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# Treating Vulnerable Consumers 'Fairly' When They Make a Complaint About Banking or Finance in Australia

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# Treating Vulnerable Consumers 'Fairly' When They Make a Complaint About Banking or Finance in Australia

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**Abstract**

*The Australian Financial Services Reform Act 2001* (Cth) *requires that licenced banking and financial services providers establish internal dispute resolution ('IDR') systems complying with requirements promulgated by the Australian Securities and Investments Commission ('ASIC'). In addition, licence holders are required to be members of an ASIC approved External Dispute Resolution ('EDR') scheme so that if a complaint is not resolved following the use of internal mechanisms, an external dispute resolution facility is available for most banking consumers. In late 2018, a new EDR body was established, the Australian Financial Complaints Authority ('AFCA'), to deal with external complaints. The 2018 Royal Commission into the banking and finance sector uncovered significant issues in terms of the banking and financial sector and raised a number of serious concerns that were largely linked to how consumers contracted with banks and other organisations however information about existing complaint handling arrangements was limited. In particular, there was little demographic information about consumers who use IDR and EDR arrangements or what factors may be relevant in terms of the settlement of complaints and disputes. In this regard, currently sections 912A(1)(g), (2) of the Corporations Act direct the form of AFSL holders' IDR and EDR systems, but they do not impose any obligations on AFSL holders in terms of conduct when providing the systems. In terms of consumers more generally, it is unclear how many consumers could be classified as 'vulnerable' and may settle a dispute on less favourable terms because the impact of proceeding may place them in an even more disadvantageous position. It is suggested that better reporting in relation to IDR and EDR activity together with targeted independent advocacy services and training of relevant staff in respect of the Australian Consumer Law could assist consumers and enable more effective reporting of misconduct issues.*

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## I Introduction

In Australia, when a consumer makes a complaint in respect of a banking or finance matter, it is unlikely that the complaint or dispute will ever be dealt with by a court or tribunal.[1] Disputes are often settled or finalised through an internal complaints or dispute handling process (Internal Dispute Resolution or 'IDR') or through some form of external dispute resolution ('EDR').[2] Usually, the first step for a consumer in a dispute in respect of financial services is to contact a complaints officer or frontline staff members. This often occurs by electronic means. An extensive array of IDR arrangements within banks and financial organisations are directed at settling or finalising complaints.

If a complaint is not finalised as a result of an IDR process, a consumer may make a complaint against a service provider via an independent EDR scheme. Consumers may still take a financial complaint to court or to a tribunal however this option will often require a consumer to pay a filing fee and there are likely additional legal and other costs. In respect of EDR schemes, ordinarily there are no filing fee costs and lawyers may not be permitted. In contrast, significant costs and barriers can be faced by individuals in terms of dispute resolution ('DR') options that include courts and tribunals and that are outside IDR and EDR arrangements. As a result, the effective and efficient operation of IDR and EDR processes have been regarded as essential in terms of the promotion of the stability in the Australian financial system.

IDR and EDR arrangements are underpinned by self-regulatory and co-regulatory approaches that have existed in the financial system in Australia for some years. Self-regulation and co-regulation are explicitly incorporated into the consumer protection regulatory framework for financial services.[3] The *Financial Services Reform Act 2001* (Cth) requires that financial services licence holders providing services to clients must be members of a scheme approved by ASIC.[4]

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1 Mary Anne Noone and Lola Akin Ojelabi, 'Ethical Challenges for Mediators around the Globe: An Australian Perspective' (2014) 45 *Washington University Journal of Law and Policy* 145, 157.

2 Laurence Boulle and Rachael Field, *Australian Dispute Resolution: Law and Practice* (LexisNexis Butterworths, 2017) 271; Tania Sourdin and Louise Thorpe, 'How Do Financial Services Consumers Access Complaints and Dispute Resolution Processes?' (2008) 19(1) *Australasian Dispute Resolution Journal* 25, 25.

3 Nicola Howell, 'Revisiting the Australian Code of Banking Practice: Is Self-Regulation Still Relevant for Improving Consumer Protection Standards' (2015) 38 *University of New South Wales Law Journal* 544, 544.

4 The licensing provisions of the *Financial Services Reform Act 2001* (Cth) commenced on 11 March 2002. Under this regime, responsible entities of registered managed investment schemes must obtain an Australian financial services (AFS) licence that authorises them to operate registered managed investment schemes. AFS licensees are subject to the conduct obligations of Ch 7 of the *Corporations Act 2001* (Cth) (*Corporations Act*), including obligations to: (a) have available adequate financial resources to provide the financial services covered by their AFS licence and to carry out supervisory arrangements (see s 912A(1)(d)); (b) do all things necessary to ensure that the financial services covered by their AFS licence are provided efficiently, honestly and fairly (see s 912A(1)(a)); (c) have adequate risk management systems (see s 912A(1)(h)); and (d) comply with the conditions on their AFS

Some commentators have suggested that, after a promising start, the schemes that existed until the end of 2018 had stalled and could not be described as world's best practice.[5] As a result a new scheme that is regarded as a 'one stop shop' to deal with banking and financial disputes commenced operations in November 2018. The Australian Financial Complaints Authority ('AFCA') is required by legislation to operate in a way that is accessible, independent, fair, accountable, efficient and effective. AFCA has limitations and cannot consider complaints about a telephone, electricity, gas or water bills. AFCA also cannot consider complaints about the level of a fee, premium, charge, rebate or interest rate unless the complaint is about a fee that was not disclosed or was misrepresented. AFCA will not consider a complaint dealt with by a court, dispute resolution tribunal established by legislation or a predecessor scheme such as the Financial Ombudsman Service ('FOS') although in June 2019 it became able to deal with 'legacy' claims.[6] Monetary caps also apply to complaints that AFCA will consider.[7]

In 2018, whilst AFCA was being established, the Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry ('the Commission') was exploring a range of issues relating to consumers in the banking and financial sector. The Interim Report of the Commission noted that there were serious misconduct issues that progressed through the IDR and EDR system that were not necessarily followed up by regulatory authorities and that:

> [M]isconduct [within the banking and financial sector] went unpunished or the consequences did not meet the seriousness of what had been done. The conduct regulator, ASIC, rarely went to court to seek public denunciation of and punishment for misconduct. The prudential regulator, APRA, never went to court. Much more often than not, when misconduct was revealed, little happened beyond apology from the entity, a drawn-out remediation program and protracted negotiation with ASIC of a media release, an infringement notice, or an enforceable undertaking that acknowledged no more than that ASIC had reasonable 'concerns' about the entity's conduct. Infringement notices imposed penalties that were immaterial for the large banks. Enforceable undertakings might require a 'community benefit payment', but the amount was far less than the penalty that ASIC could properly have asked a court to impose.[8]

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licence (see s 912A(1)(b)), including both the financial resource requirement conditions and the prescribed conditions under reg 7.6.04 of the *Corporations Regulations 2001* (Cth).

5 Bill Dee, Simon Smith and John Wood, 'Industry Ombudsman Schemes Twenty Years On: World Benchmark or Industry Captured?' (2009) 34(3) *Alternative Law Journal* 183, 183.

6 Australian Financial Complaints Authority, *AFCA Welcomes ASIC Approval for Legacy Complaints* (2019) <https://www.afca.org.au/news/media-releases/afca-welcomes-asic-approval-for-legacy-complaints/>.

7 Australian Financial Complaints Authority, *Credit, Finance and Loan Products and Issues* (2019) <https://www.afca.org.au/make-a-complaint/credit-finance-and-loan-complaints/credit-finance-and-loan-products-and-issues/>.

8 Financial Services Royal Commission, *Interim Report* (September 2018) <https://financialservices.royalcommission.gov.au/Documents/interim-report/interim-report-volume-1.pdf> xix.

In the absence of regulatory action, it is partly because of the operation of the IDR and EDR schemes that such issues were also unlikely to be ventilated in a civil court hearing and there appears to have been little reporting of IDR activity. Indeed, there is little data about IDR activity and past EDR activity.[9] A development that has not been closely reviewed by industry or the media is ASIC's new powers under s 912A(1)(g)(ii) of the *Corporations Act* which enables ASIC to develop a framework for mandatory IDR reporting requirements. Such reporting could support better quality data about the characteristics and features of consumers who use IDR and EDR arrangements as well as the issues that consumers face more generally within the sector. The Commission's final report recommended that ASIC should adopt an approach to enforcement that:

- takes, as its starting point, the question of whether a court should determine the consequences of a contravention;
- recognises that infringement notices should principally be used in respect of administrative failings by entities, will rarely be appropriate for provisions that require an evaluative judgment and, beyond purely administrative failings, will rarely be an appropriate enforcement tool where the infringing party is a large corporation;
- recognises the relevance and importance of general and specific deterrence in deciding whether to accept an enforceable undertaking, and the utility in obtaining admissions in enforceable undertakings; and
- separates, as much as possible, enforcement staff from nonenforcement related contact with regulated entities.[10]

As noted in November 2018, 'getting culture and conduct right is not a supervisory requirement. It is necessary for banks' and banking's economic and social sustainability'.[11]

Apart from general issues with IDR, EDR and regulatory action there are also issues that relate to some classes of consumer that require additional response. In this regard, this article suggests that the issues faced by vulnerable consumers in respect of both IDR and EDR arrangements are extensive and require additional consideration as well as reporting frameworks and advocacy support. In terms of how a vulnerable consumer is defined, there is debate about whether the terminology of vulnerable or disadvantaged consumers is to be used, and what, precisely, these terms

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9 Ian Ramsay, Julie Abramson and Alan Kirkland, *Review of the Financial System External Dispute Resolution and Complaints Framework* (Final Report, 2017) <https://static.treasury.gov.au/uploads/sites/1/2017/06/R2016-002_EDR-Review-Final-report.pdf> 192.

10 Financial Services Royal Commission, *Final Report* (February 2019) <https://www.royalcommission.gov.au/sites/default/files/2019-02/fsrc-volume-1-final-report.pdf> sect 3.6.

11 G30, *Banking Conduct and Culture: A Permanent Mindset Change* (Report, November 2018) Foreword, v.

convey.[12] In addition, it is not clear how many vulnerable consumers who have banking and financial system complaints ever use such schemes either because of accessibility or other concerns. This article explores the arrangements that currently exist and how future arrangements may be fairer for consumers and better support the vulnerable sectors of the community. The article examines the connection between IDR, EDR and the existing consumer law, and unconscionable and unfair conduct in light of the issues identified by the Commission with a particular focus on vulnerable consumers.

