

THE NEW AUSTRALIAN CONSUMER LAW: WHAT ABOUT CONSUMER ADR?

LUKE NOTTAGE*

Australia maintains a complicated system for Alternative Dispute Resolution (ADR) of consumer disputes, due in part to jurisdiction over consumer affairs being shared between federal and state governments. This has allowed some experimentation involving diverse forms of consumer ADR. Some of these experiments may also provide inspiration for other industrialised democracies facing similar challenges in providing access to justice for consumers, such as Japan and the European Union. Yet the Australian system retains some gaps, and also a great deal of complexity. Alongside their attempts to improve and harmonise other aspects of consumer law nation-wide, Australian politicians and officials should not neglect some problems already uncovered by recent reviews into aspects of consumer ADR. More thought and research is also needed regarding other possible problems in this field, so essential to bringing substantive consumer protections to life. The main aim of this article is therefore to provide a 'state of the nation' overview of Australia's system for consumer ADR. It also focuses on an interesting but under-analysed initiative in one field of growing common interest: home building disputes. In surveying all these developments, the article touches on several specific problems that are or may be apparent in consumer ADR. Another aim is that Australia will also look beyond its shores in order to investigate or address such issues most effectively.

I INTRODUCTION

Australia's federal and state governments share jurisdiction over consumer law and policy. One result is considerable and longstanding diversity in enforcement and redress mechanisms for consumers. The picture has become even more complicated as deregulation and market liberalisation have proceeded particularly since the 1990s, generating 'softer' and more market-oriented forms of norm generation and enforcement. These trends have also made it difficult to undertake comprehensive empirical research, particularly into Alternative Dispute Resolution (ADR). However, recent studies in Victoria have uncovered problems both on the 'demand-side' (how and

* Associate Professor, Sydney Law School; Program Director (Comparative and Global Law), Sydney Centre for International Law; Co-Director, Australian Network for Japanese Law. Thanks to Wan Sang Lung for editorial assistance, and to an anonymous reviewer for helpful comments on the original draft.

why consumers proceed with claims)¹ as well as the ‘supply-side’ (what facilities are available to deal with them).²

Broader concerns are reflected in many of the public Submissions that informed the Productivity Commission’s final report for its ‘Inquiry into Australia’s Consumer Policy Framework’. This included a chapter recommending various improvements to the country’s increasingly fragmented regime, including with respect to consumer ‘Access to Remedies’.³ Subsequently, however, the Council of Australian Governments (federal and state – COAG) and then Treasury officials have focused overwhelmingly on ways to harmonise substantive law and regulators’ enforcement powers across Australia.⁴

Consumer ADR is therefore likely to remain complex and fragmented. This risks undermining the gains from restoring greater harmony in substantive consumer law, especially because ‘reform fatigue’ is likely to set in after the current burst of legislative activity. It also represents a lost opportunity compared to many of Australia’s close trading partners, such as the European Union, where major attention is being focused

¹ IPSOS, *Dispute Resolution in Victoria: Community Survey 2007* (2007) Consumer Affairs Victoria <[http://www.consumer.vic.gov.au/CA256902000FE154/Lookup/CAV_Publications_Reports_and_Guidelines_2/\\$file/cav_report_dispute_resolution_community_survey_2007.pdf](http://www.consumer.vic.gov.au/CA256902000FE154/Lookup/CAV_Publications_Reports_and_Guidelines_2/$file/cav_report_dispute_resolution_community_survey_2007.pdf)> at 24 August 2009.

² C Field, *Alternative Dispute Resolution in Victoria, Supply-Side Research Project – Research Report* (2007) Consumer Affairs Victoria <[http://www.consumer.vic.gov.au/CA256902000FE154/Lookup/CAV_Publications_Reports_and_Guidelines_2/\\$file/cav_report_adr_supply_side_research_2007.pdf](http://www.consumer.vic.gov.au/CA256902000FE154/Lookup/CAV_Publications_Reports_and_Guidelines_2/$file/cav_report_adr_supply_side_research_2007.pdf)> at 24 August 2009.

³ See ch 9, available (with many Submissions) at Australian Government—Productivity Commission, *Consumer Policy Framework: Submissions* (2009) <<http://www.pc.gov.au/projects/inquiry/consumer/docs/submissions>> at 24 August 2009. For constructive criticism of the draft report overall, see L Nottage, ‘The Productivity Commission’s Inquiry into Australia’s Consumer Policy Framework: A Partial Response’ (2008) 18(9) *Australian Product Liability Reporter* 122. On the final report, see L Nottage, ‘Australia’s Consumer Policy Framework - Inquiry Report: Few Surprises’ (2008) 19(3) *Australian Product Liability Reporter* 33.

⁴ See the Treasury’s Consultation Paper, *An Australian Consumer Law* (2009) <<http://www.treasury.gov.au/contentitem.asp?NavId=035&ContentID=1484>> at 24 August 2009. The only consumer redress point mentioned in that lengthy paper (at 52) indicated cautious support for the Productivity Commission’s recommendation to extend powers to allow redress to non-parties by overturning *Medibank Private Ltd v Cassidy* (2002) 124 FCR 40. That was included in the Trade Practices (Australian Consumer Law) Amendment Bill introduced into the federal Senate on 26 June 2009 (see Parliament of Australia—Senate, *Trade Practices Amendment (Australian Consumer Law) Bill* 2009 (2009) <http://www.aph.gov.au/senate/committee/economics_ctte/tpa_consumer_law_09/index.htm> at 24 August 2009). The only major reform initiative focused specifically on consumer ADR comes from the National Consumer Credit Reform Package (*The National Consumer Credit Reform Package* (2009) Australian Government <<http://www.treasury.gov.au/consumercredit/content/legislation.asp>> at 24 August 2009). It will require additional classes of service providers to belong to an External Dispute Resolution scheme, like the ones outlined in Part II.C.2 below. See, with other updates on Australia’s consumer law reform initiatives since February 2009, L Nottage, ‘Consumer Law Reform in Australia: Contemporary and Comparative Constructive Criticism’ (Working Paper No 24, Sydney Centre for International Law, 2009) <http://www.law.usyd.edu.au/scil/documents/2009/SCILWP24_Nottage.pdf> at 22 February 2010, available via Sydney Centre for International Law, *Sydney Centre Working Paper Series* (2009) <http://www.law.usyd.edu.au/scil/publications/working_papers.shtml> at 22 February 2010 (and updated separately for this Special Issue).

more consistently on consumer redress mechanisms.⁵ Indeed, in surveying the field in Australia, this present article follows a template adopted by Japan's Cabinet Office for a recent cross-national study into consumer ADR.⁶

Specifically, Part II introduces some major organisations currently offering consumer ADR services in Australia, especially nationally and in New South Wales (NSW), including the types of cases and methods they cover. Part II.A outlines some significant 'administrative' (government-supported) consumer ADR institutions in Australia: Community Justice Centres (Part II.A.1), somewhat similar to Japan's new government-funded *Ho-Terasu* legal aid and advice centres;⁷ and the Australian Competition and Consumer Commission (ACCC) and the Office of Fair Trading (OFT) as its state counterpart in NSW (Parts II.A.1 and II.A.2), which play roles similar to those of the National Consumer Affairs Center of Japan (*Kokusen*) and the local government-run Consumer Lifestyle Centres.⁸

Part II.B then examines 'judicial' ADR services for consumers, especially the small claims 'court' used extensively in NSW. This is actually a Tribunal operating under its own Act and the OFT, but it can issue binding decisions and counterparts in some other states are closer to regular courts. The closest analogue in Japan is the fast-track procedure for small claims in its Summary Courts, but that is not focused specifically on the needs of consumers.

Part II.C turns to 'private' ADR. Part II.C.1 briefly explains that Choice (formerly known as the Australian Consumers Association) plays little formal role in resolving individual consumer disputes. Part II.C.2 concentrates on industry association based 'ombudsman' schemes, which now collectively address huge volumes of consumer disputes in Australia. However, many of these schemes are linked through legislation or by regulators to government, so they also show elements of 'administrative ADR'.

Part II only summarises key points of structure, process and practice in these various types institutions. More detail on CJsCs, the NSW small claims tribunal, and one major ombudsman scheme for financial services can be found in a report published in 2006 for an even broader comparative study undertaken for the European Commission.⁹ Part III

⁵ Specifically on consumer ADR, see, for example, European Commission, *Alternative Dispute Resolution (ADR): Helping Consumers Seek Redress* (2007) <http://ec.europa.eu/consumers/redress_cons/adr_en.htm> at 24 August 2009.

⁶ This included reports on France, Germany, Sweden, the United Kingdom, and the United States: see, in Japanese, Cabinet Office of Japan, *Shogaikoku ni okeru Shohisha ADR Taisei no Unyo to Jittai ni kansuru Chosa* (2008) <<http://www.consumer.go.jp/seisaku/caa/kokusai/200803adr.html>> at 22 February 2010.

