

An Ombuds should not live in fear of its own shadow: a time for and a question of Governance!

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We are submitting this article to the OBSI Governance Review. We acknowledge that this submission does not address the specific questions posed in the review. We believe, however, that this article highlights important issues about the role and performance of OBSI that need to inform any initiative designed to reform OBSI's governance structure. Most importantly, the purpose, mission and scope of an entity are critical inputs in the design and architecture of its governance structure. At this time, a single clear vision of what OBSI is and can be is not shared among OBSI's key stakeholders and, and it is this ambiguity that we believe needs to be addressed before a governance review. To that end, we hope that this article encourages all stakeholders to reach a consensus on the purpose, mission and scope of OBSI before reforming its governance structure.

Abstract

This article argues that, notwithstanding its name, the Ombudsman for Banking Services and Investments (OBSI), is not a bona fide ombudsman. This article explores why and what have prevented the classic ombudsman model from developing in Canada. The answers are complex and, in our view, can require a good understanding of what an ombuds is and what differentiates those environments that are supportive of the construct and those that are not.

Following the 2022 Independent Review of Investment Complaints, OBSI has initiated a governance review. This Review is primarily designed to consider some of the suggestions/recommendations of the Independent Review, including the elimination of the Consumer and Investor Advisory Council and the removal of the Consumer Interest Director from the OBSI board.

There should be little doubt that the OBSI is not a classic ombudsman. This shortcoming was identified in each of the independent reviews conducted in 2007, 2011 and 2016 respectively. What is less clear is why the system has not acknowledged this and why it continues to promote the OBSI as an ombudsman. This misrepresentation has consequences. When our regulators do not entrust OBSI with the capacity to act as an ombudsman, it is difficult for the public to place its trust in the organization the same way it would trust a legitimate ombudsman. This ambiguity is neither helpful nor tenable. The OBSI must either disavow its ombudsman pretensions or decide that it will no longer live in fear of it, and fully embrace the responsibilities and duties of an ombudsman including those related to the identification of systemic issues.

Introduction

The Ombudsman for Banking Services and Investments sees itself as a financial services ombudsman. Its articulated vision is to help “ensure a fair, effective, and trusted Canadian financial services sector¹”. But is it really an ombudsman, and can it ever achieve its aspirational vision, without binding authority and without an effective systemic remit?

Several informed independent reviewers (2007, 2011 and 2016) using international benchmarks and best practises have observed that it was not, at least not “yet”, an ombudsman since it lacked important powers, scope and regulatory support. At the same time, these reviewers have acknowledged that OBSI embodied the ethos of an ombudsman (2016) and that its dispute resolution processes were fair, independent, professional, impartial and objective. Based on these reviews it seems clear that OBSI has developed and refined the internal processes necessary to graduate from a dispute resolution service to a system critical consumer ombudsman. The OBSI had put in the work and continues to do so but it continues to lack some of the key requisites.

Years pass and regulators remain unwilling or unable to provide OBSI with the powers necessary to evolve beyond a dispute resolution provider. It cannot effectively secure redress for many complainants, it produces few case studies and no written determinations in the public domain (difficult to assess lessons learned) and it lacks both an accepted and meaningful systemic risk reporting role. It also lacks the critical mass of complaints to provide the necessary funding² to engage effectively in public outreach and education. This is further impacted by the inefficiencies of the resolution process³, in the absence of secure redress, and exacerbated by the loss of banking members to ADRBO.

Industry opposition to its fairness standards, combined with allegations of consumer advocacy bias and regulatory encroachment, persist. Also, there does not appear to be broad support for a consumer protection organization designed to level the playing field between service providers and consumers within a broad fairness construct.

This article examines this conflict. It pays special attention to the systemic remit of an ombuds and its fairness construct, including the arguments that conflate an ombuds model and consumer advocacy. It also addresses the issue of OBSI governance in the context of needing, once and for all, to clarify its role, in the eyes and interest of the public.

Dispute resolution versus ombudsman

The difference between a dispute resolution provider and a financial services consumer ombudsman is complex. Briefly, dispute resolution primarily reacts to individual complaints while an ombudsman addresses both the individual complaint and wider system practices and also has outreach and strategic impact⁴. Dispute resolution that lacks a formal systemic remit

¹ OBSI, “Our Vision” - <https://www.obsi.ca/en/how-we-work/our-vision--mission-and-values.aspx>

² The issue of funding for complaint resolution and complaint numbers per capita is addressed in Teasdale A (2022), Systemic Fairness and Financial Data Analysis of Canadian and International External Complaint Bodies

³ The 2016 Independent Review noted that “its current resources were consumed by the resolution process” and that it had “little left to help consumers, firms and regulators learn from the cases resolved to identify more widespread issues and trends”. <https://www.obsi.ca/en/news-and-publications/resources/PresentationsandSubmissions/2016-Independent-Evaluation-Investment-Mandate.pdf>

⁴ Outreach and strategic output can be, but are not necessary, products of dispute resolution. These functions are structural and fundamental to an ombuds and more likely incidental and less structured/formal for dispute

must rely on the consumer to find and raise issues, whereas an ombudsman can leverage case data to identify systemic deficiencies on its own. With pure dispute resolution, the playing field is consistently tilted against the more vulnerable, the less knowledgeable and the less persistent complainants.

The system, the systemic and systemic responsibility

Since all system actors, and professional bodies, effectively have a systemic and hence public interest responsibility, it follows logically that dispute resolution provision, up to and including the ombuds level, should likewise have a substantive and meaningful systemic role⁵.

If a complaint at the firm level has not been adequately addressed for root causes and systemic (including systemic fairness) concerns, even a dispute resolution body should be required to address them through the doorway of case assessment. Failure to do so risks a continuation of bad outcomes at both the industry and external dispute resolution level for all consumers affected.

If an ombuds is to secure confidence, it requires substantive systemic credibility and best complaint handling practices that can secure redress. A restriction on issues it can address, that could reasonably be impacting other consumers, that would typically be considered material to a complaint is a constraint on its ability to address systemic fairness, diminishes its integrity and stunts the value and reach of its independence.

Importantly, as more and more complaints are addressed informally, a systemic purview provides additional discipline to ombuds processes in that key “data” from informal resolution are not lost but used to address current standards and practises and enhance its strategic impact. Systemic awareness should logically inform case assessment, enhance process efficiency and by extension improve effectiveness and timeliness.

Professional standards and the systemic issue

In order to be able to identify a systemic issue it is necessary that there be a set of standards and benchmarks against which to judge deviation of systemic issue outcomes from reasonable expectation.

Often, professional body competencies, standards of conduct and ethics⁶ address the systemic by providing these standards and benchmarks and help define the boundaries of reasonableness in their day-to-day execution.

