In Defence of Consumer Law: The Resolution of Consumer Disputes

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Abstract

Consumer law sometimes struggles for respect or even recognition. This paper argues that consumer law is a relatively autonomous sub-discipline within the larger body of contract law. It best uses broad substantive standards inter-related with procedural norms and institutions rather than the more prescriptive and precise rules of contract which courts apply on a society-wide basis. The development of industry-based consumer dispute resolution schemes is used to illustrate this view. The paper argues for the preservation of the accountable autonomy of such schemes by protecting them from judicial review for mere error of law thus maintaining their focus on the resolution of consumer disputes.

We are honoured to have been asked to contribute an essay to this volume dedicated to the memory of David Harland. David will be sorely missed, not only by those who knew him as a good and loyal friend, but also by those interested in and writing about consumer law. He was a scholar who understood the importance of asking fundamental questions, and of revisiting them from time to time. This paper attempts to do just that, but in a far inferior manner to that which David himself would have achieved. Consumer law is still regarded in some circles as a subject looking for the privilege of independent existence, let alone respectability. Further, the introduction of large numbers of industry-based dispute resolution schemes designed specifically for 'consumers' is viewed by many as substantiating the case that consumer law really doesn't exist as a serious subject, or at most is a Cinderella subject not justifying a place in the mainstream of law. We wish to suggest that consumer law can rightly be thought of as having its own independent existence and rationale, and that the development of industry-based consumer dispute resolution schemes is actually right at the centre of a correct appreciation of consumer law and its proper dimensions.

What are 'consumer disputes', and what exactly needs to be achieved in order to ensure their 'resolution'? What are the best processes to ensure such resolution? These fundamental questions are not adequately addressed in the growing number of legislative, judicial and regulatory responses to demands for consumer protection. In this essay, we first identify what we understand by the term 'consumer dispute'. We then develop an argument that consumer law, whereby

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consumer disputes are resolved, is a discreet component of the legal system. In large measure this is because the successful resolution of consumer disputes presents the need for a particular kind of approach in terms of decision making. We outline four processes or techniques used potentially to confront and resolve consumer disputes. We show they all have their problems. We therefore focus on a more recent response, the development of industry-based consumer dispute resolution schemes, which in our view demonstrates a more sophisticated understanding of consumer disputes and the parameters of their successful resolution. They also help us to confront and deal coherently with the problem of the relationship between the rule of law and the just resolution of consumer disputes. The effective resolution of consumer disputes requires a more nuanced outlook than is available through the four traditional dispute resolution methods outlined, and that outlook is central to the structure and operation of the industry-based consumer dispute resolution schemes analysed herein. Those schemes should therefore be supported, as they are crucial to the sustenance of a meaningful subject of study called consumer law, and efforts should be made to ensure that they are not taken over by any of the four more traditional types of dispute resolution. An examination of the case law on attempts to bring the schemes within the parameters of the law on quasi-judicial or regulatory bodies reveals exactly these tensions. The resolution of consumer disputes requires a different understanding of the standards to be applied and the method of adjudication to be used in their achievement.

1. What Are 'Consumer Disputes'?

In order to answer this question, we might simply ask: who are 'consumers'? We might then define their 'disputes' in terms of those with whom consumers contract for the provision of goods or services.

The 'consumer' is not a creature known to the common law. In the absence of a statutory insistence that they do so, judges have not attempted to define, or even describe in a collectively acceptable way, the characteristics of a consumer. Legislators in the 20th century frequently undertook the task of giving the term some more precise definition.[1] In a growing number of situations, statutes also extended hitherto exclusively 'consumer' rights to 'small businesses'.[2]

Accordingly, rather than being purely functional or motivational in its definitions of consumer, that is focussing on the purpose for which the consumer participates in the transaction ('personal, domestic, household' or, more negatively, 'not business or investment') statute law has focussed more and more on the dimensions of relative power in connection with size, for example, the value of the relevant transaction, the number of employees, asset base and turnover.

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1 See, for examples, *Trade Practices Act* 1974 (Cth) s4B; *Consumer Credit Code* 1994 (Qld) s6(1)(b); EU Directive on Credit Agreements for Consumers 93/13/EC art 2(a) (and modified proposal art 3(a) E. Comm. 7 October 2005).

2 See, for examples, *Trade Practices Act* 1974 (Cth) (as amended by *Trade Practices Amendment (Fair Trading) Act* 1998 (Cth); and *Australian Securities and Investments Commission Act* 2001 (Cth) s12BC (hereafter ASIC).

This developmental analysis provides greater clarity when examining the historical origins in the law of the special dealings with consumers and their disputes. It allows us to look beyond the absence of 'consumer' language in the common law and equity case law, and to examine matters from the standpoint of substance rather than appearance. For example, in his essay in this journal, Ramsay observes that the origins of consumer law can be found in the law of inequality of bargaining power.[3] At this point, however, we need go no further than repeat that we must all be sensitive to the multiple sources of 'consumer law'.

2. *What, Then, Is 'Consumer Law'?*

Is it possible, therefore, to understand the activity of the just, efficient, and, indeed, necessary determination of consumer disputes in a particular way that distinguishes it from the general body of settlement of contractual disputes without thereby undermining principles of certainty and consistency, and the rule of law itself? Can the law respond to the problems encountered in consumer transactions without detracting from the integrity of the developed law of settling contractual disputes? Terms such as 'unconscionability', commonly used in consumer protection statutes and in the case law origins of consumer law, do present a challenge for the predictability which is crucial for the maintenance of general commercial practice, of which consumer activity is a part.[4]

Iain Ramsay suggests that the only answer lies in abandoning the idea of consumer law as part of a body of law which is an autonomous and independent system of values or norms. He argues, elsewhere in this journal, that consumer law can only be understood as regulation, replete with the political, social and economic consequences of that concept.[5]

Ramsay refers to the work of Gunther Teubner and Julia Black as supporting a 'decentered model of regulation'.[6] Ramsay identifies the UK Financial Services Ombudsman as representing the 'potential of a model of responsive law', but he does not make a direct link to the work of Teubner or Black in that context.[7] One of the present authors has referred to Black's early work when discussing industry-based consumer dispute resolution schemes, arguing that she attempts, in the UK context, to:

> address the doctrinal inconsistencies of the courts when dealing with self-regulatory associations by adopting jurisprudential approaches which accommodate both a plurality of legal sub-systems with their own internal norms and an overall system of legal accountability.[8]

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3 Iain Ramsay, 'Consumer Law, Regulatory Capitalism and the New Learning in Regulation' in this issue at 12, n13 referring to Gunther Teubner, *Law as an Autopoietic System* (1993).

4 Charles Rickett, 'Unconscionability and Commercial Law' (2005) 24 *UQLJ* 73 at 92.

5 Ramsay, above n3**;** Julia Black, 'Decentring Regulation: Understanding the Role of Regulation and Self-Regulation in a "Post-Regulatory" World' (2001) 54 *CLP* 103.

6 Ramsay, above n3.

7 Ibid.

8 Paul O'Shea, 'Underneath the Radar: The Largely Unnoticed Phenomenon of Industry Based Consumer Dispute Resolution Schemes in Australia' (2004) 15 *ADRJ* 156 at 169.

Black draws heavily on Teubner's theories to criticise the concentration by judges on the issue of sources of power when considering applications for judicial review of decisions of self-regulatory associations.[9] She argues that the concept of the 'autopoietic system', pioneered by Teubner, can and should be applied to the decision making role of self-regulatory associations. Such systems are 'internally normative', but also 'externally cognitive' of the general law which applies to them.[10] She thus clearly adopts a 'reflexive regulation' approach to understanding judicial review of the decisions of self-regulatory associations, rejecting the more inflexible approach she discerns in some of the English case law to be discussed later in this paper.[11]

None of the cases that Black considers, however, with the possible exception of *R v Insurance Ombudsman Bureau; Ex Parte Aegon Life Insurance Ltd*,[12] are concerned with an industry based consumer dispute resolution scheme. Certainly, Black is not considering consumer law as *sui generis*, or indeed any body of law, but rather, the capacity of self-regulatory associations, whatever their industrial, economic or social ambit, to make their own decisions, but still to be accountable to a consistently applied general legal system, a sort of accountable autonomy. She terms it 'constitutionalising self-regulation'.[13]

In more recent work, Black is moving away from Tuebner towards his rival, Habermas.[14] The latter is more interested in broader 'communicative rationality' and the potential for overcoming the relative autonomy of socio-legal spheres.[15] This is not surprising given her support for judicial review of self-regulatory bodies in her earlier work. Our concerns are less about discourse[16] in the public space than about the substantive resolution of consumer disputes, often an essentially private matter. The resolution of consumer disputes may have potentially public consequences if aggregated over multiple disputes between multiple parties or, as is more common, multiple consumers and the same industry supplier, thus, quite properly, attracting the attention of regulators. It is our contention, however, that it is not their sole preserve and that consumer law is not merely regulation.

Teubner himself, however, did consider the position of consumer law generally and observed that while attempts by legal systems to 'balance bargaining power' have had some success in the area of, for instance, labour law, 'corresponding efforts at constructing systems of countervailing powers in other spheres, particularly in consumer protection law, have not fared so well.'[17] Interestingly,

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9 Julia Black, 'Constitutionalising Self-Regulation' (1996) 59 *Mod LR* 24.

10 Id at 24, 44.

11 Id at 24, 42.

12 [1995] IRLR 101 (hereafter *Aegon Life*).

13 Black, above n9.

14 Julia Black, 'Proceduralizing Regulation: Part 1' (2000) 20 *Ox JLS* 597 at 605 and 607.

15 Julia Black, 'Proceduralizing Regulation: Part 2' (2001) 21 *Ox JLS* 33 at 59.

16 Which increasingly dominates Black's analysis see Julia Black, id at 35.

17 Gunther Teubner, 'Substantive and Reflexive Elements in Modern Law' (1983) 17 *Law and Society Review* 239 at 276–278.

