A Comparison of Regulatory Enforcement, Class Actions and Alternative Dispute Resolution in Compensating Financial Consumers

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Abstract

Today the individual frequently consumes products and services that are mass-produced and mass-marketed, so that when a product or service causes harm, it does so on a large scale. Yet, those harmed individuals may be unable to seek redress due to the high cost of taking legal action. This includes harm to consumers of financial services. Consequently, alternatives to traditional litigation for seeking compensation have developed. However, the effectiveness of these alternatives in achieving compensation needs to be evaluated. This article compares regulatory responses, class actions and alternative dispute resolution ('ADR') in the compensation of financial consumers through the lens of a case study — the collapse of Storm Financial Limited. The employment of multiple avenues for mass redress in relation to the same event provides a unique opportunity for an in-depth, contextual comparison. The article goes beyond the debate around litigation compared to ADR and analyses the interface between government and private mechanisms for compensating mass harm that implicates regulatory settings.

I Introduction

Modern society is characterised by products and services that can cause mass harm, but for which individuals may be poorly positioned to seek redress due to the high cost of taking legal action.[1] This includes harm to consumers of financial

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1 See, eg, Law Reform Commission, *Grouped Proceedings in the Federal Court*, Report No 46 (1988) [13]–[14]; *Carnie v Esanda Finance Corporation Ltd* (1995) 182 CLR 398, 429 (McHugh J); Peter Spiller and Kate Tokeley, 'Individual Consumer Redress' in Geraint Howells, Iain Ramsay and Thomas Wilhelmsson with David Kraft (eds), *Handbook of Research on International Consumer Law* (Edward Elgar, 2010) 482, 482–4; Iain Ramsay, *Consumer Law and Policy* (Hart Publishing, 3rd ed, 2012) ch 1.

services.[2] Consequently, alternatives to traditional litigation have been recommended. The alternatives may be categorised as: consumers acting individually through utilising alternative dispute resolution ('ADR'); consumers acting collectively through class actions; and actions by government authorities on behalf of, or for the benefit of, consumers.[3] However, alternatives to traditional litigation raise important questions of public policy about the effectiveness of those mechanisms in achieving compensation, in particular in the absence of evidence allowing for the comparison of each mechanism. An evidence-based comparison allows government, regulators and consumers to make informed decisions about the selection of mechanisms for compensation.

This article seeks to contribute to the public policy debate by comparing ADR, class actions and regulatory responses to mass harm by reference to effectiveness in securing compensation, cost and delay through the lens of a case study — the collapse of Storm Financial Limited ('Storm Financial'). Storm Financial was an Australian financial planning organisation that advised its clients to use debt to invest in the share market with the result that when the global financial crisis occurred those clients suffered significant losses. Storm Financial is chosen for study because of the range of mechanisms for consumer redress that were employed. Two forms of ADR were available to Storm Financial clients — the institutionalised Financial Ombudsman Service Australia ('FOS'), but 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 the Australian Securities and Investments Commission ('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.

The article speaks to not only the debate around litigation compared to ADR, but also the interface between government and private mechanisms for compensating mass harm that implicates regulatory settings. The employment of multiple avenues for mass redress in relation to the same event provides a unique opportunity for an in-depth, contextual comparison. Usually the comparison of

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2 Commonwealth of Australia, Financial System Inquiry, *Final Report* (November 2014) 199 (estimating that more than 80 000 Australian consumers had suffered over $5 billion in losses in the past 10 years).

3 See, eg, Organisation for Economic Co-operation and Development ('OECD'), *OECD Recommendation on Consumer Dispute Resolution and Redress* (12 July 2007); Christopher Hodges, *The Reform of Class and Representative Actions in European Legal Systems: A New Framework for Collective Redress in Europe* (Hart Publishing, 2008) ch 9; Colin Scott, 'Enforcing Consumer Protection Laws' in Geraint Howells, Iain Ramsay and Thomas Wilhelmsson with David Kraft (eds), *Handbook of Research on International Consumer Law* (Edward Elgar, 2010) ch 18. This approach to redress that looks at mechanisms beyond the state may also be seen as consistent with 'regulatory pluralism' or 'new governance' scholarship: see, eg, Neil Gunningham and Peter Grabosky, *Smart Regulation: Designing Environmental Policy* (Oxford University Press, 1998); Julia Black, 'Decentring Regulation: Understanding the Role of Regulation and Self-Regulation in a "Post-Regulatory" World' (2001) 54(1) *Current Legal Problems* 103; Orly Lobel, 'The Renew Deal: The Fall of Regulation and the Rise of Governance in Contemporary Legal Thought' (2004) 89(2) *Minnesota Law Review* 342.

