AFCA: the first foothill between Australia's Twin Peaks

Andrew D. Schmulow
*University of Wollongong*, andys@uow.edu.au

Virginia Dore
*University of Wollongong*

Jacob Reardon
*University of Wollongong*

William Hanna
*University of Wollongong*

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Abstract
2020 Informa UK Limited, trading as Taylor & Francis Group. This paper traces the establishment of the new Australian Financial Complaints Authority (AFCA). It places this development within the wider context of what we argue is an important new adjunct to the Australian financial regulatory architecture, and by implication therefore, the international significance of these reforms to countries that have adopted the Australian "Twin Peaks" model. By reference to the Ramsay Review and other sources, we include analysis of AFCA's forerunners, and their failures; and we include comparative analysis from other jurisdictions. We provide analysis of AFCA's strengths and potential weaknesses, and some initial data on AFCA outcomes. Finally, we provide concluding remarks on these reforms.

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AFCA: THE FIRST FOOTHILL BETWEEN AUSTRALIA’S TWIN PEAKS

Andrew Schmulow,† Virginia Dore,❋ Jacob Reardon§ & William Hanna§

I. ABSTRACT

This paper traces the establishment of the new Australian Financial Complaints Authority (AFCA). First it places this development within the wider context of what we argue is an important new adjunct to the Australian financial regulatory architecture, and by implication therefore, the international significance of these reforms to countries that have adopted the Australian ‘Twin Peaks’ model. By reference to the Ramsay Review and other sources, we include analysis of AFCA’s forerunners, and their failures; and we include comparative analysis from other jurisdictions. We provide analysis of AFCA’s strengths and potential weaknesses, and some initial data on AFCA outcomes. Finally, we provide concluding remarks on these reforms.

II. INTRODUCTION

i. Locating the relevance of this study

In April 2017 Australia’s Review of the Financial System External Dispute Resolution and Complaints Framework handed down its final report (the Review). Chief among its recommendations was the establishment of a single External Dispute Resolution (EDR) body (Ombud) for all financial disputes. First, by way of introduction, we analyse this development within the context of its significance to Australia’s financial system regulatory model and, due to the deployment of the Australian regulatory model elsewhere, by implication also the international significance of this development. Thereafter we provide a detailed analysis of the strengths and weaknesses of these reforms from the perspective of consumer protection, and in light of past failures. In particular we provide an analysis of how the reforms to the financial

† BA Honours LLB (Witwatersrand) GDLP (cum laude) (ANU) PhD (Melbourne). Admitted by the Supreme Court of Victoria as an Australian Legal Practitioner. Advocate of the High Court of South Africa. Visiting Senior Researcher, Oliver Schreiner School of Law, University of the Witwatersrand, Johannesburg. Visiting Researcher, Centre for International Trade, Sungkyunkwan University, Seoul. Senior Lecturer, School of Law, Faculty of Business & Law, University of Wollongong. Email for correspondence andys@uow.edu.au.

❋ LLB Honours (University of Wollongong). This research was undertaken while the author was in her final year, LLB.

§ BComm (Finance) LLB (University of Wollongong). This research was undertaken while the author was in his final year, LLB.

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ombud schemes in Australia may be expected to function, including an international comparative analysis of ombud schemes in operation elsewhere.

A. International significance of Australian enhancements to the Twin Peaks model

The Australian financial system regulatory model – known as “Twin Peaks” – consists of a peak agency charged with compelling good market conduct and consumer protection (the Australian Securities and Investments Commission (ASIC)), and a second peak agency, responsible for prudential regulation (the Australian Prudential Regulation Authority (APRA)). The Australian Twin Peaks model is regarded as an exemplar internationally, and has been copied in five other countries to date: New Zealand, Belgium, the Netherlands, the UK, and most recently, South Africa. Two countries have adopted hybrid/incomplete Twin Peaks regimes: Canada and France. A further dozen or so countries have signalled an intention or interest to do likewise.

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2 The term is a misnomer. It is based broadly upon Michael Taylor’s original proposal called ‘Twin Peaks’ (Taylor, Michael W., “‘Twin Peaks’ : A regulatory structure for the new century”, Centre for the Study of Financial Innovation, no. 20, London, UK, December 1995, pp 1-18), which in turn was a riff off the eponymously titled television series, popular at the time. (Conversation between the first author and Michael Taylor, August 2014). In contradistinction, the original proposal put forth in Australia’s 1998 Financial System Inquiry (Wallis, Stan, Bill Beerworth, Professor Jeffrey Carmichael, Professor Ian Harper & Linda Nicholls, “Financial System Inquiry”, 31 March 1997, pp 1-771, 26) clearly articulates Australia as a three-peak system (‘three agencies’ as described in the report), in which the Reserve Bank of Australia (RBA) would assume a macro-prudential role. Nonetheless, the most salient feature of the model adopted in Australia was not the role of the central bank – a role played by most if not all central banks. Rather its most salient feature was the creation of two additional peaks, one for prudential oversight, the other for conduct oversight. As a result, the term Twin Peaks is used to describe the prudential and conduct structures in countries like Australia, and elsewhere, irrespective of the activities of the central bank.


6 Financial Services Act, No. 21 of 2012.


10 These include China, Hong Kong, Japan, Korea, Kenya, Nigeria, the Federal level of the EU, and others.
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Twin Peaks is widely regarded as the optimal model for the regulation of the financial system;\textsuperscript{11} it is the only model which places compelling good market conduct and consumer protection on an equal footing with prudential regulation.\textsuperscript{12}

It is the separation of these functions – conduct and prudential – that defines Twin Peaks, and is its greatest advantage over competing financial system regulatory models. This is based upon two, important observations: in the aftermath of the global financial crisis (GFC), and the findings produced by the US Senate Inquiry, we have come to understand more fully that market conduct and consumer abuse – as was evident in the US subprime industry – can, if left unchecked, become a source of financial crisis.\textsuperscript{13} Second, in the aftermath of the Turner Review in the UK, and the collapse of Halifax Bank of Scotland and Northern Rock, also during the GFC, we have come to understand better than we had previously that conduct regulation and prudential regulation cannot be enforced simultaneously;\textsuperscript{14} too often they are in direct conflict.

*When prudential and consumer protection regulation are combined in a single agency, at least one of them is likely to be done badly.*\textsuperscript{15}

The only viable solution therefore is first to separate conduct and prudential regulation and, second, create them as equals. Hence the acknowledgement of the optimality of the Twin Peaks financial system regulatory architecture, and its increasing adoption world-wide. Because it was adopted first in Australia,\textsuperscript{16} Australia’s experience of Twin Peaks is the longest and most comprehensive, and so Australia has served as the touchstone for other adopters in the past, and for those countries contemplating Twin Peaks adoption in the future.

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\textsuperscript{15} Michael Taylor (September 2009). “Twin Peaks' Revisited... a second chance for regulatory reform,” The Centre for the Study of Financial Innovation (CSFI), No. 89, \url{http://static1.squarespace.com/static/54d6206ce4b049f4cd5be9b/t/55241044e4b03769e017208a/1428412682009/Twin+Peaks+Revisited.pdf}.

However, one half of the Twin Peaks model – that of compelling good market conduct and protecting consumers (hereinafter referred to simply as ‘good conduct’) – has been so invident in Australia over the past decade that a Royal Commission of Inquiry (the Commission) was constituted in late 2017 to inquire into misconduct in the banking, superannuation and financial services industry. The evidence presented to, and the findings from that Inquiry, have been difficult to comprehend, so widespread, long-standing, and egregious has been misconduct in the Australian financial system. Current estimates put the number of victims at in excess of 2 million people – almost ten per cent of Australia’s total population. Similarly, current estimates put the costs of remediation at in excess of AUD 10 billion. Some estimates put the damage done at far higher levels. One study estimates more than 54 per cent of Australians have suffered damage through misconduct, and suffered detriment worth approximately AUD 201 billion.

One of the most consistent themes that emerged from the Commission was the failure of Australia’s market conduct and consumer protection peak, ASIC, to enforce the law, or provide adequate consumer protection. This is the first salutary lesson for those jurisdictions that have or intend to copy the Australian model: superior architecture is one thing, good plumbing is quite another. The Australian model is architecturally optimal, but does not guarantee effective enforcement – good plumbing. However, we argue in light of the findings from this research, that an effective ombud can contribute to supporting good conduct – good plumbing – within a Twin Peaks model in two important ways. First, an effective ombud will step into the breach left by a conduct regulator’s failure to act. It will do so when a failure to act is due to inefficacy. But it will also step into the breach where even a highly effective regulator fails to act on a particular instance of misconduct. Such predicaments are unavoidable where regulators have to direct their finite resources towards whatever they deem the greatest threat, and away from threats they deem less severe. Consequently, there will be times, possibly even frequently, when certain breaches attract little or no consequences. Second, where the ombud tackles consumer abuse practices deemed to be ‘systemic’, it can also fill a gap left by a conduct regulator, ineffective in discharging its responsibility to compel good market conduct. As such this study presents important findings wherever Australia’s Twin Peaks model has, or will in the future, be emulated.

Moreover, from an architectural perspective, there are deeper regulatory synergies that exist between these reforms and the Twin Peaks architecture, as compared to the position in Australia ex ante. Previously Australia had multiple, sectoral ombuds. This created confusion in the minds of consumers, due in part to issues of jurisdictional overlap and underlap (as described below). Multiple ombuds also created confusion for regulatees: on the one hand providers of products and services were subject to the decisions of the single conduct regulator (ASIC). On

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the other hand, providers were subject to the different and potentially conflicting interpretations of the legislation and of ASIC’s guidelines, as a result of multiple EDR schemes.

A consolidated financial services ombud for Australia, by distinction, better reflects the form of Australia’s conduct regulator: consolidated. Finally, a single ombud represents a more streamlined and consolidated feedback-loop to a single conduct regulator: issues identified by the ombud, especially those of a systemic nature, will be consolidated across the entire financial industry, and adjudicated upon in a more harmonised and consistent manner, than would be the case with multiple ombuds. That in turn allows the conduct regulator both a more comprehensive view of trends in the financial industry, and facilitates a more harmonised approach by the regulator to redressing those issues. By comparison, in a sectorally-based regulatory model, for example, the gains that flow from creating a consolidated ombud will be of little value in a regime where the underlying architecture does not support a consolidated response in terms of financial consumer dispute resolution.

Countries that have, or intend, to adopt the Australian model focus much of their attention on the strengths Twin Peaks brings to combating financial crises through, for example, its single-minded attention to prudential issues. But if financial crises can also emanate from consumer abuse, then the extent to which the Australian EDR reforms act as a form of ‘double-redundancy’ in combating bad conduct – especially systemically bad conduct – they serve as a potential important adjunct to the Twin Peaks architecture. An effective EDR scheme may, therefore, be described as the first foothill between the twin peaks.

B. Significance for Australia of these reforms

The study is relevant to Australia for many of the same reasons: consumers were badly served by ASIC in the decade preceding the Commission and, as the Ramsay Review demonstrated, the previous ombud schemes were deeply flawed (see infra). So, as Australia grapples to overcome what may be described as its great financial regulatory crisis (GF(r)C), a well-functioning ombud may be expected to alleviate the worst excesses which consumers of financial products and services have faced. Moreover, a well-functioning ombud will ensure that ASIC is made aware of systemic issues that the ombud observes. This will, at the very least, provide ASIC with additional information necessary to fulfil its role in the overall Twin Peaks architecture, which includes supporting APRA and the Reserve Bank of Australia (RBA) to prevent financial crises. 22 In that way an ombud can act as a canary in the coalmine.