Teubner sees some hope in the development of 'semi-public institutions' which 'provide consumer information and political-legal representation for unorganised social interests.'[18] The role of 'state law' as Teubner calls it, is confined to 'co-ordination processes and to compel agreement … .(and to) resolve inter-system conflicts by arbitrating claims across sectors and settling boundary disputes.'[19]

In Teubner's 'autopoietic system', the decision-makers of a self-regulatory body are free, to a greater extent, to apply specialised and particular norms in their internal decision making, but must also always be cognisant of or 'have an eye to' the effect those decisions may have on the external legal system and its other actors, as well as to the maintenance of their scheme's own autonomy within such a system. Structures and procedures may well need to reflect such external cognition, whilst the substance of internal decisions and the flexibility of their later application and the development of particular scheme based norms need not do so, or at least not to the same extent. This 'same systems' approach, with its capacity to accommodate both the development and application of flexible and autonomous internal norms and external accountability to more consistent and certain laws, as interpreted and applied by the general courts, might well explain entire bodies of 'law' as practised by special bodies but within the legal system as a whole.

It is possible to identify 'pockets', 'bubbles' or 'enclaves', within and/or alongside the general body of law, where courts and legislators have accepted that certain internal norms and principles can apply in different ways from those attendant upon the less flexible rules of the wider and more generally applicable body of law, such as, for example, the general law of contract. These enclaves will be, internally, more autonomous with some degree of normative flexibility, but will also be externally accountable to sets of more certain rules, such as, for instance, the rules of natural justice in relation to the making of decisions. Consumer law, it is suggested, is best understood as one such enclave.

Another useful distinction in this context is that made, by Ronald Dworkin, between 'rules' and 'principles'. Rules prescribe specific acts. They are, or should be, capable of only one meaning in providing authoritative determination (though capable of a number of interpretations in argument) and are intended to operate in an all or nothing manner. Principles, on the other hand, are often less prescriptive, less specific, normative in a more flexible manner, and capable of being given relative weight in particular situations.[20] We suggest that Dworkin's analysis of 'principles' provides, something more akin to the internal flexible norms of the Teubner-Black autopoietic system, and his understanding of 'rules' looks rather more like the external norms of which such systems must be cognisant and to which they are ultimately accountable.

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18 These are the so-called 'super consumers' referred to by Michael Shames in 'Preserving Consumer Protection and Education in a Deregulated Electric Services World' in Moazzem Hossain & Justin Malbon (eds), *Who Benefits from Privatisation?* (1998) at 119–155.

19 Gunther Teubner, above n14.

20 Ronald Dworkin, *Taking Rights Seriously* (1977) at 27; and Richard Nobles, 'Rules, Principles and Ombudsmen: *Norwich and Peterborough Building Society v The Financial Ombudsman Service*' (2003) 66 *Mod LR* 781 at 784.

This 'inside out' approach to consumer law need not be confined to legislative, regulatory or judicial considerations of the position of the consumer, and their substantive rights vis-à-vis suppliers and traders. Indeed, we suggest that it may also be the best way to understand properly and to analyse meaningfully the role of consumer law agencies such as industry based consumer dispute resolution schemes.

Further, the position of consumer law, as we see it, whether realised in the context of industry based consumer dispute resolution schemes or not, is analogous to that of the theory of Quantum physics which finds its physical expression only at the sub-atomic level. Newtonian physics with its predictable certainties explains the visible 'larger world' but breaks down in the microcosm of atoms, neutrons and electrons. At this level, probabilities take over not so much undermining Newtonian principles but applying them in different more flexible ways. Just because a + b does not always = c inside an atom does not mean it never will nor that it won't in the larger more visible universe.

Consumer law is a microcosm of the greater whole in which contextual uncertainties (like inequality of bargaining power) and the application of broad principles lead to the productive resolution of consumer disputes but not, necessarily, the making of law applicable to anything else. It is guided by the general law, the way Quantum physics is influenced and guided by Newtonian principles, but not rigidly determined by it. Thus, consumer law becomes 'Quantum contract' which can co-exist with contract law without undermining it, just as Quantum physics theory does not undermine the Newtonian explanation of the world at large.

The broad standards of behaviour which are the core of consumer law can be articulated by legislation or the courts. Neither of these institutions, we argue, are best placed to 'flesh out' the detailed variations of conduct either permitted or forbidden in all situations. This task is best done on a case by case basis always with a mind to the resolution of the dispute rather than the making of rules. It is best done by alternative dispute resolution (ADR) agencies like the industry based consumer dispute resolution schemes discussed later in this paper.

This approach is not only a way of understanding how consumer law can co-exist within and alongside the general law of contract, and legal system generally, or even just the basis for an exhortation to the general courts to leave industry-based consumer dispute resolution schemes largely alone when it comes assessing conduct according to a standard of fairness. It also gives us a means of assessing the appropriateness, potential effectiveness and perhaps even the legitimacy of all consumer protection measures.

Consumer protection measures, which include statutory provisions, regulations, policy statements, mandatory and voluntary codes, that incorporate and purport to embody rules of fixed and general application, are less likely to be successful and effective as final solutions, and are thus more likely to be subject to challenge in the courts. Those consumer protection measures which are more avowedly values-based, using the tools of 'principles' or 'guidelines' and relying

on ADR style institutions for their application in the resolution of disputes, are more likely to be successful, and to maintain industry and consumer support, and are less likely to be subject to court challenges.

Hugh Collins argues that a 'transformed' private law of contract can overcome not only its own failure as an instrument of regulation but the weakness of 'welfare or public regulation' in its 'command and control mode' without confronting Teubner's famous 'regulatory trilemma.'[21] Part of this transformation is the incorporation of 'references to externalities, public goods and the articulation of policy objectives for regulation' into its reasoning'. Further, a 'transformed private law of contract' will adjust its procedures for dispute resolution, presumably by the courts, to allow for 'amicus curiae, standing to collective groups (consumer and industry organisations), the admission of statistical evidence and using the burden of proof for the purpose of detection of violation of regulatory standards.'[22]

We reply that at the level of consumer law, the realm of 'Quantum contract', the private law of contract is already transformed and continuing to transform in ways that present less of a challenge to the overall legal system, and the general law of contract, than the ambitious project contemplated by Collins. Further, the ADR schemes for the resolution of consumer disputes developed here and in the UK already incorporate the procedural adjustments he envisages and do so without the trauma which these might present to the courts.

Let us take as an example the doctrine of 'truth in lending', which was a major dogma of the consumer movement in the 1980s and 1990s. In response to this catchcry, governments introduced legislation in the area of consumer credit which relied on disclosure as its chief means of consumer protection.[23] In Australia, this legislation is highly prescriptive and detailed, identifying with minute precision exactly what must be disclosed and in what manner and format.[24] As a result, presently, even the simplest of consumer credit transactions is accompanied by large quantities of documents detailing the salient features of the agreement separately from their appearance in the clauses of the operative credit contract.

These disclosure prescriptions were backed by severe sanctions. The earlier *Credit Acts* in Australia,[25] with their automatic civil penalty regimes, led to large quantities of expensive and complex litigation, the resolution of which often turned on highly technical points. It was often impossible to identify any actual 'loss' to consumers as a result of the purported misstatement of the relevant information, and the rationale for the penalty was clearly deterrence of credit providers, with any consequent distribution of moneys to consumers or into a trust fund being, at most, a secondary benefit.[26] Interestingly, although the *Consumer*

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21 Hugh Collins, *Regulating Contracts* (1999) at 361; Gunther Teubner, 'Juridification: Concepts, Limits, Solutions' in Gunther Teubner (ed), *Juridification of Social Spheres* (1987) at 408.

22 Christine Parker, Colin Scott, Nicola Lacey & John Braithwaite 'Introduction' in *Regulating Law* (2004) at 9 paraphrasing Collins, above n21 at 93.

23 Explanatory notes accompanying the Consumer Credit (Queensland) Bill 1994 (Qld).

24 Currently, for example, *Consumer Credit Code* 1994 (Qld) ss14 and 15, and previously, the *Credit Acts* 1984 (NSW, Vic, and WA) and 1985 (ACT) ss34, 35, 36, 38, 54, 58 and 59.

25 *Credit Acts* 1984 (NSW, Vic, and WA) and 1985 (ACT) ss34, 35, 36, 38, 54, 58 and 59.

Credit Code,[27] which replaced the *Credit Acts*, diluted the civil penalty regime (by making it no longer automatic, by reducing the number of disclosure breaches that triggered the penalty, and by giving credit providers the benefit of a cap if they themselves brought their disclosure breaches to the attention of the court), it still maintained the disclosure based approach.[28] The 'financial table' mandated at the beginning of each and every consumer credit contract is the Code's most obvious and possibly dubious achievement.

A body of research is developing which calls into question the effectiveness of this approach. Empirical research has already demonstrated that consumers often do not use this information effectively, if at all.[29] The work of behavioural economists is explaining how this was always going to be so,[30] and consumer law specialists are now calling for a new approach.[31]

Inequality of information is a natural feature of consumer transactions, particularly consumer credit deals.[32] Using the 'inside out' or Quantum contract approach advocated earlier, it is arguable that the solution lies in legislation which calls for candour and openness on the part of credit providers in broad terms and leaves it to effective and accessible ADR agencies to determine, on a case by case basis, whether a consumer was likely to be disadvantaged by the failure of a credit provider to provide relevant information.

This is not an 'all or nothing' approach. It is, however, a way of testing tendencies. It may be necessary to provide a measure of rule-based prescription in legislative form, which relies on disclosure as the best way to protect consumers. Some concepts lack adequate meaning without it. For instance, as Anthony Duggan has written, 'cooling off' periods are a consumer protection measure directed towards reducing the inequality of effective information, particularly in high pressure sales situations.[33] It would be impossible to legislate for a 'cooling off' period without identifying its length. However, the effectiveness of the

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26 See discussion in Anthony Duggan and Elizabeth Lanyon, *Consumer Credit Law* (1999) at 429–430.