redress mechanisms occurs in the abstract, with a conventional form of litigation compared with a stylised version of one of the forms of ADR. Here, the comparison is with specific types of litigation, such as the class action, and particular ADR structures. Of course, the disadvantage of uniqueness is that the case study may be limited in terms of extrapolation to other situations.[4] Nonetheless, the case study method allows for 'analytic generalisation' where explanations can be generated from analysis, which may then be hypothesised to hold for a larger population of cases.[5]

II Background to the Storm Financial Collapse

Storm Financial was one of the biggest financial planning networks in Australia, with 115 staff, $4.5 billion of funds under management and 14 000 clients at the time of its collapse. Storm Financial was formed on 23 May 1994, although it had existed in other incarnations prior to that. The founders of Storm Financial were Mr and Mrs Cassimatis, who were also directors and joint chief executive officers.

Storm Financial convinced most of it clients to acquire significant debt, from various banks, to fund investments in the stock market. The Storm Financial model was allegedly a one-size-fits-all approach, with the majority of clients given the same advice regardless of their personal circumstances or needs.[6]

Typically these investors, who included retirees or people intending to retire in the near future, were encouraged to take out loans against the equity in their homes in order to generate a lump sum to invest in the share market. Clients were generally then advised to take out margin loans[7] to increase the size of their investment portfolio.

Margin loans were organised with a loan-to-value ratio ('LVR') of around 80%, with a buffer of 10%. Storm Financial clients were put into margin loan facilities with more generous LVR and buffer provisions than was the industry standard. The relevance of the LVR is that it determines the amount of the loan compared to the underlying collateral. Margin loans were relatively unregulated at the time and were not subject to regulation by ASIC.[8] In some cases, clients were

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4 Helen Simons, 'Case Study Research: In-Depth Understanding in Context' in Patricia Leavy (ed), *The Oxford Handbook of Qualitative Research* (Oxford University Press, 2014) 455, 458.

5 Gregory Mitchell, 'Case Studies, Counterfactuals and Causal Explanations' (2004) 152(5) *University of Pennsylvania Law Review* 1517, 1584–5; Robert Yin, *Case Study Research: Design and Methods* (Sage, 5th ed, 2014) 21, 41–2, 237.

6 The one-size-fits-all Storm Financial model was the subject of litigation in ASIC's case against Mr and Mrs Cassimatis: see *Australian Securities and Investments Commission v Cassimatis* (2013) 302 ALR 671, 708 [95] (Reeves J); *Australian Securities and Investments Commission v Cassimatis (No 8)* [2016] FCA 1023 (26 August 2016), [9] (Edelman J).

7 Margin loans are a loan where securities or managed funds are used as collateral to be able to borrow funds for further investments, usually securities or managed funds: see ASIC, *Margin Loans* (14 August 2015) *Money Smart* <https://www.moneysmart.gov.au/investing/borrowing-to-invest/margin-loans>. For an example of how a margin loan may function, see *Leveraged Equities Ltd v Goodridge* (2011) 191 FCR 71, 87 [96], 87 [98] (Jacobson J).

8 This has now changed: see *Corporations Act 2001* (Cth) s 761EA (defining margin lending facility and associated terms) and s 764A(1)(l) (making a margin lending facility a financial product which then triggers the requirements under the *Corporations Act 2001* (Cth) ch 7). See also Winifred

encouraged to increase borrowings through applying for further margin loans or through revaluing property the subject of mortgages. The decline in the share market during September to December 2008 triggered numerous 'margin calls'. A margin call means that notice is given to the borrower that either further collateral needs to be supplied or the securities purchased with the loan need to be sold to return the loan to the agreed LVR.