Grounded in years of practitioner refinement the understanding of the subject matter is much more substantial than can be found in regulation. Consequently, regulatory rules cannot serve as the only basis of the fairness assessment and should be supplemented by professional standards and their evolving implementation in practise. Therefore, it is reasonable for

resolution given restricted systemic function and public interest mandate. Likewise, what might be termed public interest lies on a spectrum and is expressed differently in different entities and environments.

⁵ “All participants in financial services have a shared interest in earning and keeping the public’s trust. To pursue this shared interest, firms need to put aside their competitive nature and collaborate with each other and the regulator on how shared experiences can be used to enhance public trust” - <https://www.cfauk.org/-/media/files/pdf/pdf/5-professionalism/3-research-and-position-papers/codes-standards--regulations.pdf>

⁶E.g., Code of Ethics and Standards of Professional Conduct, CFA Institute - <https://www.cfainstitute.org/-/media/documents/code/code-ethics-standards/code-of-ethics-standards-professional-conduct.pdf>

professional standards and, where applicable, good practises to be included as part of an ombuds fairness assessment.

A systemic jurisdiction for complaint process oversight would seem natural within advanced regulatory constructs that draw on well-established professional standards for regulation and the framing of fairness that underpins commitment to consumer protection and fairness in consumer outcomes. Professional bodies should be willing to support an ombuds in its ability to secure redress and to occupy its fairness jurisdiction.

In Canada, new titling legislation is opening the door to a regulation of titles that poses a risk to the acceptance of an ombuds. One credentialing body is tied to ADVOCIS which has been critical of the OBSI's fairness standards⁷. Canadian industry bodies (IIAC, IFIC etc) and individual firms have also argued strongly against introducing higher professional standards and codes of conduct in regulatory standards. This industry wide opposition also challenges the ability of professional associations to meaningfully influence systemic adherence⁸ to ombuds fairness principles rooted in, inter alia, professional standards.

Complaint resolution with systemic remit is not a regulatory function

In Canada there “appears” to be a conflation that having a systemic remit within external dispute resolution equates to a formal regulatory role. We challenge this presumption.

In the context of a financial services complaint, a systemic issue is a deficiency in one or more components (or their interaction) of the framework that provides services, products and or advice, that has potential for impaired/harmful and unfair outcomes for other consumers.

Anything that happens as a result of system structure and natural interaction is systemic. If an outcome is by transparent intentional design, it is also systematic. A systematic outcome would not usually be considered a systemic “issue” although it clearly can be in certain instances: i.e. commission structures are known to impact fair outcomes through a number of mechanisms; incentives, informational asymmetries, cognitive and behavioural factors. Systemic outcomes can either be positive or negative. Outdated regulation can also be a systemic issue if its structure conflicts with evolving standards and knowledge.

⁷ “...our members have reported that they have had very challenging dealings with OBSI in its current form. Their concerns relate to a sentiment that the existing OBSI process is not fair to all participants and does not adequately consider all evidence, and the adjudicator is apt to substitute its own ex-post judgment to a scenario.” ADVOCIS Submission to CSA Position Paper 25-404 (2021) - https://lautorite.qc.ca/fileadmin/lautorite/consultations/commentaires/bourses-chambres-oar/2021-10-04/25-404_Advocis.pdf

⁸ “Given their positions of public trust, regulated professions are legally required to uphold ethical standards, and ensure that professional practice protects the public. Nonetheless, there is ample evidence that professionals do not always behave ethically. One proposed solution is greater organizational surveillance; however, research from a neo-Weberian perspective encourages scepticism about such arguments. Organizations may not only fail to stop professionals from violating ethical codes, but rationalizing organizations might actively encourage such violations in the name of efficiency.” Adams, T. L. (2020). ‘This Happens All the Time’: Organizations, Rationalization and Ethical Dilemmas in Engineering. *Work, Employment and Society*, 34(6), 985–1003. <https://doi.org/10.1177/0950017020902968>

Systemic “issues” are flaws that usually result in negative unexpected and/or unintended system outcomes. Rationally, they need to be addressed.

In one respect systemic issue outcomes could be considered deviations from expected good or best practices, processes, technologies and professional and regulatory standards. As such they should be capable of resolution through a system’s existing capabilities - technology, competencies and knowledge base – whether this be at the registrant, firm, industry or ultimately at the regulatory level.

Discerning a systemic issue is very much dependent on the objective fairness construct (technologies, regulation, professional practices) as well as an industry’s openness to change and introspection (culture, pace of regulatory and technological change). Systemic issues can be at the registrant level (the micro), the firm level (the meso), or at the industry and regulatory level (macro) and addressing them is very much a critical factor in the successful evolution of an industry and its practises. Inputs from behavioural and cognitive neuroscience, including understanding of the impact of vulnerability on decision making, also likely impact systemic issue assessment and how system change should adapt to address them.

Many systemic issues exist primarily due to failure to fully understand a system and addressing them offers considerable benefits to both firm and consumer.

An ombuds helps to better understand how the system works with respect to the fairness construct in the context of consumer outcomes. In this sense systemic issues are unknown systematic issues. This leads to better system design and not necessarily better regulation. In this sense an ombuds can address systemic issues without entering a regulatory realm – many business processes may lie outside of regulation even though they impact consumer outcomes. Where systemic issues are addressed in other jurisdictions, we see emphasis by regulatory authorities on assessment of systemic issues within firm complaint handling. Processes to address systemic issues should be in situ at all levels of the system – registrant, firm, industry/regulator.

Other systemic issues happen by accident due to unforeseen consequences of interactions and change within a system.

Some of the systemic “issue” outcomes can be emergent (not by design, but as a result of interactions and/or iteration of structure and relationships) either via naïve interaction or intentional manipulation/gaming. Emergence can be a case of “the whole is greater than the sum of the parts” (physics emphasis) or natural evolution/mutation (biological emphasis) that changes the nature of an entity.

Other systemic “issues” can be systematic and structural and hence may require both legislative and regulatory review. It should be clear from the essential dynamics of the system that an ombuds cannot directly address the systematic and structural – the system in this respect is dependent on legislative, regulatory, professional and firm/industry commitment to fair outcomes for consumers.

Therefore, a systemic issue can be considered as a) a deviation (intentional or otherwise), with potential for impairment/unfair outcome or effect, from a rule and/or accepted practices and standards, and b) an unknown or emergent mechanic of the system with similar impact.

Fully developed ombuds organisations have clear operational guidelines for addressing systemic issues, from the minor to material, that clearly demarcate the ombuds from regulation while engaging registrants, firms, industry, and regulators in a continuous and beneficial process of evolution and improvement.

Systemic issue protocols require that all systemic issues be reported to the regulators in order that they be addressed in the regulatory realm where and if necessary. Ombuds powers are limited to identifying systemic issues, to asking firms to provide redress, to working with the firm to address the issue and to reporting the issue to the regulator. Systematic issues requiring rule or cultural change lie outside direct ombuds engagement.