27 *Consumer Credit Code* 1994 (Qld).

28 Above n23.

29 Justin Malbon, 'Shopping for Credit: Empirical Study of Consumer Decision-making' (2001) 29 *ABLR* 44; Paul O'Shea & Carmel Finn, 'Consumer Credit Code Disclosure: Does it Work?' (2005) 16 *JBFLP* 5.

30 Richard Thaler & George Lowenstein, 'Intertemporal Choice' in Richard Thaler (ed), *The Winner's Curse: Paradoxes and Anomalies of Economic Life* (1992) at 95; Michael Trebilcock, 'Rethinking Consumer Protection' in Charles Rickett & Thomas Telfer (eds), *International Perspectives on Consumers' Access to Justice* (2003) at 70–75.

31 Elizabeth Lanyon, 'Changing Direction? A Perspective on Consumer Credit Regulation', Keynote address at the Australian Credit at the Crossroads Conference, 8 November 2004 at 16: <http://www.consumer.vic.gov.au> (4 February 2005); Iain Ramsay, 'Consumer Credit Regulation as the "Third Way"', Keynote address at the Australian Credit at the Crossroads Conference, 8 November 2004 at 16 <http://www.consumer.vic.gov.au> (4 February 2005).

32 Arthur Rogerson, *Report of the Standing Committee of Commonwealth and States Attorneys-General on the Law Relating to Consumer Credit and Money Lending* (1969) at 22–25; Thomas Molomby, *Report to the Attorney-General for the State of Victoria on Fair Consumer Credit Laws* (1972) at 12.

measure, for consumers, is obviously dependent on the conduct of the credit provider or trader in its effective implementation and operation. For instance, timeshare sales contracts in Australia are subject to a 5 day cooling off period mandated by legislation.[34] The effectiveness of this provision is substantially undermined if, for example, consumers request information about the contract during the cooling off period, but they receive no adequate responses.[35] The provision is also rendered useless by the conduct of the trader if disclosure of the existence of the cooling off period is buried in voluminous documents. Technical compliance alone does not aid the consumer. It is this type of detail that is best left to principles based exhortations to act fairly and with candour. Detailed stipulations of conduct should be replaced, where possible, by general principles-based exhortations to act fairly, and it is ADR schemes which are better placed than the general courts to assess such fairness.

Another example is the exhortation to the parties to contracts to act in 'good faith.' Part of the law of insurance for hundreds of years, an implied duty of good faith had a limited if non-existent relevance to the general law of contract.[36] Teubner considered the implications of the adoption of the EU Unfair Terms Directive in the UK[37] and suggested that the 'good faith' principle would not make sense to the English judiciary if it was presented as a 'bundle of duties requiring trust and co-operation.' Rather, 'good faith' would have to be articulated as a principle which 'outlaws certain excesses of economic action' and the judges could therefore understand it only by activating the 'tradition of constitutional rights' and adapting them to the private law context.[38] Luke Nottage questions whether this is possible and points to the more prominent role of the UK Office of Fair Trading in the implementation of the Directive.[39]

The new Code of Banking Practice for the Australian Banker's Association, incorporates an obligation on banks to act 'fairly and reasonably' and in a 'consistent and ethical manner.'[40] Given the mandate of the relevant ADR scheme to use this Code as one of its criteria for resolving disputes, the Banking and

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33 Anthony Duggan, 'Economic Analysis of Standard Form Contracts: An Exposition and a Critique' in Ross Cranston & Anne Schick (eds), *Law and Economics* (1982) at 148.

34 ASIC Policy Statement 160.11 'Time-sharing Schemes': <http://www.asic.gov.au/asic/asic.nsf/lkuppdf/ASIC+PDFW? opendocument&key=ps160.pdf> (9 November 2005).

35 See Parliamentary Joint Committee on Corporations and Financial Services, *Timeshare: The Price of Leisure* (2005) at 59–60.

36 This is changing somewhat, see Paul Finn, 'Controlling the exercise of power' (1996) 7 *PLR* 86 at 93; For a more detailed discussion of 'utmost good faith' in insurance contracts see David Kelly & Michael Ball, *Insurance Legislation Manual* (3rd ed, 1995) at 96–97. For an example of its application by the relevant industry based consumer dispute resolution scheme see Peter Hardham, 'Panel Chair's Report', *Annual Review 2005 Insurance Ombudsman Service Limited* (2005) at 13.

37 For a discussion of the *Unfair Terms in Consumer Contracts Regulations* 1999 (UK) see Paul O'Shea 'Alls Fair in Love and War but not Contract' (2004) 23 *UQLJ* 226–233.

38 As explained by Luke Nottage in 'Convergence, Divergence and the Middle Way in Unifying or Harmonising Private Law' (2004) 1 *Annual of German and European Law* 166 at 219.

39 Id at 221.

40 Clauses 2.2 and 2.3.

Financial Services Ombudsman will be answering the question of whether this provision imposes an implied duty of good faith in banker-customer contracts long before any court.[41] The 'Quantum contract' principle of 'fairly and reasonably', articulated quite broadly in the Code of Banking Practice, will only apply to contracts effected by that Code, that is, consumer and small business banker-customer contracts. It will not effect the general law of contract and will be largely articulated, explained and applied on a case by case basis by ADR schemes resolving consumer disputes.

These schemes are not regulators, or courts, or self-help agencies or even conventional alternative dispute resolution agencies. They reveal attributes of all these categories of institutions, but do not neatly fit within any of them.

3. Four Types of Resolution For Consumer Disputes

Consumer disputes are, fundamentally, about contracts. The contracts in question are those between the industry members and their consumer customers. For financial services schemes, they tend to be loan contracts, insurance contracts, contracts for investment advice and other financial services such as brokerage, and the contracts between bankers and customers relating to the operation of banking accounts. For utilities, they are contracts for the supply of electricity, water, and gas, and for telecommunications they are for the supply of land-based and cellular telephone services and access to the internet.

Disagreements about the existence, meaning and effect of contracts create problems between the parties to those contracts. These are often not only problems for the parties themselves, but can create difficulties with more far-reaching social impacts. The parties can deal with these problems in a number of ways, as, for instance, by self-help; by seeking dispute resolution; by seeking (usually legislative) regulation; or by recourse to litigation in the general courts.

In resorting to *self-help*, one party takes direct action to solve a perceived or real dispute to their own satisfaction, without the co-operation or agreement of the other party. The level of intensity and social destruction arising from pursuit of self-help can vary from quietly avoiding or ignoring the relevant contract (an option which can be taken by consumers and industry parties alike) through to public protest (usually an option for consumers), and perhaps even violent action (an option chosen with varying success by both weak and powerful consumers). There is little that is specifically legal about the process of self-help. Self-help is often said to be based on the exercise of rights, but in reality it is not concerned with rights but with the exercise of power. A robust society may accommodate a limited amount of problem solving by self-help, in the non-domestic sphere, but too much of it, exercised too publicly, will undermine the capacity of that society to provide for the most basic needs of its members in respect of security of property and person. Even private or domestic or so-called 'family' disputes which, usually,

41 Paul O'Shea & Phil Pennington, 'The New Code of Banking Practice: Guarantors Guaranteed?' (2004) 24(5) *Proctor* 19 at 20.

are susceptible to much greater levels of self-help problem solving, may sometimes generate socially destructive or, at least, socially significant repercussions. In any event, in the absence of the complete destruction or disabling of one of the parties, such self-help solutions are usually not a resolution or determination of the real or underlying problem, as there is neither agreement between the parties nor enforcement of the outcome by the state. The dispute is not resolved in a lasting or authoritative manner.

Dispute resolution or, as it is usually now referred to, alternative dispute resolution[42] ADR involves the parties to the dispute reaching a new agreement as to how to solve their problem. The process usually entails some communication between the parties who then individually make concessions from their own respective positions which effectively induce the agreement of the other party to commitment to a new overall position. They create thereby a new contract. ADR process is, like self-help, not primarily concerned with the law to the extent that the law is about the parties' rights and obligations and their enforcement by the state.

The original contractual rights of the respective parties to an ADR process do not determine the outcome of that process. Perceptions about rights usually influence the initial position taken by the parties, and the flexibility or intractability with which they maintain that position. Dispute resolution, however, is fundamentally about outcomes and about reaching a position which both sides can 'live with', whether or not they think a court would determine the dispute based on their rights in the same way.

The various kinds of ADR (negotiation, mediation, conciliation and arbitration) are touted by their proponents as being more efficient, less confrontational, less expensive, quicker and easier than recourse to traditional form of litigation through the court system. 'Agree for the law is costly.'[43] The most common form of non-court resolution of civil disputes is not the more formal ADR processes of mediation, conciliation and arbitration, which always involve the services of a third party, but negotiation between the parties, whether or not using their respective lawyers or other advisers. Settlements and agreements reached as a result of dispute resolution processes are no more (or less) enforceable than the original disputed contract. Breaches of such settlement agreements constitute a new dispute which may result in the parties seeking recourse through the courts.

The courts determine rights, and decide disputes on the basis of vindicating these rights. Courts are mandated, empowered and obligated to do so. Courts determine rights between parties to civil disputes, whether those parties are private

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42 Laurence Street has argued that 'alternative' is a misnomer and that 'additional' is more accurate: see 'Mediation and the Judicial Institution' (1997) 71 *ALJ* 194 at 195. The UK Financial Services Ombudsman has claimed that the courts are now the alternative: Personal Interview by Paul O'Shea with Walter Merricks, UK Financial Services Chief Ombudsman, 10 November 2004.

