 59, 68 (2019) (highlighting the role played by various ombudsman offices in identifying and addressing systemic issues due to their ability to receive large number of complaints and identify relevant trends); Chris Gill et al., *The Managerial Ombudsman*, 83 MOD. L. REV. 797, 798, 829 (2020) (noting that while recent trends in ADR management have led to concerns about a loss of focus on public interest, the British Ombudsman offices still seek "to achieve a broader systemic impact on public administration").

its ability to investigate the underlying actions of the insurer that led to this overcharging—perhaps discovering a failed upgrade of the insurer's software applications. Consequently, the Ombudsman would order the insurer to remedy this systemic problem and proactively compensate injured customers.

Although Ombudsmen practitioners have the ability to identify and solve systemic issues, no prior study has examined their performance in doing so,[6] not to mention their role in unearthing the root causes of systemic issues. This Article fills this gap by investigating the role of Financial Ombudsman offices in resolving systemic issues and recommends reforms that can further empower these offices in simultaneously handling complaints and identifying and resolving systemic issues.

This Article proposes that the role of Financial Ombudsman offices should expand from its current extra-system dimension of remedying the effects of systemic issues as they emerge to an intra-system dimension of uncovering the origin of such issues within the system. To illustrate this point, this Article reviews the activities of the Australian Financial Ombudsman Service Limited ("FOS") in identifying and resolving systemic issues across the financial sector.[7] The FOS

6. As an example of such a gap, the American Bar Association deemed it necessary for Ombudsman offices to have the authority to receive complaints and questions about systemic problems, identify such problems, and make recommendations for their rectification without defining how these activities should be carried out. *See* Section of Admin. L. & Reg. Practice, Am. Bar Ass'n, *Standards for the Establishment and Operation of Ombudsman Offices*, 126 ANN. REP. A.B.A. 771, 779, 783 (2001) [hereinafter 2001 ABA Resolution] (defining the Ombudsman as "a person who is authorized to receive complaints or questions confidentially about . . . systemic problems" and arguing that "when an [O]mbudsman identifies a systemic problem, it would be appropriate for the [O]mbudsman to advocate for changes to correct the problem").

7. The FOS was an external dispute resolution service for disputes between member financial services firms and their retail clients that could not have been solved via an in-house dispute resolution process per the criteria set out in the Corporations Act 2001. *See* AUSTRALIAN SEC. & INV. COMM'N, REPORT 182, FEEDBACK FROM SUBMISSIONS TO THE FINANCIAL OMBUDSMAN SERVICE LIMITED'S NEW TERMS OF REFERENCE 4–5 (2009), https://download.asic.gov.au/media/1343318/rep182.pdf [https://perma.cc/8J6D-QKVP]. This service was established in 2008 as a result of the merger of preceding external dispute resolution services, was regulated by the Australian Securities and Investments Commission, and was overseen by a board of directors comprised of an independent chair, four representatives from the consumer sector, and four representatives from the financial sector. *See id.* at 4–6; Corporations Act 2001 (Cth) ch. 7 pt. 7.10A (Austl.) (defining the legislative criteria for an external dispute resolution system). As a part of its mandate, the FOS had to identify and report any systemic issue that arose from a pattern of individual disputes lodged with it. FIN. OMBUDSMAN SERV. LTD., OPERATIONAL GUIDELINE TO THE TERMS OF REFERENCE 107 (2012), https://www.afca.org.au/media/879/download [https://perma.cc/EM75-ZJLC].

was one of the few Financial Ombudsman practitioner groups that was obligated to report systemic issues that were identified through disputes that were lodged with it.[8] Thus, the systemic issues identified by the FOS during its tenure provide an empirical basis for evaluating the capabilities and limits of Financial Ombudsmen offices in resolving systemic issues.[9] Combining this empirical evidence with a critical reflection on the broader practices of the FOS highlights the two dimensions that Financial Ombudsman offices have to consider when identifying and resolving systemic issues. The first dimension, which emphasizes the effects of systemic issues on customers or claimants who are the external stakeholders of the system, is the extra-system dimension that the FOS relied on. The second dimension, which emphasizes identifying the causes of systemic issues in the financial system, is the intra-system dimension that this Article proposes. Including this intra-system dimension in dispute resolution would provide Financial Ombudsman offices with a structured approach to identifying and mitigating the systemic factors that contribute to the occurrence and recurrence of systemic issues.

The theoretical basis for evaluating systemic issues across both the extra-system and intra-system dimensions lays within the two approaches developed by James Reason for evaluating human errors.[10] In his analysis of organizational accidents within complex industrial systems, Reason distinguishes between active error and latent error, arguing that the former is usually associated with the performance of individuals on the front-line and the latter lies dormant within the system before combining with active errors and

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The FOS was replaced by the Australian Financial Complaints Authority in 2018. AUSTRALIAN FIN. COMPLAINTS AUTH. LTD., ANNUAL REVIEW 2018–2019 at 8 (2019), https://www.afca.org.au/media/306/download [https://perma.cc/JA3V-XXV3]. For more information, *see generally* Paul Ali et al., *Australia's Financial Ombudsman Service: An Analysis of Its Role in the Resolution of Financial Hardship Disputes*, 34 CONFLICT RESOL. Q. 163, 166–172 (2016) (discussing the history and legal structure of the FOS); SENATE STANDING COMM. ON ECON., PARLIAMENT OF AUSTL., PERFORMANCE OF THE AUSTRALIAN SECURITIES AND INVESTMENTS COMMISSION ch. 7 (2014), http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Economics/ASIC/Final_Report/index [https://perma.cc/JFV3-K6CP] (reviewing the legal structure, jurisdiction, and performance of the FOS).

8. FIN. OMBUDSMAN SERV. LTD., *supra* note 7, at 107.

9. *See infra* notes 79–89 and accompanying text (outlining the annual breakdown of systemic issues identified and reported by the FOS).

10. James Reason, *Human Error: Models and Management*, 320 BMJ 768, 768 (2000) [hereinafter Reason (2000)]. For a detailed explanation of the two approaches, *see generally* JAMES REASON, HUMAN ERROR (1990) [hereinafter REASON (1990)].

other factors to breach the system's defenses.[11] He identifies a personal and a systemic approach to dealing with these two types of error.

The personal approach, as a "long-standing and widespread tradition" of error analysis, focuses on active errors and views these errors as "arising primarily from aberrant mental processes such as forgetfulness, inattention, poor motivation, carelessness, negligence, and recklessness."[12] The associated countermeasures are therefore directed mainly at using regulatory and disciplinary measures to reduce "unwanted variability in human behavior."[13] The serious weakness of this personal approach lays with its "isolat[ion of] unsafe acts of people from their system[ic] context," meaning that it cannot prevent similar errors from resurfacing again because it leaves the underlying systemic failures intact.[14]

In contrast to the personal approach, the systemic approach concentrates more on latent errors, which pose the greatest threat to the safety of a complex system because these errors, also known as "latent roots,"[15] are often unrecognized and have the capacity to result in multiple types of active errors.[16] Because the "analyses of major accidents typically show that the basic safety of the system has eroded due to latent errors,"[17] Reason recommends that the focus of the investigation of adverse events should shift from the personal approach that focuses on individual errors to the systemic approach that focuses on "the error-provoking properties within the system at large."[18]

This Article applies Reason's analytical framework to processes used by the FOS for systemic issue resolution. We find that while the FOS uncovered individual errors because it evaluated the extra-system dimension of systemic issues, it missed the opportunity to unearth latent errors within the financial system because it failed to analyze the intra-system dimension of systemic issues. Specifically,

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11. REASON (1990), *supra* note 10, at 173.

12. Reason (2000), *supra* note 10, at 768.

13. *Id*. at 768.

14. *Id*. at 768–69.

15. *See* MARK A. LATINO ET AL., ROOT CAUSE ANALYSIS: IMPROVING PERFORMANCE FOR BOTTOM-LINE RESULTS 25, 163–65, 257 (5th ed. 2020).

16. *See* LINDA T. KOHN ET AL., TO ERR IS HUMAN: BUILDING A SAFER HEALTH SYSTEM 55 (2000) ("People also become accustomed to design defects and learn to work around them, so they are often not recognized.").

17. REASON (1990), *supra* note 10, at 179–80.

18. Reason (2000), *supra* note 10, at 769.

this analysis indicates that the FOS followed Reason's personal approach by focusing on the extra-system dimension of systemic issues and, consequently, only uncovered active errors and their direct effects. Uncovering latent issues through Reason's systemic approach would have required the FOS to investigate the intra-system dimension of systemic issues as proposed by this Article. A series of case studies that are discussed in Parts Two and Three of this Article further support this point by highlighting the benefits that arise from shifting the focus of systemic issue resolution from the active errors of individuals to the latent errors that lay within the system. Taken together, this Article recommends that Financial Ombudsman offices should enhance their systemic issue resolution practices to include an analysis of factors that lay within the system and contribute to the outbreak of systemic issues. Specifically, they should expand their practices from focusing on the extra-system dimension of issues to evaluating the intra-system dimension of those issues as well.

This Article is organized in three parts. Part One provides an overview of the development of the position of Ombudsman as an ADR mechanism, with special attention to the extension of its application from governmental organizations to the private sector. This part also discusses the accompanying evolution of the role of Ombudsman from a safeguard against maladministration to an ADR practitioner to highlight the distinctive role of the Ombudsman in addressing and resolving systemic issues. Part Two describes the systemic issue resolution activities that the FOS, as an example of Ombudsman offices, carried out in the past ten years. This is followed by an analysis of the personal approach the FOS adopted to identify systemic issues and how this emphasis on the extra-system dimension of systemic issues led to a lack of inquiry into the latent issues that, as James Reason indicates, "permit[s] a trajectory of accident opportunity."[19] Part Three focuses on a systemic approach to issue resolution that highlights the intra-system dimension of systemic issues and the associated latent factors. The case of the insurance dispute of James Kessel,[20] as well as several similar financial disputes submitted to the FOS, are used to highlight the benefits and drawbacks of this intra-system approach. Taken together, these three parts outline the unique role that Ombudsman offices can play in

19. *Id*. at 769 (arguing that a bad outcome can happen only when the "holes" or weakness in many layers of defenses "momentarily line up to permit a trajectory of accident opportunity—bringing hazards into damaging contact with victims").

20. *See infra*, Part IV (discussing the circumstances and the controversy that surrounded Mr. Kessel's insurance dispute with his insurance provider).

resolving systemic issues by identifying latent factors that permeate a system and give rise to a recurring pattern of failures alongside their more traditional role as ADR practitioners focused on dispute resolution.

II. Systemic Issues: A Concern for Ombudsmen

Ombudsman originally referred to a public official who was appointed by the executive or legislative branch of a government to deal with citizens' grievances and complaints against public bodies.[21] Although the existence of officials who perform similar duties can be traced back to ancient Egypt and Rome,[22] Ombudsmen in the modern sense originated in Sweden to "ensure that Swedish officials followed the law and fulfilled their obligations."[23] Gradually, the power to appoint Ombudsmen shifted from the monarch to the parliament as a part of the decline of absolutism in eighteenth-century Sweden.[24]

As a part of the subsequent development of the Ombudsman in Sweden and other Scandinavian countries over the next two centuries, this role evolved from being a prosecutor of official wrongdoing to a defender of citizens' rights and interests in good administration.[25] Moreover, independence, impartiality, and confidentiality became a critical attribute of an Ombudsman's complaint-handling

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21. *See* Sabine Carl, *The History and Evolution of the Ombudsman Model*, *in* Research Handbook on the Ombudsman 17, 19 (Marc Hertogh & Richard Kirkham eds., 2018) (discussing the origin of the position of the ombudsman as an institution to "fully protect the rights of the public against the administration" across Europe, the Indian Subcontinent, and East Asia).

22. Gerald E. Caiden et al., *The Institution of Ombudsman*, *in* International Handbook of the Ombudsman: Evolution and Present Function 9 (Gerald E. Caiden ed., 1983) (arguing that "ancient Egyptian kings had complaint officers in their court" and that "during the Roman Republic, two censors both scrutinized administrative actions and received complaints alleging maladministration.").

23. *Id.* at 9.

24. Sweden's "Age of Freedom," which began in 1718, marked the beginning of a fifty-two year decline of absolutism in favor of parliamentary government. *See* Sveriges Riksdag [swedish parliament], The Constitution of Sweden: The Fundamental Laws and the Riksdag Act 12–13 (2016), https://www.riksdagen.se/globalassets/07.-dokument—lagar/the-constitution-of-sweden-160628.pdf [https://perma.cc/WE26-KXXN] ("1718 saw the end of Sweden's status as a Great Power and the [sic] autocratic monarchy. A new form of government took shape, known appropriately enough as Age of Freedom Government . . . . The power of legislation was shared between King and Riksdag [Parliament] as regards [to] fundamental law and civil and criminal law (joint legislation), while the King retained the power of economic and administrative legislation . . . . The Parliamentary Ombudsman, who was elected by the Riksdag, had the task of ensuring that public authorities followed the laws enacted by Parliament.").