In the event that ASIC is revitalised, in combination with an effective ombud, there will be realistic prospects of combatting bad conduct and improving consumer outcomes in the Australian economy. As such these reforms are significant in and of themselves, but also as part of a broader effort to improve high-level regulatory goals: a financial system that is fair, efficient, transparent and stable. 23


The Review recommended the establishment of a single EDR body for all financial disputes, because such a model, it was asserted, would facilitate better access to EDR, as well as deliver higher levels of compensation. In addition, the Review stated that a single body would streamline a system that was characterized by multiple bodies, operating in different jurisdictions. As such it was envisaged that the lodgement of disputes and access to redress would be provided in a seamless and timely manner.

As of November 2018 the Australian Financial Complaints Authority (AFCA) assumed the jurisdiction of all existing EDR bodies. This new EDR czar has a wide remit, and is able to facilitate EDR across the entirety of financial service providers (FSPs). In doing so, AFCA will retain the Financial Ombudsman Service’s (FOS) mandate of achieving fairness in all circumstances. However, the new scheme will implement enhanced monetary limits, and more robust decision-making criteria. It is also hoped that AFCA will mark a departure from an ad hoc approach to the decision-making process, which was a constant source of criticism of the previous regime.

The centralisation of the EDR framework is not unique to Australia, and appears to be part of a greater international trend, as will be discussed in Part IV. Though the advantages identified internationally for single EDR schemes are manifold, ultimately the efficacy and enforceability of AFCA determinations will be the lynchpins upon which its success will turn. As highlighted by the Commission, there were concerns regarding the ability of favourable FOS determinations to translate into favourable outcomes. Similarly, the difficulty in countering non-compliance by FSPs in Australia, through non-litigious means, has proven to be a broad, systemic challenge. Given that AFCA adjudicates disputes ex contractu as opposed to ex lege, it is questionable whether the new regime will be any more empowered to enforce its determinations. This is a considerable source of concern for the scheme moving forward.

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24 See n 1 above.
26 Ibid.
27 AFCA will amalgamate the Financial Ombudsman Service, the Credit and Investments Ombudsman and the Superannuation Complaints Tribunal.
28 Financial Ombudsman Service, FOS Terms of Reference, Victoria, 2015, cl 8.2; Australian Financial Complaints Authority, Australian Financial Complaints Authority Complaint Resolution Scheme Rules, Victoria, 2018, s A.2.1(d).
30 This is particularly so in relation to FOS.
32 Namely, on a contractual basis instead of legislative or statutory basis. See eg, Mickovski v Financial Ombudsman Service Ltd (2012) 36 VR 436 and the text accompanying footnote 160, below.
III. SOME PRELIMINARY ISSUES

i. Royal Commissions and the Review

In 2014 the findings of an Australian Federal Senate Inquiry into the Australian Securities and Investments Commission (ASIC) recommended a Royal Commission to investigate the widespread fraudulent activity and unethical behaviour of Australia’s banks, and the poor performance of the regulators of the financial sector. By 2017, and after a decade of mounting scandals, anti-bank sentiment had reached a breaking-point, in which the Australian Federal Government finally succumbed to public and political pressure, and established a Royal Commission. A Royal Commission being the ‘highest form of inquiry on matters of public importance,’ former High Court Judge, the Honourable Kenneth Madison Hayne AC QC (Hayne) was appointed Commissioner of the investigation. In accordance with the Terms of Reference (TOR), Hayne’s interim Report was handed down in September 2018, with the Final Report issued in February 2019. In its Final Report, the Commission recommended criminal prosecution in some 14 cases.

Hayne’s interim report identified extensive instances of misconduct, ranging from unethical conduct and breaches of the Code of Banking Practice, to fraud and breaches of law. The Commission identified systemic failures of FOS, illustrating a history of reticence to exact discipline or impose appropriate penalties on contravening institutions. In light of the Commission’s findings outlined in its interim report, the Coalition Government undertook to take action in the banking and financial services industry. As part of that action the Federal Government adopted the recommendations of the Review as ‘one of a number of initiatives from the Coalition in an attempt to rebuild trust’ in the financial sector.

33 The Senate, Economics References Committee, Performance of the Australian Securities and Investments Commission (June 2014) xxv, 12.28.
34 For a succinct overview of the controversies that have arisen, and the build-up to the Banking Royal Commission, see David Chau and Emily Clark, ‘Banking royal commission: How did we get here?’ ABC News (online), 12 February 2018, <https://www.abc.net.au/news/2017-11-30/banking-royal-commission-how-did-we-get-here/9210248>.
Prior to the Royal Commission, and commencing in mid-2016, in response to unpaid compensation owed to victims of financial misconduct, a review was undertaken by an expert panel (the Panel). The Panel comprised Professor Ian Ramsay as Chair, Julie Abramson and Alan Kirkland. The Panel was tasked with carrying out the ‘first comprehensive review of the financial system’s EDR framework.’ At the time of the review, Australia’s EDR framework comprised FOS, the Credit and Investments Ombudsman (CIO), and the Superannuation Complaints Tribunal (SCT).

The mandate of the Panel was to assess the EDR framework against the Review’s core principles of efficiency, equity, complexity, transparency, accountability, comparability of outcomes and regulatory costs. The Panel was also required to make recommendations for the implementation of ‘best practice developments from other sectors in Australia, and from overseas jurisdictions’. The original TOR required that, as part of its assessment, the Review was to consider whether changes to the then current financial sector dispute resolution and complaints scheme were necessary, in order to deliver effective outcomes for users. In conducting the Review, the Panel took submissions from parties ‘representing a wide range of interests’ including both organisations and individual consumers.

The Final Report of the Review was handed down in April 2017. Many of the issues associated with the old regime identified by the Panel are discussed in the following part of this paper. In seeking to rectify those issues and to ensure the efficient and effective functioning of the Australian EDR system, the Review made 11 recommendations. The central recommendation was the establishment of a single EDR body for all financial disputes to replace FOS, CIO and SCT. Other recommendations addressed the features and powers of the single EDR body, enhancing access to redress for consumers (including raising monetary limits and compensations caps), ensuring that the single EDR body is accountable to users, increasing the transparency of internal dispute resolution (IDR), and increasing ASIC oversight of the single EDR body. Those recommendations resulted in the establishment of the Australian Financial Complaints Authority (AFCA), which commenced receiving complaints in November 2018. The issues giving rise to the recommendations in the Review, and the results of those recommendations now implemented, comprise the focal point of this paper.

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43 Commonwealth Treasury, the Review, Final Report, above n 1, 3-4.

44 Ibid 1.


46 Ibid.


48 Ibid 1.

IV. THE OLD REGIME

A. Multiple bodies with overlapping jurisdictions

The Review acknowledged consistency in EDR outcomes as critical to consumer confidence in the financial system.\(^50\) By comparison, the Australian system – as it existed at the time of the Review – was characterised by multiple EDR bodies, each with different jurisdictions, processes and decision-making criteria. This led to inconsistent outcomes for customers with similar disputes.\(^51\)

In support of a single-scheme framework, Ramsay identified the case of ‘Emily’ as an example of the inconsistent outcomes reached under the multiple-scheme arrangement.\(^52\) In this case-study the insurer paid out Emily’s life insurance in a lump sum, failing to separate it over two financial years. This resulted in the Australian Tax Office (ATO) imposing higher taxes on the pay-out, and Centrelink seeking to cancel her social-welfare payments.\(^53\)

The fundamental issue in this case centres on whether the insurer was duty bound to inform the applicant of the tax and welfare implications of a lump-sum insurance payment. Upon applying to FOS, it was determined that FOS did not have jurisdiction and the applicant was referred to the SCT,\(^54\) where under their adjudication the applicant was forced to make highly technical arguments. It was found that in adjudicating the matter the SCT relied on technical arguments, whereas FOS adopted a more inquisitorial approach.\(^55\)

While FOS and SCT decisions are guided by similar principles\(^56\), the approaches between both EDR bodies illustrated how a fundamental issue – that of the duty of the insurer – was reduced to jurisdictional and technical legal arguments about loss.\(^57\) This reduced the emphasis on the conduct of the insurer when it failed to give salient advice. Consequently, the processes did not adequately address the reality that the insured might suffer serious tax and welfare implications.

Evidence was also presented of the confusion created by multiple EDR schemes. While the CIO denied the existence of any empirical evidence indicating consumer confusion as to which body to approach with a dispute,\(^58\) and while the same proposition was put forward by both the Australian Finance Conference and Credit Corp Group,\(^59\) those arguments were discredited by the statistics of cross-referrals between EDR bodies. The findings of the Review indicated that

\(\text{Commonwealth Treasury, the Review, Final Report, above n 1, 104 [5.70].}\)
\(\text{Ibid 104 [5.71].}\)
\(\text{Ibid 105.}\)
\(\text{Ibid.}\)
\(\text{Ibid 104, the mere fact as to whether an insurance policy was attached to a superannuation policy determined whether FOS or the SCT would adjudicate the dispute. The Review noted that this ‘...results in very different experiences for the consumer, given the lengthy delays currently experiences by the SCT.’}\)
\(\text{Ibid 105.}\)
\(\text{Ibid 104.}\)
\(\text{Ibid 105.}\)
\(\text{Ibid 107 [5.85].}\)
\(\text{Ibid 108 [5.86].}\)
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FOS referred nearly 1,000 disputes to the CIO and SCT in 2015-16 alone. The CIO referred 4 per cent of complaints and 16 per cent of enquiries to FOS in the same year. Such figures are indicative not only of consumer confusion: because confusion would result in mis-filings and, consequently, delays, it is also indicative of more pervasive issues affecting the overall efficacy of the previous system.

B. Cross referrals and inconsistent outcomes

The Review labelled the prevalence of cross-referrals between EDR bodies as a ‘source of inefficiency.’ On a deeper analysis, the cross-referral statistics represented unnecessary expenditure of resources and delays for consumers, before any work had commenced on resolving their disputes. This unnecessary expenditure and elongated processing time was made more acute by the underfunding of, for example, the SCT. The SCT had an average dispute resolution time-frame of over two years.

The Review noted further that where a jurisdictional dispute arose between FOS and the SCT, FOS determined what aspects of the dispute fell within its jurisdiction. The exercise of this discretion often led to fragmentation of the dispute, and inconsistent outcomes. Undoubtedly, this compounded delays, and increased consumer confusion.

Such delays, the Review asserted, exacerbate ‘consumer fatigue’, and deter consumers from utilising EDR mechanisms to resolve disputes. Viewed from a practical perspective, such outcomes risk causing consumers to give-up on pursuing any EDR process at all. Consequently, consumers may have no other option but to seek costly assistance from the courts against FSPs; most of which have far greater resources. In spite of these concerns, the CIO warned that increased bureaucracy and lack of stakeholder accountability would offset any benefit attained through the removal of EDR duplication. It is difficult to see how this would be the case in practice, however, given the extent of issues associated with duplication, as discussed above. Considering the recommendations to centralise the EDR framework, and the reporting and supervising recommendations discussed in the next part of this paper, it appears that stakeholder accountability is more likely to increase, and bureaucracy decrease, under the new regime.

C. Failures of Internal Dispute Resolution (IDR) mechanisms

a. The Code of Banking Practice

In response to the findings of the Review, that a single EDR body should replace FOS, CIO and the SCT, the Mortgage and Finance Association of Australia (MFAA) contended that ‘at no point

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60 Ibid 108 [5.88].
61 Ibid.
62 Ibid 108 [5.89].
63 Ibid.
64 Ibid 8-9.
65 Ibid 108 [5.90].
66 Ibid.
67 Ibid 108 [5.89].
68 Ibid 106 [5.82].
has the case for change been adequately made.69 The MFAA’s position was clearly at odds with the findings outlined in the Royal Commission’s subsequent Interim Report, which identified instances of misconduct as being, at a minimum, contraventions of undertakings such as those enshrined in the Code of Banking Practice (the Code).70 “That alone was evidence in support of the argument that the current structure (as it then was), was failing consumers.