43 William Camden, *Remains Concerning Britain* (1623) as cited in Robin Hyman (ed), *A Dictionary of Famous Quotations* (1962) at 206.

citizens, corporations or the state itself. In one sense, therefore, courts are in the business of dispute resolution. This is only to the extent, however, that the entire dispute between the parties is capable of being distilled to a question about competing rights. Whether the parties' dispute is 'resolved' however, as a result of litigation, is another matter. Such resolution is not the primary concern of the courts, despite their efforts in recent times at encouraging it, even in the midst of traditional judicial proceedings, by using sometimes compulsory ADR processes.[44]

Although the judicial adjudicative method itself can be confined to narrow forensic examinations of disputed facts and the somewhat abstracted process of locating and enforcing rights, the courts do have an influence beyond the parties to particular disputes. Courts generally keep records of their decisions and the reasons for them. These become 'precedents' which will often bind and frequently influence other courts as to how to determine subsequent cases. They will also influence the conduct of parties who study these records (usually through their lawyers), and will influence how they will conduct business. Such interpretations will affect the original formation of contracts, their recording in documents, and initial pre-litigious responses of parties when disputes arise.

A court will usually be part of a system which provides for appeals or reviews based on allegations that the first court failed in its interpretation of the law, or in its interpretation of the facts. The state will enforce decisions of the courts, though, in civil matters, this will not be automatic or free of charge.

Regulators respond to (common) contractual problems in order to avoid socially destructive consequences. They are not as interested in the resolution of particular disputes, or in the legal rights of the parties. Regulation is 'legal' to the extent that it is mandated by the law, usually with a statutory source. Within the legal parameters of that power, however, its exercise is not determined (though it may be influenced) by a balancing of legal rights as interpreted from the facts in the light of statutory and precedent material. The decisions of a regulator may be based exclusively on its own perception (whether internally developed or handed down from higher authority within government) of what is the appropriate policy applicable to a particular industry or class of consumers. Few, if any, records are kept of the decisions of regulators in individual cases, and previous decisions are almost never taken to be binding or influential as precedents. Their decisions are, however, usually enforceable by the state, often through the courts.

4. *Industry-Based Dispute Resolution Schemes – Where Do They Fit?*

Industry based consumer dispute resolution schemes are a relatively new response to consumer disputes which do not appear to fit within any of the models described in the previous section of this essay.

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44 For instance see Nancy Welsh, 'The Place of Court Connected Mediation in a Democratic Justice System' (2004) 5 *Cardozo Journal of Conflict Resolution* 117.

They are not ‘self-help’ remedies, in that they do not rely on the exercise of power, whether economic or political, to resolve or determine disputes. Scheme decision makers purport to resolve ‘complaints’ by reference to decision making criteria which do not include the relative power of the parties.

This is not to say that power was not a factor in their establishment and is not important in maintaining their on-going position. At least one history of a large Australian scheme notes the power of the consumer movement to attract the attention of government to put pressure on industry associations to establish such an ADR scheme.[45] The power and strength of an industry, and other factors such as industry maturity and development of the relevant industry peak bodies, has sometimes forestalled or diluted any threatened direct regulatory intervention, thus encouraging a degree of self-regulation. Whether this self-regulation is ‘coerced’ or ‘voluntary’, it is nonetheless real and distinguishes the schemes from court-based or regulatory solutions to consumer disputes. It is the result of the interaction between multiple sources of power.

The schemes are often described as providing for ADR. Although this is, in a loose sense, accurate (to the extent that they are provide non-litigious solution to consumer disputes), it is also misleading as it tends to locate the schemes within, in particular, the mediation and conciliation ‘industry’. The schemes do however use mediation and conciliation techniques to resolve disputes prior to exercising their determinative powers. The case management statistics of all the schemes indicate that a significant number, and in most schemes the vast majority, of complaints and cases referred to them are resolved by these ADR means, prior to any final determination.[46]

Do the schemes ultimately and effectively determine the rights of the parties? In some ways, they do. Despite the predominant use of non-determinative processes, they are not merely a third party mediator or conciliator. Their investigative role is primarily directed towards informing a decision in respect of the dispute. Its effect in better informing the parties, and thus encouraging settlement, is secondary. In becoming a member of a scheme, the industry party agrees to be bound by scheme decisions and is thus, to some extent, at least, surrendering its legal rights with the objective of solving its consumer contractual problems without going to litigation. Although consumers have not so agreed, and are therefore free to reject the scheme determination, and to take their dispute to a determination by the courts, for a variety of reasons very few do so. Like the industry member, their rights have been effectively determined by the scheme’s decision making process.

Some schemes, such as the Insurance Ombudsman Services and the Financial Industry Complaints Services Ltd, publish the reasons for their determinations.

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45 Joe Isaacs, *Insurance Enquiries and Complaints – The First Ten Years* (2001) at 6–8.

46 For a more detailed examination of these see Paul O’Shea, ‘The Lions Question applied to industry based consumer dispute resolution schemes’, paper presented at the 30th Annual Conference of the Institute of Arbitrators and Mediators of Australia, Canberra, 28 May 2005: <http://iama.org.au>.

Despite the accompanying disclaimers that these are not binding precedents, the effect of such publication on both industry participants and the scheme decision makers is the development of consistent patterns of decision making which influence industry conduct. Other schemes, such as the Banking and Financial Services Ombudsman Service, produce selected summarised case studies, and comprehensive and detailed guidelines, which have their genesis in previous decisions, and which indicate the likely course of decisions in the future.

Interestingly, a guideline which indicates the attitude of scheme decision makers to a particular type of dispute, need not be the result of a binding determination of any previous dispute. It might arise from the casework experience of the scheme in facilitating settlements, or even from the prevalence of particular types of inquiries and complaints which do not proceed to any kind of determination. Yet the publication of such a document by a significant dispute resolution scheme in a particular industry sector is likely to influence industry practice. It is very likely to influence the outcomes and attitudes of industry personnel who staff the internal (and initial) dispute resolution mechanisms of firms within that industry. Without ever making a determination, an industry-based consumer dispute resolution scheme could effectively resolve consumer disputes. This is an example of the 'inside-out' theory of consumer law at work.

Enforcement of scheme decisions is by a combination of regulatory and industry self-regulation mechanisms. Failure to comply with a scheme decision will lead to industry based sanctions, such as expulsion from the relevant industry association, and, ultimately, upon being reported to the relevant regulator, to withdrawal of the license to conduct the relevant industry activity.

Are the schemes, therefore, in effect, private courts? In some senses, as indicated, they determine rights. Their mediation and conciliation roles do not ipso facto disqualify them from being 'court-like', since many courts are themselves adopting these ADR methods whilst still retaining their ultimate determinative power. The schemes differ in significant ways, however, from courts.

They are less concerned with the articulation and determination of legal rights than with the simple resolution of disputes. As each of their decisions is not meant to be a precedent (despite the publication of determinations as discussed above), they are not making rules for the entire society or even for the industry which they serve. As discussion of the cases on judicial review of their determinations will reveal, the role of industry based consumer dispute resolution schemes is not to settle upon rights of parties to disputes.

Whatever relationships they might have to the regulatory organs of the state, the schemes are not regulatory or government agencies. Their governing bodies, councils or boards are not appointed by the state.[47] Their funding comes exclusively from industry.

Furthermore, unlike courts, the schemes play an active role in the investigation of the facts in a particular dispute, although this role is somewhat hampered by the lack of a state sanctioned power to order discovery of documents or to subpoena witnesses. In common law systems, the investigation of the facts and presentation of evidence is a matter for the parties and the court acts more like a passive receptor and processor of information produced by others. European civil systems, however, give more of this role to the court itself which determines 'the issues that will be explored, the discovery that will be conducted, the witnesses who will be called and the questions that the witnesses will answer'.[48]

Enforcement of scheme decisions is not directly sanctioned by the state, as is the case for the decisions of courts. No bailiff will execute a warrant issued by an industry based dispute resolution scheme. Indeed, unlike decisions of the Small Claims Tribunals (in various Australian states),[49] scheme decisions cannot be registered as judgements and enforced in the same way.

This leads to the question: how can a consumer enforce a scheme decision against a recalcitrant industry scheme member? As the consumer is not a party to the 'agreement' pursuant to which the industry member joined the scheme, he or she cannot enforce its terms to be bound by scheme decisions. It might be argued, however, that there is an implied term in the original contract between the consumer and the industry scheme member that, as the industry member is part of an industry based consumer dispute resolution scheme, it will comply with scheme decisions. The enforceability of such a term is still itself questionable from the consumer's point of view.

A scheme may itself provide for the enforcement of its own decisions in a court, but enforcement of scheme decisions by regulatory bodies is likely to supersede any court based options. As discussed earlier, there now exists some level of regulatory licence based sanction for expulsion from an industry based consumer dispute resolution scheme. For financial services providers, scheme membership is a requirement of their Australian Financial Services licence and the appropriate schemes are those with approval from ASIC under its Policy PS139.[50]

Are the schemes, therefore, so intertwined with the government as to be just another regulatory agency? The answer is a resounding 'no'. Though the definition

47 Although consumer representatives in some schemes were once the subject of ministerial appointments, this is no longer the case.

48 Welsh, above n44 at 118; O'Shea, above n8; and, generally, John Langbein, 'The German Advantage in Civil Procedure' (1985) 52 *U Chi LR* 823.

49 *Consumer Claims Tribunals Act* 1998 (NSW); *Small Claims Tribunals Act* 1973 (Vic); *Small Claims Tribunals Act* 1973 (Qld); *Magistrates Court Act* 1991 (SA); *Small Claims Tribunals Act* 1974 (WA); *Magistrates Court (Small Claims Division) Act* 1989 (Tas); *Small Claims Act* 1974 (ACT); and *Small Claims Act* 1974 (NT).