## II Definitions of Vulnerability

Researchers, commentators and policy makers have proposed various definitions about what it means to be a 'vulnerable consumer'.[13] Early approaches focused on the personal characteristics and circumstances of consumers. Currently there is a high degree of consistency in the literature in the United States, Europe and Australia on the categories associated with potential vulnerability which include (a) age (b) low income (c) those who do not work (d) the long term disabled (e) those with lower educational attainment (f) rural dwellers and (g) ethnic minorities. There appears to be broad agreement moving beyond individual traits, highlighting firstly the multidimensional nature of vulnerability; [14] secondly that consumer vulnerability is dynamic and transient;[15] thirdly that all of us have the potential to be vulnerable when placed in a consumption situation over which one has little control;[16] and finally that a range of factors can impact on consumer vulnerability.[17] The Productivity Commission's 2008 review

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12 Peter Cartwright, 'Understanding and Protecting Vulnerable Financial Consumers' (2015) 38(2) *Journal of Consumer Policy* 119, 120.

13 Stacey Baker, James W Gentry and Terri L Rittenburg, 'Building Understanding of the Domain of Consumer Vulnerability' (2005) 25(2) *Journal of Macromarketing* 128, 134.

14 Kathy Hamilton, Susan Dunnett, and Maria Piacentini (eds), *Consumer Vulnerability: Conditions, Contexts and Characteristics* (Routledge, 2015) 3; Office of Gas and Electricity Markets, *Consumer Vulnerability Strategy* (August 2019) <https://www.ofgem.gov.uk/ofgem-publications/75550/consumer-vulnerability-strategy-pdf> 6.

15 British Standards Institution, *Annual Report and Financial Statements* (December 2010) <https://www.bsigroup.com/Documents/about-bsi/financial-performance/2010/bsi-financial-performance-2010.pdf> 72; Financial Conduct Authority, *Consumer Vulnerability* (Occasional Paper No 8, 2015) 19; Mike George et al, 'Tackling Consumer Vulnerability: Regulators' Powers, Actions and Strategies' (2015) 15 *University of Leicester Research Paper* 6, 5; Hamilton, Dunnett and Piacentini (n 14) 1.

16 Baker, Gentry and Rittenburg (n 13) 132; British Standards Institution (n 15) 130; Financial Conduct Authority, *Annual Report 2015-2016* (July 2016) <https://www.gov.uk/government/publications/financial-conduct-authority-annual-report-2015-to-2016> 35; Financial Conduct Authority (n 15) 34; Paul Harrison and Charles Gray, 'The Ethical and Policy Implications of Profiling "Vulnerable" Customers' (2010) 34(4) *International Journal of Consumer Studies* 437, 438; Teresa M Pavia and Marlys J Mason, 'Vulnerability and Physical, Cognitive and Behavioural Impairment: Model Extensions and Open Questions' (2014) 34 *Journal of Macromarketing* 471, 472; Clifford J Shultz and Morris B Holbrook, 'The Paradoxical Relationships Between Marketing and Vulnerability' (2009) 28 *Journal of Public Policy and Marketing* 124, 125.

17 Australian Government Productivity Commission, *Report on Government Services* (January 2008) <https://www.pc.gov.au/research/ongoing/report-on-government-services/2008/2008>

of consumer policy and the 2017 Australian Consumer Law review have considered the needs of vulnerable and disadvantaged consumers. Vulnerability has been viewed as a spectrum reinforcing the point that 'any individual might experience vulnerability at one point in time'.[18] European Union research has highlighted that almost 75% of consumers will at one time or another exhibit at least one dimension of vulnerability.[19]

Chapter 14 of the 2019 Banking Code is entitled 'Taking extra care with customers who may be vulnerable'. It was noted in the final report of the Royal Commission that the vulnerable require specific consideration and that vulnerable consumers can include those 'who live in remote or isolated areas, who are not adept in using English, who cannot readily produce standard identification documents, and who neither need nor benefit from products such as informal overdrafts also require consideration'.[20]

Defining vulnerability only in terms of income and financial status is problematic however financial status may be one factor that contributes to vulnerability. There are more than 3 million people living below the poverty line in Australia (13.2% of the population, more than one in eight) this includes 739,000 children.[21] Many of those below the poverty line may be unlikely to have banking or financial disputes partly because they may have few assets and are therefore less likely to require financial service arrangements. However, some people who are below the poverty line do have complex financial disputes. In New South Wales, the National Debt Hotline is operated by the Financial Rights Legal Centre, specialises in 'helping people understand and enforce their financial rights, especially people on low incomes or who are otherwise marginalised or vulnerable'. The centre took close to 25,000 calls for advice or assistance during the 2015/2016 financial year. Of those, about 17,000 or so calls related to

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sect 9.58; Baker, Gentry and Rittenburg (n 13) 135; British Standards Institution (n 15) 15; Peter Cartwright, *The Vulnerable Consumer of Financial Services: Law, Policy and Regulation* (Financial Services Research Forum, 2011) <https://www.nottingham.ac.uk/business/businesscentres/crbfs/documents/researchreports/paper78.pdf> 1; Consumer Affairs Victoria, *Annual Report 2004-05* (November 2005) <https://www.parliament.vic.gov.au/papers/govpub/VPARL2003-06No168.pdf> 27; Financial Conduct Authority, *Annual Report 2015 to 2016* (July 2016) <https://www.gov.uk/government/publications/financial-conduct-authority-annual-report-2015-to-2016> 6; Mike George et al (n 15) 5; Clifford J Shultz and Morris B Holbrook, 'The Paradoxical Relationships between Marketing and Vulnerability' (2009) 28(1) *Journal of Public Policy and Marketing* 124, 124; Office of Gas and Electricity Markets, *Consumer Vulnerability Strategy* (2013) <https://www.ofgem.gov.uk/ofgem-publications/75550/consumer-vulnerability-strategy-pdf> 5; Teresa M Pavia and Marlys J Mason, 'Vulnerability and Physical, Cognitive, and Behavioural Impairment: Model Extensions and Open Questions' (2014) 34(4) *Journal of Macromarketing* 471.

18 Harrison and Gray (n 16) 440.

19 European Commission, *General Report of the Activities of the European Union* (March 2017) <https://ec.europa.eu/commission/news/eu-2016-general-report-activities-european-union-2017-mar-15_en 12>; Carol Brennan et al, 'Consumer Vulnerability and Complaint Handling: Challenges, Opportunities and Dispute System Design' (2017) 41(6) *International Journal of Consumer Studies* 638, 639.

20 Financial Services Royal Commission (n 10) 124.

21 ACOSS and UNSW Sydney, *Poverty in Australia* (October 2018) <https://www.acoss.org.au/wp-content/uploads/2018/10/ACOSS_Poverty-in-Australia-Report_Web-Final.pdf> 6.

credit and debt problems. The most common cause of debt problems for callers were credit cards, followed by home loans, personal loans including pay day lending, car loans and energy debts.[22]

Consumer vulnerability has been linked to individual characteristics and a tendency to be influenced by an external stimulation or temptation that leads to decisions harmful to the person's own finances.[23] Some commentators have identified numerous dimensions including: product knowledge, product promotion, marketing and emotional stress, social pressure, purchasing power, refunds policy and discrimination ability.[24]

Legal capability may be an important factor in vulnerability and has been defined as the personal characteristics or competencies necessary for an individual to resolve legal problems effectively.[25] Capabilities across a number of domains, including knowledge, skills, and psychological readiness to act have been identified. As a result consumers may not use IDR or EDR schemes as they are unable to take action and have 'low levels of capability in terms of education, income, confidence, verbal skill, literacy skill and emotional fortitude'.[26] Psychological preparedness to act can be effected by both personal and systemic constraints, such as shame, a sense of insufficient power, fear, gratitude, and frustrated resignation.[27] Deficiency in any one of these dimensions may limit a person's ability to effectively resolve legal problems.[28] Lack of knowledge about legal rights, lack of awareness of public legal advice services, and believing either that the system is too inaccessible or too costly to use to resolve problems are some of the ways in which low legal capability and vulnerability manifests.[29]

Governments and non-governmental organizations ('NGOs') have undertaken research to better understand consumer vulnerability and the

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22 Ibid.

23 Hua Yu Shi et al, 'The Concept of Consumer Vulnerability: Scale Development and Validation' (2017) 41(6) *International Journal of Consumer Studies* 769, 769.; Baker, Gentry and Rittenburg (n 13) 29; Suraj Commuri and Ahmet Ekici, 'An Enlargement of the Notion of Consumer Vulnerability' (2008) 28(2) *Journal of Macromarketing* 184; Fred W Morgan, Drue K Schuler and Jeffrey J Stoltman, 'A Framework for Examining the Legal Status of Vulnerable Consumers' (1995) 14(2) *Journal of Public Policy and Marketing* 269.

24 Shi et al (n 23) 769.

25 Genevieve M Grant et al, 'Relationship Between Stressfulness of Claiming for Injury Compensation and Long-Term Recovery: A Prospective Cohort Study' (2014) 71(4) *JAMA Psychiatry* 452.

26 Hazel Genn and Alan Paterson, *Paths to Justice Scotland: What People in Scotland Think and Do About Going to Law* (Bloomsbury, 2001) 260; Rebecca L Sandefur, 'The Importance of Doing Nothing: Everyday Problems and Responses of Inaction' (2007) 112 *Transforming Lives: Law and Social Process* 117.

27 Sandefur (n 26) 123.

28 Sharon Collard et al, *Public Legal Education Evaluation Framework* (January 2012) <https://lawforlife.org.uk/wp-content/uploads/2011/12/core-framework-final-version-nov-2011-v2-370.pdf> 38; Natalina Nheu and Hugh McDonald, *By the People, For the People? Community Participation in Law Reform* (Law and Justice Foundation of NSW, 2010) <http://www.lawfoundation.net.au/report/lawreform> 178.

29 Hugh M McDonald and Julie People, 'Legal Capability and Inaction for Legal Problems: Knowledge, Stress and Cost' (2014) *Updating Justice* 41, 2.

factors contributing to it.[30] Empirical evidence increasingly treats vulnerability as a state that someone may find themselves in, rather than a personal characteristic possessed. While certain personal characteristics mean that some groups are at a higher risk of finding themselves in a vulnerable position, it is the context rather than personal characteristics that determines vulnerability. Personal characteristics such as physical impairment, ill health and being unfamiliar with new technology are all risk factors for vulnerability.[31] Such factors may be more prevalent among older people who are involved in the consumption of financial services.[32] An individual may be in control of some domains of their life, but not of others, meaning that vulnerability is also a fluid state.[33] In addition, a state of vulnerability in the financial domain may trigger or accentuate a state of vulnerability in other domains of life.[34] The consequence may lead to significant financial and social issues.