The Code was and remains voluntary; it establishes standards and rules which the community can expect banks to follow in their dealings with customers. The provisions of the Code deal with an array of matters including key commitments, general obligations, information disclosure and resolution and monitoring of disputes (IDR and EDR).71 Compliance with the Code was monitored by the Code Compliance Monitoring Committee (CCMC), now re-named The Banking Code Compliance Committee (BCCC). The purpose of the CCMC/BCCC was and is to ensure subscribing banks comply with the Code, through investigation of alleged breaches, engagement with banks, and compliance monitoring.72

Part F of the Code established and empowered the CCMC, and made specific provision for the ‘resolution of disputes, monitoring and sanctions’.73 Under that Part, the Code set out timeframes and guidelines for the resolution of internal disputes, confirmed the availability of EDR avenues for customers,74 and made a commitment to ‘prominently publicise the availability and accessibility of both internal and external processes for resolving disputes’.75

One of the biggest problems associated with IDR practices identified in the Review was the lack of available IDR data. This is attributable, in part, to ASIC’s lack of power to collect recurring data about firms’ IDR activities. ASIC relies on firms that are required only to report IDR information externally, where they subscribe to an industry code of practice. This is problematic; there is evidence that even where firms are subscribers to a code of practice, this does not necessarily result in compliance with such codes. Although the CCMC was tasked with ensuring that banks complied with their obligations under the Code, the data in the CCMC’s annual reports suggests this mandate was not met (see further infra).

The inefficiency of the CCMC was largely a product of the voluntary nature of the Code, combined with inadequate self-reporting by banks. The CCMC acknowledged that they rely ‘on information reported to it by Code-subscribing banks (banks) to monitor compliance with the Code’.76 The efforts of the CCMC were hampered by the inconsistencies with which banks identified and reported Code breaches.77 Even with inconsistencies in reporting, or failure to

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70 Ibid.
72 Ibid 32.
73 Ibid.
74 Ibid 33-34.
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report at all, information provided to the CCMC was nonetheless sufficient to be a cause for concern.

In its most recent annual report, the CCMC indicated that the number of total breaches was down by 9.5 per cent to 10,123 total breaches from the previous year. However, this ‘decrease’ in total reported breaches must be weighted by the results from previous years. In 2014-15 there was a total of 6,558 self-reported breaches of the Code by banks. In 2015-16 there was a total of 7,987 self-reported breaches. Furthermore, in 2016-17, the total number of self-reported breaches increased by 30 per cent, to a total of 11,191. With an increase of 4,633 self-reported complaints between 2014-15 and 2017-18, it is clear that complaint numbers overall were trending upwards. The breaches reported by banks in the 2017-18 year affected a total of 3.43 million customers, with an estimated financial value of at least $95 million.

It is fair to say, therefore, that the Code of Banking Practice, and the attendant monitoring and enforcement of, compliance with the Code proved to be flawed. As such it re-affirmed the need for a fair, efficient, and easily accessible complaints resolution mechanism in Australia.

b. Types of IDR Breaches

A source of considerable concern was the fact that a majority of IDR breaches stemmed from the failure of banks to recognise a complaint. Other types of IDR breaches are set out in the following table, which is extracted from a CCMC’s own motion inquiry.  

<table>
<thead>
<tr>
<th>Types of IDR breaches</th>
<th>No. of breaches</th>
</tr>
</thead>
<tbody>
<tr>
<td>Customer’s expression of dissatisfaction not recognised a</td>
<td>1153</td>
</tr>
<tr>
<td>complaint</td>
<td></td>
</tr>
<tr>
<td>Final response in writing not sent to complainant</td>
<td>173</td>
</tr>
<tr>
<td>Complaint progress letters not issued within required</td>
<td>74</td>
</tr>
<tr>
<td>timeframes</td>
<td></td>
</tr>
<tr>
<td>Complaints not recorded</td>
<td>44</td>
</tr>
<tr>
<td>Complaints not recorded or actioned</td>
<td>33</td>
</tr>
<tr>
<td>Errors in the resolution letter</td>
<td>11</td>
</tr>
<tr>
<td>Bank did not respond within required timeframe</td>
<td>11</td>
</tr>
<tr>
<td>Complaint resolved incorrectly</td>
<td>11</td>
</tr>
<tr>
<td>Total</td>
<td>2240</td>
</tr>
</tbody>
</table>

During the same period banks reported that complaints were successfully resolved in 229 cases - fewer than the number incorrectly or inadequately processed. Clause 37 of the Code

78 Code Compliance Monitoring Committee, Monitoring Compliance with the Code of Banking Practice: 2017-18 Year in Review, 2.
82 Banking Code Compliance Monitoring Committee, above n 76, 4. All figures in AUD unless otherwise specified.
83 Ibid 35.
84 Ibid.
85 Ibid.
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required banks to have an IDR process that was free, accessible and that met the standards in ASIC Regulatory Guide 165 (RG 165). The IDR breaches, contained in the table above, are instances where IDR conduct fell short of the standards set by RG 165. As an example, RG 165.78 sets out the definition of a complaint as

‘An expression of dissatisfaction made to an organisation, related to its products or services, or the complaints handling process itself, where a response or resolution is explicitly or implicitly expected.’

As indicated in the table above, the most common type of IDR breach was the failure of Banks to recognise a complaint. Failure to meet RG 165 standards was a breach of clause 37 of the Code. The CCMC noted that banks tended to deal with Code breaches in a preventative way (namely, they learned from the breach to prevent future occurrences). They tended not to deal with the impact of breaches on individual customers. Of 5,168 breaches overall (ie IDR and all other types combined) reported in 2018, the complaint was resolved by corrective action in 672 cases, but an apology issued in only 379 instances. In a quarter of total breach incidents (ie IDR and all other types combined), banks did not report any corrective action taken. The 2018 Annual Report indicates that, where corrective action was taken, in only 39 per cent of cases was action taken to address customer issues.

The Review highlighted a number of problems associated with current IDR processes. It was prevalent for firms to fail to refer consumers to specialist IDR teams in order to initiate the IDR process. Furthermore, insufficient information given to consumers about the availability of EDR, where IDR proved unsatisfactory, was identified as a concern, and may have contributed to consumers becoming overwhelmed by the IDR process. Customers who are overwhelmed may ultimately give-up on seeking a resolution, or may accept an offer from the FSP that is unreasonable. Such outcomes are unacceptable from a consumer perspective, and potentially encourages firms to attempt to avoid liability for fault, or responsibility for rectification.

The 2018 Annual Report of the CCMC indicated that IDR obligations were among the top five categories of breach. In a review of its own motion, the CCMC reported that of thirteen Code

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86 Ibid 34.
89 The Code, above n 71, cl. 37.2, 35.
90 Banking Code Compliance Monitoring Committee, above n 76, 11.
91 Ibid.
92 Ibid 6.
93 Code Compliance Monitoring Committee, 2017-18 Year in Review, above n 78, 2.
94 Commonwealth Treasury, the Review, Final Report, above n 1, 191 [10.25].
95 Ibid 191 [10.27].
96 Ibid 191 [10.28].
97 Ibid.
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subsribing banks involved in the inquiry, one bank stated that it monitored\(^9\) 100 per cent of calls, whereas six reported monitoring between three to eight calls per staff member per month. Meanwhile, five banks either failed to provide a report on call monitoring activity, or reported that they did not monitor calls within IDR teams.\(^{10}\) According to the CCMC, banks generally identified Code breaches through pro-active monitoring mechanisms such as call monitoring and quality assurance activities.\(^{11}\) Approximately 64 per cent of all Code breaches were identified through call monitoring.\(^{12}\) Consequently the failure by the majority of banks to monitor calls comprehensively constituted a serious omission, and indicated that the number of Code breaches might in fact have been significantly higher than what had been reported.

In 2018, of the 240 IDR breaches reported, 95 per cent were reported by one bank.\(^{13}\) The CCMC conceded that this is not necessarily indicative of compliance generally in the industry. The CCMC noted further that only five banks reported any IDR Code breaches. However, many have reported low or no breaches of the Code pertaining to IDR responsibilities.\(^{14}\) It is likely that the relatively low number of IDR breaches is attributable to failure to report, rather than an absence of breaches.

As a result of the above failures by FSPs identified by the Review and the CCMC, the case for change had been made. The importance and relevance of EDR mechanisms in this regard is discussed in Part V (ii) (B) below.

\section*{D. Competition}

It must be noted from the outset that, despite the existence of multiple EDR bodies, consumers had no discretion as to which EDR body to approach in order to avail themselves of the most favourable outcome in resolving a dispute.\(^{15}\) The same was not true of FSPs. FSPs were able to elect which EDR body to belong to on the basis of such factors as which scheme had lower fees, or less restrictive terms of reference.\(^{16}\) It is no surprise, therefore, that FSPs and their advocacy groups favoured separate ombud schemes, and the concomitant opportunities for forum-shopping and arbitrage.

\(^{99}\) Page 6 of the Own Motion Enquiry at [1.6] (see above n 76) refers to call monitoring and quality assurance programs. It states that the inquiry identified many ‘good monitoring practices’ but stated a primary concern regarding the lack of information about how banks monitor, for example, IDR case management systems. Page 9-10 deals with code breaches and states at [3.3] that 64 per cent of Code breaches are identified through call monitoring. Para [3.6] states that comprehensive call monitoring and quality assurance programmes are used to assess compliance. Whilst the mechanics of ‘call monitoring’ are not specified within the own motion enquiry, experience by the second author is that a ‘quality and assurance’ team within the FSP listens to recorded calls, in order to identify issues in terms of customer service, company policy, accuracy of information et cetera. These are usually done by reference to a list of criteria that sets out categories like: customer service, call duration, accuracy and clarity of information, objection handling et cetera.

\(^{100}\) Banking Code Compliance Monitoring Committee, above n 76, 35-36

\(^{101}\) Banking Code Compliance Monitoring Committee, above n 76, 5.

\(^{102}\) Ibid, 10.

\(^{103}\) Ibid 34.

\(^{104}\) Ibid.

\(^{105}\) Commonwealth Treasury, the Review, Final Report, above n 1, 105 [5.76].

\(^{106}\) Ibid 114-5 [5.114].
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The MFAA contended that the centralisation of EDR bodies would ‘undermine the fabric of external dispute resolution.’

This position was grounded in their claim that separation of entities is necessary for ensuring accountability, innovation and cost control. The MFAA’s sentiment was echoed by the CIO, which went so far as to reference amendments to their own rules as ‘innovation arising from benchmarking,’ and suggested that multiple schemes ultimately benefit the consumer. The submissions within Chapter Five of the Review, particularly the submission of FOS, debunks these arguments, however. FOS dismissed the claims made by the CIO by noting that any change within FOS was not the result of benchmarking. More appropriately, FOS claimed that improvements stem from independent reviews, member and consumer feedback, and other mechanisms. ASIC and the Australian and New Zealand Ombudsman Association (ANZOA) argued that competition ran counter to the principles of fairness, efficiency, effectiveness and independence.

In contradistinction, the Financial Services Complaints Ltd (FSCL) Report on New Zealand’s multiple EDR schemes stated that competition between EDR schemes ‘has not been dysfunctional.’ It suggested that there has not been evidence of a ‘race to the bottom’. However, the FSCL Report later asserted that New Zealand’s current EDR schemes might follow the international shift towards an EDR monopoly. Such a scheme, the FSCL Report contended, may promote efficiency, or perhaps mark the development of a ‘national portal’ to help direct consumers to the relevant scheme to handle their complaints.

In response to these facts, the Review concluded that competition between schemes is not ‘guaranteed’ to benefit all consumers. As such, competition was considered to be a suboptimal strategy to pursue for the long-term interests of consumers. In support of this we argue that justice is, or ought to be, a standard: an outcome is either just or unjust. We argue that justice is not a free-floating concept open to competitive pressures. It seems instead that competition is geared towards providing lower costs to firms, rather than conferring any benefit on the consumer. Clearly, the private sector approach to free market competition impeded the efficacy of the previous EDR arrangements. Any concerns of monopolistic behaviour by AFCA will, at least theoretically, be mitigated by ASIC oversight, as discussed in Part V.