25. Gerald E. Caiden et al., *supra* note 22, at 10 (arguing that the Swedish justice ombudsman "evolved more as a citizen-defender, concerned with resolving public

mechanism.[26] These attributes further differentiated Ombudsmen from the complaint-handling officers of ancient Egypt and Rome[27] and, thereby, expanded its function as a provider of ADR and facilitator of dispute resolution.[28]

The second half of the twentieth century witnessed a rapid expansion of Ombudsman offices beyond Scandinavia and into Germany, New Zealand, the United Kingdom, Canada, Israel, Australia, the United States, and many other countries.[29] This expansion was accompanied by a bifurcation of the role of Ombudsmen. The traditional or Classical role played by an Ombudsman, as summarized by the American Bar Association ("ABA"), consisted of "operat[ing] in the public sector [and] addressing issues raised by the general public

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complaints against the public bureaucracy, and less as a prosecutor of official wrongdoing"); *id.* at 10 (reviewing the history of Ombudsmen in Denmark and highlighting the appointment of an Ombudsman in 1955 who had limited powers of jurisdiction and no power of prosecution).

26. Donald C. Rowat, *The Parliamentary Ombudsman: Should the Scandinavian Scheme Be Transplanted?*, 28 INT'L REV. ADMIN. SCI. 399, 400 (1962) (finding that all the Nordic Ombudsmen developed in this period were appointed by Parliament, independent of the executive, and were empowered to investigate any written complaint and comment critically on official actions).

27. The complaint handling officers of ancient empires were "special representatives or agents" of the emperor that focused on whether lower ranking officials "obeyed the law [and] carried out the[ ] instructions" of the emperor, while the modern Ombudsman acted as a "citizen-defender" who was more concerned with impartial administration of justice than the "legality of official actions." *See* Gerald E. Caiden et al., *supra* note 22, at 9–10.

28. For example, the Administrative Dispute Resolution Act of 1996 defines Ombudsman as a means of alternative dispute resolution in the executive branch. *See* Administrative Dispute Resolution Act of 1996 § 4, 5 U.S.C. § 571(3) (2018). Moreover, the ABA issued a resolution in 2001 and endorsed a revised resolution in 2003 that identified the three essential characteristics of independence, impartiality, and confidentiality as being central to the role of Ombudsman as an ADR practitioner. *See* 2001 ABA Resolution, *supra* note 6; Section of Admin. L. & Reg. Practice, Am. Bar Ass'n, *Standards for the Establishment and Operation of Ombudsman Offices*, 128 ANN. REP. A.B.A. 347 (2003) [hereinafter 2003 ABA Resolution].

29. Gerald E. Caiden et al., *supra* note 22, at 10–11 ("[T]he adoption of the [O]mbudsman institution outside Scandinavia came in [West] Germany in 1957, in New Zealand in 1962, in the United Kingdom in 1967, in Canada in 1970, in Israel in 1971, in Western Australia in 1972. Hawaii became the first state in the United States to create an [O]mbudsman institution in 1969.").

or internally."[30] In comparison, the "Legislative Ombudsman" operated as "a part of the *legislative branch of government* and address[ed] issues raised by the general public or internally."[31] The roles of Classical and Legislative Ombudsman offices have been adopted both by national governments around the world, such as Latin American states,[32] and international organizations, such as the European Union.[33] An example of the Classical Ombudsman is the Peruvian human rights Ombudsman, Defensoría del Pueblo,[34] which is elected by a majority vote of two-thirds of Congress and empowered not only to mediate complaints of human rights violations, but also to "present actions of unconstitutionality to the Constitutional Tribunal and to petition the Inter-American Court of Human Rights."[35] The

30. In its 2001 resolution, the ABA defined three types of Ombudsman as: (i) the Classical Ombudsman who "receives complaints from the general public or internally and addresses actions and failures to act of a government agency, official, or public employee;" (ii) the Organizational Ombudsman who "facilitates fair and equitable resolutions of concerns that arise within the entity;" and (iii) the Advocate Ombudsman who "serves as an advocate on behalf of a population that is designated in the charter." 2001 ABA Resolution, *supra* note 6, at 775–76.

31. In its 2003 resolution, the ABA defined four types of Ombudsman, namely (i) the Legislative Ombudsman who operates as part of the legislative branch, receives complaints internally or from the general public, and addresses actions or inactions of government agencies, officials, public employees, or contractors; (ii) the Executive Ombudsman who operates in either the public or private sector, receives complaints internally or from the general public, and address actions and inactions of the entity, its officials, employees, and contractors; (iii) the Organizational Ombudsman who "facilitates fair and equitable resolutions of concerns that arise within the entity;" and (iv) the Advocate Ombudsman who "serves as an advocate on behalf of a population that is designated in the charter." *See* 2003 ABA Resolution, *supra* note 28, at 434–35.

32. *See, e.g.*, Fredrik Uggla, *The Ombudsman in Latin America*, 36 J. LATIN AM. STUD. 423 (2004) (discussing the institutional development of the office of Ombudsman in Guatemala, El Salvador, Honduras, Colombia, Peru, and Bolivia); Erika Moreno, *The Contributions of the Ombudsman to Human Rights in Latin America, 1982–2011*, 58 LATIN AM. POL. & SOC'Y 98, 100 tbl. 1 (2016) (listing human rights Ombudsman offices across sixteen Latin American states).

33. *See* Consolidated Version of the Treaty on the Functioning of the European Union art. 228, Oct. 26, 2012, 2012 O.J. (C 326) 47 [hereinafter TFEU] (establishing the office of the European Ombudsman). *See generally* EUR. PARLIAMENT, OTTAVIO MARZOCCHI & INA SOKOLSKA, FACT SHEETS ON THE EUROPEAN UNION: THE EUROPEAN OMBUDSMAN (2020), https://www.europarl.europa.eu/ftu/pdf/en/FTU_1.3.16.pdf [https://perma.cc/R9X7-VNNY] (summarizing the legal structure and functions of the European Ombudsman).

34. The Peruvian Constitution requires the Ombudsman to defend the constitutional and fundamental rights of the person and the community, to supervise the fulfillment of the duties of state administration, and to ensure the provision of public services to citizens. *See* CONSTITUCIÓN POLÍTICA DEL PERÚ [CONSTITUTION] arts. 161–62, http://www.congreso.gob.pe/Docs/files/CONSTITUTION_27_11_2012_ENG.pdf [https://perma.cc/YD3S-N9U9].

35. Thomas Pegram, *Accountability in Hostile Times: The Case of The Peruvian Human Rights Ombudsman 1996–2001*, 40 J. LATIN AM. STUD. 51, 58 (2008).

European Ombudsman, established by the Treaty on European Union in 1992, is an example of the Legislative Ombudsman that is appointed by the European Parliament to receive complaints concerning instances of maladministration.[36]

A more significant development in the evolution of the office of the Ombudsman from a prosecution office to an ADR venue was brought about by the introduction of Ombudsman offices in universities, corporations, nursing homes, newspapers, and other private entities. This transition can be traced back to the tumultuous period of the 1960–70s, when American universities started to develop Ombudsman offices for mediating conflicts between groups of demonstrators and the university administration.[37] American corporations further pioneered the adoption of Ombudsman offices as an internal control mechanism in response to allegations of corporate misconduct that characterized the 1980s.[38] In the decades that followed, the role of the Ombudsman was further transformed to accommodate the operations of private sector organizations and became an institutional means for the resolution of employee grievances, customer complaints, and workplace disputes.[39] The expansion of the role of the Ombudsman from governmental organizations into the private sector not only encouraged its application to a wider range of disputes, but also reshaped the way Ombudsman practitioners facilitated dispute

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36. *See* Treaty on European Union, Signed at Maastricht on 7 February 1992 art. 138e, July 29, 1992, 1992 O. J. (C 191) 1 [hereinafter The Maastricht Treaty] (current in effect version is available at Consolidated Version of the Treaty on European Union art. 228, Oct. 26, 2012, 2012 O.J. (C 326) 13).

37. *See* CHARLES L HOWARD, THE ORGANIZATIONAL OMBUDSMAN: ORIGINS, ROLES, AND OPERATIONS, A LEGAL GUIDE 13 (2014) (noting that, by 1971, sixty-nine colleges or universities in the United States appointed an Ombudsman to resolve academic and nonacademic grievances).

38. *Id*. at. 19 (observing that eighteen of the largest American defense contractors signed the Defense Industry Initiative on Business Ethics and Conduct in 1986, advocating for companies to adopt Ombudsman programs to receive and investigate employee reports of misconduct).

39. For example, in the United States, Ombudsman programs have been one of the "traditional ADR methods" frequently used to resolve internal employee grievances. *See* Frank Evans & Shadow Sloan, *Resolving Employment Disputes Through ADR Processes,* 37 S. TEX. L. REV. 745, 751–52 (1996) (the Ombudsman is paid by the employer but clothed with an independent status, functioning to gather information and assist employees in obtaining a resolution.). However, this role is distinct from the position of arbitrator that acts as an ADR mechanism for external employee grievances and is governed by relevant state and federal laws. *See generally* FRANK ELKOURI ET AL., HOW ARBITRATION WORKS (Kenneth May ed., 8th ed. 2016) (discussing the jurisprudence surrounding the role of arbitrators in the employer-employee relationship).

resolution.[40] Specifically, the investigation of maladministration, which was a major function of Ombudsman in the public sphere,[41] gave way to the investigation of systemic issues as Ombudsman offices expanded throughout private sector organizations. This transformation has manifested itself in the practice standards of many Ombudsman practitioners in the private sector.[42]

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40. CHARLES HOWARD, *supra* note 37, at 2 (arguing that the adaptation of the original concept of Ombudsman to universities and corporations in America "drastically reshaped the way in which the [O]mbudsman operates in nongovernmental organizations . . . ."). Indeed, the roles and powers of an Ombudsman office in the public and private sectors are different. For example, as the British and Irish Ombudsman Association has pointed out, Ombudsman schemes covering the public-sector usually focus on maladministration and have the power to issue non-binding recommendations rather than binding decisions, while Ombudsman schemes covering the private sector act mainly as an informal alternative to the civil courts, deal with complaints against commercial businesses, and usually have power to issue decisions that bind the business. *Ombudsman Schemes Dealing with Public-Sector Bodies or Private-Sector Businesses*, OMBUDSMAN ASS'N, https://www.ombudsmanassociation.org/about-ombudsmen-public-sector-private-sector.php [https://perma.cc/S5VK-2A7Q].

41. A core function of Ombudsman institutions operating in governmental organizations is to investigate complaints about maladministration by public authorities. *See supra* notes 29–36 and accompanying text. As far as the origin of this function is concerned, the Swedish 1809 Constitution authorized the Ombudsman not only to investigate allegations of official wrongdoing but also to prosecute officials who "committed an unlawful act or neglected to perform official duties properly." *See* Gerald E. Caiden, *supra* note 22, at 10. The current Swedish Constitution crystalized this function by authorizing the Parliamentary Ombudsman to (1) institute legal proceedings, (2) request courts of law, administrative authorities and State or local government employees to provide information and opinions, and (3) access the records and other documents of courts of law and administrative authorities. *See* SVERIGES RIKSDAG, *supra* note 24, at 95. In another Scandinavian country, the Finnish Ombudsman is granted the power to bring charges against civil servants and other public officials. *See* SUOMEN PERUSTUSLAKI [CONSTITUTION] § 110 (Fin.), *translated in* INTERNATIONAL ENCYCLOPAEDIA OF LAWS: CONSTITUTIONAL LAW 42 (Supp. 103, Iur. Ilkka Saraviita ed., 2013) (authorizing the Ombudsman to bring charges against a judge for unlawful conduct in office). Overseeing maladministration is also retained as a core function of the European Ombudsman. *See, e.g.*, Charter of Fundamental Rights of the European Union art. 43, Oct. 26, 2012, 2012 O. J. (C 326) 391 (stating that a citizen of the EU "has the right to refer to the European Ombudsman cases of maladministration in the activities of the institutions, bodies, offices or agencies of the Union"). For a discussion about the role of the European Ombudsman in the administration of the Union, see Herwig C.H. Hofmann, *The Developing Role of the European Ombudsman*, *in* ACCOUNTABILITY IN THE EU: THE ROLE OF THE EUROPEAN OMBUDSMAN 9, (Herwig C.H. Hofmann & Jacques Ziller eds., 2017) (arguing that the European Ombudsman's task is to "provide supervisory oversight over the administration in general, in order to enhance its accountability and to help to improve its quality"); Simone Cadeddu, *The Proceedings of the European Ombudsman*, 68 LAW & CONTEMP. PROBS. 161, 163 (2004) (arguing that the European Ombudsman "has taken on both the role of controller of 'maladministration' and of codifier of 'good administration'").

42. *See, e.g.*, INT'L OMBUDSMAN ASS'N, IOA STANDARDS OF PRACTICE cl. 4.2 (2009), https://www.ombudsassociation.org/assets/docs/IOA_Standards_of_Practice_Oct09.pdf [https://perma.cc/FNW6-7C4K] ("[T]he

III. FOS IN SYSTEMIC ISSUE RESOLUTION

This Section reviews the activities of the Australian Financial Ombudsman Service Limited which provides the empirical basis for examining how an Ombudsman that operated in the private sector identified and resolved systemic issues. Through this lens, this Article argues that the processes used by the FOS followed what James Reason calls the personal approach,[43] which limited its systemic issue resolution to what this Article calls the extra-system dimension.