Addressing a systemic issue within a complaint is clearly not the setting of a rule (rule-making), neither is it a fine nor punishment for a deviation from a rule (enforcement) or expectation.

At the micro level an ombuds would not be able to ban an advisor or penalise an advisor, but would look to make the specific complainant whole and ask the firm to do the same for others impacted by the same issue – note AFCA’s protocol⁹.

Likewise, at the meso level, an ombuds cannot ban a firm or fine a firm but can ask for systemic issues to be addressed and resolved.

Macro systemic issues are likely well outside the realm of the ombuds to address directly (regulation likely needed). They may result from regulatory or legislative failure, omission or obsolescence. All impair, to lesser or greater degree, the integrity of the fairness construct.

An ombuds cannot bring in best interest standards, ban commissions, or set fines and penalties for rule breaches. An ombuds may be able to influence regulatory change where its feedback evidences limitations or weaknesses of a rule or a regulation. However, at the macro level, evidence from international jurisdictions clearly shows that regulatory and legislative change are not effected by the ombuds construct.

Any enforcement of a rule following a breach, including fines for breach of a rule, or development of new regulation, comes from the regulator co-partnering on systemic issues. These boundaries are already well established in many jurisdictions with broad and well evidenced systemic issue remit. Developing clear systemic issue remit, which clarifies the distinction and supports the imperative, is therefore important. Systemic issue feedback is critical for the evolution of regulation and regulatory guidance.

All outcomes are systemic (of the system) but not all are “issues”. But all systemic “issues” have a fairness impact, to lesser or greater degree, and should be of systemic concern. At a fundamental level, self-regulation and regulation co-exist, meaning firms and regulators are all performing parallel and similar functions. On the one hand satisfying expectations of conduct, competency, and service necessary to meet or exceed formal regulatory standards and on the other self-regulating for breaches. Formal enforcement is for failures of self-regulation and new rules to either address issues of self-regulation, emerging complexity and/or the evolution of standards and competencies. Regulation and self-regulation are naturally systemic. If a firm

⁹<https://www.afca.org.au/about-afca/systemic-issues#:~:text=A%20systemic%20issue%20is%20one,complaint%20or%20raised%20a%20concern>

were to address a systemic issue within its own complaint handling, it would not be considered a regulator.

If addressing a systemic issue should be the responsibility of all, why is this not already embedded within our system and why are firms and regulators objecting to it? We have identified two possible reasons:

- A. The conflation of the scope and function of an EDR operating as an ombudsman with those of a regulator may reflect industry concerns over attempts to address longstanding systemic issues in the provision of financial advice generally.

Attempts to introduce best interest standards, fiduciary duties and to remove transactional remuneration have been a failed feature of the regulatory landscape for some time. These failures highlight inherent industry resistance to consumer-friendly regulation and its consequent adverse impact on fairness outcomes. An ombudsman with its own internally derived fairness standards may be considered to pose a risk to this status quo by introducing its own higher standards. This is especially likely if a systemic issue remit is introduced since it would allow these issues to be revisited, but this time with substantial accumulation of empirical evidence. Therefore, it is not that the ombuds would perform a regulatory function per se but rather it may impact regulation via moral suasion based on its access to more and better information.

A regulator that chooses to limit systemic issue remit seems, at least superficially, to be endorsing the status quo. Industry objections to ombuds powers are essentially objections to regulatory change impacting firm autonomy and business practices. Regulatory objection may also imply the potential for fairness standard arbitrage impacting regulatory autonomy and practices¹⁰ – this may be particularly relevant for self-regulatory organisations and provincial securities regulators.

The fact that Client Focused Reforms (CFR) regulation is a lesser standard than a best interest obligation is noteworthy. But the CFR does not actually state that a best interest obligation does not exist in a given relationship, just that regulation does not state it exists as a minimum expectation and standard. It needs to be proven and hence so does the level of mitigation.

- B. Firms may also be objecting to more rigorous oversight of service standards, implying more effective exposure to fairness standards than those prevailing within existing regulation; i.e. they are objecting to regulation and see the ombuds as an unwarranted extension of regulation. Objections to ombuds powers, in this respect, are essentially industry objections to intrusions that impact autonomy and extend the reach of regulators.

¹⁰ A commitment to the systemic likely implies a commitment to a fairness standard. Without this commitment it may be difficult to assess just what the fairness standard is. Absence of commitment may allow entities to game the system and to interpret regulation in their own interests. Written determinations, whereby the ombuds decision making process are open to scrutiny, could also be considered an element of systemic remit by clarifying the fairness construct and how regulation and professional standards and consumer dynamics (cognitive and informational asymmetries and vulnerabilities) impact fairness outcomes. In this respect, a lack of systemic rigour weakens regulation.

Notwithstanding these objections, providing external dispute resolution with systemic powers would not involve, in and of itself, providing an ombuds with regulatory powers.

When looking at restrictions on systemic issue remit, it is appropriate to ask, does the fairness construct frame regulation or does regulation frame the fairness construct? In many international jurisdictions it is clear that a pursuit of fairness has shaped regulation. In Canada experience suggests that regulation is wary about the impact of fairness on business practice autonomy and hence takes precedence over fairness.

Fairness and the systemic – if not the ombuds, then who?

Systemic¹¹ and objective fairness is central to the function of a bona fide ombudsman, as it is to the supporting environment(s). A system that does not place systemic fairness at its core (and that cannot evidence processes to ensure it does) should neither expect the confidence of its consumer stakeholders nor is it likely to encourage service providers to invest in higher standards.

A systemic remit focuses complaint resolution on evolving practises and emergent issues encouraging self regulation and informing regulators about evolving standards and the effectiveness of existing regulation. For this virtuous circle to work there needs to be an effective interface and engine for integrating systemic integrity with complaint handling insights.

If not the ombuds, subject to independent review, then who?

Absent OBSI, who else is capable of being this interface? Currently firms, and regulators, lack transparency and evidence of commitment to such process and capacity¹². Importantly in this respect an ombuds is usually subject to independent review of its fairness process and domain. It is rare for a Canadian regulator to be subject to independent review and one would suspect that if regulators were to assume the systemic fairness assessment mantle that it may lack accountability.

Modern progressive regulation also emphasises fairness in consumer outcomes as an overarching standard, bringing together the components of fairness within a broader framework that emphasises the relationship between consumer vulnerabilities, professional competencies, market competition, and regulation. This is more naturally supportive of independent external complaint resolution with a systemic issue remit.

Commitment to system fairness is comprised of both systematic (design) and systemic (emergence¹³ and outputs) factors – i.e. industry willingness to commit to fairness standards and to invest in processes that deliver fairness is a systemic factor. Systemic remit is therefore a product of the interaction of intentional design and openness to change and improvement. Therefore, the OBSI's lack of systemic remit is a likely product of conscious design reflecting both regulatory and industry reluctance to fully embrace a commitment to systemic fairness.