E. Commission Case Study: Suncorp and Low

After the death of his father, Rien Low and his mother were left with five business loans, approximating $1 million, owed to Suncorp. Low’s father was the sole breadwinner and his mother was unable to afford to service the loan repayments. A recommendation was sought from FOS in relation to the loans. FOS found that the first four loans were made adequately but that the fifth loan, worth $240,000, was affected by maladministration. FOS noted that if Suncorp

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107 Mortgage and Finance Association of Australia, Media Release, above n 69.
108 Ibid.
109 The Commission, Interim Report, above n 31, vol 1, 111 [5.103].
110 Ibid 112-3 [5.107].
111 Ibid 112 [5.105].
113 Ibid 14.
114 Commonwealth Treasury, the Review, Final Report, above n 1, 115.
115 Ibid 112 [5.106].
had made adequate inquiries as to the purpose of the loan, it would not have been extended. Low rejected this recommendation, appealing to the determination stage. During the interim period between the recommendation and the determination, Low accepted an offer to buy the family home. His intention was to use the proceeds to pay out the amounts owed under the valid loans and to pay the disputed loan off by instalments agreed upon when the disputed loan was originated. The house was sold for $815,000. However, Suncorp did not agree to this arrangement because the disputed loan would bear no interest. As such, this would effectively have amounted to an interest free loan to Mrs Low, spanning seventeen years. Consequently, Suncorp was of the view that the proceeds of the sale should be used first to pay out the disputed loan.

After the sale, Suncorp used the proceeds to pay out the undisputed loans. However, it would only agree to pay out the residual sum to Low’s mother if she agreed to pay the disputed loan within twelve months. FOS’s determination found that the disputed loan was made irresponsibly, and that Suncorp should not be permitted to charge interest on the loan. Importantly, FOS did not stipulate or require that the interest bearing loans be paid out before the disputed loan. The Commission was unclear as to why a borrower could be forced to pay profitable, interest bearing, and responsibly lent funds, in priority to irresponsible loans, which are non-interest bearing.

In cross-examination, Suncorp gave evidence as to their refusal to accept the Lows’ offer to pay out the irresponsibly extended loan, according to the original payment plan. The Commission was told that while the loan could be interest free for a reasonable period, after this period interest should again be charged. Suncorp believed that a FOS determination had the effect of bringing a loan contract to an end. What would then be left is a residual debt rather than a loan contract, and the continuation of interest-free lending would go against industry

116 Commonwealth, Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry, Interim Report (2018) vol 2, 298. Under FOS applicants may choose whether or not to accept the findings of a FOS determination. If the determination is accepted, the determination becomes binding on the applicant and the FSP see below n 171.

117 Ibid 300. Suncorp did not want the disputed loan to be paid off in accordance with the original installment plan, as it would effectively amount to a seventeen year interest free loan. It also believed that the FOS required loans subject to maladministration be given priority over those responsibly lent.

118 Ibid 302.

119 Ibid.

120 Transcript of Proceedings, Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry (Royal Commission, Commissioner Hayne, 28 May 2018), 2550. Mr Field gave evidence that where there are multiple loans and a lump sum payment is made, priority should be given to the interest bearing loans over the interest free loans, as they represent the greatest burden to the borrower.

121 Ibid 2551. While that is the position taken by FOS, they do not require responsible loans to be paid out first, as assumed by Suncorp. The ombudsman, Mr Field, agreed that this expectation should be made clearer in their guidance. The issue relates to the fact that by applying a lump sum payment to interest bearing funds the mortgagor does not get the benefit of applying the funds to the non-interest bearing (irresponsibly lent) funds first. This has the effect of accelerating the mortgagor’s loan repayments.

122 Ibid (25 May 2018) 2510.

123 Ibid 2511.
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The distinction between what was actually meant by ‘residual debt’ and ‘loan contract’ was unclear. During the cross examination by Ombudsman Field, FOS gave evidence that its determinations with respect to maladministration do not bring the loan to an end. It was made unequivocally clear that in no way had the Lows’ loan contract been made void ab initio. As such, FOS denied Suncorp’s assertion that there is an industry practice that treats such loans as void pursuant to a FOS determination.

Despite finding maladministration, and because FOS did not specify how the loan should be repaid, consumers were left with an inconclusive outcome, and this was a major concern when considering that most applicants to FOS have limited resources and access to representation. Consequently, and despite the favourable FOS determination, Mrs Low is now paying accelerated payments on a loan she should never have received.

This case illustrates that favourable FOS determinations do not necessarily translate into favourable outcomes. As special counsel assisting the Commission noted, if the benchmark for success under FOS was Mrs Low’s experience, then it was likely that others would be deterred from making a complaint.

Commissioner Hayne’s interim report also highlighted issues concerning FOS. One such issue identified as worthy of further inquiry: the hearings demonstrated that ‘customers who were wholly or partly successful in their claims nonetheless sometimes struggled to achieve what they believed to be a satisfactory outcome’. Whether the problems mentioned in the Review, concerning shortcomings of the old regime, were reasons for justifying these beliefs in unsatisfactory outcomes is still unknown. Hayne intended to explore further whether ‘those beliefs were unrealistic’ and why that may be the case.

Financial Illiteracy

The Review clearly identified jurisdictional hurdles and issues surrounding accessible consumer protection. Nevertheless, the general consensus amongst stakeholders was that the ombuds are

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124 Ibid 2511-2512. Special Counsel assisting the Commission put to Suncorp that such a practice does not accord with an applicant’s entitlements to continue under the loan contract that currently remains on foot. The FOS determination itself shows that the applicant remains liable for the debt and this suggests that the loan contract is still on foot.

125 The Commission, above n 116, Interim Report, vol 2, 303. Commissioner Hayne noted that the distinction between these terms comes from the notion that the loan contract is brought to an end by the FOS determination.

126 The Commission, Transcript of Proceedings (28 May 2018), above n 120, 2547.

127 Ibid 2543.

128 Ibid 2548. Ombudsmen Philip Field was unaware of any such industry practice.

129 Ibid 2548-9. FOS viewed its role as one that only established liability between the FSP and its customers. Therefore, the onus was on the customer to negotiate with their bank to determine how loans, the subject of a determination, should be paid.

130 The Commission, above n 31, Interim Report, vol 1, 304.

131 The Commission, Transcript of Proceedings (28 May 2018), above n 120, 2547. Mr Field did note that this is an unusual case, and is still unresolved, suggesting that Suncorp may yet be unable to accelerate Mrs Low’s repayments.


133 Ibid 335.
an effective medium for quick dispute resolution.\textsuperscript{134} However, financial illiteracy may also be a cause preventing consumers from using the ombuds’ services for dispute resolution.\textsuperscript{135} This despite Australia ranking ninth in the world for financial literacy.\textsuperscript{136} As such, the Review stressed the need for simplicity in the EDR framework.

\begin{center}
\textbf{ii. Accountability and Credibility}
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Little is known about what the decision-making procedures of FOS were, because the terms of reference gave no guidance as to this process.\textsuperscript{137} Given the lack of judicial oversight, and that the TOR did not require panel members to have objectivity,\textsuperscript{138} many concerns were raised as to the independence of FOS. While ASIC had oversight of FOS,\textsuperscript{139} FOS itself, as a public company limited by guarantee, was not covered by the \textit{Freedom of Information Act 1982} (Cth).\textsuperscript{140} As a result the secretive nature of FOS’s determination processes caused some to question the independence and integrity of the service.\textsuperscript{141}

\begin{center}
\textit{A. Goldie Marketing Pty Ltd v FOS}\textsuperscript{142}
\end{center}

Upon falling into default, the applicant made a complaint to FOS for negligent lending. A consultant, advocating on behalf of the applicant, was told by a senior FOS lawyer in a recorded phone call that the matter was ruled outside of their TOR.\textsuperscript{143} The advocate was told that, due to temporary staff shortages in banking advisors, the matter could not progress. This was the case even though, in the view of FOS, the matter had merit.\textsuperscript{144} The applicant began an action against FOS, submitting that a mere staff shortage is not a valid reason for a matter to be ruled outside the TOR.\textsuperscript{145} However, in file notes submitted to the court, FOS claimed there were myriad other reasons for the exclusion.\textsuperscript{146} These file notes did not correspond in any meaningful way to the conversations recorded by the advocate.

\begin{itemize}
\item \textsuperscript{135} Ibid.
\item \textsuperscript{137} Tim Griffiths and Jacqui Mitchell, ‘Financial Ombudsman Service: Dr Jekyll or Mr Hyde?’ (2012) 27 Australian Insurance Law Bulletin 130, 131.
\item \textsuperscript{138} Ibid.
\item \textsuperscript{139} Australian Securities and Investments Commission Regulatory Guide 139, Approval and oversight of external dispute resolution schemes (2013).
\item \textsuperscript{140} Commonwealth Treasury, the Review, Final Report, above n 1, 38.
\item \textsuperscript{142} [2015] VSC 292 (19 June 2015).
\item \textsuperscript{143} See \textit{The 7:30 Report} (Sharon O’Neill, Australian Broadcasting Corporation, 2016) 4:08.
\item \textsuperscript{144} Ibid 4:36. See the phone call between applicant’s advocate Bruce Chapman and Dr Justi Tonti-Filippini.
\item \textsuperscript{145} Goldie Marketing Pty Ltd v Financial Ombudsman Service [2015] VSC 292 (19 June 2015) [13].
\item \textsuperscript{146} Ibid [73]. FOS noted that the lending facilities in question were not retail consumer lending products, meaning that the applicant’s financial arrangements were much more complicated and time intensive. FOS also noted that
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FOS claimed that the file was not a verbatim record of the conversations, but a mixture of comment and observation. However, this did not explain why the evidence submitted to the Victorian Supreme Court suggested the content of conversations were different from what was actually said. The reasons given by FOS were accepted by the court, which found them to be convincing, rational, comprehensive and well-reasoned. However, no such list of reasons was supplied to the applicant.

Questions must be asked as to why a senior FOS figure, in a quasi-judicial role, constructed a file note so materially different from what was actually said? In the view of the applicant, insufficient resources to investigate a case was not an acceptable reason. This is especially so, given that FOS is an industry-funded scheme. However, once again, because FOS is not subject to the Freedom of Information Act 1982 (Cth), little could be done. As FOS failed to give a detailed account of what communication actually took place, its reputation and credibility was severely diminished.

iii. Enforceability

Over the past ten years, considerable detriment has been caused to consumers by the financial industry. According to the Review, approximately 80,000 consumers suffered losses totalling more than $5 billion, due to their interaction with FSPs. Under the previous EDR arrangements, FOS handled 83 per cent of financial disputes relating to financial and credit products and services. While the general framework of this regime was supposed to provide a ‘low cost, speedy and flexible access to redress’, the Review into EDR was borne out of the ‘alarming’ statistic that 18 per cent of FOS’s rulings against FSPs were unpaid by October 2016.

As of August 2018, $16,040,397.79 had not been returned to applicants who were successful before FOS. This figure is exclusive of any interest charges awarded to applicants on

the plaintiffs had representation, and had shown themselves to be litigious. As such, FOS used its discretion to exclude the matter, believing that the court was the appropriate place for a determination.