The FOS consolidated the various overlapping dispute resolution systems that existed across the Australian financial sector.[44] To this end, the FOS consolidated several self-regulated dispute resolution schemes to form a "one-stop shop" for consumers to resolve any of their disputes with financial services providers that were members of the FOS instead of navigating across multiple schemes based on the

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Ombudsman as an informal and off-the-record resource pursues resolution of concerns and looks into procedural irregularities and/or broader systemic problems when appropriate."). The International Ombudsman Association ("IOA"), officially formed in July 2005, is the largest international association of professional organizational Ombudsman practitioners in the world, representing almost 900-member practitioners across the globe. *About the International Ombudsman Association (OA)*, INT'L OMBUDSMAN ASS'N, https://www.ombudsassociation.org/learn-about-ioa [https://perma.cc/HL49-5U5Y].

43. *See supra* notes 10–18 and accompanying text (discussing the personal approach to issue resolution identified by James Reason as well as the accompanying systemic approach).

44. *See* Paul Ali et al., *supra* note 7, at 167–68 (tracing the roots of the establishment of the FOS to a desire to eliminate "gaps, overlaps and inconsistencies" in the financial dispute resolution system by merging the various dispute resolution services) (citing STAN WALLIS ET AL., DEP'T OF THE TREASURY (AUSTL.), FINANCIAL SYSTEM INQUIRY (1996) FINAL REPORT 287–88 (1997), https://treasury.gov.au/publication/p1996-fsi-fr [https://perma.cc/JM9Y-GEL8]; PARLIAMENTARY JOINT COMM. ON CORP. & FIN. SERVS., PARLIAMENT OF AUSTL., IMPAIRMENT OF CUSTOMER LOANS 45–46 (2016), https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Corporations_and_Financial_Services/customer_loans/~/media/Committees/corporations_ctte/customer_loans/report.pdf [https://perma.cc/2UX7-PVB5] (summarizing the intent behind the formation of the FOS as "provid[ing] customers with a free, easily accessible and simple means of dealing with disputes" by merging various external dispute resolution systems into one).

category that their disputes fell under.[45] The member service providers in the FOS numbered 3,835 in 2008–09,[46] 5,357 in 2009–10,[47] 12,853 in 2010–11,[48] 16,822 in 2011–12,[49] 16,038 in 2012–13,[50] 15,234 in 2013–14,[51] 14,107 in 2014–15,[52] 13,576 in 2015–16,[53]

45. The FOS replaced the dispute resolution schemes previously operated by the Banking and Financial Services Ombudsman ("BFSO"), the Financial Industry Complaints Service ("FICS"), and the Insurance Ombudsman Service ("IOS") in 2008, and replaced the schemes previously operated by the Credit Union Dispute Resolution Centre ("CUDRC") and Insurance Brokers Disputes Ltd ("IBD") in 2009. *See* FIN. OMBUDSMAN SERV. LTD., 2008–2009 ANNUAL REVIEW 2 (2009), https://webarchive.nla.gov.au/awa/20180313071026/https://www.fos.org.au/publications/annual-review/ [https://perma.cc/63RQ-75B3] (click on the "Publications" button, then use the snapshot window of the archival tool to navigate to 2009 and then click on "Annual Review") [hereinafter FOS 2008–09 Review].

46. FOS 2008-09 Review, *supra* note 45, at 1–2.

47. FIN. OMBUDSMAN SERV. LTD., 2009–2010 ANNUAL REVIEW 11 (2010), https://webarchive.nla.gov.au/awa/20180313071026/https://www.fos.org.au/publications/annual-review/ [https://perma.cc/63RQ-75B3] (click on the "Publications" button, then use the snapshot window of the archival tool to navigate to 2010, and then click on "Annual Review") [hereinafter FOS 2009–10 Review].

48. FIN. OMBUDSMAN SERV. LTD., 2010–2011 ANNUAL REVIEW (2011), https://webarchive.nla.gov.au/awa/20180313071026/https://www.fos.org.au/publications/annual-review/ [https://perma.cc/63RQ-75B3] (click on the "Publications" button, then use the snapshot window of the archival tool to navigate to 2011, and then click on "Annual Review") [hereinafter FOS 2010–11 Review].

49. FIN. OMBUDSMAN SERV. LTD., BUILDING SERVICE EXCELLENCE: 2011–2012 ANNUAL REVIEW (2012), https://webarchive.nla.gov.au/awa/20180313071026/https://www.fos.org.au/publications/annual-review/ [https://perma.cc/63RQ-75B3] (click on the "Publications" button, then use the snapshot window of the archival tool to navigate to 2012, and then click on "Annual Review") [hereinafter FOS 2011–12 Review].

50. FIN. OMBUDSMAN SERV. LTD., FOCUSED ON DELIVERING: 2012–2013 ANNUAL REVIEW (2013), https://webarchive.nla.gov.au/awa/20180313071026/https://www.fos.org.au/publications/annual-review/ [https://perma.cc/63RQ-75B3] (click on the "Publications" button, then use the snapshot window of the archival tool to navigate to 2013, and then click on "Annual Review") [hereinafter FOS 2012–13 Review].

51. FIN. OMBUDSMAN SERV. LTD., ANNUAL REVIEW 2013–2014 at 3 (2014), https://webarchive.nla.gov.au/awa/20180313071026/https://www.fos.org.au/publications/annual-review/ [https://perma.cc/63RQ-75B3] (click on the "Publications" button, then use the snapshot window of the archival tool to navigate to 2014, and then click on "Annual Review") [hereinafter FOS 2013–14 Review].

52. FIN. OMBUDSMAN SERV. LTD., ANNUAL REVIEW 2014–2015 at 3 (2015), https://webarchive.nla.gov.au/awa/20180313071026/https://www.fos.org.au/publications/annual-review/ [https://perma.cc/63RQ-75B3] (click on the "Publications" button, then use the snapshot window of the archival tool to navigate to 2015, and then click on "Annual Review") [hereinafter FOS 2014–15 Review].

53. FIN. OMBUDSMAN SERV. LTD., ANNUAL REVIEW 2015–2016 at 22 (2016), https://webarchive.nla.gov.au/awa/20180313071026/https://www.fos.org.au/publications/annual-review/ [https://perma.cc/63RQ-75B3] (click on the "Publications" button, then use the snapshot window of the archival tool to navigate to 2017, and then click on "Annual Review") [hereinafter FOS 2015–16 Review].

13,422 in 2016–17,[54] and 11,530 in 2018.[55] They operated the full range of financial services, covering credit, insurance, investments, payment systems, deposit-taking, and traditional trustee services.[56] The FOS acted as an ADR service provider standing between these firms and their customers by relying on negotiation and conciliation to resolve financial disputes.[57]

As an ADR service provider, the FOS maintained an efficient, convenient, inexpensive, and fruitful approach to the resolution of financial disputes. Namely, the FOS resolved the vast majority[58] of the disputes that it received, provided free and convenient avenues for submitting complaints, was able to resolve most of the disputes that were submitted to it via agreement rather than arbitration, and, alongside these dispute resolution activities, identified and rectified systemic issues.

Throughout its life, the FOS resolved 98% of complaints that it received on an annual basis, as indicated in Figure 1. Specifically, the disputes received and closed by the FOS were, respectively, 22,392 and 17,007 disputes in 2008–09,[59] 23,790 and 21,543 in 2009–10,[60] 30,283 and 28,826 in 2010–11,[61] 36,099 and 36,049 in 2011–12,[62]

54. Fin. Ombudsman Serv. Ltd., Annual Review 2016–2017 at 25 (2017), https://webarchive.nla.gov.au/awa/20180313071026/https://www.fos.org.au/publications/annual-review/ [https://perma.cc/63RQ-75B3] (click on the "Publications" button, then use the snapshot window of the archival tool to navigate to 2018, and then click on "Annual Review") [hereinafter FOS 2016–17 Review].

55. Fin. Ombudsman Serv. Ltd., Annual Review 2017–18 at 27 (2018), https://webarchive.nla.gov.au/awa/20180313071026/https://www.fos.org.au/publications/annual-review/ [https://perma.cc/63RQ-75B3] (click on the "Publications" button, then use the snapshot window of the archival tool to navigate to 2019, and then click on "Annual Review") [hereinafter FOS 2017–18 Review].

56. These covered a diverse range of financial products and services, including complaints against banks, credit unions, foreign exchange dealers, deposit takers, credit providers, mortgage brokers, general insurers, insurance brokers, life insurers, funds' managers, financial advisers and planners, stockbrokers, and some superannuation providers. Fin. Ombudsman Serv. Ltd., Review of the Financial System External Dispute Resolution Framework (FOS Submission) 26 (*53 including the preceding presentation) (2016), https://treasury.gov.au/sites/default/files/2019-03/R2016-002_FOS.pdf [https://perma.cc/GQT4-5VB9].

57. Various forms of alternative dispute resolution approaches were adopted, including negotiation, conciliation conferences, and determinations and adjudications. *See* Fin. Ombudsman Serv. Ltd., Terms of Reference – 1 January 2010 (as amended 1 January 2018) ¶¶ 7.1, 8 (2018), https://www.afca.org.au/media/873/download [https://perma.cc/K5SL-DW3M].

58. *See infra* fig. 1.

59. FOS 2008–09 Review, *supra* note 45, at 19, 45.

60. FOS 2009–10 Review, *supra* note 47, at 27, 68.

61. FOS 2010–11 Review, *supra* note 48, at 20, 22.

62. FOS 2011–12 Review, *supra* note 49, at 20, 22.

32,307 and 33,773 in 2012–13,[63] 31,680 and 33,450 in 2013–14,[64] 31,895 and 34,714 in 2014–15,[65] 34,095 and 32,871 in 2015–16,[66] 39,479 and 39,481 in 2016–17,[67] and 43,684 and 43,325 in 2017–18[68]. Of the disputes closed, 48% were closed within 30 days, 80% within 60 days, and 87% within 90 days in 2017–18,[69] compared with 25% within 30 days, 44% within 60 days, and 63% within 90 days in 2008–09.[70]

In addition to minimizing the time spent on dispute resolution, the FOS also added convenience to the dispute resolution process. The online submission of disputes became a cost-effective way of accessing the FOS's services, as the submission was free of charge for the applicants.[71] This is reflected in its complaint submission statistics: 91% of complainants used online tools (76% via the FOS's website and 15% via email), while the remainder relied on letters (7%) and phone (2%) in 2017–18.[72] By comparison, only 63% of complaints used online avenues (57% via the FOS's website and 6% via email) with the remainder using letters (21%), phone (14%), and fax (1%) in 2010–11.[73]

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63. FOS 2012–13 Review, *supra* note 50, at 47, 49.

64. FOS 2013–14 Review, *supra* note 51, at 44, 47.

65. FOS 2014–15 Review, *supra* note 52, at 47, 50.

66. FOS 2015–16 Review, *supra* note 53, at 54, 56.

67. FOS 2016–17 Review, *supra* note 54, at 60, 64.

68. FOS 2017–18 Review, *supra* note 55, at 64, 68.

69. *Id.* at 68.

70. FOS 2008–09 Review, *supra* note 45, at 43.

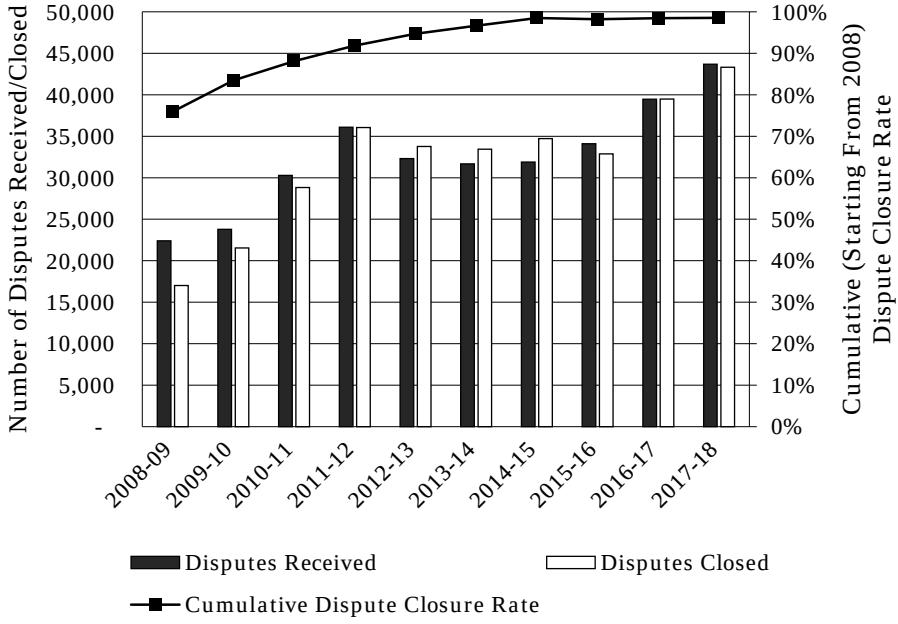
71. Dispute resolution services offered by the FOS were free to financial consumers throughout its life and could be accessed through a variety of methods, including through email and the FOS's website. *See* Fin. Ombudsman Serv. Ltd., How to Resolve a Dispute 6, 8 (2015), https://www.afca.org.au/media/876/download [https://perma.cc/R383-KKVL]. As various authorities have noted, enabling customers to submit their dispute via online tools expands the accessibility of dispute resolution services to larger swaths of the society because: (i) more people are familiar with completing online forms relative to completing handwritten legal documents; (ii) an online portal that is available throughout the year allows complainants to submit their disputes at more convenient times that better fit their schedules; and (iii) the less formal and more interactive nature of online portals makes the overall dispute process appear less daunting. *See.* Robert C. Bordone, *Electronic Online Dispute Resolution: A Systems Approach—Potential, Problems, and a Proposal*, 3 Harv. Negot. L. Rev. 175, 188–89 (1998) (noting that online dispute resolution tools are more attentive to contemporary patterns and are therefore more familiar); Karolina Mania, *Online Dispute Resolution: The Future of Justice*, 1 Int'l Compar. Juris. 76, 84–85 (2015) (noting that online dispute resolution services are more convenient and are designed to be more interactive and less legalistic).