¹¹ This means the system determining consumer outcomes and the process by which those outcomes are assessed to be fair.

¹² Note the FCAC review of bank complaint handling practices.

¹³ “Emergence thus refers to collective phenomena or behaviors in complex adaptive systems that are not present in their individual parts.” <https://medium.com/sfi-30-foundations-frontiers/emergence-a-unifying-theme-for-21st-century-science-4324ac0f951e>

Critically, since fairness has many component parts¹⁴ - that include processes, interactions, and outcomes - an ombuds should be addressing not the just the outcome but processes and interactions underpinning both the service and the complaint. These may have one or more micro (individual), meso (firm) or macro (industry and regulator) systemic content. Fairness also engages attention to asymmetries and vulnerabilities. A fundamental aspect of fairness is being fair in all circumstances. The system is therefore critical and requires system issues leading to the outcome be appropriately addressed.

The Canadian financial system's lack of confidence in the ombudsman construct may be a case of "we trust you, but only so far". However, even in this limited construct OBSI has experienced defections to ADRBO. Up until the FCAC review, the ADRBO model was perceived as the preferred industry model, at least amongst banks that were allowed to make this choice. It is therefore difficult to discern whether regulators are indeed supportive of the OBSI even in its current configuration; that is as an aspirational, but failed, transition from external dispute resolution provider to an ombudsman in name only.

As noted, a systemic fairness purview might risk taking the current system in a direction that decision making/influencing stakeholders do not favour. The "fairness" constructs seen in other ombudsman friendly jurisdictions seem too ambitious since they would constitute a challenge to firm and industry, regulatory and self-regulatory autonomy.

If a system is challenged by fairness considerations, then a regulator that wishes to retain hierarchical autonomy over system direction might choose to limit systemic remit to those issues it considers relevant to its regulatory frame. It is this perceived, and evidenced, conflict between fairness and what firms and regulators wish to pursue that should be of concern to those who advocate for the public interest and fair treatment of consumers.

Systemic issues and the OBSI

The OBSI's ability to be strategic and to impact conduct and standards at the firm and the industry level is constrained by a narrow systemic issue remit¹⁵ and funding limitations. Both outreach and strategic function are dependent on higher levels of resources and resources are currently restricted due to a) the low per capita funding of external complaint resolution in Canada¹⁶, b) the lack of binding and secure redress that impacts the efficiency of the resolution process and, finally, c) the lack of a long-term strategic plan for the development of an ombuds with clear systemic and strategic function that allows these functions to develop.

The OBSI regularly reports no systemic issues¹⁷. This reflects the fact that they are restricted to issues arising from multiple complaints. Also, the hurdle for raising an issue is high: only

¹⁴ Tax, Steve & Brown, Stephen & Chandrashekar, Murali. (1998). Customer Evaluations of Service Complaint Experiences: Implications for Relationship Marketing. *Journal of Marketing*. 62. 10.2307/1252161.

¹⁵ Nascent systemic powers for the OBSI were briefly introduced in 2008 and withdrawn following the Federal government's decision to formally allow competing ECBs in 2012, and binding has been a reported issue since at least 2007. The door onto discussion, if any, of systemic and binding issues within the regulatory/ombuds domain has been a closed one for some time.

¹⁶ Teasdale, A (2022), Systemic Fairness and Financial Data Analysis of Canadian and International External Complaint Bodies

¹⁷ Any systemic issues found, as defined by OBSI's systemic issue reporting protocols, are also excluded from OBSI data reporting if they are already under the regulatory radar. But, there is also limited regulatory reporting of systemic issues and systemic protocols with concerns over enforcement actions' interest in root causes and wider impact. There is also likely some merit in the assessing the systemic interface in a regulatory environment with multiple regulators, specifically the CSA and SRO divide.

those acts that have “significant regulatory implications¹⁸” or raise concerns about a “registrant’s fitness for registration” are considered systemic and these are vague definitions with no specific examples. As noted with respect to fairness, the systemic can be wide and deep (and its emergence complex) and the lack of a well-developed fairness construct in Canadian regulation impact regulatory thought and action.

Low balling, something OBSI reports on to regulators (but not to the general public), is itself, as noted by the 2022 Independent Review, a systemic issue that received no visible or documented feedback from regulators. Systemic issues are also very lightly referenced, if at all, in regulatory communication, and this includes enforcement and regulatory oversight.

The 2007 Independent Review noted “if the value of an industry initiated scheme is to be realised – and the prospect of a regulator-driven scheme is to be avoided – then OBSI must play its full and natural role in the consumer protection framework and use its cases to help identify at-risk consumers”. It noted that the inability to address systemic issues “diminishes OBSI’s reputation”. We see no evidence that regulators are willing to address this problem.

The FCAC’s 2020 review into Bank Complaint Handling Procedures¹⁹ uncovered both high levels of attrition and significant weaknesses in process. Regulators do not address individual complaints at the same level of focus that an ombudsman with systemic purview would, and firms are unlikely to address these complaints with the same objective focus on fairness. Limiting systemic issue reporting has many drawbacks. Some critical issues clearly require regulatory engagement, but many can be addressed by the ombudsman, either alone or in conjunction with regulators.

The Modern Firm/Regulatory/Ombuds Construct

The issues noted in this document reflect the unnecessary complexity associated with understanding the constrained development of external dispute resolution in Canada, especially with respect to the systemic. Responsibly addressing the systemic is a simpler context. It is therefore worth referencing, as a benchmark, the development of the financial services ombuds in other jurisdictions. A focus on fairness and professional accountability facilitated by developing competencies, technology and on the job learning has allowed the ombuds construct to develop.

Ultimately, within a modern regulatory/firm/ombuds system, the intention is for complaints, and their root causes to be addressed first of all within firms’ complaint processes²⁰. Complaint processing at the firm level, within progressive jurisdictions, is also intended to raise standards that impact consumer service outcomes and to eliminate the root systemic cause of complaints. This requires all firms to look to possess their own credible fairness construct. This construct is a co-production of evolving ethical standards and professional competencies and practices across the various disciplines within the system.

¹⁸ “Serious contraventions and other reportable breaches” are a separate category from systemic issues in AFCA’s systemic issue protocol. In this context, the OBSI lacks a systemic issue protocol. <https://www.afca.org.au/about-afca/systemic-issues>

¹⁹Financial Consumer Agency of Canada. (2020, February). Bank Complaint Handling Procedures. <https://www.canada.ca/en/financial-consumer-agency/programs/research/banks-complaints-handling-procedures.html>

²⁰ See the FCA’s DISP 1.3.3.B <https://www.handbook.fca.org.uk/handbook/DISP/1/3.html> and ASIC’s Rule 271 <https://download.asic.gov.au/media/3olo5aq5/rg271-published-2-september-2021.pdf>

The fundamental question

If regulators do not trust the OBSI as an ombudsman, why should consumers? If this is not an OBSI governance issue, it is clearly a system governance one. Clarifying this issue in a comprehensive governance review is a consumer and public interest priority. This review also needs to clarify regulatory intent regarding the ombuds construct in Canada.