In a rising market, the leveraged investment strategy championed by Storm Financial magnified gains. However, in a declining market, especially one that fell as dramatically as occurred in the global financial crisis of 2008, stock market investments plummeted, triggering margin calls that could not be responded to with the result that the collateral for the loans, including the family home, were lost or placed at risk.

Storm Financial was placed in voluntary administration under pt 5.3A of the *Corporations Act 2001* (Cth) on 8 January 2009. Its bankers appointed receivers to take control of most of its assets on 15 January 2009. On 26 March 2009, the Federal Court of Australia ordered that Storm Financial be wound up.[9] As a result, Storm Financial had no funds for compensation and attention turned to the banks that had provided Storm Financial clients with loans.

The ramifications of the collapse of Storm Financial was summarised by the Parliamentary Joint Committee on Corporations and Financial Services' *Inquiry into Financial Products and Services* report as follows:

> The committee acknowledges the catastrophic effect that the collapse of Storm Financial has had on many investors, particularly those double-geared clients who were not afforded an opportunity to respond to margin calls; fell into negative equity; and were sold out of their portfolios in late 2008, at or near the bottom of the market. These investors now face great challenges in meeting living expenses, repaying debts and, in some cases, keeping their homes.[10]

III Alternative Dispute Resolution

ADR encompasses any process for dispute resolution other than litigation. It can cover dispute resolution techniques, such as negotiation, conciliation and

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Murray, 'Regulation of Margin Loans — Before and After the New Amendments to the *Corporations Act 2001* (Cth)' (2011) 26(3) *Australian Journal of Corporate Law* 299.

9 This summary is based on: Parliamentary Joint Committee on Corporations and Financial Services, Parliament of Australia, *Inquiry into Financial Products and Services in Australia* (2009) ch 3; Paul Barry, 'In the Eye of the Storm: The Collapse of Storm Financial', *The Monthly* (online), February 2011 <https://www.themonthly.com.au/issue/2011/february/1299634145/paul-barry/eye-storm>; *Australian Securities and Investments Commission v Storm Financial Ltd (recs and mgrs apptd) (admin apptd)* (2009) 71 ACSR 81 (Logan J); *Sherwood v Commonwealth Bank of Australia (No 4)* (2013) 308 ALR 45, 47–8 [3] (Reeves J). See also Dimity Kingsford Smith, 'Regulating Investment Risk: Individuals and the Global Financial Crisis' (2009) 32(2) *University of New South Wales Law Journal* 514, 516–17.

10 Parliamentary Joint Committee on Corporations and Financial Services, above n 9, 19. See also ASIC, *Compensation for Retail Investors: The Social Impact of Monetary Loss*, Report No 240 (2011) 39–48 (discussing the impact of lost investments more generally by reference to financial, social and emotional effects).

mediation, as well as higher level 'architectures' or structures that employ a variety of techniques.[11] ADR is used here to refer to two structures: the industry funded ombudsman, FOS,[12] and voluntary resolution or redress schemes.[13]

A *Financial Ombudsman Service*

Each of the banks and Storm Financial held an Australian Financial Services Licence ('AFSL'). A condition of an AFSL is that the holder must provide a dispute resolution system that consists of:

(a) an internal dispute resolution procedure that covers complaints against the licensee made by retail clients in connection with the provision of all financial services covered by the licence; and
(b) membership of one or more external dispute resolution ('EDR') schemes.[14]

The EDR scheme must be approved by ASIC. One of the most well-known EDR schemes is FOS, which began operating in 2008.[15] FOS advised the Parliamentary Joint Committee on Corporations and Financial Services, which examined the collapse of Storm Financial, that it had received disputes linked to the Storm Financial collapse.[16] Once Storm Financial was placed into liquidation, FOS no longer had jurisdiction to receive further complaints. However, it was able to, and did, consider disputes involving the banks.[17]

The operation of FOS is set out in its terms of reference ('TOR').[18] The TOR sets out the types of disputes that are within the jurisdiction of FOS. In summary, FOS considers disputes between a financial services provider who is a member of FOS and individuals or small businesses and associations.[19]

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11 Naomi Creutzfeldt, 'The Origins and Evolution of Consumer Dispute Resolution Systems in Europe' in Christopher Hodges and Astrid Stadler (eds), *Resolving Mass Disputes: ADR and Settlement of Mass Claims* (Edward Elgar, 2013) 223–4.