72. FOS 2017–18 Review, *supra* note 55, at 51.

73. FOS 2010–11 Review, *supra* note 48, at 30.

The success of the FOS as an ADR provider is also highlighted by the larger number of disputes that it resolved via agreement instead of arbitration. The proportion of disputes resolved by agreement rose from 38% in 2008–09[74] to a peak of 74% in 2011–12,[75] and stabilized at about 60% in 2016–17[76] and 2017–18.[77] Notably, the FOS achieved these results while possessing many of the benefits offered by other ADR mechanisms, including money and time savings, flexibility, and the non-binding nature of its decisions on customers.[78]

FIGURE 1: DISPUTE RESOLUTION STATISTICS OF THE FOS FROM 2008 TO 2018.



The most striking feature that distinguished the FOS from other ADR mechanisms was its role in identifying and resolving systemic

74. FOS 2008–09 Review, *supra* note 45, at 42.
75. FOS 2011–12 Review, *supra* note 49, at 24.
76. FOS 2016–17 Review, supra note 54, at 65.
77. FOS 2017–18 Review, *supra* note 55, at 69.
78. FIN. OMBUDSMAN SERV. LTD., *supra* note 57, at ¶ 8.9 (If an Applicant does not accept a Recommendation or Determination in relation to the Applicant's Dispute, the Applicant is not bound by the Recommendation or Determination and may bring an action in the courts or take any other available action against the Financial Services Provider."). However, "[a] Determination is a final decision and is binding upon the Financial Services Provider if the Applicant accepts the Determination within 30 days of receiving the Determination." *Id.* at ¶ 8.7(b).

issues.[79] According to the statistics released by the FOS and summarized in Figure 2, it identified 1,490 possible systemic issues and resolved 554 of them. Specifically, the number of possible systemic issues identified and the number of systemic issues fully resolved were, respectively, 81 and 81 in 2008–09,[80] 71 and 58 in 2009–10,[81] 114 and 20 in 2010–11,[82] 184 and 31 in 2011–12,[83] 128 and 37 in 2012–13,[84] 162 and 54 in 2013–14,[85] 173 and 52 in 2014–15,[86] 129 and 64 in 2015–16,[87] 192 and 66 in 2016–17,[88] and 306 and 91 in 2017–18.[89] These issues, as discussed in this Part, affected thousands of customers and resulted in millions of Australian Dollars in refunds. Given the wide-ranging impacts of systemic issues on such a wide range of customers, it is necessary to examine how the FOS identified and resolved these systemic issues.

79. FIN. OMBUDSMAN SERV. LTD., *supra* note 7, at 107 (highlighting the role of the FOS in identifying and resolving systemic issues); *see also* Vicki Waye & Vince Morabito, *supra* note 3, at 6 ("[T]he address[ing] of systemic issues by a broad-based industry organi[z]ation such as the FOS remains reasonably unique.").

80. FOS 2008–09 Review, *supra* note 45, at 45.

81. FOS 2009–10 Review, *supra* note 47, at 5.

82. FOS 2010–11 Review, *supra* note 48, at 55.

83. FOS 2011–12 Review, *supra* note 49, at 58.

84. FOS 2012–13 Review, *supra* note 50, at 90.

85. FOS 2013–14 Review, *supra* note 51, at 92.

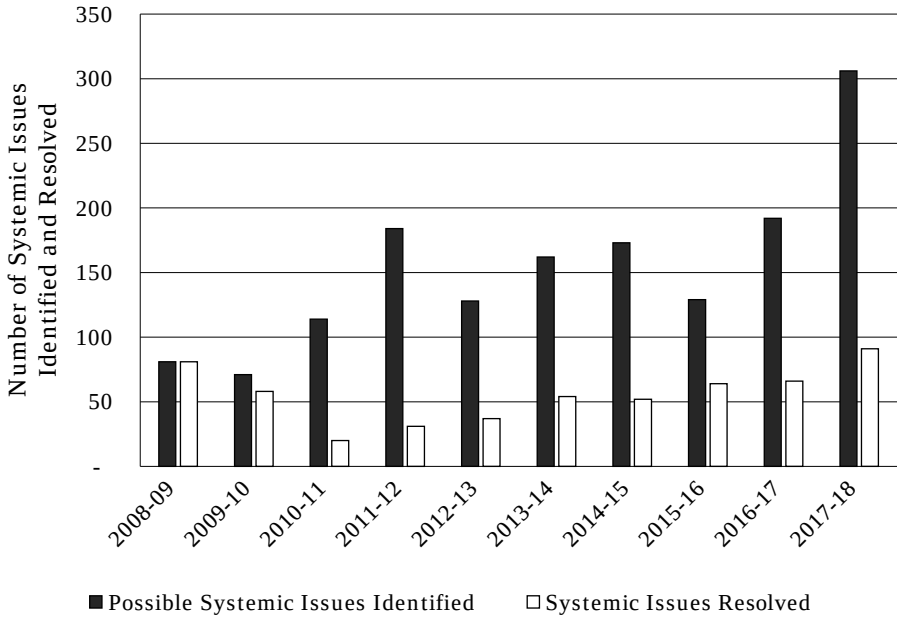
86. FOS 2014–15 Review, *supra* note 52, at 95.

87. FOS 2015–16 Review, *supra* note 53, at 111.

88. FOS 2016–17 Review, *supra* note 54, at 114.

89. FOS 2017–18 Review, *supra* note 55, at 123.

FIGURE 2: SYSTEMIC ISSUES IDENTIFIED BY THE FOS FROM 2008 TO 2018.



Systemic issue resolution by the FOS started with the definition of systemic issues in its Terms of Reference ("TOR"). The FOS defined a systemic issue as "an issue that will have an effect on other persons . . . beyond the parties to the dispute" in its first TOR[90] and employed this definition in all subsequent revisions of its TOR.[91] FOS's TOR obliged it to identify systemic issues, refer them to relevant parties, obtain a report from those parties on any remedial action undertaken, and monitor the issue until a resolution was reached.[92] The TOR definition of systemic issues was broadly in line with the regulatory approach of the Australian Securities and Investments Commission ("ASIC")—i.e., an independent government body acting as the

90. *See* FIN. OMBUDSMAN SERV. LTD., TERMS OF REFERENCE – 1 JANUARY 2010 (AS AMENDED 1 JANUARY 2012) ¶ 11.2(a) (2012), https://www.afca.org.au/media/836/download [https://perma.cc/Y8WU-GSL6]

91. *See* FIN. OMBUDSMAN SERV. LTD., TERMS OF REFERENCE – 1 JANUARY 2010 (AS AMENDED 1 JANUARY 2014) ¶ 11.2(a) (2014), https://www.afca.org.au/media/886/download [https://perma.cc/JR3E-9PF7]; FIN. OMBUDSMAN SERV. LTD., TERMS OF REFERENCE – 1 JANUARY 2010 (AS AMENDED 1 JANUARY 2015) ¶ 11.2(a) (2015), https://www.afca.org.au/media/872/download [https://perma.cc/63YJ-MCFP]; FIN. OMBUDSMAN SERV. LTD., *supra* note 57, at ¶ 11.2(a).

92. *See, e.g.*, FIN. OMBUDSMAN SERV. LTD., *supra* note 57, at ¶ 11.2(b).

corporate markets and financial services regulator in Australia.[93] Specifically, the ASIC defined systemic issues as those that "have implication beyond the immediate actions and rights of the parties to the complaint or dispute," as stipulated in its Regulatory Guide 139 ("RG139") and mandated the FOS to track and report those issues.[94]

The FOS worked with its stakeholders to carry out this systemic issue identification and resolution responsibility. The first step was to identify a possible systemic issue.[95] To this end, the FOS scoured complaints for signs of a possible systemic issue. Next, it gathered more information about possible systemic issues that it had identified by issuing formal requests to financial service providers.[96] The FOS would have then assessed the service provider's response to determine whether the possible systemic issue was, indeed, a definite systemic issue.[97] As a part of this process, the FOS would have managed the resolution of definite systemic issues with the involvement of aggrieved customers, their financial service providers, and regulators by "identify[ing] all affected customers, compensate[ing] the affected customers fairly for any financial loss, [and] implement[ing] a strategy to prevent the problem [from] recurring."[98] Last, the FOS would have provided regular updates on the prevalence of systemic issues to

93. *See* AUSTRALIAN SEC. & INVS. COMM'N, REVIEW OF THE FINANCIAL SYSTEM EXTERNAL DISPUTE RESOLUTION FRAMEWORK: SUBMISSION BY ASIC 22 (2016), https://treasury.gov.au/sites/default/files/2019-03/R2016-002_Australian_Securities_and_Investments_Commission.pdf [https://perma.cc/JSL5-4YFA] ("Systemic issues are defined broadly as relating to issues that have implications beyond the immediate actions and rights of the parties to the complaint or dispute.").

94. *See* AUSTRALIAN SEC. & INVS. COMM'N, REGULATORY GUIDE 139, APPROVAL AND OVERSIGHT OF EXTERNAL DISPUTE RESOLUTION SCHEMES at RG139.119 (2013), https://download.asic.gov.au/media/5689909/rg139-published-13-june-2013-20200727.pdf [https://perma.cc/QJ78-84BU]. ("[A]t a broad level, systemic issues relate to issues that have implication beyond the immediate actions and rights of the parties to the complaint or dispute."). The same regulatory guidance also clarified the "ASIC's oversight of the two ASIC-approved external dispute resolution (EDR) schemes—the Financial Ombudsman Service (FOS) and the Credit and Investments Ombudsman (CIO)." *Id.*

95. FIN. OMBUDSMAN SERV. LTD., OPERATIONAL GUIDELINES TO THE TERMS OF REFERENCE 115 (2018), https://www.afca.org.au/media/850/download [https://perma.cc/QWU9-T3ZS].

96. *Id.* at 115.

97. *Id.* at 115–16.

98. FOS 2017–18 Review, *supra* note 55, at 122.

the ASIC.[99] Using this procedure, the FOS resolved hundreds of systemic issues encompassing the drafting and interpretation of contracts,[100] compliance with codes of practice,[101] failure to disclose

99. *See* AUSTRALIAN SEC. & INVS. COMM'N, *supra* note 94, at RG139.116 ("Requirements that relate to the principle of accountability include that a scheme must: (a) report to us any systemic issues and matters involving serious misconduct by a scheme member; (b) collect and report information to us about complaints and disputes it receives on a quarterly basis and in its annual report; and (c) conduct independent reviews of its operations."); *Id.* at RG139.117 ("A scheme must report any systemic, persistent or deliberate conduct to us. For the purposes of this guide we have classified the types of conduct or issues that might be reported to us into two broad categories: (a) systemic issues; and (b) serious misconduct.").

100. *See, e.g.*, FOS 2013–14 Review, *supra* note 51, at 94 (discussing the example of the use of ambiguous wording in insurance policies and noting that the insurer's policy contained ambiguous wording and did not state whether all costs, including stamp duty and transfer fees, should be included in the vehicle's replacement cost); FOS 2011–12 Review, *supra* note 49, at 59 (discussing the example of the inappropriate interpretation of policy terms and noting that the financial service provider acknowledged that it had referred to incorrect policy wording to assess the customer's claim for disability benefits and, thereby, incorrectly ceased payments to the customers); FOS 2012–13 Review, *supra* note 50, at 91 (discussing the example of the inappropriate interpretation of policy terms and noting that the financial service provider admitted to the FOS that "it had been assessing total losses based on the sum insured rather than the market value as stated in the policy"). For the cases of incorrect policy, *see* FOS 2014–15 Review, *supra* note 52, at 98 (discussing the example of the inappropriate interpretation of policy terms and noting that the financial service provider's hardship policy, which included charging a fee to process a request for hardship assistance, potentially led to some hardship applications not being considered because customers were unable or unwilling to incur the fee); FOS 2017–18 Review, *supra* note 55, at 126 (discussing the example of the inappropriate interpretation of policy terms and noting that several complaints were raised with the insurer about its administration of warranty plans, including, for example, "denial of claims based on the consumer having failed to meet the warranty requirements of servicing the vehicle despite the requirements exceeding those of the vehicle manufacturer").