For the OBSI to continue to call itself an ombudsman, when it is not and there are no clear plans (in the public domain) to make it one, asks consumers to place a level of trust and confidence that is not deserved - either by the system or the OBSI itself.

What is really happening?

What are the regulators real views on the ombudsman versus dispute resolution question? How much influence does the industry have, and to what extent does the operation of a bona fide ombudsman threaten the regulatory domain? Even though an ombuds is not a regulator and clear dividing lines between regulatory and ombuds domains in other jurisdictions are well established, there are conflicting views in Canada.

The movement towards an ombudsman model in Canada

Does the structure and function of the modern consumer ombudsman, as seen in other jurisdictions and referenced in many academic papers, lie outside the framing of regulation in Canada?

To date there have been no concrete moves towards a consumer ombudsman model. Except for the work of independent international reviewers (2007-2016) no effort has been made to even define and differentiate the objective of our current model. A wider review of the ombudsman model and the development of the ombudsman model in Canada's financial services industry, including benchmarking against objective international standards, needs to be undertaken to provide the necessary evidence base and analysis for informed debate and transparent decision making.

While recent consultations have addressed external dispute resolution (Ontario's Task Force for the Modernisation of Capital Markets and the FCAC's review into banking external complaint bodies) none has addressed a bona fide Ombudsman with systemic remit. The CSA and its Joint Regulators Committee (JRC²¹), that oversees the OBSI, have been perpetually circumspect in public comment as to their intent and perspective on the subject.

There have been moves to develop external dispute resolution within the securities and banking arena and to modernise Canada's transaction focused retail financial services' marketplace. But this has also been accompanied by fractures in dispute resolution - Canada's big banks have all but left the OBSI to move to its competitor ADRBO²².

²¹ The OBSI Joint Regulators Committee. Ontario Securities Commission. Retrieved July 10, 2022, from <https://www.osc.ca/en/investors/investor-protection/obsi-joint-regulators-committee>

²² Teasdale, A. S. & Naglie, H. (2018, November). A Case for Preservation of the Ombudsman for Banking Services and Investments as Dispute Resolver for Retail Banking Consumers. Consumers Council of Canada. https://www.consumerscouncil.com/wp-content/uploads/sites/19/2020/03/obsi_case_discussion.pdf

Also, Canada's own Association of Compliance Professionals (ACCP) is critical of many aspects of OBSI, including its fairness standards²³ and is against providing it with wider powers. These are the very same professionals the OBSI interacts with daily and who, given that they interpret regulation and regulatory oversight, are shaped by the prevailing regulatory and consumer protection environment. It is noteworthy that the ACCP in their most recent OBSI Independent Review submission²⁴ stated "it has insufficient information about best practices for financial services ombudsmen" to make an informed comment on international benchmarks. This is a critical knowledge gap that if addressed could better inform and serve public debate.

Regulators have also been critical of widening OBSI's powers beyond core dispute resolution (MFDA's 2008²⁵ submission to the OBSI 2007 Terms of Reference Consultation) and inactivity on the subject suggests this view is widely held. An IDA (IIROC predecessor) 2008 letter²⁶ to the OBSI in the same consultation also raised concerns about the fairness of OBSI addressing systemic issues at the firm level (with respect to multiple clients). This same letter also raised concerns over the Joint Forum of Regulators 2007 report²⁷ that supported broad systemic issue investigation powers for ombuds services and appeared to recommend that systemic issue protocols focus primarily on reporting to the relevant regulator prior to action and in developing a protocol for such a channel – the systemic issue protocol that was subsequently adopted lacks both transparency and effect.

Contrast this with Australia's securities regulator (ASIC) who in a recent independent review of the Australian Ombudsman (AFCA) provided their own detailed submission²⁸ supportive of AFCA and its powers. Both the UK's FCA and Australia's ASIC clearly support their ombudsman in their complaint handling rules and provide detailed supporting guidance and reviews of complaint handling²⁹, especially with respect to addressing systemic issues and root causes. Greater awareness of the systemic importance of complaint handling therefore appears

²³ "The ACCP does not consider the standards used by OBSI to always be fair to respondents. Specifically, we believe that respondents are often being held to standards beyond what is required by securities rules and regulations" – ACCP-OBSI Submission Independent Review (2022) - <https://www.obsi.ca/en/news-and-publications/resources/Public-Consultations/2021-independent-evaluation/ACCP-OBSI-Submission.pdf>

²⁴ Association of Canadian Compliance Professionals. (2022, January). Request for Comment on the Independent Evaluation of the Ombudsman for Banking Services and Investments ("OBSI") with respect to Investment-Related Complaints. <https://www.obsi.ca/en/news-and-publications/resources/Public-Consultations/2021-independent-evaluation/ACCP-OBSI-Submission.pdf>

²⁵ "many of the amendments to the Terms of Reference would expand the scope of OBSI's powers beyond that of a dispute resolution service and may potentially be regulatory in nature... the introduction of any regulatory function into OBSI's process may disturb the perception of OBSI as balanced in its approach to resolving disputes as well as result in investor confusion" – MFDA (2008). Re: Proposed Amendments to OBSI's Terms of Reference - https://www.obsi.ca/uploads/17/Doc_636445205511939317.pdf?ts=637950475986892600

²⁶ Investment Dealers Association of Canada. (2008, February). Re: Proposed Amendments to OBSI's Terms of Reference. The OBSI.

https://www.obsi.ca/uploads/17/Doc_636445205513729317.pdf?ts=637947738471890212

²⁷ Joint Forum of Financial Market Regulators (2007). The Financial Services OmbudsNetwork – A Framework for Collaboration -

https://www.jointforum.ca/en/init/fson_framework/august_10_2007_a_framework_for_collaboration-en.pdf

²⁸ ASIC. (2021, April). Independent Review of the Australian Financial Complaints Authority (AFCA) Submission by the Australian Securities and Investments Commission. <https://asic.gov.au/media/1jldjcem/asic-submission-independent-review-of-afca-19-april-2021.pdf>

²⁹ See In Teasdale A (2022), Systemic Fairness and Financial Data Analysis of Canadian and International External Complaint Bodies for a detailed review of complaint handling.

correlated with greater support and acceptance of the consumer ombudsman model and vice versa.

Consumer friendly systems

Consequently, within an historical context, ombuds appear dependent on evolving consumer friendly systems whose aim is to support fair outcomes at the system level. Regulatory commitment to fairness outcomes for consumers adds substance to consumer-friendly environments that are integral to the acceptance of an ombudsman. Both Australia and the UK place considerable emphasis on fairness constructs³⁰ and consumer protection with the FCA referencing “the promotion of effective competition in the interests of consumers”³¹. But fairness is also tied in with professional standards (competencies and ethics) and their associated accountabilities, areas where there has been considerable pushback in Canada.