Issues about banking products, services and investment may be the subject of complex informational exchanges, and email and online complaint processes are increasingly important means through which such issues are managed. These arrangements are difficult for vulnerable consumers who are technologically deficient. Some individuals may be more vulnerable than others. Age, nationality, culture, psychological disposition, irrationality, and cognitive bias have been proposed as individual level explanations by psychologists, behavioural economists, and criminologists.[35] Such deficiencies can impact on legal capability through inexperience with the legal system and language barriers that impede or limit a person's ability to effectively resolve problems within the banking and finance sector. Legal capability can be explored by reference to legal problem and demographic characteristics.[36] Particular types of people are more likely to be constrained from taking action for particular reasons and for particular types of legal problems.[37]

Some demographic groups have increased vulnerability to legal problems while others are more resilient. Age often has the strongest relationships with prevalence across jurisdictions. Survey results have revealed that the oldest group aged 65 years or over had significantly lower prevalence according to a range of measures. Different ages or life stages were associated with different types of legal problems. In most

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30 Organization for Economic Cooperation and Development (OECD), *Economic Surveys: Australia 2012*, 9–11.

31 Lisbet Berg, 'Consumer Vulnerability: Are Older People More Vulnerable as Consumers than Others?' (2015) 39(4) *International Journal of Consumer Studies* 284, 285.

32 Ibid.

33 Stacey M Baker, James W Gentry and Terri L Rittenburg, 'Consumer Vulnerability as a Shared Experience: Tornado Recovery Process in Wright, Wyoming' (2007) 26(1) *Journal of Public Policy and Marketing* 128, 130.

34 Martin Coppack et al, 'Consumer Vulnerability', *Financial Conduct Authority Occasional Papers in Financial Regulation* (2015) 8.

35 Sareh Pouryousefi and Jeff Frooman, 'The Consumer Scam: An Agency-Theoretic Approach' (2017) *Journal of Business Ethics* 1, 1.

36 McDonald and People (n 29) 2.

37 Ibid.

jurisdictions, accidents, crime, personal injury and rights problems peaked between 15 and 24 years of age, and credit/debt and family problems peaked between 25 and 44 years of age.[38]

Financial vulnerability can have negative consequences for other domains of the lives of individuals and society.[39] Slow decision-making can also impact negatively. Vulnerability is often broken down into systematic and transient elements,[40] 'and time' or 'speed' are not usually considered as a source of financial vulnerability or other kinds of vulnerability. Slow determinations can be a source of distress and powerlessness in other contexts, such as in delaying access to life-saving treatments or social security benefits. Research findings indicate that certain professions and sole business owner/operators may have found it particularly difficult to access support during a credit crisis.[41] Financial exclusion is an emerging issue within the banking and finance sector and there are significant implications for policy in relation to the role and regulation of financial services.[42] To some extent the categorisation of 'vulnerability' may be problematic, particularly if it results in financial exclusion. On the whole, the identification of a person as 'vulnerable' need not trigger financial exclusion. Rather such a descriptor may indicate that triage processes need to operate which consider the need for fast decision making, advocacy, support and the handling of complaints by more experienced and trained complaints handlers.

Definitions of vulnerability may extend beyond individuals and include small business. Small businesses owners invest significant time and resources and may have clear characteristics relating to vulnerability. In addition, small businesses may be more vulnerable to natural disasters, cyber-attacks, fraud, de-risking and the influences and impacts of larger businesses.[43] At present there are no clear indicia used within the financial sector to determine 'vulnerability' in relation to consumers or small businesses who are engaged in IDR or EDR. To some extent, it is assumed that because a consumer initially entered into an agreement in relation to financial services, that they have the capacity and capability to complain when a problem arises. Such an approach does not recognise the fluid nature of vulnerability. Improving financial literacy and broadening financial understanding are necessary to help consumers make informed decisions regarding their money. Groups with lower financial literacy on average were young people under 25 years of age, those with no post-secondary education, those employed in lower blue-collar occupations and

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38 Christine Coumarelos et al, *Legal Australia-Wide Survey: Legal Need in Australia* (Law and Justice Foundation, 2012) xv.

39 Coppack et al (n 34) 20.

40 Commuri and Ekici (n 23) 183.

41 Margaret K Hogg, Geraint Howells and David Milman, 'Consumers in the Knowledge-Based Economy (KBE): What Creates and/or Constitutes Consumer Vulnerability in the KBE?' (2007) 30(2) *Journal of Consumer Policy* 151, 157.

42 Ibid.

43 Rodney C Runyan, 'Small Business in the Face of Crisis: Identifying Barriers to Recovery from A Natural Disaster' (2006) 14(1) *Journal of Contingencies and Crisis Management* 12, 14.

people with relatively low levels of income and assets.[44] Systemic, cultural and regulatory issues may mean that vulnerable consumers face considerable obstacles when complaining about financial arrangements.

## III Dispute Resolution

Financial disputes have been regarded as particularly problematic because there are limitations upon the outcomes that may be available for the consumer. While the dramatic rise in EDR scheme use has meant that avenues for consumer redress have grown exponentially, this may not have resulted in arrangements that support actual redress for some consumers.[45] The scheme that existed until November 2018, the FOS received a total of 39,479 disputes in the period 2016-2017 (an increase of 16%). The number of financial difficulty disputes accepted by the FOS were 2,742 (a reduction of 5%). The number of systemic issues that were reported to have been 'resolved' by FOS numbered 66 and the number of investigations of alleged breaches of industry codes of practice numbered 273 (with 133 confirmed breaches). The number of visits to the FOS website were 675,246, an increase of 13%.[46] In 2015-2016 only 0.2% of claims were resolved by way of determination.[47] As at 2 May 2017, there was a total of $13,909,635.50 that had not been returned to 214 affected consumers due to Australian Financial Services Licence ('AFSL') holders and Australian Credit Licence holders being unwilling or unable to comply with 151 FOS determinations since 1 January 2010.[48]

The Credit and Investments Ombudsman ('CIO') released its Annual Report on Operations for 2016 -2017. Key highlights for the year included that 5,892 complaints were made against financial services providers, an increase of 24%, nearly 26,000 enquiries were received, a reduction of 4%, credit reporting complaints comprised 26% of all complaints received and financial hardship complaints decreased to 20% of all complaints received. Consumers received $7.7 million in refunds or compensation, and 39 new systemic issues were reported to ASIC, a number of which were the subject of regulatory action, including remedial outcomes.[49] The CIO observed that unusually high numbers of staff previously employed by the CIO have now taken up roles in financial firms to support IDR functions and in response to increased regulatory scrutiny.[50]

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44 Linda Salisbury, 'Minimum Payment Warnings and Information Disclosure Effects on Consumer Debt Repayment Decisions' (2014) 33(1) *Journal of Public Policy and Marketing* 49, 53.

45 Sourdin and Thorpe (n 2) 26.

46 Financial Ombudsman Service Australia, *Annual Review 2016-17* (2017) <http://www.fos.org.au/custom/files/docs/fos-annual-review-20162017.pdf> 4.

47 Credit and Investment Ombudsman, data supplied to EDR Review, 11 November 2016.

48 Financial Ombudsman Service, *Submission to the EDR Review Supplementary Issue Paper*, 6.

49 Credit and Investments Ombudsman, *Annual Report on Operations 2017* (2017) <https://www.cio.org.au/publications/annual-report-on-operations/annual-report-on-operations-2017.html> 63.

50 Credit and Investment Ombudsman (n 47).

In contrast to predecessor schemes, AFCA dealt with 29,873 complaints in the period 1 November 2018 to 31 March 2019.[51] This appears to be a significant increase in terms of workload compared to the previous schemes although some of this increase may be attributable to the additional media attention that resulted from the Royal Commission. It is currently unclear how AFCA will deal with systemic issues in terms of the impact of any investigation and it currently has 81 systemic issues under investigation. In terms of vulnerability, there are no advocacy support services available for the vulnerable (as with the predecessor schemes) as it is assumed that staff within AFCA will support complainants. Notably in terms of vulnerability, AFCA has a special financial difficulty stream that supports faster resolution for consumers who are in financial difficulty. In terms of this EDR scheme, there are questions about whether these responses are adequate. There are, for example, other options that are explored further below which relate to the provision of advocacy and other specialised services.

The percentage of vulnerable consumers who could be defined as vulnerable that made claims in relation to any of the schemes remains unknown. To some extent, this lack of reporting is not unexpected given that schemes are required to operate according to a range of benchmarks. The benchmarks include a focus on 'fairness' and 'accessibility' but could arguably be modified to also include a requirement to consider broader characteristics relating to vulnerability. Each predecessor EDR scheme considered the Benchmarks for Industry-Based Customer Dispute Resolution that articulates six factors in assessing system efficacy. These include accessibility, independence, fairness, accountability, efficiency and effectiveness,[52] and there is some evidence that these benchmarks have not been met. For example, ASIC, the corporate watchdog has criticised banks for taking an average of seven months to start paying customers who are owed compensation, calling for stronger legal powers to influence how the big four respond to misconduct.[53] As the Royal Commission has indicated that bank remediation schemes are 'under the microscope',[54] ASIC has said that once banks had decided to pay compensation, on average it took another 217 days before the first such payment to a customer was made.[55] The Royal Commission final report recommended

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51 Australian Financial Complaints Authority, *Snapshot of AFCA's First Five Months - 1 November 2018 to 31 March 2019* (2019) <https://www.afca.org.au/news/statistics/> 2.

52 Australian Government, The Treasury, *Benchmarks for Industry-Based Customer Dispute Resolution* (February 2015) <https://static.treasury.gov.au/uploads/sites/1/2017/06/benchmarks_ind_cust_dispute_reso.pdf> 7.

53 Australian Securities and Investment Commission, *Big Four Banks Change Loan Contracts to Eliminate Unfair Terms* (2017) <https://asic.gov.au/about-asic/media-centre/find-a-media-release/2017-releases/17-278mr-big-four-banks-change-loan-contracts-to-eliminate-unfair-terms/>.

54 Frank Chung, *If You Can't Help Your Children, Who Can You Help? Elderly Guarantor Loses Home to Westpac* (22 May 2018) <https://www.news.com.au/finance/business/banking/small-business-lending-under-microscope-as-banking-royal-commission-enters-third-round/news-story/8ac010ab1ccb3c13ade6aaf54a46bd4a>.