⁷ See generally, for example, M Murayama, 'Expanding Access to Lawyers: The Role of Legal Advice Centers' in R Sandefur (ed), *Access to Justice: Classical Approaches and New Directions* (2009) 167.

⁸ The *Kokusen* legislation was amended in 2008, allowing it to offer more formal mediation services from April 2009. See, for example, Y Fujita, *ADR: Kokumin Seikatsu Senta, Chukai Kaishi 4-kagetsu, Saiban yori Hayai Wakai mo* [ADR: Since Mediation Began Four Months Ago, Some Settlements Even Quicker than Courts], *The Mainichi Daily News* (online), 21 August 2009, (available on request from the author).

⁹ The University of Leuven coordinated this study of all (then 25) European Union member states plus Australia, Canada and the US, focused on consumer redress other than redress through ordinary judicial proceedings: available via European Commission—Consumer Affairs, *Reports and Studies* (2004) <http://ec.europa.eu/consumers/redress/reports_studies/index_en.htm> at 24 August 2009.

instead examines one development in Consumer ADR that has not been widely written about, especially in academic literature: dispute resolution provided by the OFT for home building disputes before cases can proceed to the small claims tribunal in NSW.¹⁰

Part IV of this article concludes with some brief remarks about the somewhat pessimistic future for consumer ADR reform in Australia. Recent innovations in NSW regarding home building dispute resolution may provide some inspiration for other parts of Australia, and even in countries like Japan.¹¹ More generally, Australia's framework for consumer ADR may be helpful as Japan rethinks its entire approach to consumer affairs, including recent legislation establishing an overarching Consumer Affairs Agency (*Shohisha-cho*) and new roles for the government-funded Consumer Lifestyle Centres (*Shohi Seikatsu Senta*).¹² Australian law also provides for almost all major categories of consumer redress reviewed by the Organisation for Economic Co-operation and Development (OECD) in a recent comparative report.¹³

However, Australia does not adequately provide what the OECD describes as a separate regime for 'legal actions by consumer organisations'. Such organisations can join in class actions or sue for injunctions, like other private parties. But there is no special regime that recognises the impediments they face (such as a lack of financial capacity) in order to actually do so. This represents only one of several gaps in Australia's contemporary framework that are suggested by this article, alongside much complexity and other possible problems in consumer ADR or redress mechanisms. Australian policy-makers should not forget such challenges in current efforts to improve and harmonise consumer law nation-wide, and should also look abroad in investigating better solutions. At the least, this important field deserves much more comprehensive scrutiny and research.

¹⁰ Space constraints preclude an analysis of another interesting experiment in NSW (available on request from the author or via <<http://ssrn.com/abstract=1370106>>): the 'co-regulation' scheme involving law societies and the NSW government to address complaints against legal practitioners. This has attracted somewhat more commentary in academic literature: see, for example, S Mark, 'The Cost of Justice or Justice in Costs - the Experience of the OLSC in Handling Costs Complaints' (2004) 27(1) *University of New South Wales Law Journal* 225.

¹¹ See, for example, L Nottage, 'The ABCs of Product Safety Re-Regulation in Japan: Asbestos, Buildings, Consumer Electrical Goods, and Schindler's Lifts' (2006) 15(2) *Griffith Law Review* 242, also at <<http://ssrn.com/abstract=929941>> at 24 February 2010.

¹² See also, more generally, L Nottage, 'Economics, Politics, Public Policy and Law in Japan, Australasia and the Pacific: Corporate Governance, Financial Crisis, and Consumer Product Safety in 2008' (2009) 26 *Ritsumeikan Law Review* 1, also at <<http://ssrn.com/abstract=1295064>> at 19 January 2010. The present paper also provides a further comparative reference point for reassessments of consumer redress in other industrialised democracies such as the UK and the US. Compare with, for example, respectively, P Burbridge, 'Alternative Dispute Resolution in the UK' (Paper presented at the 12th International Consumer Law Conference, Hyderabad, 25-7 February 2009); R Alderman, '26th, Consumer Arbitration and ADR' (Paper presented at the 12th International Consumer Law Conference, Hyderabad, 25-7 February 2009), abstracted at <<http://nalsarconsumerconference.wordpress.com/>> at 24 August 2009.

¹³ OECD, *Consumer Dispute Resolution and Redress in the Global Marketplace* (2006) <<http://www.oecd.org/dataoecd/26/61/36456184.pdf>> at 24 August 2009. Australia provides: (a) regarding internal complaints handling, an Australian Standard (AS 4608-2004 on 'Disputes Management Systems'); (b) quite extensive payment cardholder protections; (c) various forms of ADR; (d) small claims courts (both discussed in this report); (e) private collective action lawsuits (class actions); and (f) government-obtained redress (that is representative actions).

II MAIN ORGANISATIONS AND TYPES OF CONSUMER ADR

A *Administrative (Government-Supported) ADR*

1 *Community Justice Centres (CJCs)*

The establishment of CJCs was one of three major developments in the history of ADR more generally in Australia, resulting from growing concerns about access to justice over the 1960s and 1970s.¹⁴ CJCs have been established throughout Australia since the 1980s. In NSW, for example, they have provided mediation and conflict management services for the people of NSW since a pilot program was established in 1980. Many centres currently operate under the *Community Justice Centres Act, 1983* (NSW) with funding from the NSW Government as a part of the Attorney General's Department (similar to Japan's Ministry of Justice). CJCs in NSW aim to 'contribute to the safety and harmony of communities by improving individual, group and community responses to, and resolution of, conflict', by providing services that are 'free, confidential, impartial, accessible and voluntary'.

Mediation involves two mediators selected and trained solely by the CJCs themselves (with appropriate mediators assigned by interviewing officers on the behalf of the CJC centre co-ordinator), who 'manage how the mediation session is run, [whereas the] people in dispute decide what is discussed and what is agreed upon' to resolve the dispute. 'Facilitation' is a broader service:

in which the parties (usually a group), with the assistance of a DR practitioner (the facilitator), identify problems to be solved, tasks to be accomplished or disputed issues to be resolved. Facilitation may conclude there, or it may continue to assist the parties to develop options, consider alternatives and endeavour to reach an agreement. The facilitator has no advisory or determinative role on the content of the matters discussed or the outcome of the process, but may advise on or determine the process of facilitation.¹⁵

However, facilitation is used mostly for neighbourhood disputes. The jurisdiction of the CJCs is not limited to disputes between consumers and businesses. A significant proportion of mediations do fall into this category, such as consumer credit disputes. But the CJCs are not specialist providers and the 'demand-side' survey of how

¹⁴ Others at the time were the establishment of small claims courts or tribunals (below Part II.B) and of the public Ombudsman system (recently expanded into various industry-association based schemes: below Part II.C). See Field, above n 2. More generally, see L Nottage, 'Comparing ADR in Australia and New Zealand: Introduction and Update' (Working Paper No 22, Sydney Centre for International Law, 2009) <http://www.law.usyd.edu.au/scil/documents/2009/SCILWP22_Nottage.pdf> at 22 February 2010; and H Astor and C Chinkin, *Dispute Resolution in Australia* (Butterworths, 2nd ed, 2002).

¹⁵ For this and the preceding quotes see *Community Justice Centres* (2009) Lawlink NSW <<http://www.cjc.nsw.gov.au/>> at 24 August 2009. This website also includes links to a detailed 2005 report by the NSW Law Reform Commission and to similar centres in other parts of Australia. As mentioned below (Part II.B), NSW local courts in particular increasingly refer cases to CJC mediation (often before a sole mediator). However, the CJCs' annual reports and other publically available data are not disaggregated, making it difficult to determine what proportion involves particular types of consumer and other disputes. Similarly, the Dispute Settlement Centre Victoria (*Information Kit 2009*, Department of Justice Victoria <<http://www.justice.vic.gov.au/disputes/>> at 17 November 2009) appears to retain a significant focus on neighbourhood disputes, and was least well known ADR provider reported by the 2007 IPSOS Survey (above n 1, 16: only 16 percent of respondents had heard of it).

consumers resolve disputes in Victoria, for example, shows that they are used very infrequently compared to other organisations like those introduced below.

2 *The Federal ACCC*

The ACCC is a powerful federal regulator enforcing both competition law and consumer protection law under the *Trade Practices Act 1974* (Cth) (TPA). It can bring actions in its own capacity for injunctions¹⁶ against ‘misleading conduct’¹⁷ or ‘misrepresentations’,¹⁸ and to prevent suppliers attempting to contract out of minimum statutory warranties provided to consumers (in contravention of Part V Division 2: for example, merchantable quality of goods, and reasonable quality of services). The ACCC can also bring representative actions in lieu of consumers¹⁹ for damages it believes they have suffered or are likely to suffer due to ‘a contravention’ of Part V, or Part IVA (unconscionable contract negotiations or terms). It can also bring representative actions for damages consumers suffer from defective products.²⁰ Criminal prosecutions cannot be brought by reason only of a breach of Part V.²¹ However, the ACCC can seek penalties for breaches of Part VC,²² including any ‘false or misleading representation about the existence, exclusion or effect of any condition, warranty, guarantee, right or remedy’,²³ or about ‘a particular standard, quality, value, grade’ for the goods or services.²⁴

The ACCC’s webpage on ‘How to Complain’ about consumer rights states that it ‘cannot generally become involved in private contractual disputes on behalf of consumers (for example those concerning warranty claims)’.²⁵ It interprets the Act to mean that suppliers who do not meet their minimum statutory warranty obligations under Part V Division 2 (for example, because they supply unsafe and therefore unmerchantable goods) are not in ‘contravention’ of the Act; the only contravention would be misrepresentations about those warranties (which can also attract penalties

¹⁶ *Trade Practices Act 1974* (Cth) s 80.