A better understanding of regulatory fairness standards and the consumer protection framework in Canada generally, benchmarked against international developments, is clearly needed. The OBSI, especially, as it proceeds along a governance review, needs to be aware of the absence of a robust consumer protection culture in Canada currently.

How is governance and the decisions that flow through governance structures impacted by the consumer protection environment? In our view, a commitment to fairness is associated with the evolution of the powers and processes associated with a consumer ombudsman. Greater expectations for competency, conduct (and ethics³²) and standards allows an ombudsman to occupy the fairness space more formally and effectively.

The International Network of Financial Services Ombudsman Schemes in its Guide to Setting up a Financial Services Ombudsman noted that financial services opposition to consumer protection is an important point of resistance to developing a consumer ombudsman³³. That factor together with a lack of resources for development work and an absence of coordination among regulatory bodies are all issues that impede the development of the consumer ombudsman model in the financial services sector in Canada. All these issues were essentially touched on by the OBSI independent reviews of 2007, 2011 and 2016.

The 2011 OBSI Independent Review³⁴, referencing consumer influence in Canada, noted the absence of “an organised, effective consumer presence” and that “the consumer “leg” is largely

³⁰ Note for instance AFCA’s Fairness Project and the Ramsey Report, the UK FCA’s regulatory fairness standard and their approach to consumers, including vulnerability and competitive market outcomes.

³¹ HM Treasury (2019). Financial Services Future Regulatory Framework Review Call for Evidence. Retrieved from: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/819025/Future_Regulatory_Framework_Review_Call_for_Evidence.pdf

³² fasea. (2019, February). The Financial Planners and Advisers Code of Ethics 2019. Financial Adviser Standards and Ethics Authority Ltd. <https://asic.gov.au/for-finance-professionals/afs-licensees/professional-standards-for-financial-advisers/code-of-ethics/>

³³“In countries where a consumer-friendly market economy has not yet fully developed, financial services businesses may take more persuasion that effective consumer protection is in the longer term interests of financial services businesses, and consumer bodies may be weak or non-existent.” https://www.networkfso.org/resources/Guide-to-setting-up-a%20financial-services-ombudsman-scheme_INFO-Network_March2018.pdf

³⁴ The Navigator Company. (2011). 2011 Independent Review. The OBSI. <https://www.obsi.ca/en/news-and-publications/resources/PresentationsandSubmissions/2011-Independent-Review.pdf>

without the organisational structure or resources to provide a strong lobbying force to balance industry's power over the OBSI".

The 2021 Ontario Auditor General report into the OSC³⁵ raised consumer protection issues with respect to the OSC's actions, noting in conclusion:

“the OSC has been impacted in certain of its regulatory activities to protect investors because of complexity of the sector and industry opposition to change.... We noted that certain rules proposed by the OSC that could better protect investors were limited and less rigorous than similar rules in other countries, such as the United Kingdom and Australia... The OSC needs to guard against perceptions that its rule-making is influenced by industry interests or swayed by political interference. It therefore needs to ensure it transparently and effectively carries out its mandate to protect investors as it weighs the views of stakeholders, many of whom have vested interests.”

International jurisdictions have a much richer engagement with and interest in consumer vulnerability and protection issues including systemic issues impacting fairness³⁶. Outreach, whether it be industry, regulatory, consumer and legislative has systemic and strategic impact. The 2016 BearingPoint Independent Review into Ireland's Ombuds organisations³⁷ provided in depth and detailed analysis of outreach functionality within an ombudsman and provided important insight into strategic function, something lacking in the most recent independent review as well as general OBSI communications. The 2022 review barely touched on outreach functions and there is little evidence to suggest material OBSI engagement in this area.

Conflation of consumer advocacy with ombudsman

Much of the objection to widening OBSI's powers (most notable in the 2007 Systemic Review consultation³⁸) implicates an invitation to consumer advocacy bias. This would imply that the OBSI was, or was risking, advancing the interests of the consumer, in the complaint assessment, at the expense of the firm/industry.

None of the independent reviews (2007 to 2022) have found material impairment or issue with the OBSI's case assessment processes. The fairness framework has fundamental integrity, and all sides appear fairly addressed within the process – case review is something which is core to all the independent reviews. Extending OBSI processes to the operation of a bona fide ombudsman, with systemic issue remit and secure redress, would not risk this integrity.

Accusations of consumer bias and or advocacy suggest a lack of understanding³⁹ as to what an ombuds can and should do. For example, the levelling of the playing field is a prerequisite for

³⁵ Office of the Auditor General of Ontario. (2021, December). Value-for-Money Audit: Ontario Securities Commission. https://www.auditor.on.ca/en/content/annualreports/arreports/en21/AR_OSC_en21.pdf

³⁶ Note, inter alia, the FCA 2020 consultation into the Consumer Investments Market with a specific focus on systemic issues. <https://www.fca.org.uk/publication/call-for-input/consumer-investments-market.pdf>

³⁷ BearingPoint. (2016, January). Strategic and Operational Review Financial Services Ombudsman and Office of the Pensions Ombudsman. <https://www.fspo.ie/documents/archives-fso/Strategic%20and%20Operational%20Review%20FSOB%20OPO%20Jan2016.pdf>

³⁸ OBSI Terms of Reference Consultation (2007). Documents and submissions page - <https://www.obsi.ca/modules/document/document.aspx?param=WEpbHyH4yyoStiv7FeTLxQeQuAleQuAl>

³⁹ “Research on motivated reasoning suggests that individuals are predisposed to selectively process and reject statements that are inconsistent with their prior beliefs or ideology (Kunda, 1990; Leeper & Slothuus, 2014; Taber & Lodge, 2006” - John E. Kotcher, Teresa A. Myers, Emily K. Vraga, Neil Stenhouse & Edward W. Maibach

addressing fairness in all circumstances. Additionally, systemic remit and secure redress is important to both consumer trust and confidence in outcomes and standards of financial service provision and complaint resolution.

Provision of assistance in the complaint is viewed, by some, as advocacy. But provision of assistance within an ombuds construct is different from an adversarial approach where assistance may involve which aspects of the client's case to leverage and which aspects of the opponent's case to attack. Assistance is about populating the fairness construct so that as full a picture as possible is available to make an informed and fair assessment – the impact of a decision extends beyond the complaint. Without this we cannot expect confidence in the process and acceptance of the outcome. Ultimately, more prompt and effective complaint resolution, depends on acceptance of the consumer ombuds model (and with it assistance and triage) and its necessary evolution.

In many international jurisdictions, the ombudsman fairness construct is well established, evidenced and corroborated as a vehicle central to fairness in all circumstances. Outside of the levelling and the fairness construct, it is one that does not specifically favour one (the consumer) over the other (the registrant or the firm). Accusations of bias ignore that the roots of the model have robust foundation.