12 The characterisation of ombudsmen as part of ADR has existed for many years in Europe: ibid 226–7.

13 See Competition and Markets Authority, *Guidance on the Approval of Voluntary Redress Schemes for Infringements of Competition Law*, CMA40 (2015) [1.7].

14 *Corporations Act 2001* (Cth) s 912A(2). See also *Wealthcare Financial Planning Pty Ltd v Financial Industry Complaints Service Ltd* (2009) 69 ACSR 418, 420–21 [6] (Cavanough J).

15 FOS was established on 1 July 2008 following the merger of the Financial Industry Complaints Service, the Banking and Financial Services Ombudsman and the Insurance Ombudsman Service: Financial Ombudsman Service, 'New National Financial Services Ombudsman Launched' (Media Release, 10 July 2008).

16 Financial Ombudsman Service, Submission No 353 to Parliamentary Joint Committee on Corporations and Financial Services, Parliament of Australia, *Inquiry into Financial Products and Services in Australia*. See also James Mitchell, 'Storm Financial Not True to "Spirit of Law"', *Independent Financial Adviser* (online), 18 December 2013 <http://www.ifa.com.au/news/12643-storm-financial-not-true-to-spirit-of-law> (referring to FOS being 'inundated' with complaints relating to Storm Financial).

17 FOS, 'Important Information regarding Storm Financial Limited' (Information Sheet) <http://www.fos.org.au/custom/files/docs/storm_financial_information_sheet.pdf>; ASIC, 'ASIC and Bank of Queensland Reach Storm Financial Settlement' (Media Release, 14-244MR, 22 September 2014) (referring to FOS determinations involving the Bank of Queensland ('BoQ').

18 See FOS, *Terms of Reference* (2015) <http://www.fos.org.au/about-us/terms-of-reference/>.

19 Ibid [4.1].

FOS services are free to applicants as the costs of FOS are met by financial services providers.[20] The types of disputes that can be considered are those that arise from a contract or obligation arising under Australian law and relate to the provision of a financial service (including credit transactions, loans, financial investments such as a security or an interest in a registered managed investment scheme or superannuation fund, financial or investment advice) by the financial services provider to the applicant.[21] However, FOS's jurisdiction is limited to claims that do not exceed $500 000.[22] FOS also has a discretion to refuse to consider a dispute.[23]

The types of remedies that FOS may decide that the financial services provider or the applicant undertakes include: the payment of a sum of money; forgiveness or variation of the debt; repayment, waiver or variation of a fee; and reinstatement or rectification of a contract.[24] FOS may decide that the financial services provider should compensate the applicant for direct financial loss or damage. However, the monetary limit on awards that FOS can make is $309 000 for most disputes.[25]

To resolve a dispute, FOS may resort to negotiation, conciliation, mediation or deciding the dispute through making a 'Recommendation' or a 'Determination'.[26] Where FOS is required to decide a dispute, that is, to make a Recommendation or a Determination, FOS will do so by reference to

> what in its opinion is fair in all the circumstances, having regard to each of the following:
>
> a) legal principles;
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> b) applicable industry codes or guidance as to practice;
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> c) good industry practice; and
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> d) previous relevant decisions of FOS or a Predecessor Scheme …[27]

The process, in summary, is that FOS makes a Recommendation that the parties may accept or reject. If a Recommendation is not accepted, either party may request a Determination, which is final and binding upon the financial services provider if the applicant accepts the Determination.[28] If an applicant does not

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20 Ibid [1.1].

21 Ibid [4.2]. Other disputes dealt with by FOS include: life insurance policies; general insurance policies; a legal or beneficial interest arising out of a financial investment or a facility to manage financial risk; a claim under another person's motor vehicle insurance policy for property damage to an uninsured motor vehicle; and the provision of services involving a mutual and traditional trustee company services.

22 Ibid [5.1]. FOS may also consider a dispute where all parties to the dispute and FOS agree: [4.4].

23 Ibid [5.2].

24 Ibid [9.1].

25 Ibid schs 1–2. For claims lodged prior to 1 January 2012, the limit for managed investments claims, stockbroking claims, claims made in relation to securities and any derivative products and financial planning claims was $150 000. For claims lodged between 1 January 2012 and 31 December 2014, the limit was $280 000.