101. *See, e.g.*, FOS 2009–10 Review, *supra* note 47, at 75 (noting that the insurer sought to "avoid a policy in response to innocent non-disclosure or misrepresentations by the customer before the insurance contract was signed" although Section 28 of the Insurance Contracts Act 1984 barred insurers from voiding a contract unless the customer's non-disclosure or misrepresentation was fraudulent); FOS 2010–11 Review, *supra* note 48, at 56 (discussing the reporting of a customer as being in default by a financial service provider for an amount that had not been overdue for 60 days or more, which, according to the FOS, was not "in accordance with Part IIIA of the Privacy Act [1988]"); FOS 2011–12 Review, *supra* note 49, at 59 (noting that a financial service provider failed to disclose the amount of the switch fee in its loan contract documentation which raised a systemic issue about whether this failure constituted a breach of relevant consumer credit laws); FOS 2012–13 Review, *supra* note 50, at 92 (discussing the investigation of a financial service provider's "policies and procedures for dealing with customers in financial difficulty" to determine whether it "failed to meet the requirements of" relevant banking practices); FOS 2013–14 Review, *supra* note 51, at 93 (discussing a case in which a financial service provider "was not compliant with the relevant section of the National Credit Code because it did not comply with the strict requirement to provide specific information about the debtor's rights"); FOS 2015–16 Review, *supra* note 53, at 114 (discussing a case in which a financial

relevant contractual information,[102] procedural deficiencies or processing errors,[103] inappropriate financial estimation methodologies,[104] and employee and representative misconduct.[105] Some selected issues corresponding to these categories were published to the

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service provider breached the FOS's codes of practice by requiring applicants to refer their dispute to the FOS within six months and breached clause 38.1 of the ePayments Code by declining unauthorized transaction disputes when customers failed to return a particular form to the financial service provider within 30 days); FOS 2016–17 Review, *supra* note 54, at 115 (discussing a case in which a service provider did not obtain a tax ruling before promoting a dividend washing strategy to customers, which not only caused customers loss, but also raised questions about the service provider's compliance with the Australian Corporations Act 2001).

102. *See, e.g.*, FOS 2008–09 Review, *supra* note 45, at 46 (discussing a case in which a financial service provider's website presented incorrect information on cleared funds available for withdrawal, which caused some customers to incur dishonored payment fees on both sending and receiving accounts); FOS 2009–10 Review, *supra* note 47, at 75 (discussing a case in which a service provider "had unilaterally altered the terms of its merchant facility agreement by increasing fees and charges" with "13,051 merchants using [the] terminals not receiv[ing] the required notice of the fee change"); FOS 2015–16 Review, *supra* note 53, at 112–13 (discussing a case in which the failure of a financial service provider to notify its customers of the consequences of non-payment of premiums led to a number of life insurance policies being cancelled as a result of linked credit cards expiring).

103. *See, e.g.*, FOS 2008–09 Review, *supra* note 45, at 46 (discussing a case in which the insurer confirmed that "it did not have appropriate processes and procedures in place" for eligible customers to request a refund); FOS 2009–10 Review, *supra* note 47, at 75 (discussing a case in which the FOS discovered that a financial service provider did not always correctly link its offset home loan feature to an eligible offset account, which required the service provider to fix and enhance its system as well reimburse A$11.6 million to the affected customers); FOS 2010–11 Review, *supra* note 48, at 55 (discussing a case in which a service provider's credit card processing system incorrectly treated some customers' accounts as not meeting the payment requirements for an interest-free period, which resulted in incorrect interest being charged to those accounts); FOS 2013–14 Review, *supra* note 51, at 94 (discussing a case in which customers' offset accounts were not properly linked to their mortgage loan leading to incorrect loan interest calculations).

104. *See, e.g.*, FOS 2009–10 Review, *supra* note 47, at 75 (highlighting a case in which the FOS found that a number of service providers "were not adequately taking into account the present day value discounting required for principal repayments over the remaining term of the fixed rate loan"); FOS 2011–12 Review, *supra* note 49, at 59 (discussing a case in which a cash flow calculation error in the financial service provider's methodology led to customers being unreasonably charged); FOS 2016–17 Review, *supra* note 54, at 117 (discussing a case in which the FOS found that the insurer used inflated insured values which did not accurately reflect the market values of insured vehicles).

105. *See, e.g.*, FOS 2012–13 Review, *supra* note 50, at 91 (reviewing a number of disputes related to "allegations against a former financial advisor of an [financial service provider] who purchased and redeemed investments without the applicants' knowledge or authority, and/or without reference to their attitudes to risk"); FOS 2014–15 Review, *supra* note 52, at 97 (highlighting a case in which a former authorized representative of a service provider "helped a customer to withdraw part of his

public in the form of case studies, although, "none of the case studies reflect[ed] the exact circumstances of any one systemic issue."[106]

Despite this methodical and thorough process, the FOS's approach was limited to what James Reason has identified as the personal approach. Therefore, the resolutions implemented by the FOS were limited to what this Article calls the extra-system dimension. From this dimension, systemic issues are considered to be caused by active human error on the frontline and countermeasures against systemic issues are concentrated on active errors and their direct effects. Such a limited focus on the extra-system dimension of systemic issues imposed a trifold limitation on the depth and breadth of resolutions developed by the FOS.

The first limitation imposed by focusing only on the extra-system dimension of systemic issues is that issues are addressed only after substantial financial losses have already been incurred. This limitation is based on the practical reality that predicting human errors, which is the core focus of the extra-system dimension, is a laborious and imprecise task that cannot be effectively replicated across the whole financial system.[107] Two case studies published by the FOS illustrate this point. In the first case study, the FOS highlighted the failure of insurers to adjust the insured value of cars as those cars aged and their market value depreciated.[108] In the second case study, the FOS highlighted the inappropriate charging of processing fees by financial institutions to process their customers' financial hardship applications.[109] From a human error perspective, these two systemic issues have little in common given that they arose from badly designed business processes in different sectors of the financial market. However, stepping back from a narrow focus on active human errors (i.e., adopting an intra-system, rather than extra-system approach) would reveal that they share a common foundation: the combination of complex compliance requirements and competitive cost pressures

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superannuation despite the customer being under the preservation age and not entitled to make such a withdrawal.").

106. FOS 2012–13 Review, *supra* note 50, at 91.

107. *Cf.* Alfred Cuschieri, *Nature of Human Error: Implications for Surgical Practice*, 244 ANNALS SURGERY 642, 642 (2006) ("All the available evidence clearly indicates that human errors are random unintended events."); Ian M. T. Stewart, *Economic Prediction and Human Action*, 7 FUTURES 129, 130–31 (1975) (summarizing the debate between those who argue that human actions are predictable and those who argue otherwise and concluding that even those who are in the former camp concede that human actions, especially at an individual level, are unpredictable).

108. FOS 2016–17 Review, *supra* note 54, at 117.

109. FOS 2014–15 Review, *supra* note 52, at 96.

in the back-office operations of financial firms led to the repeated recycling of business processes even when the requirements are only superficially similar.[110]

The FOS's statistics on the number of parties impacted by systemic issues as well as the losses that they experienced makes clear the lost opportunity of reacting to, rather than preventing, systemic issues even clearer. As the FOS's annual reviews disclosed, fifty-eight systemic issues affected a total of 36,544 customers and resulted in refunds of more than A$17.5 million in 2009–10,[111] twenty affected approximately 83,700 customers and resulted in refunds of more than A$3.6 million in 2010–11,[112] thirty-one affected about 30,000 customers and resulted in refunds of approximately A$12 million in 2011–12,[113] thirty-seven affected more than 13,600 customers and resulted in refunds of over A$2 million in 2012–13,[114] fifty-four affected almost 422,000 customers and resulted in refunds of A$75 million in 2013–14,[115] fifty-two affected 77,402 customers and resulted in refunds of A$4.3 million in 2014–15,[116] sixty-four affected more than 400,000 customers and resulted in refunds of more than A$12.75 million in 2015–16,[117] sixty-six affected more than 940,000 customers and resulted in refunds of more than A$42 million in 2016–17,[118] and ninety-one affected more than 295,000 customers and resulted in refunds of more than A$42 million in 2017–18[119]. In summary, each one of the 554 systemic issues that were identified and resolved by the FOS affected about 4,859 customers and resulted in refunds of about A$450,000, which is a considerable outcome for an Ombudsman that had about 350 fulltime-equivalent employees in 2018.[120]

The second limitation imposed by focusing only on the extra-system dimension of systemic issues is that systemic issue resolution is

110. In the car insurance case study, the insurer most likely attempted to use the same business process to renew home and car insurance policies. While cars tend to depreciate rapidly, homes tend not to do so. In the hardship application processing case study, financial institutions admitted to attempting to use the same business process that they employed to process overdraft requests to process hardship applications. *See id.* at 96.

111. FOS 2009–10 Review, *supra* note 47, at 74.

112. FOS 2010–11 Review, *supra* note 48, at 55.

113. FOS 2011–12 Review, *supra* note 49, at 58.

114. FOS 2012–13 Review, *supra* note 50, at 90.

115. FOS 2013–14 Review, *supra* note 51, at 92.

116. FOS 2014–15 Review, *supra* note 52, at 95.

117. FOS 2015–16 Review, *supra* note 53, at 111.

118. FOS 2016–17 Review, *supra* note 54, at 114.

119. FOS 2017–18 Review, *supra* note 55, at 123.

120. *Id.* at 21.

confined to remedying consequences, instead of also striving to rectify the root causes, of systemic issues. The FOS's approach to systemic issue resolution can be summarized as containing two essential components: (1) the Ombudsman focused on the question of "how many customers are affected by the issue" as the sole criterion to determine whether an issue is a systemic issue;[121] and (2) the Ombudsman resolved the issue in a way that drove the involved financial service providers to rectify the problem and refund losses to all affected customers.[122] Granted, a strong advantage of such an approach, as compared to other ADR models, is that it expands legal remedies to all customers affected by the same issue and thereby allows a large number of potential claims to be settled in an economically efficient manner. However, focusing on the effects without reflecting on the origins overlooks how the issue arose, and correcting results without rectifying causes overlooks the potential to prevent similar issues in the future. A typical example in this respect can be found in the FOS's 2014–15 Review, where, in the case study entitled "Early Withdrawal of Superannuation Raises Alarm," a former authorized representative of a financial service provider enabled the unlawful withdrawal of superannuation by clients who were not entitled to make such a withdrawal.[123] Based on the case study itself, the FOS's concern was focused on "all affected customers"[124] and did not encompass an in-depth consideration of the more fundamental question of how that former authorized representative, despite having already been banned by the ASIC for six years at the time of the incident, was able to continue to work and successfully enable the unlawful withdrawals.

The third limitation imposed by focusing only on the extra-system dimension of systemic issues is that the actions taken in response to systemic issues merely focus on the actions of frontline personnel instead of building the systemic defenses that are necessary for averting similar systemic issues. This does not mean that all

121. The FOS's systemic issues process indicates that it considers "whether each dispute raises any issues that could affect a wider group of people . . ." at any stage of the dispute settlement process. FOS 2016–17 Review, *supra* note 54, at 113.

122. *See e.g.*, FOS 2017–18 Review, *supra* note 55, at 123 (stating that key outcomes of systemic issue resolution were "refunds following direct FOS involvement . . . [totaling] more than [A]$42 million" and the amendment or removal of more than 2,800 "credit listings").

123. FOS 2014–15 Review, *supra* note 52, at 99.

124. The FOS expressed its concern that "the [the service provider] had not contacted all affected customers advising them that [it] could consider their complaint." *Id*. Afterwards, the service provider agreed with the FOS's request and provided refunds to all affected customers. *Id*.

the remedial actions spearheaded by the FOS were reactive in nature or that all systemic defenses have to be proactive. Indeed, financial service providers took some preventive measures, such as staff training and procedures improvements, to deal with systemic issues in response to investigations undertaken by the FOS.[125] Instead, this missed opportunity indicates that the remedial actions that were recommended by the FOS missed a class of solutions. Several of the FOS's case studies illustrate this point. For example, the case study entitled "Advice Dispute Uncovers Broader Compliance Concerns" indicates that the financial service providers did not comply with their obligations to provide clients with appropriate investment advice about their life insurance policies.[126] In response, the service providers proposed to the FOS that, in addition to compensating affected customers with more than A$200,000, they intended to implement an expanded representative monitoring program that "focused on addressing key compliance risks associated with [their] representatives."[127] This proposed monitoring program was a preventive strategy, but it, and strategies like it, still focus on individuals rather than the system. Considering that advisors' compliance is a widespread and persistent issue that still affects the fairness of the Australian life insurance industry,[128] an examination of the systemic

125. *See e.g.*, FOS 2009–10 Review, *supra* note 47, at 74 (stating that "the actions that [service providers] took to fix systemic issues included: reimbursing affected customers for losses, including interest; amending contractual and product documentation; improving staff training; case-by-case review of appropriate rectification for affected customers; changing processing systems to rectify the problems; undertaking to rectify future complaints; reviewing their processes and procedures; corresponding with affected customers to correct previous statements; [and] removing fees that had been charged incorrectly."); *see also* FOS 2012–13 Review, *supra* note 50, at 90 (stating that "positive outcomes of the systemic issues work extend beyond monetary compensation" and that the improvements service providers made include "improvements to processes and procedures; improvements to policies for dealing with customers in financial difficulty; review of lending guidelines; improvements to compliance with the duty of utmost good faith; greater disclosure to customers; updating of template letters; rectification of system errors; provision of updated information and training to staff; improved access to dispute resolution for customers").