The framework of consumer protection and especially developments regarding the understanding and accommodation of vulnerabilities in fairness outcomes and regulatory standards should already conform to evidence based professional standards, competencies, and practise.

What is incontrovertible is that an ombuds is an essential component of a system with a developing and well evidenced systemic fairness construct and fairness objective. If we look at international jurisdictions, we see many well evidenced statements and policies by both regulators and ombudsman that, in Canada, would be considered consumer advocacy - note the FCA's new consumer duty⁴⁰. In Teasdale A (2022), Systemic Fairness and Financial Data Analysis of Canadian and International Complaint Bodies,⁴¹ we see several statements from ombudsman regarding fairness and consumer protection that would be similarly framed.

Statements that support the need for consumer protection and for systemic issue remit do not imply consumer advocacy bias. This characterisation of bias and advocacy indicates a probable gulf between the evolution of the fairness construct and industry and regulatory intent.

An ombuds should not live in fear of its own shadow: this mischaracterisation of the fundamental functions of an ombudsman (assisting consumers, securing redress, systemic and strategic remit, effective outreach etc) in Canada needs to be urgently addressed.

(2017) Does Engagement in Advocacy Hurt the Credibility of Scientists? Results from a Randomized National Survey Experiment, *Environmental Communication*, 11:3, 415-429, DOI: 10.1080/17524032.2016.1275736

⁴⁰ Financial Conduct Authority (UK). (2022, July). PS22/9: A new Consumer Duty. FCA. <https://www.fca.org.uk/publications/policy-statements/ps22-9-new-consumer-duty>

⁴¹ Appendix C (p44-46), Submission to 2022 OBSI Independent Review, Andrew Teasdale, CFA, - <https://www.obsi.ca/en/news-and-publications/resources/Public-Consultations/2021-independent-evaluation/AndrewTeasdale-OBSI-Submission-final.pdf>

The Queensland Advocacy Group⁴² noted that advocacy is “speaking acting, writing with minimal conflict of interest on behalf of the sincerely perceived interests of a disadvantaged person or group to promote, protect and defend their welfare and justice by being on their side and no-one else’s” and “being primarily concerned with their fundamental needs” and “remaining loyal and accountable to them in a way which is emphatic and vigorous and which is, or is likely to be, costly to the advocate or advocacy group”.

How does this correspond to the OBSI? It is not on the side of the consumer and no-one else’s. It is not primarily concerned with the needs of consumers (and even more so if it had systemic reach), and it is neither loyal nor specifically accountable to any one participant in the complaint. Again, as confirmed by successive independent reviews there is no evidence to support any suggestion that it takes positions that it does not believe are fair, in all of the circumstances.

Canadian regulatory trajectory

The failure to develop a consumer ombudsman has also paralleled the trajectory of Canada’s securities regulation. This suggests systemic intent.

Note the failure to remove transactional returns and to assign a fiduciary/best interest standard for the provision of personalised financial advice; this is a failure which perpetuates conflicts of interest and imposes a much higher level of investor responsibility for financial advice.

The recently implemented and much weaker Consumer Focused Reforms place Canada near the bottom of the league table when it comes to minimum standards governing competencies, accountabilities, ethics and standards of care in the provision of personalised financial advice⁴³. With ombuds organisations focused on fairness and a level playing field, and at risk of being held to higher international standards, it might seem sensible for the regulatory framework to keep external dispute resolution remit in step with Canada’s lower regulatory and conduct standards.

The CSA’s Client Focused Reforms marked the end of a process that started out with the Fair Dealing Model (2004) that proposed fiduciary type standards and that was superseded by the 2012 Consultation Paper 33-403 that more fully addressed introducing a fiduciary duty. This wave was receding by the time of the 2016 Consultation Paper 33-404 and disappeared with the Client Focused Reforms in 2019.

The dominant trajectory in Canada has been the modernisation of a transaction focused retail financial services marketplace and the avoidance of higher standards of fairness associated with advice based best interest/fiduciary standards. This contrasts with international jurisdictions that have moved to incorporate best interest standards, professional competencies, and ethics. Improvements and developments in complaint handling, both legislative and regulatory, have accompanied improvements in financial services standards. Ombudsman and similarly focused external complaint handling bodies are focused on systemic fairness and they are more welcome in accommodating environments.

⁴² Queensland Advocacy for Inclusion. (n.d.). What is advocacy? <https://Qai.Org.Au/about-Us/#what-Is-Advocacy>. Retrieved July 15, 2022, from <https://qai.org.au/about-us/#what-is-advocacy>

⁴³Discussion of Canadian standards in the context of those prevailing in international jurisdictions can be found in [Teasdale A, CFA \(Proposed Rule \[2020-001\] Financial Professionals Title Protection \).pdf \(fsrao.ca\)](#)

The OBSI, coinciding with the 2012 CSA Consultation of a Fiduciary standard, was arguably at or even past the peak of its own evolution by the 2011 Independent Review, having recently been awarded the ability to address systemic issues but also facing significant industry resistance. So, it would appear, as the Canadian system shied away from higher professional standards and accountability with respect to advice, regulators also retreated from developing the OBSI as an ombudsman.

As far as the consumer is concerned, regulators, via the Joint Regulator Committee, have reported irregularly and minimally on ombudsman issues. On the face of it the OBSI has also stood back from the fray and focused on the terms of its MOU with its regulators. Neither have substantively addressed the dispute resolution/ombudsman conflict. Indeed, the latest independent review advises, “to keep in mind that OBSI has a specific mandate and purpose”.

Governance

The OBSI calls itself an ombudsman with a vision to help “ensure a fair, effective, and trusted Canadian financial services sector”. But while evidencing fair and professional complaint resolution for some time, it is clearly not an ombudsman. Critically it cannot secure redress and lacks systemic impact.

It exists within an environment that lacks a) regulatory and legislative support for the fundamentals of a consumer ombudsman and b) evolving regulatory and industry commitment to fair treatment of consumers evidenced by some of the weakest regulatory standards among developed economies. Moreover, the environment is one where the powers of an ombuds are pejoratively equated with those of a regulator and the championing of the fairness domain impugned as biased consumer advocacy.

The role of the consumer ombudsman is constantly evolving⁴⁴. But its fairness construct and its function are well evidenced. Yes, it is intended to level the playing field. Yes, its primary interface, focus and resource allocation is with the consumer and the consumer complaint. But it is not a regulator, and it advocates for no-one. Its master and its domain are fairness in all of the circumstances, and fairness and its externalities are the public good and the public interest.

If the OBSI were indeed an ombudsman, you would have to also believe that it is afraid of its own shadow. This is because it operates in fear of reaction to its named essence, it is sensitive to accusations of advocacy and regulatory encroachment and does not assert its purported authority or fairness domain. Based on the actions of regulators, defections of bank members, and regulatory inaction there may good reasons for OBSI fearing its own shadow.