147 The 7:30 Report, above n 143, 5:38.
148 Ibid.
149 Goldie Marketing Pty Ltd v Financial Ombudsman Service [2015] VSC 292 (19 June 2015) [109]. While the reasons given were compelling, Cameron J notes that a staffing shortage would have been sufficient to place the matter outside the TOR.
150 The 7:30 Report, above n 143, 5:40.
152 Ibid 7:48. Senator Xenophon, as he then was, said that the discrepancy in the evidence went directly to the creditability of the FOS, and that unless it could formulate a thorough explanation as to why it exists, it could no longer be regarded as a credible body.
153 Commonwealth Treasury, the Review, Final Report, above n 1, 8.
154 Ibid 8.
155 Ibid.
the base amount under dispute.\textsuperscript{157} FOS may also have awarded compensation for direct financial loss or damage pursuant to its TOR. A significant amount of this compensation was unpaid as well.\textsuperscript{158} FOS could expel FSP members for non-payment, though exercise of this power, in practice, was rare.\textsuperscript{159}

\textbf{A. The FOS scheme had a contractual basis}

The legal basis upon which FOS adjudicated disputes was grounded in contract.\textsuperscript{160} A tripartite contract was formed between the consumer, the FSP and FOS.\textsuperscript{161} All FSPs were required to implement their own IDR processes and be a member of an EDR scheme.\textsuperscript{162} As such, FSP members became bound by the TOR.\textsuperscript{163} Therefore, under contract, the parties agreed that disputes would be determined under FOS’s TOR. The contractual nature of this EDR process posed considerable hurdles for judicial review.\textsuperscript{164}

Pursuant to the TOR, FOS resolved disputes in what it considered to be fair in all the circumstances.\textsuperscript{165} It did this having regard to legal principles,\textsuperscript{166} industry codes\textsuperscript{167} and good practice,\textsuperscript{168} as well as past FOS decisions.\textsuperscript{169} In the first instance, FOS would make a recommendation as to how the dispute should be settled. This may have been rejected by either the applicant or the FSP.\textsuperscript{170} If the recommendation was rejected, FOS would proceed to a determination. At that stage, the FSP had no right to accept or reject the determination such that,

\textsuperscript{158} Ibid; Financial Ombudsman Service, FOS Terms of Reference, Victoria 2015, cl 9.2.
\textsuperscript{159} Commonwealth Treasury, the Review, Final Report, above n 1, 59. FOS explained that the conservative use of this power was due to members who may have otherwise been expelled becoming insolvent or have had open disputes brought by their customers.
\textsuperscript{160} See Mickovski v Financial Ombudsman Service Ltd (2012) 36 VR 456, 467 [34]-[35]. The VSCA noted that the consideration that moved from the complainant was their submission to FOS’s processes, while the consideration that moved from the FSP and FOS was the promise to be bound by the FOS’s decision, and to arbitrate in accordance with the TOR, respectively.
\textsuperscript{161} Ibid.
\textsuperscript{162} Corporations Act 2001 (Cth) s 912A(1)(g)(i); (2)(c).
\textsuperscript{164} See, eg, Financial Ombudsman Service Ltd v Utopia Financial Services Pty Ltd [2016] WASC 55 (24 February 2016) [31]. Le Miere J commented that a FOS decision must not be so unreasonable that a rational person having regard to the TOR could not have arrived at the same or similar conclusion.
\textsuperscript{165} Financial Ombudsman Service, FOS Terms of Reference, Victoria, 2015, cl 8.2.
\textsuperscript{166} Ibid cl 8.2(a).
\textsuperscript{167} Ibid cl 8.2(b).
\textsuperscript{168} Ibid cl 8.2(c).
\textsuperscript{169} Ibid cl 8.2(d).
\textsuperscript{170} Ibid cl 8.5(b)-(c).
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if the applicant accepted it, it was binding.\textsuperscript{171} If the determination was rejected by the applicant, the matter may then have proceeded to court.

B. FOS v Utopia Financial Services\textsuperscript{172} (Utopia)

FOS was able to litigate to enforce its determinations by virtue of its contractual relationship with FSPs. In \textit{Utopia},\textsuperscript{173} the court made an order for specific performance in order to enforce its determination.\textsuperscript{174} This had the effect of requiring the FSP to comply with the TOR, thereby forcing compliance with the determination. However, constant referral to the courts for adjudication was an untenable proposition, as it is inefficient and negates the goal of an EDR process, as an alternative to costly court litigation.

It was argued in the Utopia case that specific performance should not be granted due to lack of mutuality in the obligations of both parties.\textsuperscript{175} However, it was FOS itself that was attempting to enforce the determination, not the applicants.

Utopia also sought to restrict specific performance on the grounds that FOS’s TOR provided an alternative means of enforcement, such as its ability to expel a member FSP. However, the court noted that this was not an adequate remedy, because it did not achieve any performance of Utopia’s obligations, or constitute an adequate alternative remedy.\textsuperscript{176} As such, this case illustrates that the courts may and do impose specific performance in relation to failures to implement FOS determinations.

C. Other enforcement measures

Outside of litigation, there was very little recourse to enforce FOS determinations.

a. Binding professional-indemnity-insurers to determinations

One possible solution may be to bind professional-indemnity-insurance policies held by FSPs to the determination itself. Professional indemnity insurance could act as a consumer protection device that can compensate consumers of FSPs. Professional indemnity ensures compensation for loss due to an act, error, or omission as a result of the services provided by an FSP. In Australia, most FSPs have professional indemnity insurance.\textsuperscript{177}

\begin{footnotes}
\item 171 Ibid cls 8.5, 8.7(b).
\item 172 [2016] WASC 55.
\item 173 See also Patersons Securities Ltd v Financial Ombudsman Service Ltd (2015) 108 ACSR 483.
\item 174 See generally FOS v Utopia Financial Services [2016] WASC 55 (24 February 2016).
\item 175 Ibid [56].
\item 176 Ibid [57]-[59]. This is because the expulsion of a member FSP is not an alternative common law or equitable remedy. As such, the appropriate order was to require Utopia to implement the FOS determination through specific performance.
\item 177 Australian Lawyers Alliance, Submission No 17 to Senate Standing Committees on Economics, Treasury Laws Amendment (Putting Consumers First – Establishment of the Australian Financial Complaints Authority) Bill 2017, 29 September 2017, 5.
\end{footnotes}
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The Australian Lawyers Alliance (ALA) made a submission regarding this measure to the Senate Standing Committee on Economics.\(^{178}\) In particular, ALA noted the considerable hurdles FOS has faced with non-compliance by FSPs with its determinations.\(^{179}\) ALA contended that the legislative amendments creating AFCA did not do enough to address this issue. As such, ALA believed that professional indemnity insurers of FSPs should be required to be members of AFCA.\(^{180}\) In addition, ALA submitted that AFCA should be empowered to join such insurers to a complaint, and bind them to the determination. While AFCA can join other parties to a superannuation complaint, the policy reasons for not extending this to non-superannuation complaints do not seem to have been well articulated. ALA suggested that such a simple measure would reduce the pressure placed on any compensation scheme of last resort.\(^{181}\)

Conversely, and while this would be a simple measure to implement, it may distort the function that professional indemnity insurance currently performs. According to the ASIC Regulatory Guides, the role of professional indemnity insurance is not to protect consumers directly. Such insurance is also not a guarantee that compensation will flow to consumers.\(^{182}\) Thus, the main role of professional indemnity insurance is to protect the insured against financial risks arising from poor quality service and other misconduct by FSPs.\(^{183}\)

What deserves to be adequately explored is whether binding professional-indemnity-insurers to determinations would lead to an increase in premiums, and whether those premium increases would ultimately act as a disincentive to poor conduct and consumer abuse?\(^{184}\)

b. Compensation Scheme of Last Resort (CSLR)

Under the Review’s Supplementary Final Report,\(^{185}\) a CSLR was found to be necessary. The Report noted that the scheme should be limited and carefully targeted. While the Panel was of the view that reforms need to be made to professional indemnity insurance, it stated that such reforms would not solve the problem of unpaid determinations.

The Review considered that any future CSLR should be the last resort, and should only be available after all other avenues for compensation have been exhausted.\(^{186}\) In particular, the Review noted that any such scheme should apply prospectively, meaning the scheme can only apply to future complaints.

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178 Ibid.
179 Ibid. ALA noted that, under FOS, between January 2010 and 2016, thirty-four FSPs were either unwilling or unable to comply with FOS determinations that were favourable to approximately 192 consumers. The real value of these determinations was estimated by FOS in January 2016 to be AUD$16,622,514.
180 Ibid 6.
181 Ibid.
185 Commonwealth Treasury, the Review, Supplementary Report, above n 49, 51.
186 Ibid 4.
be applied to determinations made after its establishment. While such a reform is a step in the right direction, it will do nothing to address FOS’ legacy of unpaid determinations. However, the Minister for Revenue and Financial Services said that consideration of any CSLR would be deferred until after the completion of the Commission.

D. Judicial review of FOS determinations

The prospects for judicial review of a FOS determination were bleak. An application for judicial review had to be based on a breach of contract by FOS. The court required that the plaintiff establish that the FOS determination was so unfair as to be a breach of the TOR. As a consequence, the court’s prime concerns related to the construction of the terms of the contract.

In Patersons Securities Ltd v FOS, the court stressed that issues regarding contract should not be confused with issues that are associated with an exercise of statutory power. As such, the court was limited in its capacity to intervene in decisions that were a result of private agreements. It could only intervene where the decision was made outside the TOR, where no natural justice was afforded, or where the decision is one that no reasonable person could have come to. A decision that is merely wrong is insufficient under this test. There were no successful judicial merits reviews of FOS determinations.

The lack of an effective judicial appeal mechanism represented another systemic failure within the FOS framework. Accordingly, as there was no effective appeal process past the determination stage, the only viable option was to litigate FOS determinations at considerable expense. Further, no new helpful precedents were established which could have assisted businesses and consumers to make sound commercial decisions.
V. INTERNATIONAL PERSPECTIVES

A comparison with a FOS operating in the United Kingdom (‘FOSUK’) sheds light on some of the issues with respect to enforceability. In the UK, the application for judicial review in the case of *R (on the application of Kelly) v Financial Ombudsman Service Ltd & Shawbrook Bank Ltd (Interested Party)* demonstrated the general inaccuracies of FOSUK to properly summarise complaints. This case concerned fraudulent conduct of a loan transfer without written evidence. The High Court quashed FOSUK’s decision, ruling against the applicant on the basis that it only responded to the ‘perceived complaint’, rather than the ‘actual complaint.’ It was found that FOSUK ‘was irrational’ and misunderstood the complaint altogether.

Similarly, FOSUK is guided by its own TOR, which is premised on the principle that the determination be ‘fair and reasonable in all the circumstances’. This was articulated in the case of *Aviva Life and Pensions (UK) Ltd v Financial Ombudsman Service* in the UK. The case elaborated on the scope of FOSUK’s mandate to make determinations that are ‘reasonable and fair’, by taking into account the relevant rules and regulations. Coupled with this, the case also made it incumbent on FOSUK to state, with detailed and adequate reasoning, why FOSUK deviated from certain UK laws, particularly where those laws conflicted with what FOSUK thought to be ‘fair and reasonable’. The *Aviva case* is not only demonstrative of the hurdles FOSUK has in satisfying ‘fair and reasonable’ in their determinations, but also, simultaneously, ensures FOSUK’s accountability in adjudicating upon the arguments of both parties.

The *Aviva case* is more reminiscent of the case of *R. (Heather Moor & Edgecomb Ltd) v Financial Ombudsman Service*, where it was held that an ombudsman’s opinion must be ‘fair and reasonable’. Should FOSUK make a perverse or irrational determination, as was the case in *Kelly v FOS*, then the case of *Heather Moor v FOS* makes clear that FOSUK’s determinations may be set aside on judicial review grounds.

FOSUK’s jurisdictional conflicts, arising from its TOR, and premised on achieving a ‘fair and reasonable’ outcome, have created a level of uncertainty in the financial dispute resolution framework in the UK. It has created further tension between the law and a ‘fair and reasonable’ approach to financial dispute resolution, while inviting scrutiny and warranted scepticism. This may, to some extent, undermine FOSUK’s authority and the enforceability of its determinations against parties, such as insurers and financial institutions.