126. FOS 2017–18 Review, *supra* note 55, at 124.

127. The FOS also highlighted broader concerns that service providers' "existing monitoring mechanisms were infrequent, leaving potential for unchecked behavior to continue over long periods." *Id.*

128. Following several financial scandals involving the Australian financial advice industry, Parliamentary Joint Committee on Corporations and Financial Services launched an inquiry and released its findings in 2009. Parliamentary Joint Comm. on Corp. & Fin. Servs., Parliament of Austl., Inquiry Into Financial Products and Services in Australia at vii (2009), https://www.aph.gov.au/~/media/wopapub/senate/committee/corporations_ctte/completed_inquiries/2008_10/fps/report/report_pdf.ashx [https://perma.cc/2E5Y-UGVJ]. The Australian government introduced

factors that contribute to the spread of this issue in the industry should have been included as an integral part of the systemic issue resolution model to prevent other parts of the system from repeating the same mistakes.

As these three limitations of the extra-system dimension highlight, merely focusing on the extra-system dimension of systemic issues leaves the door open to the recurrence of similar mistakes. As can be seen from the FOS's annual reports, similar types of systemic issues reappeared year after year, albeit in different forms and different contexts. For example, the systemic issues arising from the disclosure of insurance policy information were discussed as case studies in almost every FOS annual review, ranging from the use of ambiguous wording in insurance policies to the inappropriate interpretation of policy wordings, and ranging from the cancellation of insurance policies without written notification to the failure to notify policyholders of policy changes.[129] Alongside this recurrence of systemic issues is the reality that some financial service providers, although few in number, have been especially frequently involved in disputes. As FOS statistics over the past five years indicate, about 0.3–0.4% of its member firms had more than 100 disputes lodged against them—corresponding to fifty firms in 2017–18,[130] forty-nine firms in 2016–17,[131] forty-seven firms in 2015–16,[132] fifty-four firms in 2014–15,[133] fifty-one firms in 2013–14,[134] and fifty-six firms in

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regulatory reforms based on the recommendations of the Committee, known as the Future of Financial Advice ("FOFA") reforms, in 2012. *See* Explanatory Memorandum, Corporations Amendment (Streamlining of Future of Financial Advice) Bill 2014 (Cth) 3 (Austl.). The FOFA legislation commenced on July 1, 2012 and became mandatory on July, 1 2013. *See* Corporations Amendment (Future of Financial Advice) Act 2012 (Cth) s 2 (noting the commencement date of July 1, 2012); *Future of Financial Advice (FOFA) Reforms*, Australian Sec. & Inv. Comm'n (Jul. 28, 2020), https://asic.gov.au/regulatory-resources/financial-services/regulatory-reforms/future-of-financial-advice-fofa-reforms/ [https://perma.cc/8AFG-F3XC]. According to the ASIC, 37% of sampled consumer advice selected from both before and after the mandatory compliance date of the FOFA reforms failed to meet the relevant legal standard. *See* Australian Sec. & Inv. Comm'n, Report 413, Review of Retail Life Insurance Advice 6 (2014), https://download.asic.gov.au/media/2012616/rep413-published-9-october-2014.pdf [https://perma.cc/7ZKY-247Z].

129. *See supra* notes 102, 104 (highlighting case studies published by the FOS about systemic issues observed in the interpretation of contract documents and the disclosure of contract information).

130. FOS 2017–18 Review, *supra* note 55, at 28.

131. FOS 2016–17 Review, *supra* note 54, at 25.

132. FOS 2015–16 Review, *supra* note 53, at 22.

133. FOS 2014–15 Review, *supra* note 52, at 22.

134. FOS 2013–14 Review, *supra* note 51, at 21.

2012–13.[135] Attributing this pattern to human errors by particular individuals provides an insufficient explanation about why these firms were frequent visitors to the FOS's dispute resolution chambers. Developing a particular response to a particular issue is also insufficient to address and fix latent conditions within the system that have allowed the financial disputes, such as conflicts around insurance policy interpretation and adjustments, to occur frequently. Therefore, Ombudsman offices must include an intra-system dimension in their analysis of systemic issues and extend their systemic issue resolution protocols to include the discovery of systemic weak points. Not only does the identification of the root causes of systemic issues prevent potential systemic issues from propagating to affect thousands of customers, but it also prevents similar issues from surfacing again and again.

IV. Intra-system Dimension of Systemic Issue Resolution

This section discusses the life insurance case of James Kessel,[136] as well as several similar cases submitted to the FOS, to illustrate how the inclusion of the intra-system dimension in systemic issue resolution could unearth the latent systemic factors that contribute to the escalation of an issue into a scandal. Stated another way, this discussion highlights the benefits of tracing the causes of systemic issues back to their systemic roots as a part of systemic issue resolution.

The case of Mr. Kessel revolved around the question of which biological symptoms constitute a heart attack covered by a life insurance policy.[137] Although the FOS was faced with this question in several other cases by the time of Mr. Kessel's case, it never thought that there was any problem, let alone a systemic one, that might eventually escalate into the 2014 CommInsure life insurance scandal.[138] The combination of Mr. Kessel's case with similar ones shows that

135. FOS 2012–13 Review, *supra* note 50, at 19.

136. Adele Ferguson, *CommInsure (Commbank) Life Insurance Claims Investigation Part 1: Heart Attack*, Sydney Morning Herald, https://www.smh.com.au/interactive/2016/comminsure-exposed/heart-attack/ [https://perma.cc/7RL7-PBLV].

137. *See id.*

138. The 2014 CommInsure life insurance scandal consisted of the following three cases: the mental health case of Matthew Attwater, the terminal illness case of Evan Pashalis, and the heart attack case of James Kessel. *See id.*; Adele Ferguson, *CommInsure (Commbank) Life Insurance Claims Investigation Part 2: Mental Health*, Sydney Morning Herald, https://www.smh.com.au/interactive/2016/comminsure-exposed/mental-health/?prev=1/ [https://perma.cc/WN3Y-2ZGV]; Adele Ferguson, *CommInsure (Commbank) Life Insurance Claims Investigation Part 3: Terminal Illness*, Sydney Morning Herald, https://www.smh.com.au/interactive/2016/comminsure-exposed/terminal-illness/?prev=2 [https://perma.cc/WE2J-RTYJ].

the extra-system dimension adopted by the FOS was responsible for this absence of inquiry into failure points within the system. These failure points would have been uncovered via the intra-system analysis that has been discussed in the preceding section of this article.

Mr. Kessel, a 46-year-old mechanic, suffered a severe heart attack in 2014.[139] At the time of the incident, Mr. Kessel was paying for a one million Australian Dollar trauma policy[140] with CommInsure.[141] The policy "covered heart attacks," but CommInsure denied Mr. Kessel's claim on the ground that the concentration of troponin[142] in his blood did not reach the heart attack threshold.[143] CommInsure based this denial on its own definition of "heart attack" which relied on two diagnostic mechanisms: troponin levels and electrocardiogram[144] ("ECG") changes.[145] According to the former, a policyholder experiences a heart attack only if the policyholder's blood troponin level exceeds 2.0 micrograms per liter.[146] In contrast, the concentration of troponin in Mr. Kessel's blood was recorded at 0.488 micrograms per litter.[147] Consequently, CommInsure only offered Mr. Kessel a 25,000 dollar "partial payment" for the insertion of

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139. Adele Ferguson, *supra* note 136.

140. *Id.*

141. CommInsure is a registered business name of The Colonial Mutual Life Assurance Society Limited, which is a wholly owned but non-guaranteed subsidiary of the Commonwealth Bank of Australia. *Insurance*, COMMONWEALTH BANK AUSTL., https://www.commbank.com.au/insurance.html [https://perma.cc/52TM-FBS6].

142. "Cardiac Troponin (cTn) is a biomarker of" damages to heart muscles. Richard L. Popp, *Troponin: Messenger or Actor?*, 61 J. AM. COLL. CARDIOLOGY 611, 611 (2013). "These proteins are released when the heart muscle has been damaged, such as occurs with a heart attack. The more damage there is to the heart, the greater the amount of troponin T and I there will be in the blood." U.S. National Library of Medicine, *Troponin Test*, MEDLINE PLUS (Oct. 8, 2020), https://medlineplus.gov/ency/article/007452.htm [https://perma.cc/2RG9-HMQB].

143. *See* Adele Ferguson, *supra* note 136.

144. "An electrocardiogram, also called an ECG or EKG, is a simple, painless test that detects and records your heart's electrical activity." *Electrocardiogram*, NAT'L INSTS. OF HEALTH, https://www.nhlbi.nih.gov/health-topics/electrocardiogram [https://perma.cc/3FLB-73BY].

145. COMMINSURE, TRAUMA CLAIM 1 (2014), *reprinted in* Adele Ferguson, *supra* note 136.

146. Adele Ferguson, *supra* note 136.

147. CommInsure's definition of heart attack was based on the presence of the following medical symptoms: (1) elevation of cardiac enzyme CK-MB, or elevation in levels of Troponin I greater than 2.0 mcg/L or Troponin T greater than 0.6 mcg/L or their equivalent; and (2) confirmatory new electrocardiogram (ECG) changes, or medical evidence indicating that the heart attack had reduced the Left Ventricular Ejection Fraction to below 50% when measured at least six weeks after the heart attack. *See* COLONIAL MUT. LIFE ASSURANCE SOC'Y LTD., COMMINSURE PROTECTION: SUPPLEMENTARY COMBINED PRODUCT DISCLOSURE STATEMENT AND POLICY 120 (2016), https://www.commbank.com.au/content/dam/commbank/personal/apply-online/download-

stents[148] into his heart rather than the one million dollar payment outlined in his policy for a heart attack.[149]

This case escalated into a national scandal. Most of the controversy revolved around the extent to which Troponin levels and ECG results can be used to define a heart attack.[150] The joint investigation led by Adele Ferguson[151] and ABC's Four Corners program[152] found that the consensus in the medical community was that "it is not possible to diagnose a heart attack based on troponin levels alone."[153] In fact, Dr. Andrew MacIsaac, the then-president of the Cardiac Society of Australia and New Zealand,[154] argued that using the minimum

printed-forms/CIL70-110514_CIL1905-160616_combined_PDS_websecure.pdf [https://perma.cc/2UMA-2TA7].

148. "A coronary artery stent is a small, self-expanding, metal mesh tube. It is placed inside a coronary artery after balloon angioplasty. This stent prevents the artery from re-closing." *Troponin Test*, MEDLINE PLUS (Oct. 8, 2020), https://medlineplus.gov/ency/article/002303.htm [https://perma.cc/65FP-LNJL].

149. Adele Ferguson, *supra* note 136.

150. The controversy was not limited to CommInsure's criteria for heart attacks. For example, a commentator criticized the wording of CommInsure's policy itself. *See* Pat McConnell, *CommInsure Case Shows It's Time to Target Reckless Misconduct in Banking*, CONVERSATION (May 7, 2016), https://theconversation.com/comminsure-case-shows-its-time-to-target-reckless-misconduct-in-banking-55748 [https://perma.cc/S2TQ-6YDJ]. (arguing that CommInsure's Supplementary Combined Product Disclosure Statement and Policy "runs to some 136 pages," "dedicates 25 pages purely to definitions," and "contains so many weasel words and get-out sub-clauses that even experts disagree on the interpretation.")

151. "Adele Ferguson is a multi-award-winning senior business writer and columnist for The Age, the Sydney Morning Herald and the Australian Financial Review . . . . Her series of investigations into the banks over the past five years helped bring about the royal commission into the sector." *Adele Ferguson*, HARPERCOLLINS PUBLISHERS, https://www.harpercollins.com/blogs/authors/adele-ferguson [https://perma.cc/9JMX-WTXY]. Ms. Ferguson became a member of the Order of Australia in 2019 for "significant service to the print and broadcast media as a journalist and business commentator." *Australian Honours Search Facility*, DEP'T OF THE PRIME MINISTER & CABINET, https://honours.pmc.gov.au/honours/awards/2003150 [https://perma.cc/2K23-FXQL].

152. ABC's Four Corners program is an Australian investigative journalism program that has been broadcasted since 1961. *See Four Corners*, ABC, https://www.abc.net.au/4corners/about-us [https://perma.cc/M2R6-3M6R].