To date the position of OBSI’s board on the issue of the clarity of scope and definition of the OBSI is largely unknown. Likewise, its position on the issue of consumer representation, as an included and informed stakeholder on its board, helping shape consensus and perspective, remains unclear.

The 2022 Independent Review has suggested that the OBSI consider removing direct consumer representation and reconsider the use of a dedicated consumer advisory council, replacing it with roundtables. In its place would likely remain industry representation - just no longer nominated by regulators and special interest groups - and community directors.

⁴⁴ Consumer Alternative Dispute Resolution (CADR) around the world is discussed in Teasdale A (2022), Systemic Fairness and Financial Data Analysis of Canadian and International External Complaint Bodies.

Informed and experienced advocacy, itself would appear to be devalued in this environment, and consumer rights and interests, which should shape the public interest, held in abeyance outside the actual domain of engagement. The governance recommendations appear to imply that consumer representation is problematic: that it brings into the decision-making forum expectations and demands that are contrary to the best interests of the OBSI and that impair consensus driven decision making.

Consensus is clearly easier to obtain with a greater concentration of like mindedness. The independent review also implied that the perspectives, experiences, and the knowledge base of investor advocacy is incidental to the function of an ombudsman and contrary to the mandate as expressed by the MOU. This raises issues with respect to how industry and community director expectations and knowledge base are informed and shaped.

If regulators, industry, and compliance professionals are against developing a bona fide ombudsman, and these views are considered to have hierarchical dominance over consumer views, then how will community directors, that may well have good governance experience but lack a deep knowledge base of complaint handling and regulation (and history), converge to an effective board consensus? In a playing field which is not level, how is formalising imbalance conducive to good governance of the public interest with respect to all of its stakeholders?

In other jurisdictions that are standard setting for ombudsman development, the UK and Australia, the boards either have a balanced representation of industry and consumer interests, or eschew dedicated industry representation. Additionally, both the UK and Australia have what are generally understood to be consumer ombudsman and strong supporting consumer interest representation and consumer protection frameworks. Good governance is a system wide issue and extends beyond the mere frame of governance.

There are three things that bring governance urgently into the spotlight.

1. The first is the well-defined difference between what the OBSI is and what an ombudsman is. The 2016 reviewer noted, a “‘pretend’ ombudsman will damage consumer trust”.
2. The second is the substantial time the system has been given to clarify the scope, definition, and evolution of the OBSI. Time is up.
3. The third is the tone of the latest independent review and its governance recommendations. The 2022 review has veered from the previous three reviews by de-emphasising discussion of the differences between the OBSI as a dispute resolution provider and that of an ombudsman. Furthermore, it asks us to focus on its regulatory driven mandate and to ignore the wider issues. It also asks us to take a step back with respect to governance, to remove and de-emphasise the consumer interest and perspective from the process in which the board informs itself and achieves consensus.

This effectively brings governance into the spotlight and the need to clarify once and for all what the OBSI is and what it is not.

In Summary

The modern consumer ombudsman is increasingly well defined in the academic literature⁴⁵ and well evolved and evidenced in action. It is also able to draw on an increasing body of work framing fairness in the financial services arena which serves to distance it from charges of biased consumer advocacy. Effective regulatory co-partnering and engagement has also served to substantiate the ombuds against charges of regulatory conflation with respect to systemic issues.

Developments in the understanding of and importance of fairness within financial services have been advanced by progressive regulators interested in evidence informed improvements in the functioning of consumer protection. In these jurisdictions the consumer interest and the co-dependence of industry and consumer are clearly framed.

The consumer ombudsman model is one that has significance not just for the fair treatment of consumers but for the evolution of financial services. The area of consumer alternative dispute resolution itself is dense and complex.

Effective representation of the interests of a public interest body charged with systemic fairness requires an informed body of knowledge and experience both within it and its supporting and endorsing environment. It is difficult to identify whether such a culture exists within the OBSI's regulatory masters. It is therefore left to the ombudsman itself and its board in particular to ensure this important area of governance is appropriately addressed.

Corporate governance is usually comprised of three components: the framework and processes of corporate governance, the informed experience and knowledge base of its directors and the best interests of the evolving operation, both present and future, of the entity itself. Directors are required to serve the best interests of the entity and are charged with effective oversight of management of the entity and the governance processes themselves. It is understood that directors should not be representing any other constituency than that of the entity.

Making sure that decisions have integrity and further the interests of the corporation and its stakeholders requires a board to have knowledge of wide areas impacting the entity and its activity. But OBSI is a public interest vehicle in an industry and a country where there is considerable resistance to its evolution and to consumer protection generally. Moreover, it is also conflicted between being on the one hand an aspirational consumer ombudsman, and on the other, based on its evidenced reality, a pure external dispute resolution provider charged with addressing the incidental complaint. The difference is material, significant and impactful and addressing it should be a pre-condition of this governance review.

If OBSI governance is to be able to make these decisions it will need to draw on a body of knowledge and expertise that can both address core corporate functioning but also the

⁴⁵ **A)** Gill, C. & Hirst, C. (2016) Defining Consumer Ombudsmen: A Report for Ombudsman Services. Warrington: Ombudsman Services, **B)** Hodges, Christopher, Consumer Redress: Implementing the Vision (June 9, 2016). Pablo Cortés (ed.), The New Regulatory Framework for Consumer Dispute Resolution (Oxford University Press, 2016) Forthcoming, University of Leicester School of Law Research Paper No. 16/27, Available at SSRN: <https://ssrn.com/abstract=2793603> or <http://dx.doi.org/10.2139/ssrn.2793603>, **C)** Hodges, C., & Voet, S. (2018). Delivering Collective Redress: New Technologies (Civil Justice Systems). Oxford: Hart Publishing. Retrieved August 11, 2022, from <http://dx.doi.org/10.5040/9781509918577>

necessary perspectives of the consumer and public interest and the complex function and environment of a modern consumer ombudsman.

Making this distinction and this decision is a corporate governance issue. If it is not within the remit of the OBSI, it is most definitely within the remit of regulators and legislators. The OBSI board should certainly be able to commit to the clarity of its dispute resolution status. Only its regulatory masters that determine its memorandum of understanding, and/or legislators, can decide whether it is to be a consumer ombudsman.

If regulators do not trust the OBSI to be a system critical ombudsman, then why should consumers? If the OBSI is indeed an ombuds then it should neither live in fear nor in embarrassment of its shadow. In the forthcoming governance review the OBSI and its regulators should decide once and for all to clarify its being. That is, is it a designated external dispute resolution body of its regulators or an independent system critical consumer ombudsman co-partnering, inter alia, with its stakeholders on matters of systemic importance?

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This submission is drawn from an original document produced by Andrew Teasdale and edited by Harvey Naglie.

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