¹⁷ *Trade Practices Act 1974* (Cth) s 52, pt V, div 1.

¹⁸ *Trade Practices Act 1974* (Cth) s 53.

¹⁹ *Trade Practices Act 1974* (Cth) s 87(1B).

²⁰ *Trade Practices Act 1974* (Cth) s 75AQ within Pt VA, modelled on the 1985 EC Product Liability Directive, like Japan’s PL Law of 1994. See the national report on Australia for the Kyoto Comparative Law Centre, incorporated (in Japanese) into the Japanese Cabinet Office’s Report on Representative Actions for Monetary Remedies (2007), available via *Sonota Shiryo* (2007) <<http://www.consumer.go.jp/seisaku/cao/soken/seido/sonota/sonota.html>> at 24 August 2009. More generally comparing the product liability regimes in Australia, Japan, the EU and the US, including industry-associated based PL ADR Centres, see L Nottage, *Product Safety and Liability Law in Japan: From Minamata to Mad Cows* (2004).

²¹ *Trade Practices Act 1974* (Cth) s 78.

²² *Trade Practices Act 1974* (Cth) s 79.

²³ *Trade Practices Act 1974* (Cth) s 75AZC(1)(k).

²⁴ *Trade Practices Act 1974* (Cth) s 75AZC(1)(a)-(b).

²⁵ See ACCC, *Know How to Complain: Stand up for your consumer rights* (2006) <<http://www.accc.gov.au/content/item.phtml?itemId=773418&nodeId=e7546abdfa9a7c4f1f2b61e8b5443751&fn=Know%20how%20to%20complain.pdf>> at 24 August 2009; and also ACCC, *Resolving Problems* <<http://www.accc.gov.au/content/index.phtml/itemId/815362?pageDefinitionItemId=86167>> at 24 August 2009, where the wording is even stronger: ‘[The ACCC] cannot bring an action against any corporation for a breach of the conditions and warranties implied into consumer transactions by the Trade Practices Act. This means that you, as the consumer, must negotiate with the seller or service provider or, when necessary, pursue legal action on your own behalf’.

under s 75AZC(1)(k) or about the quality etc of goods or services). It distinguishes breaches of s 52 in Part V Division 1, which expressly prohibits suppliers engaging in misleading conduct, or breaches of Part IVA, which prohibits unconscionable conduct. For ‘contraventions’ of those provisions, the ACCC has brought representative actions.²⁶

The possibility of such representative actions, or injunctions, may arise nonetheless from situations where the ACCC believes that a supplier is refusing to honour clear obligations under minimum statutory warranties. Even then, however, it is likely to devote resources to pursuing those options only if it can find widespread breaches. For similar reasons, although it could become a representative party or group member in a class action, available since 1992 for certain breaches of federal legislation like the TPA under Part IV of the *Federal Court of Australia Act 1976* (Cth), the ACCC has never participated in such litigation.²⁷ Its role in mediating disputes is therefore much more indirect than that played by Japan’s Consumer Lifestyle Centres, where the staff often get involved in ‘shuttle diplomacy’ (*assen*) passing on to the other party the key information and arguments provided by one party to the dispute. Those centres can and do also facilitate a resolution when the consumer’s complaint is about the quality of goods or services, even without a limitation clause, misrepresentation or unfair conduct. Consistently with this gap in coverage, the numbers of complaints received each year by the ACCC (for example, 47,337 in 2006)²⁸ appear lower than those received by Japan’s Consumer Lifestyle Centres. The ACCC also reports that it refers on a high proportion to other bodies, including state fair trading authorities.

²⁶ In the author’s view, there remains the possibility of a more expansive interpretation. Even though the wording is less direct than under div 1 or pt IVA, pt V div 2 in effect prohibits the supply of unmerchantable (for example unsafe) goods, otherwise the consumer can claim relief including damages. It is also like pt VA, where a manufacturer must not supply unsafe or defective goods, otherwise the consumer can claim certain damages (for example *Trade Practices Act 1974* (Cth) s 75AD). Under that pt VA, the ACCC clearly has the power to bring representative actions instead of harmed consumers (*Trade Practices Act 1974* (Cth) s 75AQ). It seems odd that representative actions should be excluded against retailers who have supplied defective (but not unsafe) goods. Yet the ACCC’s narrower interpretation means that it has less scope for assisting consumers in seeking redress against retailers, including offering mediation of their statutory warranty claims under pt V div 2. However, the Commonwealth Consumer Affairs Advisory Council’s Review of Statutory Implied Conditions and Warranties (July 2009) now invites public debate about whether regulators should be given more express powers in this respect. See Australian Government—The Treasury, *CCAAC Review of Statutory Implied Conditions and Warranties* (2009) <<http://www.treasury.gov.au/contentitem.asp?ContentID=1521&NavID=037>> at 24 August 2009; Nottage, ‘Consumer Law Reform in Australia: Contemporary and Comparative Constructive Criticism’, above n 4.

²⁷ See the explanation and assessment of such federal class actions in the report of the University of Leuven for the European Commission (above n 9), and the much more detailed study recently by P K Cashman, *Class Action Law and Practice* (Federation Press, 2007).

²⁸ See ACCC, *Annual Report 2006-07* (2007) [44] <<http://www.accc.gov.au/content/item.phtml?itemId=816120&nodeId=aaad06d0fa8b3508cadc38508b0f0fee&fn=ACCC%20annual%20report%202006%E2%80%9307.pdf>> at 22 February 2010. However, this includes complaints by businesses against other businesses, some involving pure competition law (for example price-fixing) rather than consumer protection. Unfortunately the annual reports and other publically available information do not disaggregate complaints by consumers in relation to specific parts and divisions of the TPA most directly relevant to consumer protection. Nor is there any information about how cases are dealt with.

3 *State Fair Trading Authorities (for example, NSW OFT)*

States have enacted legislation mirroring the consumer protection provisions of the TPA, but applicable to all traders. For example, the *Fair Trading Act 1987* (NSW) provides for mandatory statutory warranties,²⁹ and prohibits misleading conduct,³⁰ unconscionable conduct,³¹ and misrepresentations about warranties and quality etc of goods and services.³² The regulator is the OFT within the Department of Commerce. It can seek injunctions to prevent breaches of the Act.³³ Offences do not lie for breaches of ss 42 and 43, but there is no such express exclusion for breaches of the statutory warranties.³⁴ This seems to give the OFT broader powers than the ACCC. However, offences only arise from ‘contraventions’ of the Fair Trading Act, and the OFT interprets that restrictively (like the ACCC in the context of s 87(1B) representative actions) to exclude power to act regarding suppliers merely breaching statutory contractual warranties. Compared to the ACCC, however, the OFT seems more willing to intervene on behalf of consumers claiming breaches of warranties against suppliers.³⁵ OFT staff may be better resourced, and/or be more open to hearing about any related unconscionable or misleading conduct, or misrepresentations, for which the OFT has clear powers to prosecute suppliers.

The OFT also has a broader power than the ACCC in being able to require anyone who has committed any ‘unlawful act’ under the Act more than once to ‘show cause’.³⁶ If dissatisfied with the response, the OFT can then seek a ‘trading prohibition order’ from the NSW Supreme Court,³⁷ which can also include an order to compensate any harmed persons. On the other hand, the NSW Act does not provide for the OFT simply to bring representative actions for damages.³⁸ Its only collective redress mechanism is to seek injunctions, but again only for ‘contraventions’ of the *Fair Trading Act 1987* (NSW).³⁹

Since 2003, amendments to the *Home Building Act 1989* (NSW) require building disputes regarding private homes (up to \$500 000) to go through dispute resolution at the OFT’s Fair Trading Centres (detailed at Part III below), before they can be dealt with by the Home Building Division of the Consumer, Trader and Tenancy Tribunal (CTTT, discussed below at Part II.B). Centre officials may attempt informal mediation of the dispute. Sometimes the dispute may be referred to an OFT building inspector, who may also assist in settling the dispute before or even at the CTTT hearing. If the builder refuses to comply with the inspector’s rectification order, s/he may be subjected to disciplinary action under the *Home Building Act 1989* (NSW). In addition, the OFT provides an online Public Register of Builders’ Licences including any licence

²⁹ *Fair Trading Act 1987* (NSW) pt IV div 4.