26 Ibid [7.1].

27 Ibid [8.2].

28 Ibid [8.5], [8.7(b)].

accept a Recommendation or Determination, the applicant is free to utilise other dispute resolution mechanisms such as a court.[29]

FOS operates on a 'without prejudice' basis so that any information obtained through its processes may not be used in any subsequent court proceedings unless mandated by an appropriate court process.[30]

B *Bank Resolution Schemes*

The Commonwealth Bank of Australia ('CBA') issued a press release on 17 June 2009 in which Chief Executive Officer Ralph Norris stated that he was 'committed to the identification and resolution of all issues relating to the Bank's involvement with Storm Financial'.[31] To proactively address the requests for compensation, CBA and law firm Slater and Gordon created a voluntary resolution scheme ('CBA Resolution Scheme'). A number of other banks such as the National Australia Bank and ANZ Bank also negotiated resolution schemes with Slater and Gordon that were available to bank customers who alleged losses resulting from the collapse of Storm Financial. The details of the schemes are not publicly available.[32] However, some elements of the CBA Resolution Scheme were made publicly available. CBA agreed to pay for clients' legal fees to a maximum of $5000 and to disclose documents and facts about each client's situation to the client's lawyer. The scheme used test cases before an independent panel to establish the principles for deriving settlement offers from CBA to the client.[33] The offers included financial and non-financial components such as adjusting home loan terms, writing off interest payments and providing permanent tenancies to allow claimants to stay in their homes. Clients were then able to accept offers, make counter-offers, seek evaluation of an offer from the independent panel and reject an offer.[34]

Those claimants who settled under the scheme gave a release to CBA. However, the release contained what came to be called an 'ASIC carve-out' clause, which enabled CBA customers to obtain the benefit of any compensation recovered by ASIC from CBA in relation to those customers.[35]

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29 Ibid [8.9].

30 Ibid [7.7].

31 CBA, 'Commonwealth Bank Statement — Storm Financial' (Media Release, 17 June 2009). See also Parliamentary Joint Committee on Corporations and Financial Services, above n 9, 45–6.

32 Duncan Hughes, 'Storm Compo Deal Stirs Mixed Response', *The Australian Financial Review* (Sydney), 24 February 2010, 52.

33 The panel was composed of retired High Court judge, Ian Callinan QC, a retired Federal Court judge, Roger Gyles QC and a barrister, Robert Gotterson QC (subsequently appointed to the Queensland Court of Appeal).

34 Slater and Gordon, 'Slater and Gordon and Commonwealth Bank Map Way Forward for Storm Clients' (Media Release, 24 June 2009); CBA, 'Commonwealth Bank Extends Commitment to Customers Impacted by Storm Financial' (Media Release, 30 July 2009); Stuart Washington, 'Compensation for Storm Victims' *Business Day, The Sydney Morning Herald*, 24 February 2010, 1–2; CBA, 'Storm Financial Class Action' (Media Release, 2 July 2010); Slater and Gordon, 'Slater and Gordon Settles 900 Storm CBA Claims' (Media Release, 7 September 2010).

35 ASIC, *FAQs on CBA Settlement* (8 March 2013) <http://storm.asic.gov.au/settlements/cba-settlement/faqs-on-cba-settlement>.

Twelve months after the start of the CBA Resolution Scheme, more than 900 of the 1120 claims lodged with Slater and Gordon had been finalised, about 100 accepted that they had no claim and others were still going through the process.[36] When completed, the total monetary compensation paid was estimated to be about $132 million and there were other benefits such as interest waivers, reduced interest rates and flexible payment arrangements provided under CBA's hardship scheme.[37]

IV Regulatory Proceedings by the Australian Securities and Investments Commission

Since 1 July 1998, ASIC's functions have included acting as a consumer protection regulator in relation to the financial sector.[38] The collapse of Storm Financial implicated the provision of financial products and advice that was the subject of regulatory oversight by ASIC. ASIC formally commenced an investigation into Storm Financial on 12 December 2008, which became one of the largest investigations ASIC had ever undertaken.[39] ASIC acted on its investigation by bringing a number of proceedings,[40] including seeking compensation.