50 Above n34.

of their membership may be the result of regulation, they themselves are not regulators.[51]

It is easier to argue that the UK Financial Ombudsman Service is a regulatory agency, as it is created and constituted by statute.[52] Yet, even in this case there is a separate agency, the Financial Services Authority, which has a clearer regulatory role in matters such as licensing and the endorsement of industry codes of conduct.

In Australia, the schemes themselves are not constituted by statute. Their constitutions, jurisdiction and membership are substantially influenced by statutes such as the Corporations Act for financial services, the Telecommunications Acts for the Telecommunications Industry Ombudsman and the various statutes which privatised water and electricity supply for the Electricity and Water Ombudsman Victoria and the Electricity and Water Ombudsman New South Wales.[53] None of these statutes, however, provides for the establishment of the relevant scheme, but merely that the industry members must join a scheme which conforms to certain requirements. The constituent form of the schemes can vary from companies limited by guarantee to incorporated associations. There is no theoretical reason why any particular scheme needs to rely on an incorporation statute at all, though, practically, it would be impossible to satisfy the statutory and regulatory obligations of their members if they did not. Despite this, the schemes themselves are not creatures of statute any more than any other public or private company, club or association.

The schemes are not funded by government. In the case of the financial services schemes, no funding, or even facilitation, was provided by government. The only role played by government, through ASIC, is to process applications by schemes for approval under PS139 as appropriate bodies to satisfy the dispute resolution requirements of Australian Financial Services licence holders. Although some establishment costs were borne by government for the Telecommunications Industry Ombudsman and the utilities schemes, all ongoing operational costs are paid for by industry.

Scheme staff members are not government employees. The members of the scheme boards or councils are no longer government appointees and, in some cases, never were.[54] The scheme decision makers are not accountable directly to government for any scheme decision.

When resolving individual disputes and making the decisions which are their prime function, the schemes do not rely on government policy as a decision making criterion. Relevant criteria are usually limited to the law, the relevant industry code, and what is fair and reasonable in the circumstances.

51 It is unclear whether Ramsay would identify the UK Financial Ombudsman Service as a regulatory agency and thus consistent with his thesis that consumer law is regulation.

52 *Financial Services Markets Act* 2000 (UK).

53 *Telecommunications Act* 1997 (Cth); *Telecommunications (Consumer Protections and Standards) Act* 1999 (Cth); *Electricity Industry Act* 2000 (Vic); *Electricity Supply Amendment Act* 2000 (NSW).

54 See Paul O'Shea, 'A Constitutional Challenge for an Industry Based Consumer Dispute Resolution Scheme' (2005) 16 *AJDR* 99 at 113.

Although the schemes have a role in detecting and reporting systemic issues, that is their only ‘society-wide’ concern. They are primarily involved in determining the outcome of a particular dispute between two identified parties, the consumer and the industry member. A regulator, on the other hand, is primarily concerned with how particular conduct or disputes impact on society as a whole. For a regulator, particular outcomes are secondary to general implications.

There are two useful theoretical conclusions to draw from this discussion. The first, and most obvious, is that the industry-based consumer dispute resolution schemes do not fit into the categories of self-help, ADR, regulation or court litigation, which categories generally encompass the most common ways society deals with consumer disputes. The second conclusion is that the schemes display some features of all of these categories and interact, in a variety of ways, with systems and institutions defined by them.

This ‘inside out’ aspect presents the most interesting challenges for a theory both to explain and to understand the schemes, as well as to assess them and consider their future.[55]

5. The Australian Industry-Based Consumer Dispute Resolution Schemes

The schemes in Australia include:

- The Banking and Financial Services Ombudsman Service (‘BFSO’) formerly the Australian Banking Industry Ombudsman Service (‘ABIO’);
- The Financial Industry Complaints Services Ltd (‘FICS’)
- The Insurance Ombudsman Services (‘IOS’) formerly Insurance Enquiries and Complaints Ltd.
- The Credit Union Complaints Resolution Centre (‘CUDRC’).
- The Financial Co-operatives Dispute Resolution Service (‘FCDRS’)
- Insurance Brokers Disputes Ltd (‘IBD’)
- Credit Ombudsman Service (‘COS’) formerly the Mortgage Industry Ombudsman.

These are the schemes which have approval from ASIC under its Policy Statement 139 to be External Dispute Resolution schemes which satisfy the dispute resolution requirements of holding an Australian Financial Services Licence under the *Corporations Act* as amended by the *Financial Services Reform Act* 2001 (Cth).[56] The timeshare industry, through the Australian Timeshare and

55 For a more detailed discussion of some possible theoretical approaches to industry-based consumer dispute resolution schemes see O’Shea, above n8. The earlier experience of such schemes in Britain has generated substantially more analysis: eg Rhoda James, *Private Ombudsmen and Public Law* (1997); Rhoda James & Phillip Morris, ‘The new Financial Ombudsman Service in the United Kingdom: has the second generation got it right?’ in Charles Rickett & Thomas Telfer, *International Perspectives on Consumers’ Access to Justice* (2003).

56 The requirement to be a member of an external dispute resolution scheme which complies with ASIC PS139 is in s912A(1)(g) *Corporations Act* 2001 (Cth).

Holiday Ownership Council, has proposed the establishment of its own scheme, the Australian Timeshare Industry Complaints Service, but to date ASIC has not approved this proposal. The ASIC decision is under challenge in the Administrative Appeals Tribunal.

To these schemes can be added the utilities schemes:

- Telecommunications Industry Ombudsman ('TIO')
- Energy and Water Ombudsman New South Wales ('EWON')
- Energy and Water Ombudsman Victoria ('EWOV')

Structurally, all the financial services and utilities schemes are companies limited by guarantee, with the exception of the FCDRS which is an incorporated association. Their members are financial services and utilities and information service providers who have agreed to submit their consumer disputes to the relevant scheme.

With the exception of the TIO, none of the schemes has a statutory monopoly on the resolution of consumer disputes within their industry. Australian Financial Services Licence holders must be members of a scheme which satisfies ASIC's PS139 criteria, not of a particular named scheme. Likewise, energy and water providers are required by their relevant regulatory legislation to be members of 'an approved' scheme, but not of a particular scheme.[57]

The TIO is slightly different in that it has received increasingly explicit legislative recognition. The *Telecommunications Act* 1991(Cth) only provided for the issuing of licences which required holders to 'enter into and comply with an Ombudsman scheme' without specifying any more about it.[58] The TIO was formed by carriers in response to this requirement. The *Commonwealth Telecommunications Act* 1997 provided that providers must subscribe to industry codes which may refer powers to the TIO which is named and defined,[59] and the current legislation, the *Telecommunications (Consumer Protections and Standards) Act* 1999 (Cth) provides at section 128:

> (1) Each carrier and each eligible carriage service provider must, in association with other carriers and other eligible carriage service providers, enter into a scheme providing for a Telecommunications Industry Ombudsman.
>
> (2) The scheme is to be known as the Telecommunications Industry Ombudsman scheme.
>
> (3) To avoid doubt, there is only one Telecommunications Industry Ombudsman scheme, namely, the scheme operated by Telecommunications Industry Ombudsman Ltd.

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57 For instance, s28 *Electricity Industry Act* 2000 (Vic) requires licence holders to be members of a consumer dispute resolution scheme approved by the Essential Services Commission. Thus far, the Commission has only approved one such scheme, the EWOV, but has not received any other applications for approval.

58 Section 64. Of course, prior to the 1991 Act the government-owned telecommunications provider, Telecom, operated a monopoly.

59 Sections 114 and 7 respectively.

No other industry-based consumer dispute resolution scheme in Australia is so clearly mandated by statute. Judicial approaches, to be discussed below, which focus on the relationship of the particular scheme to legislative power in order to assess the susceptibility of its decisions to judicial review, would likely deal differently with the TIO than with the other schemes. It is our contention that this view may be misplaced, and that the essential consumer contract focus of the TIO render its decisions no more reviewable than those of other Australian schemes.

6. The Judicial View Of Industry-Based Consumer Dispute Resolution Schemes

Courts in both the United Kingdom and Australia have considered the position of industry-based dispute resolution schemes and have reached a variety of conclusions as to their juridical nature. Faced with applications from aggrieved scheme members for judicial review of scheme decisions, the courts have relied on the principles of general administrative law to inquire as to the public, private or hybrid nature of the scheme in dispute. There has been inconsistency in the outcomes of such inquiries in both countries. Perhaps the judges, and some of their academic critics, are asking the wrong questions? In particular, there appears to have been some difficulty in recognising the schemes for what they are, rather than requiring them to be slotted in to one of the existing types of resolution techniques.

In *R v Panel on Takeovers and Mergers; Ex p. Datafin*,[60] the English Court of Appeal was concerned with a decision of the Panel on Takeovers and Mergers, commonly known as the Takeovers Panel. The applicants, Datafin, were bidding in competition with Norton Opax to take controlling interests in McCorquodale. There were other competing interests, including the late Robert Maxwell. Datafin alleged that Norton Opax were 'acting in concert' with other parties to the bid and, as such, were in breach of the Rules of the Stock Exchange. Using those Rules, Datafin made a complaint to the Takeovers Panel. The Takeovers Panel determined that the relevant parties were not acting in concert, within its Rules, and dismissed the complaint. Datafin then applied for judicial review of the decision of the Takeovers Panel. Refused at first instance, Datafin sought leave to appeal which was granted, principally, as Sir John Donaldson MR said: '…because the issue as to jurisdiction seemed to us to be arguable and of some public importance…'[61]

60 [1987] QB 815 (hereafter *Datafin*).
61 Id at 834.