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199 Ibid.
200 Ibid.
202 Ibid.
203 Ibid.
204 Ibid.
205 *R (Heather Moor & Edgecomb Ltd) v Financial Ombudsman Service* [2008] EWCA 642.
206 Ibid.
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In respect of costs, the Review refers to Brooker’s observation of FOSUK that ‘there is no evidence that the single statutory scheme model is actually inefficient’ and that the costs per case were quite favourable.208

While much discussion has been centred on the UK’s regulatory framework, Singapore also provides a centralized body for consumers to resolve their disputes with financial institutions, through Singapore’s Financial Industry Disputes Resolution Centre (Fidrec).209 Fidrec is governed by an independent Board of Directors, and its conduct is bound by its own TOR.210 The Monetary Authority of Singapore has created a structure, through which Fidrec is funded by the financial industry, as part of ‘the industry’s commitment to the general public to resolve disputes’.211 Singapore’s single EDR body takes a similar approach to defining ‘fairness’ as the UK’s FCA.212 However, it is difficult to objectively assess whether Fidrec does take a fair approach to its determinations, especially when it is funded by financial institutions who are often the defendants in financial dispute resolution cases,213 and because Fidrec requires plaintiffs to sign non-disclosure declarations relating to case proceedings or outcomes.214

Similarly, in the aftermath of the Global Financial Crisis of 2008-09, the Hong Kong Monetary Authority (HKMA) made a proposal for a centralised EDR scheme, administered by the Financial Dispute Resolution Centre (FDRC).215 Hong Kong’s EDR processes are not governed by a statutory scheme like Australia and the UK.216 The FDRC follows the same structure that guided the Hong Kong International Arbitration Centre, that is, a two-tiered process for resolving complaints – first mediation, then arbitration if mediation fails.217

Prior to 2011, Hong Kong lacked a centralised financial dispute resolution scheme comparatively akin to Australia’s previous arrangement. The turning point in Hong Kong’s regulatory architecture occurred in the aftermath of the Hong Kong ‘Minibonds Crisis’. In the


211 Ibid 10.


214 Ibid.


217 Ibid 502.
lead-up to the crisis, a bank employee of Dah Sing Bank forged a customer’s signature to purchase high-risk minibonds, issued by Lehman Brothers. Ordinary, it was the Consumer Council of Hong Kong that would have handled financial consumer complaints, but the HKMA sought to embolden this style of relief. Consequently, in 2008, the HKMA announced a two-step process of ‘mediation then arbitration’, to be administered by the Hong Kong International Arbitration Centre. At the time, the Securities and Futures Commission in HK provided a proposal to the Financial Secretary, advocating for a scheme that is ‘simple, consumer friendly’ and empowered to order compensation.220

Although the primary concern at the time in Hong Kong was centred on the foundational structure of their EDR regime, the HKMA sought to establish a more authoritative and enforceable scheme, governed by appropriate TOR. This led to the establishment of the FDRC and, ultimately, the construction of a centralised financial dispute resolution arrangement. Notwithstanding Hong Kong’s methodical approach to establishing the FDRC, the FDRC’s TOR resembles similar principles found in the UK and Singapore of facilitating a ‘fair and speedy resolution’, allowing parties a ‘reasonable opportunity’ to present their case, while acting ‘impartially’.221

In light of the problems embedded in a multiple dispute resolution scheme, the international financial regulatory landscape illustrates a meaningful shift towards a centralised EDR framework. While each EDR framework analysed above is centralised, the style of executing their functions differs according to their interpretation of a fair and reasonable approach to forming a determination. It does, however, provide an objective foundation to ruling on EDR matters, but it also presents an interesting inconsistency where each country tends to provide their own distinctive EDR framework based on past experience and historical mistakes. The establishment of AFCA firmly supports this point.

VI. THE NEW REGIME

i. The AFCA Model

The former EDR schemes in Australia are now incorporated into AFCA. AFCA is a not-for-profit company that commenced receiving disputes in November 2018.222 The establishment of AFCA has incurred establishment costs223 to the industry of some $48.5m to date.224

The existence of a single EDR body will simplify the process for consumers,225 while AFCA is endowed with a broader remit to review claims and disputes across the entire financial

219 Shahla F Ali and Antonio D Roza, Alternative Dispute Resolution Design in Financial Markets, above n 215, 495.
220 Ibid 498.
221 Financial Dispute Resolution Centre, Terms of Reference, Hong Kong 2018, cl 20.3.1.
225 Due to the extent of AFCA’s jurisdiction, consumers need only contact one body.
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sector.  

For members of the AFCA board, experience regarding consumer representation and experience in operating member businesses will be equally weighted.  

This is a solid accountability measure which is likely also to have a positive impact on consumers. More significantly, AFCA will be able to join FSPs, which will enable it to consider all the parties involved. This will make AFCA’s decisions fairer, more comprehensive, and will allow greater transparency in the apportionment of liability. Here, AFCA’s decision making will be guided, in part, by the corporate regulator, ASIC, which will provide independent oversight of AFCA, and in part because AFCA will also be subject to review by an independent assessor.  

AFCA retains FOS’s objective of achieving ‘fairness in all circumstances’. AFCA will make use of an expert panel for complex disputes, or where a dispute may result in a decision which may set an industry standard. Combining EDR schemes will invariably result in economies of scale. This in turn will likely lead to a greater level of efficiency, which will generate positive spill-over effects for consumers and FSPs.

A. Comparison with the UK

Australia’s AFCA is authorised and empowered by the Treasury Laws Amendment (Putting Consumers First—Establishment of the Australian Financial Complaints Authority) Act 2018 (Cth) (‘the AFCA Act’). FOSUK is given statutory powers under the Financial Services and Markets Act 2000. In particular, FOSUK is guided by the principle of a ‘fair and reasonable’ outcome in their determinations in s 228(2) of the Act. AFCA has not faced judicial review similar to that of FOSUK, due to its recent establishment. Nonetheless, the statutory powers embedded in the UK’s Financial Service and Markets Act lends considerable flexibility to FOSUK to form a view that is ‘fair and reasonable’. As mentioned previously, AFCA has also retained this principle from FOS in Australia, to ensure flexibility in making determinations.

226 While AFCA essentially assumed the same jurisdiction of other previous EDR bodies, its creation does show a commitment to provide a better EDR model. See Commonwealth, Parliamentary Debates, Senate, 14 September 2017, 7318 (Senator James McGrath).
227 Treasury Laws Amendment (Putting Consumers First—Establishment of the Australian Financial Complaints Authority) Act 2018 (Cth) s 1051(3)(d).
228 Australia Financial Complaints Authority, Scheme Rules, above n 29, ss A.6.1, A.6.2. While FOS could join parties under its TOR, no provisions existed for complaints which involved other schemes. That represented a challenge for consumers.
229 Ibid A.2.1(d); Commonwealth Treasury, the Review, Final Report, above n 1, 126. The Review favours this test as it is consistent with a high degree of flexibility, allowing AFCA to choose an appropriate approach for each matter.
231 See generally Massimiliano Celli, ‘Determinants of Economies of Scale in Large Businesses – A Survey on EU listed Firms’, (2013) 3 American Journal of Industrial and Business Management 255. Microeconomic analysis suggests that due to AFCA’s wide jurisdiction, the cost per dispute should decrease with its increased scale.
232 Benjamin Shaw, Australian Financial Complaints Authority, above n 195, 90. The streamlining of the process will mean that FSPs will deal with less EDR bodies, which will favour increased efficiency.
233 Treasury Laws Amendment (Putting Consumers First—Establishment of the Australian Financial Complaints Authority) Act 2018 (Cth).
235 Ibid s 228(2).
236 Ibid.
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AFCA also operates in accordance with its ‘Rules’, which form a contract with financial firms and complainants, and provides an overview of how AFCA considers complaints.\textsuperscript{237}

B. Compensation Caps

As discussed below, the Ramsay Review made an important recommendation for this new body to lift the monetary limit from $500,000 to $1m, and the compensation cap from $300,000 to $500,000.\textsuperscript{238} While these recommendations have been implemented with the establishment of AFCA, it is at this stage difficult to evaluate the effectiveness of the Review’s recommendations.

In forming a broader perspective on Australia’s current scheme, Australia has a much higher monetary limit than comparative nations, such as New Zealand (NZ$200,000), the UK (AUD$240,000), Singapore (AUD$94,000) or Canada (AUD$355,000).\textsuperscript{239} The general trend of increasing monetary limits to make EDR a more accessible avenue has been closely followed by Singapore’s Fidrec.\textsuperscript{240} In December 2016 Fidrec decided to increase the monetary limit for financial dispute claims from SGD$50,000 to SGD$100,000 (USD$36,710 to USD$73,420) for non-insurance claims. This decision is in line with current insurance related claim limits of SGD$100,000 (USD$73,420).\textsuperscript{241}

Similar to other jurisdictions surveyed, Hong Kong’s FDRC falls below Australia’s new monetary limit, with a claimable amount of up to HKD$1,000,000 (USD$127,685).\textsuperscript{242} However, like Australia and Singapore, Hong Kong followed the general trend of doubling the maximum claimable amount from HKD$500,000 to HKD$1,000,000 (USD$63,842 to USD$127,685), effective 1 January 2018.\textsuperscript{243}

An international comparison of compensation caps makes it clear that Australia is ahead of other comparative jurisdictions. The new framework ensures consumers find EDR accessible, while reducing the need for consumers to pursue litigation.

ii. Efficacy

Consolidation of the multiple EDR bodies into AFCA will help address issues surrounding undue complexity and fragmentation of disputes surrounding jurisdictional issues. This in turn will reduce unnecessary customer confusion. It will further mitigate delays by allowing the allocation of greater staff numbers to congested work queues, while removing duplicate costs for both firms and the scheme, as concluded by the Review panel.\textsuperscript{244}

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\textsuperscript{237}Australia Financial Complaints Authority, Scheme Rules, above n 29. \\
\textsuperscript{238}Commonwealth Treasury, the Review, Final Report, above n 1, 12. \\
\textsuperscript{239}Commonwealth Treasury, the Review, Final Report, above n 1, 154. \\
\textsuperscript{240}Lorna Tan, ‘Fidrec raises limit for non-insurance claims’, The Straits Times (online), 23 December 2016 <https://www.straitstimes.com/business/fidrec-raises-limit-for-non-insurance-claims>. \\
\textsuperscript{241}Ibid. \\
\textsuperscript{244}Commonwealth Treasury, the Review, Final Report, above n 1, 111.
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A. Compensation caps

With respect to monetary limits and compensation caps under the old regime, the Review highlighted that the $500,000 cap was outdated, because it did not reflect the ‘general economic indicators and the current values of financial products held by consumers’.[245] What was intended here by Ramsay, was to provide a compensation scheme that would be broad enough for consumers to access, while also adjusting the monetary limit for growth in average wages.[246]

Ramsay’s approach to the former EDR framework is summarised in his ‘principles’ on compensation caps, which were aimed to ensure the framework is ‘easy to understand for consumers’ and ‘easy to apply’ by EDR entities.[247] Ramsay’s principled-based approach also included the aim that the ‘substantial majority’ of consumer disputes be resolved by the EDR body, and that monetary limits and compensation caps reflect ‘general economic indicators’ and the ‘current value’ of financial products held by consumers.[248]

These limits are also subject to continuous review and indexation by an independent assessor.[249] Meanwhile, there are no caps for superannuation complaints or compensation.[250] Ramsay also recommended an independent review of AFCA eighteen months into its operation. The aim of the independent review will be to determine the impact of the new compensation caps on consumer outcomes, and competition. This approach mirrors the pillars of accountability and enforceability, mentioned above.[251]

As of February 2019, AFCA welcomed the Australian Government’s announcement to extend AFCA’s remit to review eligible financial complaints from 1 January 2008.[252] This remit is expanded for a period of 12 months and re-enforces accountability measures, by allowing more people access to justice.[253] Ordinarily, AFCA would only consider matters that have occurred in the past six years (reduced to two years if the complaint has been through a firm’s IDR process).[254] In other words, legacy issues relating to unpaid determinations under the old regime will see the new compensation caps backdated to periods prior to the establishment of AFCA.