³⁰ *Fair Trading Act 1987* (NSW) s 42.

³¹ *Fair Trading Act 1987* (NSW) s 43.

³² *Fair Trading Act 1987* (NSW) s 44.

³³ *Fair Trading Act 1987* (NSW) s 65.

³⁴ *Fair Trading Act 1987* (NSW) s 62.

³⁵ See, for example, its brochure on ‘Warranties’ (June 2007, FTC37) under ‘What if there is a dispute?’ (Recommending that if a consumer cannot resolve a problem by contacting directly first the supplier, s/he should call the OFT or visit its website).

³⁶ *Fair Trading Act 1987* (NSW) s 66A.

³⁷ *Fair Trading Act 1987* (NSW) s 66B.

³⁸ Compare *Fair Trading Act 1987* (NSW) s 68.

³⁹ *Fair Trading Act 1987* (NSW) s 65.

suspensions and penalty notices, as well as insurance claims paid (since 1997) and CTTT orders not complied with (since 2002).

Due to this legislative change, the number of consumer complaints involving home building matters received by the OFT rose from 1732 in 2002-3 to 6275 in 2003, and has since stabilised around that level. Of 6112 complaints received in 2006-7, 5128 were dealt with as follows: 2251 (44 per cent) were resolved through OFT staff facilitating negotiations with builders, 1533 (30 per cent) were resolved through mediations and technical assessments by inspectors, and 1344 (26 per cent) were referred to the CTTT or other dispute resolver.⁴⁰ There have also been steadier increases in complaints involving ‘real estate’ (1732 in 2002-3 to 2650 in 2006-7) and ‘fair trading’ generally (from 21 918 to 25 290), and hence in total consumer complaints to the OFT (from 24 458 to 34 052). Of this total, surveys suggest that 85 per cent were successfully resolved at an informal level (compared to 67 per cent in 2003-4). About 96 per cent were resolved within 30 days, but that included also withdrawals by complainants or referrals to the CTTT etc. On the other hand, surveys show a significant decline recently in the proportion of the general public knowing which NSW government agency to approach to get help.⁴¹ There is also no comprehensive independent study into consumer satisfaction with the OFT’s new facilitative processes (examined in more detail in Part III below). Yet it seems to be functioning better than the CTTT in resolving building disputes – if only because of the recent criticisms of the tribunal in this field, outlined in the next section.

B *Judicial (court-annexed or small-claims) ADR*

To reduce growing caseloads and save costs, since the 1990s growing numbers of regular courts in various jurisdictions in Australia have introduced mandatory referrals to ADR in civil cases. Local courts have become a significant source of referrals to CJs, for example, although it is difficult to ascertain how many involve consumer disputes. Lower-cost ‘small claims tribunals’ or other specialist courts probably remain most important for resolving disputes. Their regular hearings are more informal and shorter than in regular courts, and many of their cases are settled before hearings anyway. The establishment of small claims courts constituted the second of the three major developments in ADR in Australia resulting from debates in the 1960s and 1970s about access to justice. Compared to CJs (discussed at above Part II.A.1), these courts focused more specifically on the needs of consumers. Further impetus came from calls from citizens for other consumer protection, picked up by politicians and resulting for example in the TPA of 1974. The particular popularity of small claims courts may also have been partly because they promised a cheaper substitute for stronger ex ante regulation – and one easier to sell to businesspeople.

⁴⁰ Of the remaining 984, 308 were still unresolved and the rest were matters withdrawn, involving an insolvent or untraceable builder, or where the OFT had no jurisdiction. See Office of Fair Trading, *A Year in Review 2006-2007* (2007) [29] - [30] <http://www.fairtrading.nsw.gov.au/pdfs/About_us/Publications/ft333.pdf> at 24 August 2009.

⁴¹ Seventy three per cent knew in 2003-04, but only 66 per cent in 2006-07. Ibid [18]-[19]. Many of the complaints come by telephone, through the Fair Trading Information Centre free-dial number. This attracts about 1 million enquiries every year, out of about 6.5 million total requests for services. However, proportions for home building (13 per cent) and general fair trading (24 per cent) are less than for tenancies (33 per cent), business regulation (13 per cent) and vehicles (13 per cent). Ibid [21].

The first was established was established in 1973 in Queensland. Most states initially set up specialist tribunals (for example, NSW and Victoria), but some (for example, South Australia) instead added simplified procedures to regular proceedings. As other tribunals and specialist Dispute Resolution (DR) institutions have proliferated since the 1970s, calls emerged for mergers to achieve scale efficiencies and harmonise structures or processes. In 1998, for example, the Small Claims Tribunal and the Residential Tenancy Tribunals merged into the Victorian Civil and Administrative Tribunal (VCAT), with higher monetary jurisdiction and new powers allowing mandatory mediation of small claims.

Similarly, in NSW, the CTTT within the OFT was reconstituted in 2002 by the merger of two similar bodies: the Fair Trading Tribunal and the Residential Tribunal. The CTTT is very much a public-interest driven body, aiming to provide consumers with an ‘accessible, expeditious and cost-effective DR service which helps to build a better and fairer marketplace’. Its eight registries deal with around 60 000 claims annually, with its jurisdiction ranging across residential and tenancy disputes, motor vehicle claims, and general consumer and corporate matters. Tenancy disputes account for about three quarters of the tribunal’s caseload. General consumer claims account for around 10 per cent, home building cases for around 7 per cent, and motor vehicles for around 2 per cent.

The CTTT has powers both to mandate conciliation between the parties, under s 59 of the *Consumer, Trader and Tenancy Tribunal Act 2001* (NSW). Otherwise, it can issue binding decisions. About three-quarters of cases handled by the tribunal are successfully resolved either before hearings or, more rarely, at a conciliation session usually held just before the short hearing resulting in a decision. Almost all conciliations and all hearings are led by a single tribunal member, who is actively involved in discussions and the evidence-gathering process.⁴² Early case management is also used, especially in complex building matters. Where the dispute involves more than \$25 000, a specialist tribunal member can involve the parties’ expert witnesses in joint meetings or ‘conclaves’ on-site.⁴³ The *Consumer, Trader and Tenancy Tribunal Act 2001* (NSW) empowers the tribunal largely to determine its own procedures, allowing it to be as flexible and informal as circumstances require. This includes allowing documents to be lodged online and hearings or evidence by telephone, but so far very few cases have been decided solely on the documents.

⁴² The CTTT must use best endeavours to help the parties reach a settlement, so it schedules a ‘conciliation’ (*Consumer, Trader and Tenancy Tribunal Act 2001* (NSW) s 54) during a ‘preliminary conference’ (*Consumer, Trader and Tenancy Tribunal Act 2001* (NSW) s 54) conducted by a member (or Tribunal Registrar) before the hearing. Parties are not forced to reach agreement, and information supplied cannot be used in the subsequent hearing except with their consent. (The Act also provides for referral to [outside] ‘mediation’ at CTTT expense, but this is used only for larger monetary value disputes or where there are multiple applications about similar issues, for example in a retirement village.) Parties must fill out a ‘Hearing Notes’ form and exchange documents. If settlement is reached with the conciliator present, s/he helps the parties write it out as a Tribunal Order. If not, the matter proceeds to Hearing, usually immediately or on the same day.

⁴³ Consumer, Trader and Tenancy Tribunal, *Annual Report 2006-2007* (2007) [10], [18] <http://www.cttt.nsw.gov.au/pdfs/Resources/Publications/Annual_reports/annualreport0607.pdf> at 24 August 2009. The tribunal member visits the property in question with the parties and/or the technical experts each often appoints for larger-value disputes.