55 Clancy Yeates, 'Banks Under Fire for Taking 217 Days to Pay Compensation Claims', *Sydney Morning Herald* (9 April 2018) <https://www.smh.com.au/business/banking-and-

the establishment a compensation scheme of last resort and in early reports, it was suggested that a panel appointed by government could review external dispute and complaints settlements.[56] However, more recently it would appear that the compensation scheme of last resort would be limited to circumstances where the financial provider had failed or had not paid where a determination had been made by AFCA.[57]

A number of case studies examined in the sixth round of hearings involved problematic dealings between an insurer and the EDR body, these included the CommInsure, TAL and AAI (Hunter Valley Storm) case studies.[58] The Commission suggested that it was appropriate for insurers to be subject to some form of duty when interacting with the EDR body and noted:

> I agree. The issue then becomes what duty and where should the duty be recorded.
>
> I consider it preferable for this duty to sit alongside a pre-existing related duty in section 912A(1)(g) of the Corporations Act. That relevantly provides that an AFSL holder must:
>
> if … financial services are provided to persons as retail clients:
>
> (i) have a dispute resolution system complying with subsection (2) …Subsection (2) of section 912A specifies that an AFSL holder's dispute resolution system must consist of both an IDR procedure that meets certain standards, as well as 'membership of the AFCA scheme'.
>
> As they presently stand, sub-sections 912A(1)(g), (2) mandate the form of AFSL holders' IDR and EDR systems, but they do not impose any conduct-related obligations on AFSL holders when providing or using those systems. There is little benefit in mandating the existence of systems if there is no obligation to comply with those systems. In this regard, section 912A could be amended to require that AFSL holders take reasonable steps to co-operate with AFCA in its resolution of particular disputes including, in particular, by making available to AFCA all relevant documents and records relating to the issues in dispute.[59]

The International Standard on Complaints Management sets out guiding principles such as visibility, accessibility, responsiveness, objectivity, charges, confidentiality, customer focused approaches, accountability and continual improvement.[60] Access or accessibility is recognised as a key requirement in any dispute resolution scheme. It has been suggested by some commentators that the schemes were not designed in a holistic fashion utilising planning strategies advocated by Standards

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finance/banks-under-fire-for-taking-217-days-to-pay-compensation-claims-20180408-p4z8ee.html>.

56 Financial Services Royal Commission (n 10) 487.

57 Ibid 482.

58 Ibid sect 4.6.

59 Ibid.

60 Australian Standard ISO 10002:2014, *Quality Management, Customer Satisfaction, Guidelines for Complaints Handling in Organizations* (2014) <https://www.iso.org/standard/65712.html>.

Australia.[61] There may be a lack of community awareness about the range of schemes that can be accessed and their different jurisdictions.[62]

This is particularly problematic given that the population of vulnerable consumers is increasing in Australia. The Australian population is aging and a higher proportion of older Australians are likely to be managing significant financial funds and are more likely to face vulnerability issues. Vulnerability in the elderly can manifest as a state of powerlessness over which the individual lacks control of the situation and which is associated with negative consequences.[63] Many demographic groups can experience issues in terms of debt, financial literacy and also in terms of investment understanding. For example, debt illiteracy has been found to be particularly severe among certain demographic groups such as the elderly, young women, minorities, and the divorced and separated.[64] Barriers to accessing EDR schemes can be magnified when the consumers seeking access have particularly vulnerable demographic characteristics. [65] Consumer debt and household net worth in socially disadvantaged areas are key factors that can lead to vulnerability,[66] the current data gap means that there is little information available about vulnerability and EDR schemes. Measures of financial hardship assess whether people are excluded from minimally accepted standards of living due to insufficient resources, and therefore provide a direct measure of relative poverty.[67] Such an indicators do not necessarily measure 'poverty' which can be a significant factor in determining vulnerability and which is defined by income below a specific level.[68] Financial hardship can be significant and may limit activities to aid recovery and have a reinforcing effect on depression.[69] Mental illness in turn may cause impairment and may impact on educational attainment, labour-force participation, unemployment and earnings, and therefore could be conceptualised as a cause of hardship.[70]

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61 Standards Australia ISO20038:2019, *Banking and Related Financial Services* (2019) <https://www.standards.org.au/standards-catalogue/sa-snz/communication/it-005/as--iso--20038-colon-2019>.

62 Sourdin and Thorpe (n 2) 28.

63 Baker, Gentry and Rittenburg (n 13) 134.

64 Declan French and Donal McKillop, 'Financial Literacy and Over-Indebtedness in Low-Income Households' (2016) 48 *International Review of Financial Analysis* 1, 4.

65 Sourdin and Thorpe (n 2) 33.

66 French and McKillop (n 64) 9.

67 Kim Kiely et al, 'How Financial Hardship is Associated with the Onset of Mental Health Problems Over Time' (2015) 50(6) *Social Psychiatry and Psychiatric Epidemiology* 909, 909.

68 Ibid.

69 Peter Butterworth, Bryan Rodgers and Tim Windsor, 'Financial Hardship, Socio-Economic Position and Depression: Results from the PATH Through Life Survey' (2009) 69 *Social Science and Medicine* 229, 230; Vincent Lorant, Denise Deliege and William Eaton, 'Socioeconomic Inequalities in Depression: A Meta-Analysis' (2003) 157 *American Journal of Epidemiology* 98, 109.

70 Ronald Kessler, Steven Heeringa and Matthew D Lakoma, 'Individual and Societal Effects Of Mental Disorders on Earning in the United States: Results from the National Comorbidity Survey Replication' (2008) 165 *American Journal of Psychiatry* 703; Daphna Levinson, Matthew D Lakoma, and Maria Petukhova, 'Associations of Serious Mental Illness with Earnings: Results from the WHO World Mental Health Surveys' (2010) 197 *British Journal of Psychiatry* 114, 117.

Statistics show that many older Australians are retiring without access to a range of pre-existing social supports. As superannuation has become a more prominent investment focus for households, arguably a greater proportion of people are now using banks and financial services to manage superannuation arrangements with continuing issues relating to financial literacy.[71]

## IV The Connection Between IDR, EDR and Consumer Law

Dispute Resolution ('DR') processes are now used extensively in Australia to finalise disputes in courts and tribunals and are also frequently used before parties commence an action (for example, pre-litigation ADR may be required as a result of legislation or contract). Government departments consider that DR is an important tool in improving access to justice for ordinary citizens.[72] A core factor in ensuring that DR processes deliver justice to parties including procedural and substantive justice is the appropriateness of process based on the nature of the dispute and characteristics of the parties. For example, where there is significant power imbalance between the parties the forms of ADR available may require modification and external supports.[73] Having a spectrum of DR processes enables intervention in disputes based on the parties' needs and circumstances to achieve process and legislative objectives.[74] However, on the whole, in the financial arena, there is little discussion of what constitutes ethical practice, fairness and justice in the context of DR and also in terms of power and other imbalances which may have particular impacts on vulnerable consumers. There may also be variability and diversity in context and practice of DR that impacts of consumer understandings of DR as well as the suitability of forms of DR.[75]

These issues can be significant as there is evidence that in some instances the power imbalance issues in the financial sector can be considerable. For example, in *Australian Securities and Investments Commission (ASIC) v National Australia Bank Ltd*, Justice Jagot commented on ASIC's belated settlement with National Australia Bank (NAB) and Australian and New Zealand Banking Group (ANZ) over attempted manipulation of the Bank Bill Swap Rate:

> Each of NAB and ANZ has admitted to unethical and dishonest conduct. It is difficult to convey the seriousness of what the attempts involved. Knowing the function of the BBSW in the Australian financial system and that it was relied upon as an independently established benchmark throughout the system, employees of NAB and ANZ deliberately sought to manipulate that benchmark

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71 Panha Heng, Scott J Niblock and Jennifer L Harrison, 'Retirement Policy: A Review of the Role, Characteristics, and Contribution of the Australian Superannuation System' (2015) 29(2) *Asian-Pacific Economic Literature* 1, 2.

72 Lola Akin Ojelabi and Mary Anne Noone, 'ADR Processes: Connections Between Purpose, Values, Ethics and Justice' (2017) 35(1) *Law in Context* 5, 5.

73 Ibid.

74 Ibid.

75 Ibid.

> to advantage their employer (and their own performance) over counterparties who had no means of protecting themselves from the effects of such manipulation, and had a right to expect that NAB and ANZ would deal with them fairly, honestly, and in good faith …That any employee performing these kinds of functions within a bank, could have conceived of manipulating the BBSW, and in fact attempted to do so repeatedly over such periods of time suggests that there may be some failings in the culture, training, governance and regulatory systems of both NAB and ANZ. Understandably, there may be shock dismay and even disgust that conduct of this kind could have occurred.[76]

EDR schemes are often considered more accessible than court however there may be access barriers for consumers that are not dissimilar from those that arise in court and tribunal processes. Processes may be unfamiliar, seem complex or perhaps intimidating and cultural or language barriers can be present.[77] Although information is available about processes used by EDR schemes to manage and finalise disputes it is unclear how well this is understood by consumers particularly if they are not 'repeat players'.[78] Where a favourable determination of a dispute does not result an action to pay can be significant consequences for a consumer and may undermine trust and confidence in the broader financial system.[79] Such consequences, from a consumer perspective can lead to a consumer becoming more vulnerable as a result of the non-payment of a determination amount. Under such circumstances, there are few (if any) supports available for consumers.

Some DR processes support some consumers better than others and also in terms of the extent of support provided to consumers.[80] There is however almost no information about what takes place in the context of IDR arrangements and this restricts informed evaluation of this option for consumers. The extent to which the outcomes are determined with reference to the consumer law is also unknown.[81] In general, the *Australian Consumer Law* ('*ACL*') which is intended to deal with relationships between consumers and the financial sector is focussed more on the way in which initial transactions are made and to a lesser extent focussed on what may occur when a dispute arises. It should be noted that the consumer protection provisions in the ACL are largely mirrored in the *Australian*

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76 [2017] FCA 1338, [112] (Jagot J).

77 Sourdin and Thorpe (n 2) 33.

78 Ian Ramsay, Julie Abramson, and Alan Kirkland, *Review of the Financial System External Dispute Resolution and Complaints Framework: Final Report* (2017) <https://static.treasury.gov.au/uploads/sites/1/2017/06/R2016-002_EDR-Review-Final-report.pdf> 8.

79 Australian Government, *Review of the Financial System External Dispute Resolution and Complaints Framework: Interim Report* (6 December 2016) <https://treasury.gov.au/review/review-into-dispute-resolution-and-complaints-framework/>.

80 Sebastian Chia, *Alternative Dispute Resolution Services in Australia* (IBISWorld Industry Report OD4116, 2015) <https://www.resolution.institute/documents/item/1857>; National Alternative Dispute Resolution Advisory Council (NADRAC), *ADR Statistics* (Attorney-General's Department, 2003).