In the midst of Commissioner Hayne’s release of the Commission’s final report, Australian political parties provided bipartisan support for the establishment of a compensation scheme of last resort.[255] Commissioner Hayne endorsed the Ramsay Review’s recommendation

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245 Ibid 149.
246 Ibid 151 [8.4].
247 Ibid 155 [8.19].
248 Ibid.
249 Ibid.
250 Ibid.
251 Ibid. Adele Ferguson, Bank compensation schemes need scrutiny too, above n 41.
252 Commonwealth Treasury, the Review, Final Report, above n 1, 12.
254 Ibid
255 Ibid
to establish such a scheme, in which AFCA will be responsible for administering the scheme’s $30 million fund, from 1 July 2019.256

Furthermore, because AFCA will be able to hear disputes of a higher value, more consumers and small businesses will be able to access EDR, and avail themselves of fair compensation, if they have wrongfully suffered a loss.257 Consistent with increases in claim thresholds, the robustness of the decision-making process will also be enhanced. AFCA must adopt a consistent approach to making decisions,258 demonstrate the principle of comparability of outcomes,259 publish its decisions,260 and take into account previous decisions.261 As such, an appropriate attempt is made to move away from the seemingly ad hoc FOS approach to decision making. It is hoped that determinations by AFCA will not be inconclusive as to their execution, as was the case with the previous EDR regime.262

### B. IDR

When hearing disputes of a higher value, and in consideration of the problems associated with IDR processes under the old regime as discussed above, the Review recommended that complaints received by AFCA should be referred back to the firm for IDR.263 Once referred back to the firm, the complaint will be subject to tracking and monitoring by AFCA, providing necessary additional support for vulnerable consumers. This approach also provides an opportunity for systemic and cultural issues within firms to be identified and ultimately resolved, in turn contributing to a culture of continual improvement.

In order for IDR processes to be sufficiently fortified against the evasive tactics deployed by some firms, ASIC should publish the details of non-compliance, and identify the firms responsible. This view was endorsed by the Joint Consumer Group, who appropriately suggested that such a method would promote a culture of compliance and continuous improvement.264 ASIC should not be imbued with discretion to determine whether or not to identify firms,265 as failing to do so allows firms to avoid a direct impact upon their reputation for continued failings; the power to do so makes ASIC vulnerable to capture. Such an outcome would detract from the efficiency of any culture of compliance.

The AFCA Complaint Resolution Scheme Rules specifically make provision for addressing systemic issues in IDR processes (Rule A.17). The Rules allow for investigation, monitoring, and reporting of identified systemic issues to the relevant authorities.266 In response,

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258 Australia Financial Complaints Authority, Scheme Rules, above n 29, s A.2.1(d).
259 Ibid.
260 Ibid s A.2.1(d). A guiding principle is one of transparency whilst providing appropriate discretion.
261 Ibid s A.14.2. Like FOS, AFCA should have regard to legal principles, industry codes and good industry practice.
262 In the case of Suncorp and Rien Low, discussed above.
263 Commonwealth Treasury, the Review, Final Report, above n 1, 192 [10.29].
264 Ibid p 188 [10.15].
265 Ibid p 189; citing ANZ, submission to the EDR Review Interim Report, page 5; Joint Consumer Group, submission to the EDR Review Interim Report, 35.
266 Australia Financial Complaints Authority, Scheme Rules, above n 29, A.17.3-5.
the submissions of ANZ, Westpac and the Banking Association created a false dichotomy: they implied an inverse relationship between levels of prudential regulation and levels of consumer protection. They suggested any increased emphasis on one, necessarily diminished the other. Both ANZ and Westpac took specific issue with Rule A.17, suggesting that the current regulatory framework allows for greater balance between prudential considerations and consumer protection. The position of the banks in relation to A.17 is that AFCA’s approach is too narrow, in that it is too far weighted towards consumer protection, and fails to leave sufficient scope for adequate prudential regulation.

Given that the typical complainant is unrepresented, Rule A.17 is an important step towards addressing the inherent inequality in the bargaining position of FSPs and their customers to negotiate desirable outcomes. It incentivises FSPs to implement robust IDR processes that achieve efficacious outcomes in the first instance, and ensures accountability to their customers.

It also seems that firms are concerned that the new regime may force them to bear the consequences of misconduct, evident from submissions of the Banking Association, that allowing AFCA and regulators to address systemic issues may result in ‘duplication or inconsistency.’

There is an historical tendency for firms to expect minimal consequences for failure to comply with proper IDR processes. This tendency has cultivated an attitude of nonchalance with respect to instituting and adhering to their own IDR frameworks. Rule A.17 imbues AFCA with more pervasive powers to investigate potential systemic issues. Further, it grants AFCA powers to monitor a matter until an outcome acceptable to AFCA is reached, as opposed to an outcome acceptable to the firm.

Under Rule A.9, firms are required to provide all relevant information relating to a dispute, unless it does not or no longer exists, or cannot reasonably be obtained. One submissions suggested that the final incarnation of this rule would represent a compromise following submissions on the draft rules by various associations, suggesting that firms should be compelled to procure the documents whether they are in possession or in control of the documents or not. Further submissions suggested that documents containing confidential information should not be withheld if it is possible to redact the confidential content. The final drafting of the rule contains the proviso that the firm provide a statutory declaration as to why

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268 Ibid.

269 Commonwealth Treasury, the Review, Final Report, above n 1, 49 [4.13], which states that in 2015-2016, 94% of all disputes lodged with FOS were by individuals, of which 81% were unrepresented.


271 Australia Financial Complaints Authority, Scheme Rules, above n 29, A.17.

272 Ibid.


274 Australia Financial Complaints Authority, Scheme Rules, above n 29, A.9.1.


276 Ibid.
the documents cannot be provided. However, the effectiveness of this safeguard, in practice, remains to be seen.

Another potential area for concern, is the exemption of complaints relating to a practice or policy that does not involve an allegation of maladministration or inappropriate application of the practice or policy.277 Rule C.2.2(c) fetters AFCA’s ability to adjudicate on complaints arising directly from the IDR process itself.278 Therefore, AFCA has no power to assess the integrity of any IDR policy or procedure, provided that procedure was correctly administered.

In an interview conducted by the lead author with CEO of AFCA David Locke279, some promising insight was provided regarding the operation of AFCA since commencement. At the time of writing, AFCA had received approximately 23,000 disputes, 48 per cent of which had been settled within the four months of AFCA’s operation. Fifteen per cent of unresolved disputes had been referred to adjudicators. Ninety-one point two per cent of members of AFCA had generated no disputes, with 8.8% of members responsible for all disputes. It remains to be seen whether the industry funding model discussed immediately below will serve to ameliorate the trend of a majority of disputes being generated by a minority of FSPs.

C. Competition

The consolidation of the multiple EDR bodies into AFCA mitigates a number of concerns associated with competition, discussed above. Membership of AFCA is mandated for all firms by statute. Compulsory membership removes the ability of firms to exploit the opportunity to join the EDR body they favour most. Despite being framed as a criticism by the MFAA and the CIO, preventing firms from leaving a scheme, where they are of the view that they have been subjected to ‘high charges and poor service’,280 is a positive shift for consumers.281

The AFCA funding model fact sheet also addresses concerns of rising costs as a result of a single-entity scheme. The AFCA funding model explicitly states that the user charge will promote and reward high rates of resolution at the IDR stage,282 and reward firms who ‘reduce the need for their customers to use AFCA’.283 This concept manifests in a user charge that will only be applied for members with more than 1 complaint in a 12 month period. The user charge will be determined by reference to the volume and complexity of complaints closed over that period.284

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277  Australia Financial Complaints Authority, Scheme Rules, above n 29, C.2.2.
278  Ibid.
279  Interview conducted with David Locke, CEO, AFCA, 28 February 2019, at AFCA Offices, Level 10, 66 Goulburn Street, Sydney.
280  Mortgage and Finance Association of Australia, Media Release, above n 69; Commonwealth Treasury, the Review, Final Report, above n 1, 114 [5.111]
281  The shift to a single EDR body will increase consistency in processes and outcomes, make it easier to pursue disputes involving multiple financial firms, and decrease customer confusion. The fact that the single EDR body will be subject to stronger oversight will also lead to pressure on the body to improve its effectiveness over time. Commonwealth Treasury, the Review, Final Report, above n 1, 119-20.
283  Ibid.
284  Ibid.
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The MFAA made the argument that large financial firms stand to benefit under the centralised scheme, at the expense of smaller firms.283 Our research indicates that this is incorrect in respect of AFCA, by virtue of the scaled membership fee outlined in the fact sheet. Appropriately, complaints fees are based on the stage of the process at which the complaint is resolved, and the complexity of complaints extending beyond the initial investigation phase.285 Although historically industry funding may have had the potential to affect the independence of EDR bodies, mandatory membership and the fee scheme mitigates such potential.

The cost mechanisms in place under AFCA incentivises firms to resolve disputes at the initial stages. The mandatory membership requirements of a single scheme alleviates any independence issues, by removing the opportunity for firms to seek alternate EDR bodies with lower fees. The new scheme also allows reduction of fees only in correlation with a reduction in lengthy dispute resolution procedures, representing a significant positive change for consumers.

iii. Enforceability

A. Prospects for Judicial Review under AFCA

Outcomes from AFCA are excluded from judicial review.287 As such, litigation risk for AFCA determinations will be as problematic as those under FOS. Experience has shown that ombudsmen are not infallible, and it is peculiar that judicial oversight of AFCA determinations is denied. Though a favourable finding is unlikely,288 (in other words, the Court’s reticence to declare that FOS exercised a public function), the outcome will turn on whether AFCA is exercising a public function.

If the approach taken is that AFCA is exercising hybrid powers as those described in R v Takeovers Panel Ex parte Datalin Plc289 (Datalin), then a finding of a public function may be feasible and justify judicial review on this basis. In Datalin, the Panel on Takeovers and Mergers (‘the Panel’) was an unincorporated association. It had no statutory basis, nor did it exercise statutory, prerogative or common law powers.290 The Panel was not in a contractual arrangement with anyone that it regulated.

The primary role of the Panel was to oversee the City Code on Takeovers and Mergers. This created a code of conduct that had to be observed in the takeovers of listed public

285 Mortgage and Finance Association of Australia, Media Release, above n 69.
286 Ibid.
287 Administrative Decisions (Judicial Review) Act 1977 (Cth) sch 1 s 3. Appeal rights have been retained for superannuation complaints on questions of law: Treasury Laws Amendment (Putting Consumers First – Establishment of the Australian Financial Complaints Authority) Act 2018 (Cth) s 1054C.
288 FOS was found not to be exercising a public function: see Mickovski v Financial Ombudsman Service Ltd (2012) 36 VR 456.
289 [1987] 1 All. ER 564.
290 Ibid 564.
companies. The Panel itself had no power to actually enforce the code. However, much like AFCA, it could determine whether a breach existed. A finding that there was a breach of the code could result in statutory sanctions, such as the exclusion or the suspension of a company listed on the exchange.

In determining whether the Panel was subject to judicial review, the court was of the view that the source of power was not the sole test. In this respect, Lloyd LJ stated that while the source of power will usually be decisive, this is an issue of degree. At one extreme, where the source of the power is pursuant to some legislative instrument, it is clear that the body is subject to judicial review. At the other end of the scale, if the source of the power is contractual, then the body is not subject to judicial review. Between both of these extremes there is an area where it is prudent not only to look at the source of the power, but also the nature of that power.