Most consumer cases involve claims heard by the ‘General, Home Building and Motor Vehicles Division’, for which consumers pay a low application fee. The jurisdiction limit of \$25 000 for vehicle and general claims was raised to \$30 000 with effect from 1 September 2007.⁴⁴ In many consumer cases in this division, although less so for home building disputes (up to \$500 000), parties are barred from obtaining legal representation. This underlines the tribunal’s emphasis on informality and seeking mutually acceptable outcomes. In addition, costs are rarely awarded. This is also designed to facilitate access to consumers, who might otherwise be concerned about having to pay the costs of a successful defendant (as in regular court proceedings in Australia). However, more research is needed to determine whether other costs (such as search costs in finding out about the CTTT, and opportunity costs in participating) or other impediments (such as the threat of the unknown) are impeding individual consumers, especially from socio-economically disadvantaged backgrounds. Once the tribunal process is engaged, informality is further promoted by allowing a rehearing if the decision was not ‘fair and equitable’. On the other hand, appeals can be made to the Supreme Court of NSW for ‘error of law’. However, there are only a few dozen appeals each year, and almost all are dismissed or the cases are returned to the CTTT.⁴⁵

For small claims tribunals generally, issues that continue to be debated in Australia include appropriate jurisdictional limits and fees, possible delays, informality both of procedures and the substantive grounds for rulings (whether tribunals are bound to apply the law, or can temper it with broader fairness), involvement of lawyers or other representatives, and usage patterns (especially whether firms can invoke procedures, risking clogging them up with debt collection claims; and under-representation of less advantaged social or ethnic groups). There remains considerable diversity across Australia in these and other respects. The Productivity Commission’s final report for the government’s inquiry into Australia’s consumer policy framework therefore included recommendation 9.3 urging greater consistency especially in jurisdictional limits and fees, as well as more decisions based only on written submissions unless either party requests otherwise.⁴⁶

Diversity is also increasing now that the various tribunals often have specialist divisions for certain types of consumer disputes. For example, VCAT regularly uses ADR for consumer disputes involving credit, legal practice, and home building disputes. For domestic building disputes up to \$15 000 (‘small claims’), cases are not usually referred to separate mediation, despite the tribunal’s power to mandate mediation. Further, if mediation is attempted but it is unsuccessful, it is usually followed immediately by a full hearing. By contrast, claims between \$15-100 000 go to mediation automatically. Around 70 per cent settle, representing large savings in time and cost. If mediation fails, there will usually be a ‘directions hearing’ on the same day where the tribunal tries again to mediate, but otherwise sets rules about experts and dates for filing evidence. Larger or complex disputes go directly to a ‘Directions Hearing’, and will then generally be referred to a ‘compulsory conference’, which is conducted by a tribunal

⁴⁴ See Consumer, Trader and Tenancy Tribunal, *Consumer Claims Act 1998 Amendments* (2008) <http://www.cttt.nsw.gov.au/About_us/Whats_new/2008/ccact1998announcement.html> at 24 August 2009 (describing other measures to expand the CTTT’s jurisdiction). Fees for a claim up to \$10 000 are \$32; up to \$10-25 000, \$65; and for larger disputes, \$172.

⁴⁵ See further detailed explanations and assessments of the CTTT in the report of the University of Leuven for the European Commission, above n 9, [20]-[3].

⁴⁶ Australian Government—Productivity Commission, above n 3, [213].

member and similar to an evaluative mediation (where mediators help clarify legal issues and arguments).⁴⁷ VCAT also has a detailed Code of Conduct for its mediators, who are appointed to a panel including private mediators as well as both full-time as well as part-time tribunal members; and it recently opened dedicated 'Mediation Centre' facilities.⁴⁸

VCAT seems to be more successful than its CTTT counterpart in NSW, especially regarding home building disputes. In December 2007 the NSW Legislative Council (upper house of Parliament) published an 'Inquiry into the Home Building Service' (HBS) within the OFT, which was particularly critical of the CTTT. It summarised problems identified in a separate 'Operations Review' completed by the OFT in December 2006, a June 2007 review by outside consultants, and various submissions to the inquiry from consumers and other (but not from the CTTT itself). The main criticisms focused on experiences or perceptions of delays, costs, and lack of tribunal member expertise, especially in more complex and technical home building disputes. It urged the CTTT to complete prompt and substantial implementation of the 2006 and 2007 reviews, and stated that it would consider launching a separate parliamentary inquiry specifically into the CTTT. The council inquiry also recommended that the OFT publish a report completed in late 2007 regarding a small home building advocacy service operated by the Macquarie Legal Centre (a CJC), and that the OFT itself establish a larger and long-term advocacy service for consumers to help them prepare for home building disputes that might end up before the CTTT.

Problems with the CTTT persist despite amendments to the *Home Building Act* (NSW) in 2002 that created the HBS, which administers mandatory early dispute resolution before (fewer) cases proceed to the CTTT, as mentioned above (Part II.A.3) and elaborated further below (Part III). Home building disputes are very significant for NSW because around 45 000 new homes are built in NSW, and 150 000 registered home renovations take place every year.⁴⁹ Home owners often invest much emotional attachment as well as money in their residences, and disputes with builders are quite frequent and can escalate quickly.

In 1997, following three public inquiries (especially the 'Dodd Report'), the government's powerful Building Services Corporation was reorganised. Its licensing, insurance and some of its inspection powers were folded into the new Office of Fair Trade, along with the Ministry of Consumer Affairs. However, as part of the government's broader move to deregulate, inspectors required to monitor home building

⁴⁷ Compare Victorian Civil and Administrative Tribunal, *Your Guide to Mediation in the Domestic Building List* (2002) <[http://www.vcat.vic.gov.au/CA256902000FE154/Lookup/domestic_building/\\$file/mediation-domestic_building.pdf](http://www.vcat.vic.gov.au/CA256902000FE154/Lookup/domestic_building/$file/mediation-domestic_building.pdf)> at 24 August 2009, with Victorian Civil and Administrative Tribunal, *Code of Conduct* (2004) <<http://www.vcat.vic.gov.au/CA256DBB0022825D/page/Mediation-Code+of+Conduct?OpenDocument&1=30-Mediation~&2=10-Code+of+Conduct~&3=~>> at 24 August 2009.

⁴⁸ See Victorian Civil and Administrative Tribunal, *2006-07 Annual Report* (2007) [14] – [15] <[http://www.vcat.vic.gov.au/CA256902000FE154/Lookup/annual_report_vcat/\\$file/2006-07_complete_annual_report.pdf#xml=http://search.justice.vic.gov.au/isysquery/irlde1e/8/hilite](http://www.vcat.vic.gov.au/CA256902000FE154/Lookup/annual_report_vcat/$file/2006-07_complete_annual_report.pdf#xml=http://search.justice.vic.gov.au/isysquery/irlde1e/8/hilite)> at 24 August 2009.

⁴⁹ General Purpose Standing Committee No 2, 'Report 25', via Parliament of New South Wales, *Inquiry into the operations of the Home Building Service* (2009) [52] – [61] <<http://www.parliament.nsw.gov.au/prod/parlment/committee.nsf/0/D9F780D9C38E3EFACA257325001AAA11>> at 24 August 2009.

projects no longer had to be public officials. Home owners were allowed to engage private ‘building consultants’ as inspectors, and many did (sometimes to save costs, but often more to provide a quicker service). Unfortunately, these consultants also increasingly were engaged, at considerable cost, by consumers and builders as expert witnesses for home building disputes, even in the Fair Trading Tribunals within the OFT. When those tribunals became part of the CTTT in 2002, the HBS was established within the OFT, with a ‘Mediation and Compliance’ division including 28 public inspectors who are often involved in mediating disputes for free. Many cases are now resolved at this earlier stage, as explained further below (Part III). However, reviews like the 2007 inquiry by the NSW Legislative Council suggest that many other home building disputes that proceed nonetheless to the CTTT still experience similar problems of cost, delay and lack of technical expertise.

C *Private ADR (Especially Industry Ombudsman Schemes)*

1 *Australian Consumers Association (Choice) and other Purely Private ADR*

Choice (formerly known as the Australian Consumers Association) is a completely private organisation established to promote the interests of consumers. However, it now mainly provides information to its members and other consumers, particularly about the quality and safety of goods and services (especially through ‘Choice’ magazine and its partly members-only website). It also presents a ‘consumer voice’ on governmental or industry schemes already in existence (such as the ombudsman schemes described in Part II.C.2) or in law and policy reform discussions. Each year the association logs about 10 000 telephone calls from consumers, which it registers as important for the organisation (for example regarding product safety or its other campaigns and policy initiatives). Probably only around 2 per cent of these calls involve specific complaints. The association’s staff do not provide legal information or advice, but do provide consumers with general advice about their rights and tips on solving problems with traders (also available via their website). They only rarely get involved in facilitating negotiations between consumers and suppliers. Instead, Choice aims to refer all such requests to bodies that do provide such services (such as the ACCC, and especially its state counterparts like the OFT in NSW), or to bodies that provide more formal dispute resolution (such as the CTTT or the industry ombudsman schemes discussed in the next section). However, it relies partly on such consumer requests for information or assistance in order to identify potential problem areas, which it then covers in Choice magazine or in negotiations with regulators and other policymakers in consumer affairs.

There is also almost no resolution of consumer disputes by the many other private organisations and individuals that provide ADR services to anyone, but on a fee-paying basis. For example, arbitration of civil disputes has a long tradition in Australia, drawing primarily on English legislation and practices. Organisations like the Chartered Institute of Arbitrators (CI Arb) provide for training and/or appointment of arbitrators and assistance in subsequent management of arbitral proceedings. However, their focus has been overwhelmingly on resolving disputes between firms, not consumer disputes (as happens instead in countries like Belgium, or more recently the US particularly after firms or associations there began adding arbitration clauses to their standard-form

contracts).⁵⁰ Arbitration in Australia has also been more popular only in quite specific areas, such as disputes involving commercial property.