81 David Lewin and Paul J Gollan (eds), *Advances in Industrial and Labor Relations, 2017: Shifts in Workplace Voice, Justice, Negotiation and Conflict Resolution in Contemporary Workplaces* (Emerald Publishing, 2018) ch 3.

*Securities and Investments Commission Act 2001* (Cth). There is limited evidence about how well those within the IDR and EDR sector are familiar with the law and there may be a significant lack of training relating to the law in terms of complaints handling.

The lack of focus on vulnerability in the context of IDR arrangements is not unexpected given Regulatory Guide 165,[82] that outlines ASIC expectations for Australian Financial Service Licensees is modelled on the earlier 2006 Australian Standard ISO 10002:2006 *Customer Satisfaction - Guidelines for Complaints Handling in Organizations*. The Regulatory Guide requires that IDR processes be 'visible', deal with complaints in less than 45 days and be accessible with a particular focus on 'literacy.'[83] A focus on literacy and accessibility reflects an approach taken by policy makers in the past. In this context, vulnerability is arguably a much broader category and as noted above incorporates a range of indicia that may lead to variation in terms of how consumers are supported and how processes are used.

## V The Relationship Between Vulnerability, Consumer Law and Unfairness

In terms of ASIC guidance on IDR schemes, there has been, to date, little focus on the Consumer Law and compliance with that law. The recent *Treasury Laws Amendment (Putting Consumers First – the Australian Financial Complaints Authority) Act 2018* will require greater data reporting. In the context of consumer law, however it is not clear how understandings within IDR schemes are about obligations which may relate not only to initial financial arrangements but also where new arrangements are agreed upon. At the EDR level, there is a requirement in relation to 'fairness' however this requirement may focus on process rather than outcome and where vulnerable consumers are involved, attention must be paid to both substantive fairness (in accordance with Consumer law) as well as procedural fairness. A greater focus on vulnerability is required both to discharge obligations relation to 'fairness' and to ensure that arrangements that are proposed or agreed to do not fail an unconscionability test.

Many areas of Commonwealth and State law and in some cases international law, impact upon the interests of Australian banks. The Australian Competition and Consumer Commission ('ACCC'), ASIC, Australian Prudential Regulation Authority (APRA) and the Reserve Bank of Australia ('RBA') all regulate banks. Many areas of law, for example in terms of taxation or financial sector reform, affect the trading environment for Australian banks and the Australian Banking Association ('ABA') consults its members to form industry positions on these and many other

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82 Australian Securities and Investment Commission, *Licencing: Internal and External Dispute Resolution*, Regulatory Guide 165 (February 2018) <http://download.asic.gov.au/media/4644516/rg165-published-14-february-2018.pdf>.

83 Ibid [4.3].

issues. The ABA addresses a large range of public policies to help build a regulatory environment that promotes growth in the banking industry and the wider economy. Working with the Government and other stakeholders the ABA encourages changes to banking industry conduct and disclosure laws that enhance the accessibility of banking and financial products and services, and promote consumer protection for banks' retail and business customers. Specific policy areas include streamlining disclosures, professionalising financial advice, modernising retail banking, simplifying customer identification and protecting customers' personal and financial information.[84]

Provisions set out in Sections (736), (992AA), (992A) of the *Corporations Act 2001* (Cth) prohibit offering financial products for issue or sale during, or because of, an unsolicited meeting or telephone call with a retail client. In 2017, Consumer Affairs Ministers agreed to a package of fourteen legislative reforms to improve the operation of the ACL.[85] The legislative reforms were proposed by the Final Report of 2017 ACL Review. The exposure drafts include amendments to: clarify existing provisions relating to consumer guarantees, voluntary recalls, unsolicited consumer agreements and false billing; enhance the regulators' information gathering powers for investigations in relation to product safety and unfair contract terms; extend the unconscionable conduct protections to publicly listed companies; expand the remedies available to the courts for contraventions of the ACL; and improve price transparency.[86]

Clearly both 'unfairness' and unconscionability' require a focus on the individual circumstances of a consumer. Court cases have considered both concepts and have tended to consider entry into contractual arrangements and fixed status including language, literacy and understanding rather than dispute resolution arrangements where pressure might be applied. The concepts of fairness and protection for financial services customers, as well as the regulatory mechanisms and improvements for financial services regulation, have been under scrutiny since the commencement of the Royal Commission into misconduct in the banking, superannuation and financial services industry.[87]

In terms of the Royal Commission's work, it seems clear that a specific focus on vulnerability is required. As noted, vulnerability for the purposes of consumer arrangements should not be conceived as a fixed category but rather as a state that is highly dependent on the circumstances of consumers at the time of the transaction and the market in which they find themselves

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84 Australia Banking Association, *Vulnerable Customers* (21 December 2019) <https://www.ausbanking.org.au/policy/customers/vulnerable-customers/>.

85 Australian Government, *Australian Consumer Law Review: ACL Amendments* (7 September 2018) <https://treasury.gov.au/consultation/t257313/>.

86 Ibid.

87 Camilla Pondel, 'Legitimacy in Australia's Financial System External Dispute Resolution Framework: New and Improved or Simply New?' (2019) 42(1) *University of New South Wales Law Journal* 335, 336.

dealing.[88] Clearly, the fact consumers have entered into a transaction they later regret or that the business has done a good deal does not make the conduct exploitative. Similarly, dealing with consumers who are experiencing some form of disadvantage also does not mean that a business model is predatory. Consumers need to take care in their purchasing decisions and businesses need to deal with different consumer groups without increasing prices to account for the risk that the transaction may be set aside.[89] Vulnerability factors mean that goods and service providers must consider individual circumstances not only in the transaction but also when a complaint is made.

It is assumed in some cases that a consumer is able to understand the terms of an agreement which may not necessarily be the situation where vulnerability is present. Recent reforms introduced a number of highly specific bright line rules regulating specific business practices considered to present a high risk to consumer well-being, discussed further below.[90] Providers of small amount loans have been made subject to stringent and prescriptive requirements covering disclosure, responsible lending, fee caps, and bans on certain types of loans. Bright line rules are complemented by general provisions promoting substantive fairness in the terms of consumer contracts through mandatory minimum standards of quality in the provision of goods and services, and a regime that renders void unfair terms in standard form consumer contracts.

For courts, exploration of issues of morality and fairness are constrained by legislation and established legal principle.[91] Areas where there is lack of clarity about fairness provide opportunities for certainty however legislative changes can take time. The tension between legal doctrine, commercial realities and public perception of fairness is unlikely to be resolved.[92] Tension may be magnified in IDR particularly where there is little exploration of substantive fairness and where new agreed terms have been proposed. Although, the *Australian Consumer Law* contains prohibitions on misleading or deceptive conduct, undue harassment and coercion, unconscionable conduct, and powers for courts to reopen unjust

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88 Jeannie Marie Paterson and Gerard Brody, '"Safety Net" Consumer Protection: Using Prohibitions on Unfair and Unconscionable Conduct to Respond to Predatory Business Models' (2015) 38(3) *Journal of Consumer Policy* 331, 338; John Wightman, 'From Individual Conduct to Transactional Risk: Some Relational Thoughts about Unconscionability and Regulation' in Mel Kenny, James Devenney, and Lorna Fox O'Mahony (eds), *Unconscionability in European Private Financial Transactions* (Cambridge University Press, 2010) 99; Mindy Chen-Wishart, 'Undue Influence: Beyond Impaired Consent and Wrongdoing Towards a Relational Analysis' in Andrew Burrows and Alan Rodger (eds), *Mapping the Law* (Oxford University Press, 2006) 201.

89 Paterson and Brody (n 88) 339.

90 Therese Wilson, Nicola Howell and Genevieve Sheehan, 'Protecting the Most Vulnerable in Consumer Credit Transactions' (2009) 32(2) *Journal of Consumer Policy* 117, 120.

91 Pamela Hanrahan, 'Fairness and Financial Services: Revisiting the Enforcement Framework' (2017) 35 (7) *Company and Securities Law Journal* 420, 420; Donald M Scott, *Whither Customer Protection in Financial Services?* (Law Book Co, 2017) 404-405.

92 Marilyn Warren, 'Corporate Structures, the Veil and the Role of the Courts' (2017) 40 *Melbourne University Law Review* 657, 673.

contracts, if these provisions are not understood within IDR or EDR, it is likely that substantive unfairness might result.

Standard-based prohibitions, particularly those based on conscience or fairness, are sometimes criticised as introducing uncertainty into the law and, for this reason, as providing inadequate protection for consumers.[93] However, standards of prohibited conduct can encourage innovation in both regulatory and compliance strategies.[94] The standards do not dictate any particular compliance requirements, and enable businesses themselves to develop their own strategies. Safety net standards may be harder for businesses to avoid than technical rules,[95] however the extent to which they are understood in complaint handling and dispute resolution areas rather than initial transactions is unclear. Standards can accommodate changing community values and understandings about the impact of different types of vulnerability and disadvantage.[96]

Courts are continuing to accommodate vulnerability and some barriers to attending court can be overcome with court or other supports. In *Alexander v Jansson* [2010] NSWCA 176, Brereton J (with whom Basten JA and Handley AJA agreed) stated:

> Proper maintenance is not limited to the bare sustenance of a claimant [cf *Gorton v Parkes* (sic) [1989] 17 NSWLR 1], but requires consideration of the totality of the claimant's position in life including age, status, relationship with the deceased, financial circumstances, the environs to which he or she is accustomed, and mobility.[97]

## IV Unconscionable and Unfair Conduct

In Australia, a prohibition on unconscionable conduct has been part of the consumer protection regime since 1986.[98] Section 21 of the Australian Consumer Law, provides that a person must not, in 'in trade or commerce,' engage in conduct that is, 'in all the circumstances,' unconscionable. In its current form, this prohibition is not limited to consumer transactions, although the protection will not apply to a listed public company. Unconscionable conduct is not defined in the legislation. Section 21 contains a set of interpretative principles to guide courts in their application of the prohibition. These confirm that the 'section is capable of applying to a system of conduct or pattern of behaviour, whether or not a particular

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93 Ibid. See also, Tyrone Carlin, 'The *Contracts Review Act 1980* (NSW) - 20 Years On' (2001) 23 *Sydney Law Review* 125, 137.

94 Julia Black, 'Forms and Paradoxes of Principles Based Regulation', *Law, Society and Economy, London School of Economics Working Paper No 13* (2008) 425, 427.

95 Anthony Duggan and Ian Ramsay, 'Front End Strategies for Improving Consumer Access to Justice' in Michael Trebilcock, Lorne Sossin and Anthony Duggan (eds), *Middle Income Access to Justice* (University of Toronto Press, 2012) 95.

96 Paterson and Brody (n 88) 341.

97 *Alexander v Jansson* [2010] NSWCA 176, 18 (Brereton J).