It is the Court of Appeal's finding on that issue which has led to its frequent subsequent citation.[62] All three judges of the Court (Donaldson MR, Lloyd and Nicholls LJJ) agreed that the Takeovers Panel was susceptible to judicial review. As the Master of the Rolls said:

> It [the Panel] is without doubt performing a public duty and an important one. This is clear from the expressed willingness of the Secretary of State for Trade and Industry to limit legislation in the field of take-overs and to use the panel as the centrepiece of his regulation of that market. The rights of citizens are indirectly affected by its decisions, some, but by no means all of whom, may in a technical sense have assented to this situation, eg the member of the Stock Exchange…Its source of power is only partly based on moral persuasion and the assent of institutions and their members, the bottom line being the statutory powers exercised by the Department of Trade and Industry and the Bank of England. In this context I should be very disappointed if the courts could not recognise the realities of executive power and allow their vision to be clouded by the subtlety and sometimes complexity of the way in which it can be exerted.[63]

Despite the fact that the legal source of the power of the Takeovers Panel was essentially contractual and private, the Court of Appeal found that this power was 'interwoven with and inextricable from executive power'.[64] The Panel was somehow a 'hybrid' of public and private power.

Having made this finding, the Court went on to consider the illegality, irrationality or procedural unfairness of the decision of the Panel.[65] It is only the first of these which distinguishes the public or hybrid body from the purely private or domestic body which still must act rationally and in accordance with natural justice.[66] In *Datafin*, there were no arguments put or judicially considered on the rationality of the Panel's decision or on any procedural unfairness. Having assumed jurisdiction for judicial review, however, their Lordships quickly disposed of the technical legal arguments put by the applicants and ultimately

62 For example, in Britain: *R v Panel on Take-overs and Mergers Ex p Guinness Plc* [1990] 1 QB 146; *R v Chief Rabbi of the United Hebrew Congregations of Great Britain and the Commonwealth* [1992] 1 WLR 1036; *R v Disciplinary Committee of the Jockey Club Ex p Aga Khan* [1993] 1 WLR 909; *Aegon Life*, above n12. In Australia: *Norths Ltd v McCaughan Dyson Capel Cure Ltd & Ors* (1988) 12 ACLR 739 at 745 (hereafter *Norths*); *Adamson and Others v New South Wales Rugby League Ltd and Others* (1991) 103 ALR 319 at 367 (hereafter *Adamson*); and *Minister for Local Government v South Sydney City Council* (2002) NSWLR 381; and *Masu Financial Management Pty Ltd v Financial Industry Complaints Service Limited and Julie Wong No 2* (2004) 50 ACSR 554 (hereafter *Masu No 2*).

63 *Datafin*, above n60 at 838-839.

64 Ken Adams, 'Judicial Review of Claims Review Panel Decisions' (1997) 8 *Insurance Law Journal* 105 at 107.

65 *Datafin*, above n60 at 842.

66 The leading text on domestic tribunals in Australia is John RS Forbes, *Justice in Tribunals* (2002). A brief summary of the law in this area is contained in Adams, above n64 at 113-119.

dismissed the application.[67] The Takeovers Panel is an industry based dispute resolution scheme, but can hardly be said to be an agency of consumer dispute resolution.

The former UK Insurance Ombudsman Bureau, however, was exactly that. One of its decisions was subject to an application for judicial review in *Aegon Life*.[68] Whilst the Insurance Ombudsman Bureau had some statutory recognition under the *Financial Services Act* 1986 (UK), its origins pre-dated that statute and it had been formed voluntarily by insurers to resolve consumer disputes. By 1993, it had 350 members and represented 90% of eligible insurance companies.[69] Aegon Life Insurance Ltd had taken over Trans International Life, which had an agent who was liable for some unsustainable guaranteed returns on a failed investment. The Insurance Ombudsman determined in 23 cases that Aegon Life were liable for the guarantees and these determinations were the subject of an application for judicial review.

There was no finding that the decisions had been arrived at in breach of natural justice or that they were irrational on a *Wednesbury* basis.[70] The only basis for review was that they were simply wrong in law, or on the merits, and this was only available if it was found, as it had been in *Datafin*, that the Insurance Ombudsman Bureau was subject to judicial review as a public body.

Lord Justice Rose considered *Datafin* and acknowledged that it was authority for the proposition that 'a body whose source of power is not solely the consent of those over whom it exercises that power, which performs public law duties and which is supported by public law sanctions can be susceptible to judicial review'.[71] However, both he and McKinnon LJ agreed that the Insurance Ombudsman Bureau was not such a body. As Rose LJ said:

> The foundations of the IOB initially, conspicuously lacked any trace of government underpinning. It was a free-standing independent body whose jurisdiction was dependent on the contractual consent of its members. It provided an alternative means of dispute resolution outside the courts, for members of the public who choose to use it in relation to insurance companies who were members. I am unable to accept that the Act directly or indirectly changed the character of the IOB's foundations or altered the source of its power…In a nut shell, even if it can be said that it has now been woven into a governmental system, the source of its power is still contractual, its decisions are of an arbitrative nature in private law and those decisions are not, save very remotely, supported by any public law sanction.'[72]

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67 *Datafin*, above n60 at 842-844 (Sir John Donaldson MR), 844 (Lloyd LJ), and 852-853 (Nicholls LJ).

68 *Aegon Life*, above n12.

69 Adams, above n64 at 107, 112.

70 *Associated Provincial Picture Houses Ltd v Wednesbury Corp* [1948] 1 KB 223 (hereafter *Wednesbury*).

71 *Aegon Life*, above n12 at 105.

72 Id at 105-106 (Rose LJ).

Julia Black is critical of this and several other English decisions which adopt the *Datafin* reasoning. She appears largely supportive of the expansion of judicial review to 'hybrid bodies' pioneered in *Datafin*, but says that:

> The public power test of *Datafin* has in fact been modified in the subsequent case law and the test which has been evolved is the 'government interest' …[which can be seen] … as an attempt to address the tensions between the source and nature of power arising from *Datafin* through a focus on the context of power. However, it has occurred without judicial elaboration or even recognition.[73]

Black disagrees with the focus in cases, such as *Aegon Life*, on the contractual origins of power:

> In seeing the contractual basis of power to be a highly significant if not determinative factor in withholding review, the courts are confusing the use of contract as an instrument of economic exchange with the use of contract as an instrument of governmental or non-governmental organisation and regulation.[74]

Black is, of course, ignoring here another obvious aspect of contracts, namely that they represent the voluntary acceptance of mutual obligations.

The situation changed dramatically in the UK with the passage of the *Financial Services and Markets Act* 2000, which established a single statutory Financial Ombudsman Service ('FOS') which brought together the eight existing industry based schemes.[75] James and Morris, writing in 2003, predicted that 'the FOS will almost certainly be subject to judicial review'.[76] They reported that the first Chief Ombudsman of the new scheme, Walter Merricks, was 'sanguine' about this prospect, provided that it:

> is confined to its proper function, that is to say checking whether the decision-maker has acted lawfully rather than substituting the court's opinion for that of the decision-maker who has been entrusted with that responsibility by Parliament.[77]

By 2004, the FOS had been subject to a number of judicial reviews, and when asked whether he was he still so sanguine, the Chief Ombudsman said he was less so:

> but if we merely said we've taken account of the way the law runs in this area without trying to specify the view exactly where the law stands …then… I think in many cases we can avoid getting into serious trouble with the courts.[78]

This more guarded optimism, consistent with our Quantum contract theory, may well be justified in light of the decision in *Norwich & Peterborough Building Society v Financial Services Ombudsman*.[79] In that case, a consumer complainant

73 Black, 'Constitutionalising Self-Regulation', above n9 at 36.
74 Black, id at 41–42.
75 See James & Morris, above n55 at 167.
76 Id at 175.
77 Ibid.
78 Personal Interview by O'Shea with Walter Merricks, Melbourne, November 2004.
79 [2003] 1 All ER 65 (hereafter *Norwich*).

held a certain class of savings account, which had certain tax advantages, at the respondent building society. The government changed the tax rules so that a new class of account was more advantageous. The respondent did not offer the new account, but did offer a kind of hybrid account which was only available to those who had held the old style accounts for five years. The hybrid account paid higher interest than the old style account. The complainant could have transferred his old style account to another institution without loss of tax relief, but there was a penalty term for early withdrawal in the contract with the respondent and, more importantly, the respondent was paying higher interest to its account holders, of any kind, than other comparable institutions.

The complainant argued that it was unfair for their class of account holders to receive a lower rate of interest than those holding the hybrid accounts. The FOS decided in favour of the complainant on two grounds. First, although the 'strict wording' of the Banking Code was not 'directly applicable' with respect to its sections 2.17 and 2.18 in relation to 'superseded accounts', the FOS considered that the 'fair way of interpreting the spirit of section 2.17' was that the superseded account 'should not pay worse interest than any accounts in the Firm's current range with less onerous features'.[80]

Secondly, the FOS relied on a standard of 'relative onerousness' which was a principle developed by the previous Building Societies Ombudsman and 'which had been applied whether the accounts being compared were 'superseded' or not'.[81] Judicial review was sought by the respondent building society on two grounds:

- First, that the FOS could not find that there was no breach of the express terms of the Banking Code, and yet hold that the Code had been somehow breached 'in spirit'.
- Secondly, that the standard of 'relative onerousness' was irrational and that in its application the FOS had failed to take into account the issue whether the complainant would have received better treatment from other competing institutions.

Ouseley J drew a clear distinction between the Banking Code as a set of rules for interpretation and application and the role of an Ombudsman applying the standard 'relative onerousness' as a test or guide to what is meant by the principle of 'fairness'.[82] As Richard Nobles has said in commenting on this decision: '… the former acting as a collection of rules guiding conduct; the latter as a party authorised to resolve disputes relying on principles as well as rules'.[83]

80 Id at 74, 78.

81 Id at 74.

82 The statutory criterion for decision making by the FOS is 'what is, in his opinion, fair and reasonable in all the circumstances of the case': s228(2) *Financial Markets and Standards Act* 2000 (UK).