Consumers in Australia could agree to arbitrate disputes when concluding underlying contracts with firms, or even after a dispute has arisen, but this has remained rare. One problem may be the lack of expertise or training on the part of arbitrators and/or arbitral institutions in dealing with features more specific to consumer disputes. Another barrier is that privately-supplied arbitration remains quite time-consuming and (especially) costly.⁵¹ Such concerns have led since the 1980s to greater privately-provided mediation of commercial disputes. However, the costs involved are almost always too high for consumers involved in such disputes, especially when various forms of government-supported mediation are provided for free (see above Part II.A, but also below Part II.C.2), and at low cost through small claims courts (above Part II.B).

2 *Ombudsman and other Industry-based Schemes*

The private ADR organisations that deal with possibly the largest volumes of consumer complaints are industry association based schemes. They have proliferated since the late 1980s and tend to be called ‘ombudsman’ schemes. This is because several arose in areas where industries formally provided mainly or solely by government were privatised and liberalised, such as utilities. Prior to that, complaints about services from such government suppliers often could be addressed to public ‘ombudsman’ schemes. Those schemes were set up from the 1970s in each state as the third major development in ADR in Australia, along with CJs and small claims courts, following earlier ‘access to justice’ concerns. The public ‘ombudsman’ still deals with many complaints about other government activities nowadays, in a less formal manner than complaints through the system of courts or even administrative tribunals. In areas where the government no longer supplies services directly, however, private industry associations have often set up their own informal ‘ombudsman’ schemes to resolve complaints from consumers. Similar schemes have also been developed in fields where the government was hardly ever involved. Some of these new ombudsman schemes are almost completely private, although the ACCC may exert some minimal governmental control – with side benefits for consumers – when it examines industry associations for any anti-competitive effects.

Reflecting this historical context, however, the largest ombudsman schemes still tend to retain some government supervision. The Telecommunications Industry Ombudsman (TIO) is an example of one category of schemes that have the most direct links to government. Participation in the TIO scheme was a legislative requirement for being licensed as a telecommunications carrier from its inception in 1993. This was extended to ISPs (internet services providers) and mobile phone service providers, which now comprise most of its 1000 members, under the *Telecommunications (Consumer Protection and Standards) Act 1999* (Cth). Section 128 requires the scheme to make investigations, directions and determinations, with no charge to consumers. The statute

⁵⁰ Compare the University of Leuven study, above n 9; and R M Alderman, ‘Why We Really Need the Arbitration Fairness Act: It’s All About Separation of Powers’ (2009) 12 *Journal of Consumer & Commercial Law* 151; University of Houston Law Center No. 2009-A-15. Available at Social Science Research Network, <<http://ssrn.com/abstract=1411868>> at 19 January 2010.

⁵¹ One ‘Med-Arb’ scheme investigated by CI Arb for small business-to-consumer disputes has not yet begun operation. Compare with the Institute of Arbitrators and Mediators Australia, *Homepage* (2009) <<http://www.iama.org.au/>> at 24 August 2009.

does not specify many other details. The TIO dealt with around 100 000 complaints from consumers in 2007, including complaints about premium mobile phone services. Almost all were resolved informally, mostly by the TIO referring the matter back to the service provider. However, around 800 were resolved by a ‘determination’ binding on the member (but not the consumer) for up to \$1200. The TIO also escalated 56 disputes to what it calls ‘level 4’, where it can dismiss the complaint or make a binding determination or give a ‘direction’ up to the value of \$10 000; or also (very rarely) make a non-binding ‘recommendation’ up to \$50 000.⁵²

More indirect but in some respects stronger government control is achieved in a second category of schemes, involving most financial services providers. Under the *Financial Services Reform Act 2001* (Cth), obtaining an Australian Financial Services Licence requires membership of an external DR scheme approved by the Australian Securities and Investment Commission (‘ASIC’, the regulator since 1998 for that sector) and ASIC developed a policy (PS139) for such approval. This policy largely tracked the federal government’s publication in 1997 of national ‘Benchmarks for Industry-based Customer DR Schemes’, setting out key practices and underlying principles of accessibility, independence, fairness, accountability, efficiency and effectiveness. Major private ombudsman schemes were able to obtain ASIC approval, so their members could obtain licences, because those schemes had already been set up consistently with the government’s Benchmarks.

The first ‘private’ ombudsman scheme was the Australian Banking Industry Ombudsman, established in 1989 and partly inspired by the banking ombudsman scheme established in 1987 in the UK. In August 2003 Australia’s scheme was renamed the Banking and Financial Services Ombudsman (‘BFSO’) to reflect its 25-bank membership’s growing activity in or associated with broader financial services markets. The next private schemes established were what has become now General Insurance Enquiries and Complaints Ltd (‘IEC’, set up originally in 1991; now with around 80 general insurers), and the Financial Industry Complaints Service (‘FICS’, originally in 1991 for life insurers; now including over 2500 members providing also services in managed investments, financial planning, and stockbroking). Many smaller ombudsman schemes have been established subsequently, especially for specific financial services such as insurance brokers and credit unions, as well as schemes more directly linked to the government such as the TIO and those regarding water and energy supply.

In 2003, the major schemes were estimated to handle 250 000 individual contacts annually, the vast majority of these from residential and retail customers; and to manage

⁵² See Telecommunications Industry Ombudsman, *TIO Annual Report 2006/07* (2001) <http://www.tio.com.au/publications/annual_reports/ar2007/annual_200704.html> at 24 August 2009. Despite its statutory basis, the TIO website also emphasises that it operates independently of government, as well as being independent of industry (although funded by industry) and consumer interests. It states: ‘The TIO is governed by a Council and a Board of Directors, and is managed by an independent Ombudsman appointed by the Board on the recommendation of Council. The Council is comprised of five TIO member representatives and five consumer representatives, with an independent Chairman. While the Ombudsman has responsibility for the day to day operations of the scheme, the Council provides advice to the Ombudsman on policy and procedural matters’: see Telecommunications Industry Ombudsman, *About the TIO* (2001) <http://www.tio.com.au/about_tio.htm> at 24 August 2009.

combined budgets of over \$25 million.⁵³ Not all these contacts involve consumer complaints; but in 2004, for example, the BFSO (with 44 staff) accepted 6104 new disputes in writing (90 per cent from individuals, including 1402 online) from over 32 000 calls to BSFO case officers. Around half are resolved within 60 days, but 90 per cent are resolved by the service provider after the BSFO forwards the complaint but before it initiates a formal investigation.

A major reason for this high settlement rate is that these schemes allow (but do not require) consumers to make claims at no cost against the licenced suppliers, which result in decisions binding on the supplier but not the consumer. This also makes it easier for the ombudsman organisation to recommend a settlement after initiating an investigation. Usually this is done by ‘shuttle diplomacy’, with staff relaying oral or written arguments and evidence from one side to the other. This is therefore similar to the settlement facilitation technique (*assen*) used by staff in Japan’s Consumer Lifestyle Centres, and industry association based Product Liability ADR Centres.⁵⁴ As in the latter centres, however, there is some criticism that there is not enough formal mediation by independent and professionally trained mediators. Further, the outcomes are likely to be more favourable for consumers in Australia’s industry schemes, because of the risk to businesses that the case will escalate to a determination binding only on the business but not the consumer. The risk of such escalation may be expanded because the determinations generally do not have to be based strictly on law, but also codes and other standards of good industry practice (for example FICS rule 5).

However, the precise juridical basis of those determinations is still unresolved by Australian courts.⁵⁵ Assessments of Australia’s ombudsman schemes have also been variable in other respects. In its *Consumer Redress Study* published in 1999, the Commonwealth Treasury reported ‘high consumer satisfaction with the accessibility of the schemes, wide variation in satisfaction with scheme independence, and general dissatisfaction with the outcome of disputes’.⁵⁶ In a review of FICS over 2002-3, over half of the complainants surveyed believed that face-to-face discussion with the other side was a better method of DR than a process of [binding] ‘advice’ or determination, because such discussion is ‘fairer (27 per cent)’ or may ‘save time (27 per cent), but especially because it provides ‘the opportunity to fully present your case (82 per cent)’, ‘for the company to understand the situation (53 per cent)’, or ‘to hear from the other

⁵³ See generally P O’Shea and C Rickett, ‘In Defence of Consumer Law’ (2006) 28(1) *Sydney Law Review* 141.

⁵⁴ See L Nottage and Y Wada, ‘Japan’s New Product Liability ADR Centers: Bureaucratic, Industry, or Consumer Informalism?’ (1998) 6 *Zeitschrift fuer Japanisches Recht [Journal of Japanese Law]* 40, also at SSRN: <<http://ssrn.com/abstract=837965>>; and Nottage, *Product Safety and Liability Law in Japan: From Minamata to Mad Cows*, above n 20, ch 4.

⁵⁵ See report of the University of Leuven to the European Commission, above n 9, [5]-[6]. Specifically, it remains unclear whether the scheme is based on (a) administrative law (in which case, for example, only industry members can complain about matters such as impartiality or directions of the decision-makers; consumers’ only option would be not to abide by the decisions issued); (b) arbitration law (in which case, both industry members and consumers can rely on arbitration legislation); or (c) contract law.