98 Commonwealth of Australia, *Avoiding Unfair Business Practices: A Guide for Businesses and Legal Practitioners* (March 2016) <https://www.accc.gov.au/system/files/Avoiding%20unfair%20business%20practices.pdf> 16.

individual is identified as having been disadvantaged by the conduct or behaviour.' Australian Courts have repeatedly confirmed that the statutory prohibition on unconscionable conduct is not limited by the unwritten or general law, and this is now also expressly stated in the interpretative principles accompanying the prohibition.

In practice, unconscionable conduct involves a high threshold of misconduct. Conduct that is unfair may not meet the threshold. The threshold makes it difficult for regulators to take action against traders that test the boundaries. The courts have set a high bar for establishing unconscionability, particularly for commercial transactions. Whether a specific transaction is unconscionable depends on the individual facts and circumstances of the case. A general power imbalance between parties or a contract that favours one party more than the other is not sufficient to support a claim of unconscionable conduct.[99]

The test for unfairness focuses on the substance of the terms (substantive unfairness) rather than flaws in the process through which the contract was made (procedural unfairness). The interaction between substantive and procedural unfairness, and whether or not one can be insulated from the other is not entirely clear. The test is concerned with the effect of the contract term, whether it is imbalanced, protects the interests of the trader and the detriment to the consumer, rather than the process through which the contract has been made. It has been suggested that courts should consider the transparency of a term and other steps taken to inform consumers about the terms of their contract in assessing whether a term is unfair. While measures designed to better inform consumers about the terms of their contracts are important, they may not resolve concerns about the substantive fairness of those terms. Consumers do not always fit the model of a competent and rational contracting party. Insights of behavioural economics suggest that there are significant limitations on the decision-making process of consumers related to rational, social and cognitive factors which are not necessarily improved by consumers being provided more information about terms of the contract.[100]

Federal and state judiciaries have wrestled with 'unconscionable conduct' and have demonstrated difficulty applying this imprecise term. If a regulator chooses to proceed with a case of unconscionable conduct there will be evidentiary challenges. Arguably those exposed to such conduct are more likely to be vulnerable and disadvantaged consumers who are less willing to complain, more easily intimidated, less likely to retain records and perhaps therefore less successful in providing evidence in court

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99 Australian Securities and Investment Commission, 'Disputes about Commercial Loans' *Information Sheet 207* (November 2018) <http://asic.gov.au/about-asic/contact-us/how-to-complain/disputes-about-commercial-loans/>.

100 Jeannie Marie Paterson, 'Knowledge and Neglect in Asset-Based Lending: When is it Unconscionable or Unjust to Lend to a Borrower Who Cannot Repay' (2009) 20 *Journal of Banking and Finance Law and Practice* 18, 32.

proceedings.[101] Suitability of regulation is an important factor.[102] There are particular issues with commission fee arrangements that can target more vulnerable consumers. Indeed, in terms of payment commissions it could be said that a commission culture was deeply embedded in the Australian financial services landscape.[103]

*Paciocco v Australia and New Zealand Banking Group Limited* was characterised as the 'sequel' to the case of *Andrews v Australia and New Zealand Banking Group Ltd*,[104] in which the High Court reconsidered the application of the penalties doctrine in Australia. The Andrews litigation commenced before Gordon J in the Federal Court in 2011 and constituted representative proceedings against Australia and New Zealand Banking Group Ltd ('ANZ') to obtain declarations that 'exception fees' charged on accounts amounted to penalties and were therefore unenforceable. Justice Gordon held that, of the various exception fees, only the late payment fees could be considered penalties. The decision was appealed to the Full Court of the Federal Court, however the High Court did not consider the issues arising in the appeal relating to the penalties doctrine.[105]

Current policy statements continue to reflect these imperatives: the primacy of civil enforcement over criminal enforcement, with the latter used for more serious misconduct; responsive regulation theory and a pyramidal model of sanctions calibrated to the severity of the misconduct; and the magnitude and deterrence value of sanctions. As the Explanatory Memorandum to the *Financial Services Modernisation Bill 2009* (Cth) states, '[t]he intention of the dual regime [of civil and criminal sanctions] is to given primacy to the civil penalty regime and retain criminal penalties for serious breaches of the Act.' In its submission to the 2015–16 Senate Inquiry into Penalties for White-Collar Crime, ASIC observed that:

> The introduction of civil penalties has provided another step in the 'pyramid of enforcement' whereby serious misconduct (such as director negligence) could be met with substantial penalties, but without the moral opprobrium of a criminal conviction or a custodial sentence.[106]

One difficulty is that not all problematic business models will involve clear misleading assertions or aggressive harassment of consumers. Unconscionable conduct contrary to *Australian Consumer Law* has been found in cases of what is sometimes called passive exploitation and this may be particularly relevant when considering vulnerable consumers. Business models may not actively engage in manipulative marketing or

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101 Gerard Brody and Katherine Temple, 'Unfair but not Illegal: Are Australia's Consumer Protection Laws Allowing Predatory Businesses to Flourish?' (2016) 41(3) *Alternative Law Journal* 169, 169.

102 Gail Pearson, 'Suitability' (2017) 35(7) *Company and Securities Law Journal* 464, 464.

103 Gail Pearson, 'Commission Culture: A Critical Analysis of Commission Regulation in Financial Services' (2017) 36(1) *University of Queensland Law Journal* 155, 155.

104 [2012] HCA 30.

105 *Andrews v Australia and New Zealand Banking Group Ltd* (2012) 247 CLR 205, 219 [17]-[18] (French CJ, Gummow, Crennan, Kiefel and Bell JJ).

106 Australian Securities and Investment Commission, *Submission No 49 to Senate Economics References Committee* (2015 – 2016) 17 [58].

promote an unusual or complex product structure, however the transaction nonetheless presents significant and foreseeable risks for consumers, which the business did nothing to address. In respect of these issues, the fault on the part of the business comes from its 'reckless indifference' to the interests of the vulnerable consumers with whom it is dealing.[107]

The problem has most commonly been observed in cases of lending secured on the family home, sometimes termed asset-based lending.[108] In this context, it was been held in *ASIC v Australian Lending Centre Pty Ltd* that: 'if a loan was advanced to [a consumer] with knowledge that she would be unable to meet the repayments and that her home would be lost then this would be unconscionable [in equity]. It is only a small step to suggest that unconscionable conduct might be found in some payday lending practices where an unsecured loan is advanced to consumers in circumstances where there is no reasonable likelihood of the consumers being able to repay, and the probable consequence is therefore escalating financial hardship'.[109]

There is currently no industry-wide compensation scheme in the financial service industry in Australia.[110] In the context of vulnerable consumers, some may be poorly positioned to seek redress due to the high cost of taking legal or other action or the cost of obtaining supporting advocacy services that may be required particularly where transactions involve complexity. There may also be harm to consumers of financial services that limits the capacity of the consumer to seek redress. Consequently, as noted previously, alternatives to traditional litigation mainly through IDR and EDR schemes were introduced. However other alternatives that include consumers acting individually through utilising more effective DR; consumers acting collectively through class actions; and actions by government authorities on behalf of, or for the benefit of, consumers could also assist consumers.[111]

In respect of matters involving large numbers of consumers, responses can be multi-faceted. For example, two forms of DR were available to Storm Financial clients; the institutionalised Financial Ombudsman Service Australia (FOS), and also ad hoc voluntary dispute resolution schemes that were established by the banks that had made loans to Storm Financial clients. However, other clients commenced class actions, also called representative proceedings, under Pt IVA of the *Federal Court of Australia Act 1976* (Cth), against a number of banks. There was also regulatory action by ASIC, which commenced legal proceedings against the banks, secured an oversight role for itself in a voluntary dispute resolution scheme and involved itself in the settlement of the class actions. In this regard, the government regulator can play an important role in

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107 Rick Bigwood, '*Kakavas v Crown Melbourne Ltd* – Still Curbing Unconscionability: Kakavas in the High Court of Australia' (2013) 37 *Melbourne University Law Review* 489, 501.

108 Paterson (n 100) 32.

109 Paterson and Brody (n 88) 346.

110 Andrew Serpell, 'Financial Products and Services: Consumer Rights and Remedies' (2016) 134 *Precedent* 4, 5.

111 Commonwealth of Australia (n 98) 9.

seeking redress through a combination of direct action through test cases, and also through indirect action such as providing oversight and information.[112] However, from a disputant perspective, the consequences of not being able to correctly identify limitation periods which may be problematic for vulnerable consumers can be far reaching and catastrophic.[113]

Unconscionability and unfairness can be considered not only in the context of the original financial transaction or arrangements but also in terms of the IDR or EDR processes that may follow. That is, should such arrangements be regarded as 'unfair' if the result causes a 'significant imbalance in the parties' rights and obligations arising under the contract; and it is not reasonably necessary to protect the legitimate interests of the supplier; and it would cause financial or non-financial detriment to a party' the agreement is void. The meaning of 'unfair' could be construed in relation to vulnerability and the factors noted above.

The *Corporations Act 2001* (Cth) ('*Corporations Act*') and the *National Consumer Credit Protection Act 2009* (Cth) ('*NCCP Act*') operate to protect consumers. Under s 911A of the *Corporations Act* and s 29 of the *NCCP Act*, a person who carries on a financial services business or engages in credit activities is required to hold a license issued by ASIC. Section 912A(2)(b) of the *Corporations Act* requires Australian financial service license holders to be members of an ASIC-approved EDR scheme covering complaints made by retail clients in connection with all services covered by the license. A similar requirement is contained in s 47(1)(i) of the *NCCP Act*. Section 912A(2)(a) of the *Corporations Act* and s 47(1)(h) of the *NCCP Act* also require license holders to have in place an IDR procedure that complies with the standards and requirements made or approved by ASIC. Under clause 4.2 of its Terms of Reference, which came into effect on January 1, 2010,[114] FOS had jurisdiction to consider disputes relating to credit, payment systems, deposit taking, insurance, investments, and superannuation, as long as they are brought against an Financial Service Provider (FSP) that is a member of FOS at the time of the registration of the dispute. Clause 5.1(o) of the Terms of Reference limited the value of a claim that can be brought to FOS to $500,000 and played a crucial role of providing for the independence of FOS from the industry that is its source of funding, by restricting the powers of its members to influence the decision-making process.[115] At present, it is likely that AFCA, which has clearer operating guidelines, may not face similar issues in terms of jurisdiction. In addition, it is no doubt hoped that AFCA will be perceived

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112 Commonwealth of Australia (n 98) 13.

113 Omri Ben-Shahar and Lior Strahilevitz, 'Interpreting Contracts Via Surveys and Experiments' (2017) 92(6) *New York University Law Review* 1753, 1822.