83 Nobles, above n20 at 783.

There is, admittedly, a tension in documents such as the Banking Code and similar industry codes, in that they not only contain prescriptive and detailed rules to guide conduct in specific situations, but they also contain more general statements of intent and purpose, such as a general promise to 'act fairly and reasonably in all our dealings with customers'.[84] Clearly, in reaching his decision the FOS relied more on the more general provisions in the 'Key Commitments' to overcome the lack of direct applicability of the more specific prescriptions in sections 2.17 and 2.18.

Ouseley J expressly rejected this approach. His Lordship also rejected submissions for the FOS that the Court could not interfere with an interpretation of the Banking Code by the FOS even if it disagreed with such interpretation:

> The task of interpreting the Banking Code 1998 is in my judgment for the Court….The Code, however, is a material consideration for the Ombudsman to take into account. If he misinterprets it, he will have failed to take it into account. It has one meaning. Although people may reasonably differ as to that meaning, it is for the Courts to decide what the one meaning is because it is for the Courts to decide whether a material consideration has been ignored.[85]

Further, although purpose, context and 'spirit' were important in determining the meaning of the Code,[86] they could not be relied on to detract from or rewrite the specific provisions of the Code, since otherwise these would fail as effective guides to action by institutions and the expectations of customers of such action. As Nobles stated:

> This led the Court to claim that not only was the code a collection of rules rather than a series of examples illustrating a general principle of unfairness, but that these rules should be give a literal (albeit practical) interpretation rather than one based on claims as to the code's underlying purpose or spirit.[87]

Luckily for the complainant customer, the erroneous interpretation of the Banking Code by the FOS was not the only basis for the latter's decision. There was the standard of 'relative onerousness' developed in the context of the 'fairness' criterion. Ouseley J said:

> the Banking Code does not provide for all situations and should not be interpreted so that it does when clearly it does not. But that also means that what is fair or unfair cannot be judged exclusively by reference to it…There are powerful arguments as to what is fair or unfair on both sides, but I cannot conclude that in these respects the Ombudsman's approach is irrational. He deals with that consideration in a lawful manner within the broad scope of fairness.[88]

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84 *Banking Code* 1998 (UK) 'Key Commitments'. See also Code of Banking Practice 2004 (Aust) Clauses 2.2 and 2.3.

85 *Norwich*, above n79 at 87, 92.

86 Id at 87.

87 Nobles, above n20 at 785.

88 *Norwich*, above n79 at 97.

Earlier in the judgment, his Lordship had demarcated the role of the Court as opposed to that of the Ombudsman in matters of fairness:

> The Ombudsman is entitled and consistency in decision-making probably obliges him to develop criteria as to what constitutes unfairness. Those criteria are a matter for him. The very concept of 'unfairness' is very wide and permits reasonable people to disagree. But its very width serves against over-active judicial intervention in the approach adopted by the Ombudsman in the criteria which he develops or in the application of those criteria or of the concept of unfairness to the circumstances of the case.[89]

In Australia, judicial approaches vary from judicial restraint when faced with an apparently procedurally correct decision, to a readiness to intervene and impose natural justice requirements whilst commenting obiter dicta on general rights of judicial review. The focus seems to be on the *sources* of decision making power, rather than on the consequences and context of its use.

The first attempt judicially to review an industry-based consumer dispute resolution scheme in Australia occurred in *Citipower v Electricity Industry Ombudsman (Vic) Ltd & Anor*.[90] The Electricity Industry Ombudsman of Victoria is now the EWOV, but the structural position of the scheme was the same. The original complaints arose from an interruption to power supply which was alleged to have caused damage to some electrical equipment. The claimant consumers had contracts with Citipower for the supply of electricity, though Citipower neither itself generated or even distributed, at a wholesale level, power, nor was it responsible for the maintenance of power supply in a technical sense. Despite this, the EIOV awarded damages against Citipower in favour of the complainants and noted in her reasons that:

> Consumers (including the claimants) were entitled to the benefit of an implied contract with Citpower to supply power and to make appropriate arrangements to maintain the supply of electricity to consumers; and
>
> On the basis that Citipower was able to claim under its contract with the Victorian Power Exchange for damage suffered, Citipower carried responsibility for the damage suffered by each claimant.[91]

Citipower sought judicial review of the EIOV's decision as being either beyond her power and the result of an error of law by the EIOV, and/or in breach of the contract between Citipower and the EIOV represented by the constituent documents of the EIOV. Interestingly, no argument was put to Warren J (as she then was), nor considered by her, as to the susceptibility of the EIOV to full judicial review for mere error of law which did not go to jurisdiction.

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89 Id at 89.
90 [1999] VSC 275 (hereafter *Citipower*).
91 Id at para [8].

Whilst her Honour does refer to *AFL v Carlton Football Club Ltd*[92] on several occasions in her reasons,[93] which decision did adopt the reasoning in *Datafin*, she herself does not expressly do so. Instead, her decision is confined to an interpretation of the Articles of Association, Constitution and procedures of the EIOV. Her Honour dealt with the EIOV as a 'domestic tribunal' and gave no consideration to its status as either a public or 'hybrid' body along the lines of the reasoning in *Datafin*. In doing so, she upheld the independence of the EIOV, stating:

> It is not open to me to examine the correctness of the determination of the Ombudsman as to whether the interruption of power supply was a matter within the control of Citipower. I could substitute my own opinion for that of the Ombudsman only if the determination of the Ombudsman was so aberrant as to be irrational.[94]

And her Honour found that it was not.

The stakes were raised both in argument by counsel and in the judgment of the New South Wales Supreme Court in *Masu Financial Management Pty Ltd v Financial Indsutry Complaints Service Limted and Julie Wong*.[95]

Julie Wong had retained Masu Financial Management Pty Ltd ('Masu'), which recommended investment in a negatively geared property which Ms Wong bought in 1999. After a rental guarantee period had expired, the property started losing more money than Ms Wong could afford. When she tried to sell it, the real estate agents indicated that it would yield a $50,000 loss.

Ms Wong complained to the Financial Industry Complaints Service ('FICS'). The FICS panel determined that Masu should repay its consultancy fee of $9,863.00 plus some out of pocket expenses and interest. Masu applied to the Supreme Court for declarations that:

- FICS represented an unconstitutional exercise of the Commonwealth's judicial power;
- FICS was a public body and amenable to judicial review and, in this instance, was in breach of its public duties; or alternatively
- FICS was contractually bound to Masu in a way which gave rise to similar duties which had been breached.

Justice Shaw considered the constitutional issue separately.[96] He ruled that FICS was not, of itself, exercising the judicial power of the Commonwealth, stating:

> Determinations of a panel of FICS create new rights and obligations designed to achieve fairness, in a broad sense, between the parties rather than amounting to

92 (1998) 2 VR 546.

93 *Citipower*, above n90 at paras [16], [18], [24], [27], [28] and [30].

94 Id at para [30].

95 (2004) 50 ASCR 554 (hereafter *Masu No 1*) and *Masu No 2*, above n62.

96 *Masu No 1*, above n95.

> the performance of the traditional task of a court, namely the ascertainment and enforcement of existing legal rights.[97]

In this statement, his Honour is seeing FICS for what it is, something particular but not quite like a court. In his second judgment, Shaw J proceeded to consider the substantive question of whether FICS, in reaching its decision on Ms Wong's complaint against Masu, was in breach of its duties either as a judicially reviewable public body, or otherwise in contract.

The determination of the FICS panel was, in summary, that Masu must repay Ms Wong the entirety of its consultancy fee plus some out of pocket expenses and interest. Ms Wong had also sought compensation for an expected capital loss on the sale of the investment property she had bought on Masu's advice. The FICS panel determined that:

> If the complainant sells the apartment before 31 December 2002 and satisfies the Panel that:
>
> (a) the sale was on the open market and at arm's length; and
>
> (b) she has made a loss after taking into account interest payments and income from and expenditure on or in connection with the apartment
>
> the Panel will give a further direction to the member to compensate her for that loss. Otherwise, it will not direct the member to pay her any more compensation than is provided for in this decision.[98]

Masu argued that there were several errors which, somewhat confusingly, Shaw J described as both 'substantive' and, elsewhere, as 'procedural.' In summary, they were as follows:

- First, there was insufficient notice given to Masu that the FICS panel was going to consider an important question, namely disclosure of commission;
- Secondly, the FICS panel gave insufficient reasons for its determination;
- Thirdly, the decision of the FICS panel was so unreasonable as not to have been available or open to it;
- Fourthly, the panel should not have proceeded to deal with the matter at all unless and until it had determined the monetary value of the claim so as to ensure that it was within its Rules as to jurisdiction.

It is interesting to note that none of these grounds amounts to an error of law within jurisdiction. They are, therefore, available as grounds for review regardless of whether FICS is characterised as a public or a private body. Justice Shaw's finding that 'FICS was exercising powers of a public nature, and this (*sic*) is susceptible to judicial review'[99] was not necessary to determine the outcome of the

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97 Id at para [13]. For a more detailed discussion of the constitutional aspect see Paul O'Shea, 'A constitutional challenge to an industry based consumer dispute resolution scheme' (2005) 16 *ADRJ* 5.

98 *Masu No 1*, above n95 at para [6].

99 Ibid.

application. It is, therefore, merely obiter. His Honour was himself keenly aware of the limitation of this finding, as he says:

> Lest I be wrong about the capacity of the court to judicially review decisions of FICS, I think that the cautious approach is to couch any remedies which this court might grant in the contractual context of the enforcement of the constitution and rules of FICS.[100]

This caution is, with respect, justified. First, it is not clear that the weight of authority supports his Honour's conclusion as to the law; and secondly, several of the 'observations' his Honour makes about FICS, to support his conclusion, were either erroneous at the time of the hearing of the case, or are certainly so now.