⁵⁶ National Alternative Dispute Resolution Advisory Council (2001), ‘A Framework for ADR Standards’, Report to the Commonwealth Attorney General, Canberra, Commonwealth of Australia, 28 <http://ntru.aiatsis.gov.au/ifamp/practice/pdfs/NADRAC_ADRStandards.pdf> at 23 February 2010.

side (40 per cent)'. FICS responded by introducing more formal conciliation at earlier stages, albeit mostly by telephone conference.⁵⁷

Other commonly voiced suggestions recently include the need to: (i) simplify the organisation structure of the schemes; (ii) collaborate more among schemes (for example through IT); (iii) consider mergers among schemes (although acknowledging the strengths of more focused schemes, and risks of going the way of the Financial Services Ombudsman scheme in the UK – with hundreds of staff); (iv) be sensitive to possible tensions between resolving each individual complaints, yet identifying and dealing with emergent systemic issues; (v) manage involvement of lawyers (especially those acting for members, encouraging them not to take an adversarial approach); and (vi) improve assistance to low income and other vulnerable consumers.⁵⁸

The Productivity Commission's inquiry report included a recommendation (5.2) to require *all* suppliers of consumer credit or related financial advice to belong to an ombudsman scheme like that demanded by ASIC for other financial services. Recommendation 9.2 added that:

Australian Governments should improve the effectiveness of alternative dispute resolution (ADR) arrangements for consumers by:

- extending the functions of the Telecommunications Industry Ombudsman to pay TV and reviewing options for further consolidation ...;
- reducing the inconsistencies in the complaint-handling and reporting processes used by energy and water ombudsman and assessing the scope for some jurisdictions to immediately combine their energy ombudsman offices on a bilateral basis prior to the ultimate formation of a national energy ombudsman;
- further enhancing financial ADR services through:
 - integration of the existing bodies into a single umbrella scheme to provide one referral and complaint pathway, while allowing independent governance of its subsidiary schemes;
 - timely and coordinated revisions of ceilings on the value of transactions subject to ADR, with ceilings differentiated according to the relative risks of consumer detriment for the relevant classes of products;
 - allowing a consumer with a claim exceeding any given ceiling to waive the excess and have their claim met up to the limit; and
- ensuring there are effective, properly resourced, government-funded ADR mechanisms to deal consistently with all consumer complaints not covered by industry-based ombudsmen; and

⁵⁷ For more detailed explanations and assessments of FICS, see above n 55 [14]-[19].

⁵⁸ See especially the Productivity Commission's final Report for its *Inquiry into Australia's Consumer Policy Framework* (30 April 2008), above n 3, [199]-[209]. However, a converse problem can also arise regarding the involvement of legal experts in ombudsman schemes like that of the TIO. It allows reimbursement of legal costs even by a successful complainant only in exceptional situations (see Telecommunications Industry Ombudsman, *Compensation Claims and the TIO* (2001) <<http://www.tio.com.au/policies/Compensation/Compensation.htm>> at 24 August 2009). But suppliers know this, so have much less incentive to settle cases promptly and for compensation comparable to what would be awarded in courts (even quite accessible local courts). This helps explain persistently high levels of complaints and consumer dissatisfaction particularly in telecom services in Australia. In the author's view, the TIO and other ombudsman schemes should at least fund a 'consumer advocate' within its organisation to investigate egregious breaches of contractual and statutory duties by suppliers, and allow the advocate's reasonable costs to be included in the compensation amount that may eventuate from a binding determination.

- establishing a formal cooperative mechanism between the various regulators, ADR schemes and other stakeholders to re-assess every five years the nature and structure of ADR arrangements to achieve best practice and address redundancies or new needs.⁵⁹

A third and final category of industry schemes in Australia in fact involves ‘co-regulation’ with government. Industry or professional associations share responsibility for design, structure, operations and funding. These offices are usually headed by ‘Commissioners’, and are now common especially for both private and public health services, and for legal services. A pioneering example is the NSW Office of the Legal Services Commissioner (OLSC), which mainly mediates complaints from consumers against barristers and solicitors.⁶⁰

III ADR INITIATIVES FOR HOME BUILDING DISPUTES

This Part focuses on processes and structures involved in consumer ADR for another significant category of disputes throughout Australia, but also (already or potentially) in close trading partners such as Japan. Home building dispute resolution is provided by the NSW OFT and therefore represents an example of ‘administrative ADR’. Yet the current scheme has received little, if any, academic commentary.

As mentioned above (Part II.A.2), legislative changes in 2003 led to a significant increase in consumer complaints about home building being resolved by the OFT before the CTTT. During the year from 1 July 2006 to 30 June 2007, 5652 complaints were lodged by consumers with the OFT’s Fair Trading Centres, and 99 per cent were dealt with within 30 working days in three ways. Centre staff in turn contacted the builder, almost always by separate telephone calls, resulting in 2251 complaints being resolved.⁶¹ The centres referred 1344 other complaints to another agency or to the CTTT. They referred the remaining 2057 complaints to the OFT’s Home Building Service (HBS).

The HBS received another 460 written complaints directly from consumers. It completed a preliminary assessment of 95 per cent of its combined 2517 cases within 10 working days. Some matters raising only compliance issues (for example complaints that a builder was unlicensed) were passed on to the HBS’s Investigations Unit for formal investigation. Others were dealt without the HBS’s 28 inspectors conducting an on-site inspection of the property in dispute, for example, by warning letter (for minor disputes). However, most cases (1784 out of the 2517) were passed on to inspectors who conduct on-site inspections with the parties present. Inspectors contacted 97 per

⁵⁹ Ibid 209. In the draft report (November 2007, 156-62) such an ‘ADR mechanism’ envisaged an organisation that cannot issue a binding decision on businesses, but instead only ‘can compel a party to attend conciliation’. In the author’s opinion, this should have been clarified so that only the business – not the consumer – can be forced into such mediation. But the final report does not elaborate at all on what is meant by ‘ADR mechanisms’. As mentioned above n 4, the National Consumer Credit Reform Package proposes more ombudsman-like schemes for a wider set of financial service providers.

⁶⁰ Mark, above n 10.

⁶¹ See NSW Inquiry Report No 25 (December 2007) 48, figure 4.1 data and flowchart, as explained further in an interview with M Cooper, Acting Director of Mediation and Compliance, OFT Home Building Service (Parramatta, 28 March 2008). The 2251 cases resolved by the centres included withdrawals by consumers, complete admissions or redress by builders, or some compromise between the parties.

cent of complainants within two days of referral, made the inspection on average within 19.5 days of referral, and issued a 'Complaints Inspection Advice' (CIA) within 5 days of the inspection. The HBS's inspectors therefore issues CIAs within a total of 33-41 working days (7-8 weeks). The CIA is the Inspector's written assessment of what out to be done by builders (and sometimes consumers) to resolve the dispute, in light of normal building practice and all the circumstances of the case. It is signed by all parties, but is not a legally binding contract. (This is therefore like some types of non-binding 'expert determination' dispute resolution, used increasingly in construction disputes between firms.) However, in most cases (1533 out of the 1784) the parties later comply with the CIA so the matter is resolved; only the remaining 251 cases are referred to the CTTT.

During these 'mediations' conducted on-site by inspectors, some serious matters can also emerge that they include in a report to the HBS's Investigation Unit, for possible disciplinary action (for example a Rectification Order, 'show cause' request, reprimand or even loss of licence). Although that unit then assigns different staff to the investigation, there is no confidentiality attached to the Inspectors' report.⁶² It can also be used as evidence in any subsequent civil proceedings in the CTTT, between the builder and the consumer. It is the author's view that this background helps partly to explain the high success rate of the Inspectors' on-side mediations resulting in CIAs.

A second factor is that they have a background in relevant trades: most have a builder's licence, as well as qualifications and experience in particular trades applicable to the particular dispute. The builder can have some trust in a professional colleague, and the consumer complainant can have trust in a neutral public official who can explain technical or usual standards to laypeople. Further, half the 28 inspectors are fully accredited mediators, while the rest have completed basic training in good mediation techniques through a course offered by LEADR – Association of Dispute Resolvers.

A third factor behind their success rate may be the more informal and less threatening nature of the mediation. It takes place on the consumer's own 'turf' (home), rather than in the CTTT (or a court building) or even on-site but involving a tribunal member (or Judge). Fourthly, these mediations by inspectors can take place at an early stage. They occur before more formal and legalistic (and therefore often, for laypeople, confusing) documentation needs to be filed in the CTTT or court. The latter also charge filings fees, and often involve considerable expenses by lawyers and experts before filing, whereas the inspectors provide a free technical service.