Despite the fact that the Panel was an unincorporated association deriving power through contract, the court found that it was exercising a public function. A number of decisions of the Panel suggested that it was, in effect, exercising public power. Of particular interest to the court was that the Panel was integral to the government’s regulation of financial markets. The nature of the decisions made by the panel were such that they affected a large number of people, most of whom had not consented to the exercise of its power. As such, the court found that the Panel performed a fundamental role in a system that had a public law character. Moreover, the court noted that if its decisions were ignored, public law sanctions would be imposed, and so in this way the Panel was performing a public law function.

Given the outcome in Datafin, there is now scope, at least in the UK, for non-government entities to be made subject to judicial review. The concept of Hybrid powers contemplated by this case were further articulated by Rose LJ:

A body whose birth and constitution owed nothing to any exercise of governmental power may be subject to judicial review if it had been woven into the fabric of public regulation or into a system of government control or was integrated into a system of statutory regulation or was a surrogate organ of government or but for its existence a government body would assume control.

However, in Australia this line of cases has gained little traction. Given the loose foothold of this jurisprudence, it is improbable that AFCA will fall under the auspices of the Datafin principle. The main hurdle for parties approaching AFCA, and who then want to avail

292 Ibid 564.
293 Ibid.
294 Ibid 583.
295 Ibid.
296 Ibid 571.
297 Ibid 579.
298 Ibid.
300 Agricultural Societies Council of New South Wales v Christie [2016] NSWCA 331 (23 May 2016) [89] (Leeming J). This is a controversial area of the law and is by no means settled, as the status of Datafin is uncertain.
301 While some courts have signalled approval of Datafin, the principle has only been successfully applied once: see Typing Centre of New South Wales v Toose (1994) NSWSC (15 December 1988).
themselves of review, will be to establish that, by making its determinations binding on FSPs, AFCA is exercising a public function. As noted above, the courts have clearly indicated that FOS, in making its determinations, was not exercising a public function. In Mickovski v FOS & Anor, the court stated:

_The public interest in the existence of a dispute resolution mechanism to resolve private disputes, however desirable from the point of view of public policy, does not in my view constitute a public function or element which of its nature is sufficient to invoke the principle in Datafin. The public interest evident in the regulatory framework is that there should be a mechanism for private dispute resolution but I do not think it can be said that FOS is exercising a public duty or public element when its jurisdiction is consensually invoked by the parties to a complaint. Mr Mickovski was under no obligation to make use of FOS and the terms of reference makes clear that complainants are not bound by decisions of FOS._

While it is arguable whether FOS’s jurisdiction is consensually invoked, given how the case law has developed, it is unlikely that it will be said that AFCA is exercising a public function. As such, it is likely that the limited rights of judicial review under FOS will continue to be a feature of AFCA.

**B. Targeted Reviews under AFCA**

While acknowledging the role of independent reviews, in regard to public accountability and the promotion of a culture of improvement, the Review points to deficiencies in the current system. These include ASIC’s lack of power to require ‘targeted’ reviews of particular problems, and the lack of obligations for schemes to publish responses to recommendations, report on the implementation of such recommendations, or on follow-up action following a review. In response, the report recommends the EDR body be ‘subject to more frequent, periodic independent reviews, and provide detailed responses in relation to recommendations of independent reviews.’

Significantly, the recommendation to establish an independent assessor to monitor and review complaints handling will likely facilitate and strengthen the use of better procedures, and the delivery of satisfactory outcomes for consumers.

The above recommendations for independent reviews were made prior to the inception of AFCA. As discussed in Part 4 of this paper, AFCA is subject to reviews of this nature. The recommendations made by the Review were agreed on in principle by FOS, who confirmed the

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304 Ibid [22].
305 FSPs must be a member of AFCA by law: Corporations Act 2001 (Cth) s 912A(2)(c).
306 For superannuation complaints, rights of review exist for questions of law: Treasury Laws Amendment (Putting Consumers First – Establishment of the Australian Financial Complaints Authority) Act 2018 (Cth) s 1054C(1).
307 Commonwealth Treasury, the Review, Final Report, above n 1, 176 [9.10].
308 Ibid 176 [9.13].
309 Ibid [9.14].
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need for detailed responses to recommendations of independent reviews, updates on implementation of recommendations, and detailed explanations when recommendations were not accepted. This position was qualified by the suggestion that if more frequent reviews were required, the EDR must have flexibility to undertake targeted reviews, rather than a comprehensive review each time. This is reasonable when considering the costs and time involved in such reviews. However, it remains to be seen whether this would present a potential detriment in terms of then extending the time in which other potential problems could be identified and addressed.

C. ASIC Review

Like FOS, AFCA is required to report instances of non-compliance to ASIC. In 2014, FOS stated that they were in active discussions with ASIC about how best to approach this issue. However, four years on, unpaid determinations are still of concern. AFCA does have additional statutory powers, which increase its ability not to be ignored by FSPs. However, these only relate to superannuation complaints. The Panel recommended an increase to ASIC’s powers, by allowing ASIC to intervene when AFCA does not comply with legislative and regulatory requirements – used as a last resort following consultations with AFCA. While the Head of the Consumer Action Law Centre, Gerard Brody, stated that AFCA will be able to ‘engage in a process of continual improvement’ due to regular independent reviews, ASIC’s inability to sufficiently execute their mandate may, however, cause some to lack confidence in ASIC’s ability to enforce principles of independence, efficiency, and fairness against AFCA.

310 Ibid 179 [9.26].
311 Ibid [9.27].
312 Ibid.
315 Commonwealth Treasury, the Review, Final Report, above n 1, 93. As noted above, there is considerable traction behind the implementation of a CSLR. As of October 2018, AFCA, in response to the Commission’s Interim Report, acknowledged the need for the establishment of a CSLR. In its view, an EDR mechanism on its own is not satisfactory for a consumer or small business where there has been a determination in its favour, and the FSP does not comply. Australian Financial Complaints Authority, AFCA Response to Royal Commission’s Interim Report (26 October 2018) 9.
316 Treasury Laws Amendment (Putting Consumers First – Establishment of the Australian Financial Complaints Authority) Act 2017 (Cth) ss 1054A, 1054B. These offences relate to requests by AFCA for information, and the ability to coerce attendance during a conciliation process. These are strict liability offenses.
318 Adele Ferguson, Bank compensation schemes need scrutiny too, above n 41.
The Commission identified key issues relating to the conduct of financial firms. Issues identified include the culture and corporate governance framework, the capability and effectiveness of financial regulators, and conflicts of interest, particularly with respect to remuneration. It was clear that ‘risk to reputation was ignored’ by financial institutions, and that ASIC had done little to prevent prohibited conduct by financial firms. While ASIC’s conduct and its ability to fulfil its functions was a significant source of issues that came before the Commission, it also raised doubts as to ASIC’s ability to review AFCA in accordance with their mandate. For example, ASIC has demonstrated a willingness in the past to countenance illegal and unethical behaviour by, for example, negotiating with banks in respect of enforcement outcomes.

ASIC’s inability to enforce the law is concerning. It was noted that civil proceedings are ‘seldom’ brought. ASIC’s regulatory tools, such as enforcement, engagement, surveillance, and education were not sufficiently used, despite the fact that 70 per cent of ASIC’s regulatory resources were deployed for surveillance and enforcement. Evidently, ASIC’s response to misconduct to date appears to be woefully inadequate. The Hayne Royal Commission interim report emphasised the importance that existing laws ‘be obeyed’, and not simply dismissed as ‘just a breach of those laws’, as ASIC’s responses suggest.

In essence, ASIC demonstrably contributed to a culture of regulatory failings. ASIC seemed to have been more concerned with ‘negotiation’ and ‘accommodation’, as well as securing acquiescence from banks ‘later than the law required’. The Commission showed that public denunciation of unlawful conduct played ‘no part in ASIC’s current enforcement approach’ - a position with which ASIC’s Senior Executive Leader, Financial Advisers, Louise Anne Macaulay - agreed. Unless ASIC demonstrates an improvement in its efficacy, ASIC oversight of AFCA will not serve as it is intended: a last line of defence.

iv. Accountability and Credibility

A. Independent Reviews

Despite the lack of judicial oversight, and as noted above, AFCA will be subject to regular independent reviews. This feature accords with the calls for greater accountability measures by

320 Ibid 267.
321 Ibid 269.
322 Ibid 271.
323 Ibid.
324 Ibid.
325 Ibid 278.
326 Ibid 280.
327 Ibid 285.
328 Ibid 289.
329 Treasury Laws Amendment (Putting Consumers First - Establishment of the Australian Financial Complaints Authority) Act 2018 (Cth) ss 1051(3), (3)(a).
the Ramsay Review. The independent assessor’s review, the TOR of which will be determined by the board, will consider complaints regarding standards of service. Such reviews, conducted appropriately, will produce greater levels of efficacy over time. As discussed above, membership of the board will require an equal representation of professional experience in operating member businesses, and representing consumers. This is a solid accountability measure. AFCA must comply with the assessor’s demands. Its findings will be submitted to the Chief Ombudsman who can then accept or reject them. If this feature is effective it will provide a valuable incentive to AFCA to maintain high serviceability standards.

B. Freedom of Information

AFCA will not be subject to the Freedom of Information Act 1982 (Cth), due to its status as a public company. This is concerning, given that the efficacy of the independent assessor and new board representation measures remain to be seen.

VII. CONCLUSION

Australia is undergoing major changes to its current financial system. These changes are due, in part, to the Banking Royal Commission and the Ramsay Review. However, it is evident that the trend from a multiple EDR scheme to a single EDR scheme is not limited to Australia. This change is also being undertaken internationally in key countries, as discussed above.

While AFCA has yet to be holistically evaluated in relation to its efficacy and accountability in resolving financial disputes, the Australian financial system will continue to face significant challenges. As noted by the Commission, the enforcement of laws against FSPs continues to be of vital importance. It may be that ASIC will need to be further empowered to enforce such laws, and to appropriately execute its functions in reviewing AFCA’s performance.

Crucially, as highlighted by the Commission, regulatory action requires more than simply vesting the regulator with power to enforce the law. Effective regulatory action also requires the regulator to be imbued with a culture of enforcement. ASICs propensity to cultivate a culture of insufficient regulatory scrutiny, and the consequences of such an approach, have now been brought to the forefront by the Commission. Only time will tell whether the regulators are able or willing to effect the necessary cultural changes required to operate efficiently in their role.

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330 Commonwealth Treasury, the Review, Final Report, above n 1, 177.
331 Treasury Laws Amendment (Putting Consumers First – Establishment of the Australian Financial Complaints Authority) Act 2018 (Cth) ss 1051(2)(c), 1052C(1). ASIC can direct AFCA to ensure compliance with the independent assessor scheme.
332 Australian Financial Complaints Authority Ltd, Independent Assessor Terms of Reference Victoria, 2018, cl 1.
333 Ibid cl 1.
334 Treasury Laws Amendment (Putting Consumers First – Establishment of the Australian Financial Complaints Authority) Act 2018 (Cth) s 1051(3)s 1051(3)(d).
335 Australian Financial Complaints Authority Ltd, Independent Assessor Terms of Reference, above n 332, cl 14. The independent assessor may ask for any additional information from AFCA, and AFCA must comply with such requests.
336 Ibid cl 17-8. Where the chief ombudsman rejects an outcome, the matter may be referred to the chair of the board, or the board may make the final decision.
337 Freedom of Information Act 1982 (Cth) s 3.
AFCA: Enhancing Australia’s Twin Peaks

Positive steps have been made in the Australian financial system, which has begun the process of financial reform with the establishment of AFCA. As to the future of the regulatory landscape of the Australian financial sector, and the full measures recommended to be implemented for consumer protection, Australia awaits the responses to the recommendations made within Commission’s Final Report, and the manner in which those recommendations slated for adoption will be implemented. In addition, Australia awaits further information on AFCA’s performance, once it has been in operation for a sufficient length of time, to provide a more comprehensive assessment of its efficacy.