The line of authority on which his Honour relied included the English decision in *Datafin* and those Australian cases which refer to *Datafin*. His Honour said he was following the observations of Spigelman CJ in *Minister for Local Government v South Sydney City Council*,[101] where the Chief Justice said, amongst other things:

> In my opinion, the common law basis for the duty to accord procedural fairness is reflected in the cases which extend the duty to the exercise of prerogative powers…It is also the basis for the extension of the principles of judicial review to private bodies which make decisions of a public character. (See, *Forbes v New South Wales Trotting Club Ltd* (1979) 143 CLR 242; *R v Panel on Take-overs and Mergers; Ex parte Datafin Plc* [1987] QB 815).[102]

It should be noted here that Spigelman CJ is referring only to procedural fairness, not to error of law.

In *Masu No 2,* Shaw J said that:

> In my view, the preponderance of Australian authority indicates that the English case of *R v Panel on Takeovers and Mergers; Ex parte Datafin Plc* [1987] 1 All ER 564 is applicable in this country, that is to say that companies administering external complaints schemes concerning participants in the finance industry are judicially reviewable.[103]

He also referred to cases on the Advertising Standards Council[104] and concluded: 'Thus, it seems to me clear that the *Datafin* principle applies in New South Wales, that FICS was exercising powers of a public nature, and this is susceptible to judicial review.'[105] His Honour did not, however, refer to cases where Australian

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100 Id at para [11].

101 (2002) 55 NSWLR 381.

102 Id at para [7] as cited in *Masu No 2*, above n62 at para [4].

103 *Masu No 2*, above n62 at para [5].

104 *Typing Centre of New South Wales v Toose* (Unreported, Supreme Court of NSW, Mathers J, 15 December 1998); *Dorff Industrires Pty Ltd & Box Emery & partners (a firm) v The Honourable PB Toose CBE QC* (1994) 54 FCR 350; *McClelland v Burning Palms Surf Life Saving Club* (2002) 191 ALR 759.

105 *Masu No 2*, above n62 at para [6].

courts have considered *Datafin* and found that there was not sufficient 'public interest' or 'legislative intertwining' in the relevant organisations to justify judicial review.[106] He ignored the most relevant Australian decision, that of Warren J in *Citipower*[107] which considered similar Australian authorities but followed a different analytical path to a different conclusion.

His Honour's reasoning also ignores the decision in *Aegon Life* which is, probably, the most analogous UK decision. FICS is not a statutory authority, unlike the UK Financial Services Ombudsman which subsequently replaced the Insurance Ombudsman Bureau. It is a company limited by guarantee whose members hold Australian Financial Services Licences. AFS licence holders are required by the *Corporations Act* to be members of an ASIC approved dispute resolution scheme, not necessarily FICS.[108]

As discussed above, in *Aegon Life* the Court of Appeal specifically endorsed the approach in *Datafin*, but found that it did not apply to the Insurance Ombudsman scheme. In Australia, these cases have been the focus of comment by Ken Adams. He applied their reasoning to the former General Insurance Claims Review Panel (now the IOS) and concluded that the Australian scheme would not be subject to judicial review as a public body.[109]

Secondly, in *Masu No 2,* Shaw J identified a number of 'indicia' which he said prompted him to the conclusion that FICS was susceptible to judicial review. These included, amongst others, that:

- the federal government was responsible for appointing a substantial proportion of the members of the board of FICS; and
- the federal government was involved in the appointment of two-thirds of any panel appointed by FICS to hear a complaint.[110]

Taking the first point, it is conceded that the federal Minister for Consumer Affairs did select the appointees for the Consumer Director positions on the FICS board until May 2002, but this was not as of right, but rather by way of an invitation by the FICS board. The federal government has no proprietary interest in FICS. Even so, federal government appointees accounted for only four out of the nine members of the board at the time of the *Masu* determination. At the May 2002 Annual General Meeting of FICS, the constitution was amended, so that Consumer Directors would in future be appointed by the board itself after consultation with relevant consumer organisations.[111] Less than three months after the *Masu* FICS determination, and two years before the New South Wales Supreme Court judgment, the first two Consumer Directors not selected by the Minister were appointed. The current position, therefore, is that the federal government is no longer involved at all in appointments to the FICS board.

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106 *Norths*, above n62 at 745; *Adamson*, above n62 at 347.
107 *Citipower*, above n85.
108 See O'Shea, 'Underneath the Radar', above n8 at 159.
109 Adams, above n64 at 114.
110 *Masu No 2*, above n62 at para [7].
111 Financial Industry Complaints Services Ltd, *FICS Annual Review* (2001) at 4.

On the second point, panel members are employees and appointees of the FICS board. The federal government, through the Minister for Consumer Affairs was involved, until May 2002, in their appointment by way of consultation only. Since then, the federal government has not been involved at all in such appointments.

The claim for judicial review could be upheld regardless of whether FICS is a public body or not. As Shaw J stated: 'I accept that it (Masu) was entitled to procedural fairness as a matter of contract between Masu and FICS …These contractual rights are enforceable in this court.'[112]

On the first substantive ground, Shaw J accepted the submission that Ms Wong had added her complaint about a non-disclosed commission paid to Masu after her original written complaint. Masu, on the other hand, had only been given an opportunity to reply to the original complaint. The FICS panel's determination included reference to the question of commission. His Honour concluded: 'It is a reasonable submission for the plaintiff to make that Masu was then thereafter faced with a determination on the basis of a case that it did not know it was required to meet.'[113]

On the ground of insufficient reasons, Shaw J thought 'there is substance in the plaintiff's submission when it says that it does not know (from the reasons) "what legal wrong it has committed."'[114] He did regard as 'hyperbolic' some of Masu's submissions to the effect that the FICS panel's reasons were 'incoherent' and indicated 'grave prejudice'.[115] He noted that the reasons given failed to explain all the relevant considerations that had been taken into account.[116]

Having already concluded that the decision was flawed, his Honour's observations about the other argued grounds are obiter, but he did not 'think there is great strength' in the plaintiff's argument that the FICS panel's determination was so 'unreasonable so as to not have been available or open' on a *Wednesbury* basis.[117] Further, he did not think that there was:

> much substance in the criticism that the [FICS] tribunal was prohibited by [its own rules] from proceeding to deal with the matter at all unless and until it had determined the monetary value of the claim so as to ensure that the claim was within the relevant limitation.[118]

Indeed, the flexibility demonstrated by the FICS panel in this 'two stage' determination is a good example of one of the advantages that industry-based consumer dispute resolution schemes have over the more limited options available in court orders. It demonstrates reflexive internal normative flexibility as opposed to court-based rulings.

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112 *Masu No 2*, above n62 at paras [10] and [11].
113 Id at para [16].
114 Id at para [17].
115 Id at para [18].
116 Id at paras [18] and [20].
117 *Wednesbury Corp*, above n70; id at para [21].
118 *Masu No 2*, above n62 at para [21].

Justice Shaw, however, did exercise judicial imagination in making his order. He rejected Masu's submission that the decisions should simply be quashed without any order for redetermination. He was minded to repair the breaches of procedural fairness by allowing FICS to redetermine the case, albeit giving proper notice and better reasons.

Shaw did not apprehend any actual bias on the part of FICS or the panel: 'Rather, what is said is that there could be a reasonable apprehension of bias'[119] should the same panel redetermine the complaint. This defect, he found, 'could be accommodated by an order directing that the matter be remitted to a differently constituted panel which can then apply an independent collective mind to the complaints Ms Wong has made'.[120] There was no order as to costs. Interestingly, whilst opining in obiter about executive power and judicial review, Shaw J engaged in exactly the kind of flexible decision making for which Julia Black has called when courts consider decision-making by self-regulatory bodies.

Most disturbingly, if the obiter of Shaw J that FICS and, by extension, other similar schemes are all public bodies susceptible to full judicial review is adopted as correct law by other Australian courts, this opens up the possibility of judicial review being available for mere error of law within jurisdiction. This may well be a serious undermining of the autonomy of the schemes, their flexibility, their accessibility and their usefulness to both consumers and industry as a low-cost informal means of resolving disputes.

It will amount to the imposition of rule-based externalities on what could be, and arguably already is, a self-regulating system which can develop and apply its own internally flexible norms when resolving consumer disputes, without disturbing the overall structure and integrity of the general law of contract.

Industry-based dispute resolution schemes are not judicial or regulatory bodies relying on rules, but rather they operate on the basis of the application of flexible standards and principles designed to avoid the features of rule-mandated decision making which is the central feature of general courts. The Quantum contract theory explains how they do not contradict the general body of law, but rather seek to reach outcomes by the use of open-textured guidelines which provide considerable discretion in the determination of any particular consumer dispute. The case law just examined exhibits a movement towards grasping that central truth, while at the same time demonstrating the continuing pull towards more established versions of dispute resolution, which need to be strongly resisted if consumer disputes are to be handled with sensitivity and understanding of their dimension.

119 Id at para [26].
120 Id at paras [25]–[27].

7. Conclusions

Consumer law exists as an internally autonomous enclave, alongside or within the general law, but with its own internally coherent content. That content recognises the particular nature of consumer disputes, and reflects the need to resolve them by the application of flexible and open-textured principles rather than inflexible all or nothing rules. The explicit reference to standards such as fairness and good conscience in the resolution of consumer disputes raises no threat to those sorts of values said to be promoted by the general law, since consumer law sits alongside the system of general law, and seeks to ensure that the coherence of the general law is not threatened by the existence of the enclave. Consumer law works within and is part of the same system as the general law. It simply has features that differ internally from those found in the general law. Industry-based dispute resolution schemes exemplify this point. They provide clear evidence for the workability of this hypothesis, in that they are both 'institutional' and have internally coherent and independent content. Furthermore, they reveal the best practice and content of consumer law, against which the use of other forms of resolution of consumer disputes, including in particular regulation, must be benchmarked in the future.