Again, however, there is a need for comprehensive research into the participants' satisfaction with the scheme. For example, the 'threat' of disciplinary action may put unwarranted pressure on builders, while consumers may believe that the inspectors are still focusing too much on the technical aspects rather than more inchoate aspects of their dispute. Indeed, the NSW parliament's recent Inquiry into the HBS (mentioned above Part II.B) did recommend further improvements to their system. These focused

⁶² Inspectors, and other OFT staff, are not subject to a public 'Conciliation Policy' like staff or others who engage in mediation through the CAV: see Consumer Affairs Victoria, *Conciliation Policy* (2009) <[http://www.consumer.vic.gov.au/CA256902000FE154/Lookup/CAV_Publications_Reports_and_Guidelines/\\$file/CAV%20Conciliation%20Policy.pdf](http://www.consumer.vic.gov.au/CA256902000FE154/Lookup/CAV_Publications_Reports_and_Guidelines/$file/CAV%20Conciliation%20Policy.pdf)> at 22 February 2010. However, the latter's 'principles' do not expressly include confidentiality.

on better training for centre and HBS staff in providing full and accurate information to consumers, and for inspectors in relevant trade competencies. However, the HBS seems quite confident that the centres and the HBS are operating quite well even in these fields, compared to the problems still faced by the CTTT in resolving home building disputes. They point out that similar early dispute resolution is being considered by other states, namely Tasmania and even Victoria (with its seemingly more efficient VCAT system).

The HBS therefore focused more on the inquiry's further recommendation to allow builders (rather than just consumers) to bring claims before the HBS, for example to fast-track a final payment that the consumer has withheld because of alleged defects or for other reasons. The builders' only option, in general, has been to file a claim against the consumer in the CTTT or in court. Mediation after that seems less likely to be successful, because the dispute has already become more expensive and formalised. For cases that proceed to trial, the tribunal or court process also seems likely to take longer, than if the parties had clarified at least some of the issues through an early dispute resolution process like that provided by the HBS.⁶³

IV THE FUTURE OF CONSUMER ADR IN AUSTRALIA

This article illustrates how Australia has built up a complex variety of consumer ADR mechanisms. Some particular examples, for example for home building disputes, may be useful now or in the future for other industrialised democracies like Japan. Furthermore, a common theme seems to be a continued awareness of the need for the government to directly or indirectly support cheap and quick early intervention to resolve disputes for consumers before these escalate into formal proceedings in courts or even in tribunals. This comes despite over a decade of economic liberalisation and privatisation throughout Australia. One reason for this paradoxical outcome appears to be the realisation, particularly in the home building area (but less so for other types of contract disputes dealt with by the OFT, let alone the ACCC), that government investment and involvement in consumer ADR ends up saving money for the economy over the long run.

Government support for early-stage consumer ADR comes in various forms. As well as straightforward 'administrative ADR', such as the free mediations now provided by inspectors from the OFT's HBS, there are administrative/private hybrids such as the OLSC and industry ombudsman schemes. Common reasons for the considerable – but not complete, and always variable – success of these schemes seem to be not only their ability to 'translate' often complex technical issues for consumers, but also:

- the provision of free services to consumers (because of funding from the government or its demands that industries fund the schemes):

⁶³ From 1 July 2006 to 30 June 2007, for example, the CTTT's Home Building Division attracted 3709 claims, two-thirds brought by consumers but around one-third by builders. Of these, 48 per cent were listed for hearing within 28 days; 65 per cent were resolved before or at the first hearing; and 36 per cent were resolved within 35 days. See CTTT, *Annual Report 2006-2007*, above n 43, [24]. Of all HBS matters that ended up in the CTTT over this period, 83 per cent had their first hearing within 35 days; 68 per cent had hearings that were not completed in one day; but 39 per cent were resolved within 49 days (Inquiry, above n 61, [48]).

- a sense of neutrality (due to sole or joint government control, or – as for ombudsman schemes for most financial services – due to more indirect government supervision associated with its licensing regime); and
- the threat of the relevant entity itself escalating the dispute into some form of binding outcome on firms (which then encourages them to agree to mediated settlements).⁶⁴

Consumer ADR, in its various forms, also expanded quite rapidly in Australia from the 1970s until the mid-1990s. Since then, however, the focus has increasingly been on business-to-business dispute resolution. Arguably, this reflects a lack of attention towards consumer law and policy generally in this country under the federal government led by John Howard's conservative coalition (1996-2007). Yet the States did not pay much attention to this general field either, although some (like Victoria, then NSW) appear to have been more active than others. This may have reflected a sense that Australia had achieved world-class standards in substantive consumer law by the 1980s (especially the TPA and its State equivalents), and that the nation had also developed some innovative consumer ADR mechanisms by the mid-1990s (including various ombudsman schemes and bodies like the OLSC). However, Australia's 'lost decade' until 2007 has revealed serious gaps and great complexity in its system of consumer law.

Some similar challenges in the field of consumer ADR have already been identified by others. One example is the way the CTTT deals with home building disputes (Part II.B, creating pressures to introduce earlier intervention as sketched in Part III), and disparities among small claims courts and tribunals nation-wide. Another example comes from gaps and complexities in ombudsman schemes (Part II.C.2). Drawing partly on a broader comparative perspective, this article also suggests some other problems: limited consumer law expertise and caseloads in CJs (Part II.A.1), jurisdictional restrictions on state and federal fair trading authorities becoming involved in certain common types of consumer disputes (especially breaches of statutory warranties: Parts II.A.2 and II.A.3), and the lack of special legislative or financial support to allow peak consumer bodies to encourage collective redress (Part II.C.1).

Significant reforms to consumer law are now underway, spearheaded by Kevin Rudd's Labour Party government. These are mostly driven by the Productivity Commission's inquiry, completed in April 2008. One major set of changes involves more harmonisation of consumer law throughout the country, including more powers for the ACCC. However, this heightens the incongruity of hardly considering even those consumer redress reforms proposed by the government's own Productivity Commission in its inquiry report.⁶⁵ Harmonised and improved substantive law, and more centralised

⁶⁴ Thus, both the HBS (and the OLSC) can begin disciplinary proceedings, and ombudsman schemes can issue binding decisions against industry members. For an argument why Australia needs more 'hard law' to make 'soft law' more effective specifically in the field of consumer product safety, see L Nottage (Hitoshi Nasu, trans), 'Shohiseikatsuyohin no ototeki Saikisei - Osutoraria to Nihon ni okeru Hado-ro to Sofuto-ro' (2006) 7 *Soft Law Kenkyu* 111-44 (based on: 'Responsive Re-regulation of Consumer Product Safety: Hard and Soft Law in Australia and Japan' (2006) COESOFTLAW-2006-5 *University of Tokyo Soft Law COE Discussion Paper* at <<http://www.ju-tokyo.ac.jp/coelaw/COESOFTLAW-2006-5.pdf>> at 24 August 2009).

⁶⁵ See further L Nottage, 'Product Safety Regulation in Australia's New Consumer Law: Proper Disclosure Please' (2009) 19(10) *Australian Product Liability Reporter* 146, based on a Submission at Australian Government—The Treasury, *An Australian Consumer Law: Fair Markets - Confidential*

and capable enforcement by regulators,⁶⁶ will help cast a better shadow for consumers seeking out-of-court dispute resolution. But various ADR options, and redress mechanisms within the court system, deserve attention too. Australian policy-makers need to take seriously the problems already uncovered, particularly through public inquiries and consultation processes, and proceed with further empirical and comparative research with those and other possible issues.

Meanwhile, states like Victoria may continue developing some aspects of consumer law, and access to justice more generally. In some respects, perhaps as part of broader civil procedure reforms, states like NSW may now follow their lead more actively. On 4 March 2008 the Victorian Law Reform Commission submitted to its Attorney-General a comprehensive report on civil justice, for example, which covers many matters of interest to consumers.⁶⁷

Hopefully, such broader initiatives will combine with the reforms currently underway to substantive consumer law and enforcement nation-wide to refocus attention on consumer ADR and access to justice. Many existing processes and institutions appear quite path-dependent, such as home building disputes in NSW, and therefore may be difficult to replicate directly in other parts of the country. They also are embedded in each jurisdiction's wider civil justice system, underpinned by considerable divergences still in legal education and the legal profession. Yet similar challenges afflict the EU, which has nonetheless directed considerable attention to consumer redress mechanisms in tandem with an active program of substantive consumer law reform. Australia should renew its interest in overseas developments, and thereby present an even better comparative reference point in developing more effective consumer law protections world-wide.

Consumers - *Consultation Paper* (2009)
<<http://www.treasury.gov.au/contentitem.asp?NavId=035&ContentID=1484>> at 24 August 2009.

⁶⁶ For a critical empirical study recently by CHOICE, see *Consumer Protection Enforcement* (2008) <<http://choice.com.au/viewArticle.aspx?id=106646>> at 24 August 2009. It assessed 12 regulators against a Good Practice Model and found that none is providing 'good' performance on consumer protection enforcement.

⁶⁷ See Victorian Law Reform Commission, *Civil Justice Review* (2008) <<http://www.lawreform.vic.gov.au/wps/wcm/connect/Law+Reform/Home/Completed+Projects/Civil+Justice/>> at 24 August 2009.