On 22 December 2010 ASIC filed proceedings in the Federal Court of Australia against Bank of Queensland Limited ('BoQ'); the owner and franchisee of the BoQ's North Ward branch, Senrac Pty Limited ('Senrac'); and Macquarie Bank Limited ('MBL'). Those proceedings were brought by ASIC in its own name and, under the *ASIC Act* ss 12GM, 50, on behalf of two former Storm Financial investors, Mr and Mrs Doyle.

In the proceedings, ASIC brought claims against BoQ and MBL based on: breach of contract (the 2004 Code of Banking Practice formed part of BoQ's home loan contracts and the 1993 Code of Banking Practice formed part of MBL's margin loan contracts); unconscionable conduct (pursuant to the *ASIC Act*, the *Trade Practices Act 1974* (Cth) and *Fair Trading Act 1989* (Qld)); and the novel claim of liability as linked credit providers. The novel claim involved ASIC alleging that BoQ and MBL were linked credit providers of Storm Financial

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36 Slater and Gordon, 'Slater and Gordon Settles 900 Storm CBA Claims', above n 34.

37 ASIC, *FAQs on CBA Settlement*, above n 35.

38 *Financial Sector Reform (Amendments and Transitional Provisions) Act 1998* (Cth) sch 1 amending *Australian Securities Commission Act 1989* (Cth), which was subsequently repealed and replaced with *Australian Securities and Investments Commission Act 2001* (Cth) ('*ASIC Act*'); Robert Baxt, Ashley Black and Pamela Hanrahan, *Securities and Financial Services Law* (LexisNexis Butterworths, 8th ed, 2012) [2.12].

39 Parliamentary Joint Committee on Corporations and Financial Services, above n 9, 48; ASIC, *ASIC Investigation Background* (17 September 2014) <http://storm.asic.gov.au/proceedings/summary-of-asic-actions/asic-investigation-background/>.

40 ASIC's other proceedings were to obtain orders temporarily freezing and seeking repayment of a $2 million dividend paid by Storm Financial to Emmanuel Cassimatis and Associates Pty Ltd and winding up Storm Financial: *Australian Securities and Investments Commission v Storm Financial Ltd (recs and mgrs apptd) (admin apptd)* (2009) 71 ACSR 81 (Logan J). ASIC also brought proceedings against Mr and Mrs Cassimatis alleging that they breached their duties as directors of Storm Financial: *Australian Securities and Investments Commission v Cassimatis (No 8)* [2016] FCA 1023 (26 August 2016) (Edelman J).

pursuant to s 73 of the *Trade Practices Act 1974* (Cth) and therefore were jointly liable with Storm Financial for loss and damage suffered by the two investors.[41] The case against Senrac was based on its involvement in BoQ's alleged contraventions. The relief sought by ASIC in these proceedings included declarations of unconscionable conduct, statutory and common law damages and compensation orders, and orders setting aside various loan transactions and securities.[42]

The proceedings were settled, without admission, by BoQ, Senrac and MBL, who agreed to pay $1.1 million, which fully compensated Mr and Mrs Doyle for their financial loss arising from their Storm Financial investments.[43]

On 22 December 2010, ASIC also filed proceedings in the Federal Court of Australia alleging that the conduct of the Storm Financial model amounted to the operation of a managed investment scheme that was required to be registered under the *Corporations Act 2001* (Cth) and was not registered in contravention of s 601ED(5). ASIC further alleged that Storm Financial operated the managed investment scheme and that CBA, BoQ and MBL were knowingly concerned in the operation of that managed investment scheme.[44] These proceeding are referred to as ASIC's unregistered managed investment scheme ('UMIS proceedings'). At the time ASIC commenced these proceedings against CBA, a class action had already commenced. However, ASIC needed to be the party seeking additional compensation in order for the 'ASIC carve-out' clause to operate. That clause had been included in the settlement agreements signed by CBA customers who went through the CBA Resolution Scheme.

The UMIS proceedings began as a vehicle for clients of Storm Financial to claim compensation under ss 1325(2)–(3) of the *Corporations Act 2001* (Cth). However, ASIC had to recast the proceedings as regulatory proceedings seeking an injunction and declaration under s 1324(1) of the *Corporations Act 2001* (Cth) in response to a strike out application. In that application, the banks had contended that s 1325 required ASIC to identify one or more Storm Financial investors who had suffered loss, otherwise the proceedings would seek an advisory opinion from the court.[45] As a result, the reconfigured UMIS proceedings no longer sought compensation.