153. Adele Ferguson, *supra* note 136.

154. "The Cardiac Society of Australia and New Zealand is the professional body for cardiologists and those working in the area of cardiology. . . . The Society is the chief advocacy group for the profession and aims to facilitate training, professional development and improve medical practice to enhance the quality of care for patients with cardiovascular disease." *About Us*, CARDIAC SOC'Y OF AUSTL. & N.Z., https://www.csanz.edu.au/aboutus [https://perma.cc/Y578-GFAN].

troponin level of 2.0 micrograms per liter as the threshold for diagnosing a heart attack was "certainly out of date."[155] The extent of this scandal went beyond disputes within the medical community on the definition of heart attack because CommInsure was allegedly aware of the shortcomings of its heart attack definition before the scandal broke. Indeed, CommInsure's heart attack definition was already regarded by a cardiologist as flawed, a point-of-view that was also acknowledged by a committee within CommInsure.[156] CommInsure's medical experts composed an internal email with the subject of "Exgratia Decision Forum – James Kessel" to warn that reliance on the concentration of Troponin in blood was "not in line with current medical practice."[157] The email further warned that "[b]y declining this claim based on a now unobtainable threshold, CommInsure would not be acting in utmost good faith and should the decision be disputed[,] it would attract negative attention by [the] FOS."[158] Nonetheless, CommInsure went on to reject Mr. Kessel's claim, which—as forewarned by CommInsure's experts—prompted a scandal over the "outdated and unfair" policy definition.[159] The scope of this scandal grew further because this definition of heart attack was used to handle one-fifth of all of CommInsure's trauma claims.[160]

While Mr. Kessel's case sparked a national scandal, it was not the first time the threshold of a heart attack in insurance policies had been disputed. For example, in a complaint submitted to the FOS in 2013, the claimant provided a cardiologist's report in which the cardiologist insisted that the claimant had experienced an acute heart attack and attributed the absence of corresponding Troponin measurements to the policies of hospitals to "only measure[ ] Troponin I and Troponin T on a medical needs basis (to limit hospital

155. Adele Ferguson, *supra* note 136. (reporting Dr MacIsaac's statement that "[i]f we're going to use 2 micrograms per liter as our threshold for diagnosing a heart attack – that's certainly out of date and not the standard we'd apply now . . . .").

156. *Id*.

157. *Id*. (the email explains, "from a medical perspective, I am strongly persuaded by the provided medical evidence that this client had suffered a severe heart attack requiring invasive intervention. This is not in dispute.")

158. *Id*.

159. *Id*. ("CommInsure's decision on Kessel's claim hinged on a strict method it uses to define heart attacks – a method that a joint investigation by Fairfax Media and Four Corners has confirmed is now outdated and unfair if used in isolation.").

160. Adele Ferguson, *supra* note 136 ("The joint media investigation understands that the bank [i.e. Commonwealth Bank] was aware of this, even as it continued to use the method to assess claims on heart attacks — which account for one-fifth of CommInsure's trauma claims.").

expenses)."[161] Although the FOS acknowledged that "the complainant had experienced a heart attack," it still determined that the insurer "correctly declined the [a]pplicant's trauma claim in line with the policy wording."[162] Similar outcomes were also present in two other cases that were submitted to the FOS in 2013.[163] In one case, the complainant criticized the policy's definition of heart attack for "not [being] transparent or expressed in plain language" and "only [being] meaningful to a medically trained professional."[164] In another case, a cardiologist reported to the insurer that "it is clear on historical, clinical and laboratory grounds that [the complainant] did suffer a myocardial infarction at the time of his presentation to [the hospital]" despite the insurer's denial of the complainant's claim.[165]

Even though the 2014 CommInsure life insurance scandal arose out of the outdated technical definition of heart attack adopted by insurers and generated a considerable amount of backlash, the same issue kept re-appearing.[166] Multiple complaints indicate that the

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161. FIN. OMBUDSMAN SERV. LTD., CASE NO. 280,551, LIFE INSURANCE – NON-INCOME STREAM RISK – TRAUMA – FSP DECISION – DENIAL OF CLAIM ¶ 10 (2013), https://service02.afca.org.au/CaseFiles/FOSSIC/280551.pdf [https://perma.cc/B8LQ-TD7P].

162. *Id.* (stating the FOS adjudicator's finding that "I am not satisfied that the medical evidence demonstrated that the Applicant sustained myocardial damage of at least the same degree of severity as that indicated under the first limb [of the definition of heart attack in the Policy].")

163. Fin. Ombudsman Serv. Ltd., Case No. 276,195, Life Insurance – Non-Income Stream Risk – Trauma – FSP Decision – Denial of Claim ¶ 23 (2013), https://service02.afca.org.au/CaseFiles/FOSSIC/276195.pdf [https://perma.cc/WD66-T63D] ("It is also reasonably clear from the definition of 'heart attack' that the Recovery policy does not cover all heart attacks, only those that satisfy one of the ways set out for making the diagnosis. Accordingly, I am satisfied that the PDS [Product Disclosure Statement] satisfactorily disclosed that a person may suffer a heart attack that would not be covered by the policy."); FIN. OMBUDSMAN SERV. LTD., CASE NO. 286,717, LIFE INSURANCE – NON-INCOME STREAM RISK – TRAUMA – FSP DECISION – DENIAL OF CLAIM ¶ 11 (2013), https://service02.afca.org.au/CaseFiles/FOSSIC/286717.pdf [https://perma.cc/3C7N-T6WJ] ("There is no evidence that the Applicant satisfied the first of the dot points in the definition [of heart attack in the Policy], even though 12 ECGs were conducted at the time.").

164. FIN. OMBUDSMAN SERV. LTD., CASE NO. 276,195, *supra* note 163, at ¶ 66.

165. FIN. OMBUDSMAN SERV. LTD., CASE NO. 286,717, *supra* note 163, at ¶ 20.

166. *See, e.g.*, FIN. OMBUDSMAN SERV. LTD., CASE NO. 358,672, DETERMINATION 2 (2015), https://service02.afca.org.au/CaseFiles/FOSSIC/358672.pdf [https://perma.cc/NS8M-26ZX] (noting that the claimant argued that the financial service provider's definition of heart attack "is unfair and fundamentally flawed" because "the definition only covers heart attacks where the diagnosis is based on electrocardiogram (ECG) changes."); FIN. OMBUDSMAN SERV. LTD., CASE NO. 371,928, DETERMINATION 2 (2015), https://service02.afca.org.au/CaseFiles/FOSSIC/371928.pdf [https://perma.cc/JV3W-XC6Y] (reporting the claimant's criticism of the policy's definition as outdated because, according to the claimant's cardiologist, "it is not common practice to check cardiac enzymes" in diagnosis of heart attacks).

FOS continued to strictly adhere to the insurance policies' definition of a heart attack and to limit its investigations to the question of whether the claimant's symptoms fell within this definition of a heart attack.[167] This strict approach raises the question of why the Ombudsman did not deem it necessary to examine the question of whether the insurance policies accurately define the onset of a heart attack.

The FOS missed this opportunity because the thrust of its systemic issue resolution was focused on the extra-system dimension. This, in turn, limited the FOS's field of view to the symptoms of disputed issues and not their root causes within the system. Indeed, the absence of a focus on the intra-system dimension of issues led to the lack of a sense of urgency for the tracing of uncovered issues back to their origins in the system. For example, in a case similar to that of Mr. Kessel's, the FOS determined that "it would be preferable if the PDS [Product Disclosure Statement] more clearly stated that not all heart attacks that may be diagnosed by doctors are covered by the policy," which raised the question of whether the [Financial Service Provider] failed to "disclose a significant risk or feature."[168] Considering that the ASIC—the regulatory body that oversaw the FOS—deemed "poor disclosure" as a factor that may point to systemic problems in the financial system,[169] the FOS would have been wise to further investigate the reason behind these symptoms of poor disclosure. However, as shown in the FOS determinations, the Ombudsman's response to such symptoms was that "it [was] not necessary for me to decide."[170] Similar determinations reappeared in two

167. A narrow exception is the Life Insurance Case Number 280,726, where the FOS considered the development of diagnostic criteria for a heart attack and adopted the opinion of an independent cardiologist that the policyholder suffered a heart attack as defined by the policy. *See* FIN. OMBUDSMAN SERV. LTD., CASE NO. 280,726, LIFE INSURANCE – NON-INCOME STREAM RISK – TRAUMA – FSP DECISION – DENIAL OF CLAIM 7–9 (2013), https://service02.afca.org.au/CaseFiles/FOSSIC/280726.pdf [https://perma.cc/A3SW-S6RQ].

168. FIN. OMBUDSMAN SERV. LTD., CASE NO. 276,195, *supra* note 163, at ¶ 19.

169. *See* AUSTRALIAN SEC. & INVS. COMM'N, *supra* note 94, at RG139.122 ("Factors causing systemic conduct or problems in the financial or credit system might include poor disclosure or communication, administrative or technical errors, and improper interpretation or application of standard terms.").

170. FIN. OMBUDSMAN SERV. LTD., CASE NO. 276,195, *supra* note 163, at ¶ 19 ("If this [dispute] amounted to a failure to disclose a significant risk or feature (which it is not necessary for me to decide), the Applicant's remedy would be to be put in the position he would have been in if not for the non-disclosure.").

other cases[171] where the FOS was presented with challenges to the outdated criteria that the insurers used to determine the onset of heart attacks. In one case, the FOS found that "the definition [was] not outdated even if it [was] not common practice to check for cardiac enzymes CK-MB."[172] In the other case, the claimant complained that, despite clear evidence of the death of heart muscle, the policy requirement of changes in ECG readings was rigidly applied as the only "way of proving that there ha[d] been [a] death of the heart muscle."[173] The FOS affirmed the insurer's determination on the ground that "the policy was entered into by mutual agreement," and that "it [was] not [the FOS's] role to consider whether the terms of the policy itself were unfair."[174]

The insurance cases discussed so far indicate that the FOS accepted the terms stipulated in the policies as settled to such an extent that it never considered if they were outdated and, if they were, why the policies relied on outdated terms. This failure can be attributed to the strict adherence of the FOS to the extra-system dimension in systemic issue resolution, which led to the absence of a systemic approach to inquiring into issues that trace their roots into the system. A focus on the intra-system dimension of issue resolution advocated by this article would have enhanced the FOS's ability to discover systemic weaknesses by providing the FOS with three capabilities.

First, a focus on the intra-system dimension of systemic issues would have provided the FOS with a systemic approach to understanding disputes in the context of their respective systems. Such a perspective would have indicated that the definitions included within insurance policies were not limited to a single issue within a single dispute, but a systemic issue that pervaded the Australian life insurance industry. Indeed, the ASIC's thematic review of the life insurance claims handled in the 2013–15 period indicates that 9% of the 5,000 life insurance disputes arose out of policy definitions[175] which,

171. FIN. OMBUDSMAN SERV. LTD., CASE NO. 371,928, *supra* note 166, at 2–3 (*3–*4 in the published packet); FIN. OMBUDSMAN SERV. LTD., CASE NO. 358,672, *supra* note 166, at 2–4 (*5–*7 in the published packet).

172. FIN. OMBUDSMAN SERV. LTD., CASE NO. 371,928, *supra* note 166, at 2 (*3 in the published packet).

173. FIN. OMBUDSMAN SERV. LTD., CASE NO. 358,672, *supra* note 166, at 2 (*2 in the published packet).

174. *Id.* at 2 (*2 in the published packet).

175. In 2016, the ASIC conducted a thematic review of the life insurance claims, analyzing more than 5,000 life insurance disputes handled by the Financial Ombudsman Service, the Superannuation Complaints Tribunal, and three consumer advocacy groups in the period from 2013 to 2015. *See* Peter Kell, *Check Against Delivery*, *in* LIFE INSURANCE CLAIMS HANDLING 2 (Australian Sec. & Invs. Comm'n ed.,

as the ASIC pointed out, might have been due to the limited ability of insurers "to update definitions depending on the effect of the update on the consumer's cover."[176] Even more specifically, an analysis of the issues surrounding the definitions of a heart attack within insurance policies would have showed that the Australian life insurance industry adopted definitions that were stricter than its peers, such as the British[177] and Canadian[178] insurance industries. Considering that "a high troponin threshold arbitrarily disadvantages potentially more than 50 percent of legitimate cases,"[179] a focus on the intra-system dimension of systemic issues would have concluded that the

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2017), https://download.asic.gov.au/media/4186560/peter-kell-speech-to-money-management-claims-handling-breakfast-16-march-2017.pdf [https://perma.cc/CH5Y-M8AF].

176. Australian Sec. & Invs. Comm'n, Report 498, Life Insurance Claims: An Industry Review 19 (2016), https://download.asic.gov.au/media/4042220/rep498-published-12-october-2016a.pdf [https://perma.cc/KSB8-TZDH] ("[B]ecause insurance is priced according to risk, less expensive policies will tend to have more stringent policy terms (e.g. only providing coverage for severe medical conditions).").

177. For example, according to the Statement of Best Practice for Critical Illness Insurance issued by the Association of British Insurers, the evidence of a heart attack includes Troponin T > 0.2 micrograms per liter and Troponin I > 0.5 micrograms per liter. Ass'n of Brit. Insurers, Statement of Best Practice for Critical Illness Cover 8 (2014), https://www.abi.org.uk/globalassets/sitecore/files/documents/publications/public/2014/protection/statement-of-best-practice-for-critical-illness-cover-dec-2014.pdf [https://perma.cc/2ZZD-GLEN]; *accord* Ass'n of Brit. Insurers, ABI Guide to Minimum Standards for Critical Illness Coverage 9 (2018), https://www.abi.org.uk/globalassets/files/publications/public/protection/new-abi-guide-to-minimum-standards-for-critical-illness-cover.pdf [https://perma.cc/ZM86-HFSF]. This threshold is significantly lower than that of CommInsure, which was specified as Troponin T > 0.6 micrograms per liter and Troponin I > 2.0 micrograms per liter. *See* Colonial Mut. Life Assurance Soc'y Ltd., *supra* note 147, at 120.