114 Financial Ombudsman Service, *Operational Guidelines to the Terms of Reference* (March 2010) <https://www.fos.org.au/custom/files/docs/draft_og_tracked_to_29_oct_2009.pdf> 10.

115 Paul Ali et al, 'Australia's Financial Ombudsman Service: An Analysis of Its Role in the Resolution of Financial Hardship Disputes' (2016) 34(2) *Conflict Resolution Quarterly* 163, 168; Tim Griffiths and Jacqui Mitchell 'Financial Ombudsman Service: Dr Jekyll or Mr Hyde?' (2012) 27(9) *Australian Insurance Law Bulletin* 130, 131.

to be more 'independent' as a result of a complaints review mechanism and a clearer constitution. [116]

Since 2009, the national set of protections for consumers in financial hardship, defined as where a person is willing, but unable, to meet their debt obligations when they fall due. These protections are embodied in s 72 of the *National Credit Code*. Section 72 allows consumers in financial hardship to apply to their credit provider for a variation of their credit contract and requires credit providers to respond to such an application within prescribed timeframes. Disputes in relation to this provision can arise for a variety of reasons including that the credit provider may not respond to the application, or may refuse to vary the contract, or may not suspend enforcement proceedings against the consumer.[117]

Section 72 of the *National Credit Code* gives consumers in financial hardship the right to give their credit provider notice (known as a hardship notice) that they may not be able to meet their obligations under a credit contract. This is referred to by FOS as a 'financial difficulty request', as what the consumer is seeking is both a temporary reprieve from enforcement proceedings while the application is being considered, and 'assistance' in the form of a variation to their contractual arrangements, ss (72), (89A)(1) require the credit provider to respond to the financial difficulty request before they can commence enforcement proceedings against the consumer. If the credit provider refuses to grant a variation, they must notify the consumer of the name and contact details of the EDR scheme of which they are a member, and outline the consumer's rights under that scheme. Section 74(1) of the National Credit Code provides the consumer with the right to seek a hardship variation in the courts. The very small number of cases testing that provision indicates that it is FOS and CIO, and not the courts that provide the primary forum for the resolution of disputes under s 72 that are taken beyond the internal dispute resolution process of the credit provider.[118]

In a submission to the independent review of FOS in 2013, consumer organisations were concerned that groups such as migrants (from a non-English-speaking background) or people with a mental illness face additional barriers to using such services.[119] The independent review of FOS acknowledged the concern that financial services EDR 'serves middle-class, educated consumers well, but proves to be a difficult process for less 'paperwork-capable' consumers'. This concern is a serious one; as specified by the United Nations in its consumer protection guidelines, access to justice requires dispute resolution procedures to be 'expeditious'

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116 Australian Financial Complaints Authority, *Australian Financial Complaints Authority Limited Constitution* (March 2018) <https://www.afca.org.au/public/download.jsp?id=7177> 10.

117 Ali et al (n 115) 164.

118 Ali et al (n 115) 169; Griffiths and Mitchell (n 115) 131.

119 Redfern Legal Centre, *Independent Review of the Financial Ombudsman Service (FOS)*, (October 2013) <https://rlc.org.au/sites/default/files/attachments/Joint%20consumer%20submission%20to%20Independent%20Review%20of%20FOS%20-%20October%202013.pdf> 2.

and 'fair' and to 'take particular account of the needs of low-income consumers'.[120] Yet it is impossible, based on the available data, to determine to what extent this concern applies to the group of consumers who are using FOS (and others who are unable to access its dispute resolution service). In 2013 McGill and Howell suggested that access to justice requires fair outcomes, not only fair processes.[121] To date, little information exists beyond broad outcome categories about what arrangements are actually being made in over half of financial difficulty disputes that are resolved directly between the applicant and the FSP.[122]

It is suggested that barriers may be encountered for some consumers who seek to access processes available when they find themselves in a situation where they encounter financial hardship. For vulnerable consumers, deficiencies in legal capability and lack of understanding may manifest a 'paralysing' effect for substantial legal problems. A 'holistic' approach to justice and a mixed-mode suite of legal assistance services is needed to further access to justice across the community.[123] In 2003 James and Morris suggested that the term 'alternative dispute resolution' is something of a misnomer, for consumers in financial hardship seeking to make a complaint against their credit provider, the free-of-charge service provided by an industry-funded ombudsman is usually 'the only viable means of redress, not so much an alternative to the courts.'[124]

Financial service providers may also not be complying with the requirement to respond to a request for hardship assistance in s 72 of the *NCCP Act*. In the past, while the gradual increase in the number of financial difficulty applications involving a failure to respond by the financial service provider could also be attributed to greater consumer awareness of FOS, only a minority of consumer complaints were escalated to EDR, suggesting that the actual number of requests that receive no response from the financial service providers is much higher. The importance of the AFCA in this area cannot be understated, particularly given the comparatively large number of claims it has acquired in its relatively short period of operation. Given that AFCA is one of the primary

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120 The United Nations Guidelines for Consumer Protection (UNGCP) are 'a valuable set of principles for setting out the main characteristics of effective consumer protection legislation, enforcement institutions and redress systems and for assisting interested Member States in formulating and enforcing domestic and regional laws, rules and regulations that are suitable to their own economic and social and environmental circumstances, as well as promoting international enforcement cooperation among Member States and encouraging the sharing of experiences in consumer protection': United Nations, *United Nations Guidelines for Consumer Protection* (2016) <https://unctad.org/en/PublicationsLibrary/ditccplpmisc2016d1_en.pdf> 17.

121 Denise McGill and Nicola Howell, 'Improving the Ability of Guarantors to Make a Real Choice: Lenders' Practices in Taking Third Party Guarantees' (2013) 24 *Journal and Banking and Finance Law and Practice* 182, 202.

122 Ali et al (n 115) 172; Griffiths and Mitchell (n 115) 131.

123 McDonald and People (n 29) 8.

124 Rhoda James and Paul Morris, 'The New Financial Ombudsman Service in the United Kingdom: Has the Second Generation Got It Right?' in Charles EF Rickett and Thomas GW Telfer (eds), *International Perspectives on Consumers' Access to Justice* (Cambridge University Press, 2003) 168.

forums through which Australian consumers can seek redress from their credit providers, this in turn highlights the need for further investigation of the extent to which AFCA succeeds in providing consumers in financial hardship with an accessible process for making a complaint against their financial service providers, and delivering outcomes that assist them in meeting their financial obligations.[125] The challenges faced by third party DR schemes in identifying, supporting and working with vulnerable consumers remains an underexplored area of research, policy and practice.[126]

Effective redress is central to consumer protection policy, but if significant barriers to redress are faced by some consumers this makes them particularly vulnerable. Some of the barriers faced by such consumers might be addressed by information/education-based responses, helping consumers to be more assertive, while others may only be addressed through greater intervention. An example of this is the concept of amplified voicing to describe where consumers enlist the help of third parties such as consumer groups and regulatory agencies to act on their behalf.[127] It is a particular concern that any cuts to important sources of support (such as Citizens Advice) could impact disproportionately upon vulnerable consumers.[128]

## VII Lack of Advocacy and Legal Services

Given that consumers are increasingly expected to take responsibility for their own financial well-being, a better understanding of the risk factors for financial vulnerability is required.[129] Effectively designed complaint handling systems play a key role in enabling vulnerable consumers who are involved in a dispute to complain and obtain redress. Contemporary understandings recognise that the interaction between a wide range of market and consumer characteristics can combine to place any individual at risk of vulnerability. While this broad definition of consumer vulnerability reflects the complex reality of consumers' experiences, it poses a key challenge for designers of complaint handling systems. Third party complaint handling organizations, including a range of DR services, can play a key role in increasing access to justice for vulnerable consumer groups and provide specific assistance for individual complainants during the process.[130]

The Ramsay Review indicated that complainants at the EDR level are mostly self-represented, 78% in 2015-2016 or represented by friends/family, 5% in 2015-2016. The overwhelming majority of cases

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125 McDonald and People (n 29) 7.

126 Brennan et al (n 19) 638.

127 Alan Andreasen and Jean Manning, 'The Dissatisfaction and Complaining Behavior of Vulnerable Consumers' (1990) 3(1) *Journal of Consumer Satisfaction, Dissatisfaction and Complaining Behavior* 12, 12.

128 Peter Cartwright, 'Understanding and Protecting Vulnerable Financial Consumers' (2015) 38(2) *Journal of Consumer Policy* 119, 132.

129 French and McKillop (n 64) 2; Coppack et al (n 34) 23.

130 Brennan et al (n 19) 638. See also *Alexander v Jansson* [2010] NSWCA 176, [18].

were finalised by conciliation (and to a much lesser extent mediation) and without a recommendation of determination from EDR. This fact that most disputes are finalised through agreement makes it difficult to determine whether complainants could have received more favourable outcomes had the claim progressed to a recommendation or determination stage. The Ramsay Report remained silent on whether a process of providing complainant advocates and funding representation against an organisation that is significantly more powerful than the complainant should be established at least in the most complex disputes.

At present however, there is little evidence that in relation to IDR schemes, there are independent advocacy services that can be accessed by vulnerable consumers. In Australia unmet legal need is coupled with a limited capacity for existing services to assist with civil rather than criminal issues. This has been evidenced with a growing trend where less affluent consumers are paying more to service their debts,[131] and some groups of consumers are becoming increasingly vulnerable to significant financial loss when dealing with banks and financial services.[132] It is also unknown what percentage of disputes are resolved by the consumer simply accepting what is offered so that they no longer have to engage with the process.

For certain vulnerable consumer populations, there are moves to support more focussed services. For example, current ageing policies in Australia recognise access to justice is consistent with ensuring standards of protection and services in both gerontology and law. Access to justice policies however may not recognise or prioritise the distinctive legal needs of older people. Current policies may reflect a narrow efficiency focused view of the limitations on legal services which focuses on the personal attitudes and attributes of those groups who do not access services, and are therefore believed to have successfully resolved their legal disputes on their own.[133]

It is relevant that in some financial disputes area, there appears to be a growing acceptance that in relation to some complex financial disputes it may be appropriate to support funded advocacy services. For example, at the Administrative Appeals Tribunal, a new small business division that deals with taxation disputes, set up in early 2019, provides not only for streamlined case management but also enables applicants to have some access to free legal services.[134]

In terms of understanding that legal or other advice might be helpful, it is notable that in the specific area of credit/debt and other financial issues,

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131 Simangaliso Biza-Khupe, 'An Alternative Theoretical Perspective to the Analysis of Global Trends on Consumer Debt' (2008) 7(3/4) *Perspectives on Global Development and Technology* 281, 283; David Jones et al, 'Credit Risk Modelling' (1998) 4(3) *Economic Policy Review* 51, 55.

132 French and McKillop (n 64) 3.

133 Susannah Sage-Jacobson, 'Access to Justice for Older People in Australia' (2015) 33(2) *Law in Context* 142, 143.

134 Administrative Appeals Tribunal, *Guide to Small Business Taxation Division* (March 2019) <https://www.aat.gov.au/AAT/media/AAT/Files/Documents/Guide-to-Small-Business-Taxation-Division-draft.pdf> 6.

the 2009 Wesley Report indicated that only about one in four respondents (26%) to the Wesley Mission Survey sought help after experiencing financial concerns, while 47% sought no help at all.[135] Of the 26% who did seek help, the majority turned to a family member (47%) or spouse/partner (29%) for guidance, and only 3% of respondents turned to a professional financial counsellor for assistance.[136] Differences between those that sought financial advice and those that did not was most evident in the single-parent households surveyed, who were 30% more likely to avoid a counsellor in times of financial worry.[137] These findings suggest that there may be a need not only to provide some advocacy services in the financial sector, perhaps targeted at vulnerable populations, but there may also be a need to support information and campaigns to help raise awareness about how to seek assistance.

## VIII Has the Royal Commission Better Articulated the Cultural and Ethical Changes Required?

For the finance industry, external pressure to act responsibly increased during and after the global financial crisis.[138] The Royal Commission received 10140 submissions from the public via a web form, there were also many thousands of phone calls and emails asking for help to make a complaint. The submissions were divided up by industry: banking and finance 61%, financial advice 9% and superannuation 12% and the nature of dealings have involved personal financial, superannuation as well as small business finance.[139]

The topic of trust, and the difficulties involved in achieving this trust, has garnered increasing attention in relation to the banking and financial industry. The finance industry has an exceptional need for confidence and trust.[140] Arguably, incentives that include commission payment schemes have propelled unnecessary and sometimes illegal risk taking and have helped create a 'bad' corporate culture. Such incentives can increase the sales of financial products that are inappropriate or unsuitable for the buyer,[141] and there is evidence that such remuneration structures are not designed for good consumer outcomes,[142] particularly where consumers do not understand how they might influence what they purchase. There is little

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135 The Wesley Mission, *Financial Hardship, the Hidden Human Cost* (The Wesley Report, 2009) 26.

136 Ibid.

137 Ibid 44.

138 Olaf Weber, Michael Diaz and Regina Schwegler, 'Corporate Social Responsibility of the Financial Sector - Strengths, Weaknesses and the Impact on Sustainable Development' (2014) 22(5) *Sustainable Development* 321, 322.

139 Financial Services Royal Commission (n 10) xxxv.

140 Peter Norberg, 'Bankers Bashing Back: Amoral CSR Justifications' (2015) *Journal of Business Ethics* 401, 402; Patrick Kenadjian and Andreas Dombret (eds), *Getting the Culture and the Ethics Right: Towards a New Age of Responsibility in Banking and Finance* (De Gruyter, 2016) 10.

141 Pearson (n 103) 159.

142 Australian Securities and Investment Commission, *Review of Mortgage Broker Remuneration: Report, No 516* (16 March 2017) 182–183.

overall suitability requirement for the sale of financial products in Australia except in relation to the regulation of personal advice for other financial products and services. Commission payments can potentially drive the sale of inappropriate products to vulnerable consumers. Such payment structures can also create conflicts of interest between the banking and finance sector and consumers as well as within the banking and financial sector.[143]

On 13 July 2017, the Treasury released its consultation paper on the Banking Executive Accountability Regime. Based on experience overseas,[144] it is anticipated that executives can expect guidelines to be issued by APRA, which will be broadly defined to provide it with a sufficiently strong enforcement mandate. Internal training regimes will be implemented for banking senior managers, as well as policy and procedure guidelines and rules concerning decision making and record-keeping. Significant review, and perhaps overhaul, will occur in terms of current internal governance arrangements within banks in relation to senior executives' roles and responsibilities. The extent of any 'no-gaps' approach applied internally will largely depend on the definition of a senior manager adopted under the he Banking Executive Accountability Regime (BEAR).[145] The Royal Commission recommended APRA should determine for the purposes of section 37BA(2)(b) of the *Banking Act*, a responsibility, within each Authorised Deposit-taking Institution 'ADI' subject to the BEAR, for all steps in the design, delivery and maintenance of all products offered to customers.[146]

As noted in the final report of the Financial Services Royal Commission,[147] mandatory individual registration for financial advisers is likely to have a number of benefits including formalising the existing the financial advice registry, and ensure that valuable information about financial advisers is made available to the public. It will facilitate the introduction of a central disciplinary body for financial advisers, focused on the conduct of individual advisers and complaints about individual advisers. In addition, Australia has adopted strategies to disclose, ban, cap, and deemphasise commission payment arrangements. Other jurisdictions have banned or are considering banning commission payments in the banking and financial services areas. It would seem that, despite disclosures, consumers generally do not know how financial brokers get

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143 Pearson (n 103) 168.

144 Phillip Hawkins and Helen Portillo-Castro, 'Treasury Laws Amendment (Banking Executive Accountability and Related Measures) Bill 2017' (2018) *Bills Digest* 70 <https://parlinfo.aph.gov.au/parlInfo/download/legislation/billsdgs/5767696/upload_binary/5767696.pdf;fileType=application/pdf>.

145 Angela Pearsall, Liam Hennessy and Jessica Taylor, 'Regulation of Culture in Finance' (2017) 1 *JASSA: The Finsia Journal of Applied Finance* 38, 38-44.

146 Financial Services Royal Commission (n 10) 24.

147 Ibid 213.

paid,[148] and that even where such payments are banned, financial advisers may not always give appropriate advice.[149]

In Australia, the existing codes of conduct at corporate, industry and professional levels and the complex regulatory environment have to date proved incapable of addressing some ethical and cultural issues in banking and finance. It is in this context that the needs of banking consumers have been the subject of a continuing focus.[150] The establishment of the Royal Commission into the alleged misconduct of banks and financial institutions has been largely focussed on identifying misconduct. This may ensure a focus on initial misconduct however the extent to which such misconduct may be tolerated by IDR and EDR arrangements is unclear, although a recent stream of reforms relating to banking and customer service have included a range of initiatives to support customers in making complaints and resolving disputes.[151] The lack of a Commission focus on vulnerability and IDR arrangements is at this point somewhat disappointing particularly as the recent amendments in this area encourage only limited reporting and review and remain focussed on 'access' rather than broader issues linked to vulnerability indicia.

## IX Conclusion

In Australia, policy reform in terms of access to justice has largely focused on equality within the justice system, preventing disputes and promoting efficiency. The impact of social disadvantage on access to the justice system, removing the barriers to these services and a focus on the community's legal needs has been one area of reform although on the whole there is very little funding to support advocacy or advice services in respect of civil disputes. At the same time, a raft of legislation has been designed to protect consumers who enter into financial arrangements with banks and other financial entities. IDR and EDR schemes are intended to support consumers who face issues or have concerns about the arrangements that they have entered into and such schemes can play an important role in providing accessible and low cost alternatives to courts and tribunals. It was noted in the conclusion of the Royal Commission Final Report that 'ASIC and APRA recognise that their approach to enforcement must change. That change cannot be effected by the passing of legislation. It must come from within the agencies.'[152] A compensation

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148 Australian Securities and Investment Commission, *Report to the Parliamentary Joint Committee on Late 2004 (and Early 2005) Superannuation Switching Advice Surveillance* (Report 51, November 2005) <http://asic.gov.au/regulatory-resources/find-a-document/reports/rep-51-report-to-the-parliamentary-joint-committee-on-late-2004-and-early-2005-superannuation-switching-advice-surveillance/> 11.

149 Pearson (n 103) 156.

150 Parliament of Australia, *Review of the Four Major Banks* (March 2017) <https://www.aph.gov.au/Parliamentary_Business/Committees/House/Economics/Four_Major_Banks_Review>.

151 Australian Bankers' Association, *Media Release* (December 2017) <https://www.bankers.asn.au/media/media-releases/media-release-2017/>.

152 Financial Services Royal Commission (n 10) 480.

scheme of last resort is to be made to review external dispute and complaints arrangements made has been recommended. ASIC has tended to direct its investigation and enforcement activities to the most obviously serious cases. This means there may be cases where legitimate complaints warranting some form of disciplinary action are not investigated. A body dedicated to the investigation of matters concerning individual advisers could be expected to consider a broader range of cases than ASIC currently does.

At present there is a lack of information about how such arrangements cater to vulnerable consumers and the extent to which there is regulatory or organisational understanding about vulnerability or compliance with the ACL is unclear. Recent media coverage that focussed on the issues faced by consumers in the financial sector suggests that: better reporting about the demographic characteristics of consumers using such schemes; auditing to 'test' outcomes and review outcomes in the context of the ACL; considering the training provided to those who provide IDR and work in the EDR schemes; providing advocacy services for those that lack capacity or capability; and, considering the type and quality of DR processes may work to enhance fairness and also support vulnerable consumers more effectively may promote a 'fairer' system that attends to the needs of vulnerable consumers.

The behaviour of those negotiating outcomes outside the court system has received limited attention by courts. Where negotiations take place under a legislative scheme, there may be 'good faith' requirements. Such requirements can incorporate a requirement to act transparently and honestly and may also include requirements to cooperate in terms of considering options and listening to the perspective of the other negotiating party. At present in relation to banking and financial disputes, there is no clear requirement to negotiate in good faith. Nor are there clear behavioural guidelines about the obligations that parties may have in terms of honesty and cooperation. Although such guidelines can exist in relation to civil procedural rules (for example in respect of courts in Victoria or the Administrative Appeals Tribunal) it may be that are clearer articulation of such guidelines in respect of IDR and EDR schemes could impact on behaviours that are particularly problematic for vulnerable parties.

Issues of fairness also arise when considering vulnerable consumers who face difficulties in the financial and banking sector and where redress can be limited by knowledge, skills or psychological readiness to act and to resolve issues. Vulnerability can manifest in various ways that include a lack of knowledge about legal rights, legal advice services, beliefs that the processes or the broader justice system that includes EDR and perhaps even IDR arrangements is inaccessible or unavailable as well as other factors that can be transitory or long standing. Physical and mental impairments, ill health and unfamiliarity with new technology are all risk factors in terms of vulnerability and given the proportion of the population that may have such risk factors and may be involved in complex financial transactions

with banks and other financial service providers there is a pressing need to ensure that processes and systems are in place to manage such risk.