178. The Canadian life insurance policies tend to eschew any specific threshold for Troponin concentration in favor of focusing on whether there are persistent presence of heart attack symptoms over "waiting periods" that typically last for about a month. *See, e.g.*, *Critical Illness Definition*, BMO Bank of Montreal, https://www.bmo.com/home/popups/personal/critical-illness-definitions [https://perma.cc/9UU8-XAAT] ("The diagnosis must be based on all of the following criteria occurring at the same time: new episode of typical chest pain or equivalent symptoms, and new electrocardiographic (ECG) changes indicative of an acute myocardial infarction, and biochemical evidence of myocardial necrosis (heart muscle death) including elevated cardiac enzymes and/or troponin . . . . The insured person must survive for 30 days following the date of diagnosis."); Sun Life Fin., Group Critical Illness Insurance – Definitions of Covered Conditions 3 (2011), https://www.sunlife.ca/static/canada/Planadvisor/About%20Group%20Benefits/Advisor%20communications/Advisor%20Communications%202011/June%20-%20CII/Group%20CII%20definitions%20comparison_EN.pdf [https://perma.cc/VHD8-CTYZ] (using the same definition as the preceding insurer).

179. Adele Ferguson, *supra* note 136 (stating further that "a review was conducted of 40 heart attack cases which found that potentially more than half of critical illness claims could have been declined based on troponin levels alone.")

factors that account for this stricter definition were embedded within the Australian insurance industry rather than outside of it.

Additionally, a focus on the intra-system dimension of systemic issues would have provided the FOS with a systemic approach for tracing the causes of an issue back to its systemic root. For example, a focus on the intra-system dimensions of the problem of outdated definitions in life insurance policies would have pointed to a desire to minimize payouts and pressures on insurance premiums as a potential root cause. Despite the adoption of the Universal Definition of Myocardial Infarction by the Australian medical community in 2007,[180] Australian insurers still relied on a definition of heart attack that was established in 1996.[181] In contrast to the 2007 definition, which relied on the presence of any one of the four enumerated symptoms for the diagnosis of a heart attack,[182] the outdated definition was more stringent and required the verification of elevated blood biomarkers as well as persistent ECG changes over three days.[183] In 2012, some Australian insurers amended their claims definition for heart attack to align more closely with how clinical specialists define a heart attack and made the process of filing a claim for a heart attack easier for policyholders.[184] However, this trend is yet to proliferate fully because of the risk of higher insurance claim costs that would arise from a more permissive definition of a heart attack. It is estimated that moving from the 1996 definition to the more generous 2007 definition is expected to result in a 7–20% increase in the overall number of successful heart attacks claims and an 65–85% increase in associated claims costs.[185] Such an increase can translate into as much as a 15% increase in total trauma claim costs for males alone,

180. *See* Geetha Singam, *Am I having a heart attack?*, ACTUARIES, June 2012, at 10, 11. *See also* Kristian Thygesen et al., *Universal Definition of Myocardial Infarction*, 27 CIRCULATION 2,634 (2007). For the further discussion, *see* Kristian Thygesen et al., *Fourth universal definition of myocardial infarction (2018)*, 72 J. AM. COLL. CARDIOLOGY 2231(2018).

181. André Dreyer et al., *Trauma Insurance: Want to play the lottery?*, 2013 ACTUARIES SUMMIT 11.

182. The four criteria are symptoms of ischemia (inadequate blood supply to heart muscles), ECG changes indicative of new ischemia, development of pathological Q waves in the ECG, and imaging evidence of new loss of viable myocardium or new regional wall motion abnormality. *See* Kristian Thygesen et al., *Universal Definition of Myocardial Infarction*, *supra* note 180, at 2638–42.

183. André Dreyer et al., *supra* note 181, at 12.

184. *See* Col Fullagar, *Trauma Insurance and the Changing Definition of a Heart Attack*, Money Mgmt. (June 7, 2012), https://www.moneymanagement.com.au/news/liferisk/trauma-insurance-and-changing-definition-heart-attack [https://perma.cc/J6LQ-2NJR].

185. Geetha Singam, *supra* note 180, at 12.

which cannot be easily absorbed by the current premium margins.[186] Therefore, a focus on minimizing insurance premiums and claim costs can be seen as one of the root causes of the continued reliance on the outdated definition of a heart attack in insurance policies.

Lastly, a focus on the intra-system dimension of systemic issues would have provided the FOS with the tools needed to detect systemic weaknesses that were behind the recurrence of an issue. For example, a focus on the intra-system dimension of the recurrence of disputes about definitions included in insurance policies would have pointed to a systemic weakness in developing a unified standard for phrasing commonly understood insurance policies and practices. In contrast to the United Kingdom's insurance industry, where industry groups have defined consistent terms for over 20 different illnesses[187] and the forms of a heart attack not qualifying for a benefit,[188] the Australian life insurance industry relies on policy definitions that vary wildly among insurers.[189] In fact, according to a study by the ASIC in 2016, significant differences were present not only across products offered by life insurers, but also across products offered by the same insurer through different distribution channels.[190] The Australian life insurance industry had not yet developed an industry code at the time of ASIC's 2016 study[191] despite the ASIC's promulgation in 2003 of Regulatory Guide 183 to facilitate the development and approval of such codes.[192] Nonetheless, the Financial Service Council went on to release the first mandatory code of the Australian

186. *Id*. at 13.

187. Financial Ombudsman Service (United Kingdom), *Critical Illness*, OMBUDSMAN NEWS ISSUE, Jan. 2002 at 8.

188. ASS'N OF BRIT. INSURERS, STATEMENT OF BEST PRACTICE FOR CRITICAL ILLNESS COVER, *supra* note 188, at 8 ("For the above definition, the following are not covered: Other acute coronary syndromes; angina without myocardial infarction.").

189. Adele Ferguson, *supra* note 136 ("[T]he definition of heart attack varies wildly between insurance companies."); *see also* AUSTRALIAN SEC. & INVS. COMM'N, *supra* note 139, at 19 (finding that "policy definitions vary between insurers" with some variations being significant).

190. *See* AUSTRALIAN SEC. & INVS. COMM'N, *supra* note 176, at 5 ("[E]ven where the insurance is issued by the same insurer, there can be differences in insurance cover obtained through a superannuation policy (group), through an adviser (retail) or directly through the insurer or a third party without any personal advice (non-advised—sometimes called direct).").

191. It is worth noting that "[i]t is not mandatory for any industry in the financial services sector to develop a code," and that "[w]here a code exists, that code does not have to be approved by [the] ASIC." AUSTRALIAN SEC. & INVS. COMM'N, REGULATORY GUIDE 183, APPROVAL OF FINANCIAL SERVICES SECTOR CODES OF CONDUCT 4 (2013), https://download.asic.gov.au/media/1241015/rg183-published-1-march-2013.pdf [https://perma.cc/LW2Y-8F6B].

192. S*ee id*. at 2.

life insurance industry in 2017, with the code's appendix providing the "minimum standard medical definitions,"[193] including a definition for heart attack that was based on contemporary medical advances.[194] This code is binding on life insurance companies with an independent compliance committee monitoring compliance with the code.[195] It is reasonable to assume that had the FOS applied the intra-system dimension to the initial complaints concerning the fairness of the definition of a heart attack, such an industry code would have been introduced earlier, thereby preventing the issue from raising repeatedly over a long period of time.

V. Conclusion

The increasing profile of ombudsmen in the ADR community raises the question of what distinguishes them from other ADR mechanisms that are already widely used in private sector organizations. A common view is that ombudsmen are a complaint-handling mechanism with similar characteristics to other ADR mechanisms. However, this understanding does not fully capture the uniqueness of ombudsmen within the world of ADR. In contrast, by examining the activities of the Australian Financial Ombudsman Service Limited in financial dispute resolution, this Article concludes that the most distinctive role of the office of the Ombudsman lies in its ability to identify and resolve systemic issues arising from disputes within private sector organizations.

By embracing ADR as a method of handling systemic issues, Ombudsman practitioners create three sources of competitive advantage. Namely, they can settle a large number of claims that arise from a systemic issue, address specific industry issues not covered by

193. Fin. Servs. Council, Life Insurance Code of Practice 30 (2017).

194. *Id.* at 31 ("Heart attack means the death of a portion of the heart muscle as a result of inadequate blood supply, where the diagnosis is supported by the detection of a rise and/or fall of cardiac biomarker values with at least one value above the 99th percentile upper reference limit (URL) and with at least three of the following: a) Symptoms of ischaemia. b) New significant ST-segment–T wave (ST–T) ECG changes or new left bundle branch block (LBBB). c) Development of new pathological Q waves in the ECG. d) Imaging evidence of new regional wall motion abnormality present at least six weeks after the event. If the tests specified in a) to d) above are inconclusive or unable to be met, then the definition will be met if at least three months after the event the insured's left ventricular ejection fraction is less than 50 per cent. The following are not covered: A rise in biological markers as a result of an elective percutaneous procedure for coronary artery disease. Other acute coronary syndromes including but not limited to angina pectoris.").

195. *Id.* at 2, 24.

legislation, and meet claimants' desires for an explanation and a prevention of recurrences. However, the successful realization of these advantages depends on the systematic integration of the two dimensions of systemic issue resolution—i.e., the extra-system and intra-system dimensions—to focus on both the symptoms of systemic issues and the weaknesses within the system that gave rise to them.

The FOS's failure to recognize the root causes of disputes that arose out of dated definitions included in life insurance policies highlights the impact of an exclusive focus on the extra-system dimension of systemic issues at the cost of their intra-system dimension. First, the FOS was incapable of flagging the systemic issue before the trickle of complaints turned into a flood and a national scandal broke out because the extra-system dimension analysis squarely focuses on the effects of an issue on persons beyond internal stakeholders. As a result, a systemic issue can "only become evident" after the FOS has received "multiple complaints or disputes that are similar in nature."[196] Although the FOS's guidelines and policies also state that it may identify "[a] systemic issue . . . out of the consideration of a single complaint or dispute,"[197] such an approach is difficult in practice to implement without a focus on the intra-system dimension of issues. For example, it is difficult to argue that a complaint such as that of Mr. Kessel's, which revolved around a technical definition in an insurance policy, "will clearly extend beyond the parties to the complaint or dispute" to such an extent to trigger a systemic root cause analysis due to its extra-system impact.[198]

Second, the FOS's focus on the extra-system dimensions of issues made it almost impossible to prevent similar issues from arising since the causes of those issues within the system were not identified and resolved. The FOS strongly adhered to the extra-system dimension, which, as the heart attack cases discussed in this Article demonstrate, led to a lack of a systemic approach to the assessment of the fairness of the system. Although the FOS was required to pay attention to legal principles and industry standards and practices to ensure that "its opinion[s are] fair in all the circumstances,"[199] it failed

196. AUSTRALIAN SEC. & INVS. COMM'N, *supra* note 94, at RG139.121 ("a systemic issue may only become evident after the scheme has received multiple complaints or disputes that are similar in nature – for example, where a particular intermediary has mis-sold financial or credit products to a number of consumers.").

197. *Id.* at RG139.121.

198. *Id.* at RG139.121.

199. FIN. OMBUDSMAN SERV. LTD., *supra* note 95, at 76 ("[W]hen deciding a Dispute and whether a remedy should be provided . . . [the] FOS will do what in its opinion is fair in all the circumstances, having regard to each of the following: a) legal

to respond to concerns repeatedly raised through complaints about the fairness of the definition of heart attack in insurance policies. The FOS did not even identify the issue of outdated policy definitions as problematic, even though the effects of this issue extended to "financial loss and loss of consumer confidence in the relevant financial service provider."[200]

To solve the above problems caused by an exclusive adherence to the extra-system dimension of systemic issue resolution, this Article recommends that systemic issue resolution be extended to include an analysis of the intra-system dimension to shed light on error-provoking weaknesses within the system. Approaching systemic issues from the intra-system dimension not only helps Ombudsmen with strengthening the detection and prevention of systemic issues, but also assists them with the retention of their advantage over litigation in terms of flexible dispute resolution.[201]

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principles; b) applicable industry codes or guidance as to practice; c) good industry practice; and d) previous relevant decisions of FOS or a Predecessor Scheme (although [the] FOS will not be bound by these).").

200. AUSTRALIAN SEC. & INVS. COMM'N, *supra* note 94, at RG139.123.

201. Two examples illustrate how litigation is not a suitable alternative for flexible dispute resolution by ombudsmen practitioners because of litigation's inherent adherence to a strict definition of contractual terms. In *MLC Ltd. v O'Neill*, the plaintiff's physician argued that "MLC can probably argue that Mr. O'Neill did not fit their tight criteria, but it is a pretty unacceptable policy if they are going to use such tight criteria, and ignore the greater accuracy provided by the newer scanning techniques." [2001] NSWCA 161, at ¶ 7 (Austl.). Similarly, in *Larwint Pty. Ltd. v Norwich Union Life Austl. Ltd.*, Judge Ashley found that "[t]he evidence in this case showed that it is not uncommon for a person who has suffered a heart attack to have a normal ECG. It follows that a medical man may diagnose a heart attack in reliance upon clinical presentation and having regard to other test results." [2007] VSCA 21, at ¶ 72 (Austl.). Nonetheless, the courts declined to depart from a strict interpretation of contract terms and decided that the plaintiffs had not suffered a heart attack as defined under their insurance's policies in either case.