On 14 September 2012, ASIC entered into a settlement agreement with CBA, for CBA to make available up to $136 million as compensation for losses suffered on investments made through Storm Financial.[46]

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41 *Australian Securities and Investments Commission v Bank of Queensland Ltd* (2011) 211 FCR 412, 414 [4], 415–18 [9]–[13] (Foster J).

42 Ibid.

43 ASIC, 'ASIC Settles in Storm Financial Proceedings' (Media Release, 13-122MR, 29 May 2013).

44 *Australian Securities and Investments Commission v Storm Financial Ltd (recs and mgrs apptd) (in liq) (No 2)* [2011] FCA 858 (2 August 2011) [2], [4] (Reeves J).

45 *Australian Securities and Investments Commission v Storm Financial Ltd (recs and mgrs apptd) (in liq)* [2011] FCA 763 (9 June 2011) (Reeves J); *Australian Securities and Investments Commission v Storm Financial Ltd (in liq) (No 2)* [2011] FCA 858 (2 August 2011) [19], [46]–[53] (Reeves J).

46 ASIC, *FAQs on CBA Settlement*, above n 35; CBA, 'Commonwealth Bank Settles Storm Financial Litigation with ASIC' (Media Release, 14 September 2012). The proceedings were formally

On 24 September 2012, a trial combining ASIC's UMIS proceedings against MBL and BoQ and the class actions against CBA and MBL began. However, on 9 November 2012 the class action against CBA was adjourned. The trial of the UMIS proceedings involving MBL and BoQ, and the class action against MBL, continued and concluded on 12 December 2012 with closing submissions being made in February 2013.[47]

The proceedings against MBL were brought to an end on 12 September 2014, following the settlement of the related class action (discussed below).[48] The class action encompassed all of the persons who would have benefited from ASIC's action. Similarly, on 22 September 2014 ASIC's proceedings against BoQ were resolved in conjunction with a related class action (discussed below).[49]

V Class Actions

A class action is 'a procedure whereby the claims of many individuals against the same defendant can be brought or conducted by a single representative'.[50] The class action provides a procedure that both aggregates claims and allows for a representative to prosecute those claims. The legislation creating class actions or representative proceedings in Australia at the federal level is pt IVA of the *Federal Court of Australia Act 1976* (Cth), which was introduced through the *Federal Court of Australia Amendment Act 1991* (Cth) and commenced on 4 March 1992.[51] The Second Reading Speech that accompanied the amending legislation explained that '[t]he new procedure will enhance access to justice, reduce the costs of proceedings and promote efficiency in the use of court resources'.[52] A class action is said to allow for small losses to be recovered by permitting the plaintiffs to pool claims and for large losses to be pursued more efficiently as costs may be shared and economies of scale realised.[53]

Three class actions under pt IVA of the *Federal Court of Australia Act 1976* (Cth) were commenced against banks as a result of the Storm Financial collapse: *Sherwood v Commonwealth Bank of Australia and Colonial First State Investments Ltd* ('the Sherwood class action') was commenced on 1 July 2010;

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dismissed by the court on 17 September 2012: Commonwealth Courts Portal, *ASIC v Storm Financial Limited (recs and mgrs apptd) (in liq)*, Federal Court of Australia File No QUD577/2010.

47 ASIC, *UMIS Proceedings* (23 June 2015) <http://storm.asic.gov.au/proceedings/umis-proceedings>.

48 Commonwealth Courts Portal, *ASIC v Storm Financial Limited (recs and mgrs apptd) (in liq)*, Federal Court of Australia File No QUD577/2010.

49 ASIC, 'ASIC and Bank of Queensland Reach Storm Financial Settlement', above n 17. The proceedings were formally dismissed by the court on 11 March 2015: Commonwealth Courts Portal, *ASIC v Storm Financial Limited (recs and mgrs apptd) (in liq)*, Federal Court of Australia File No QUD577/2010.

50 Law Reform Commission, above n 1, [2].

51 *Federal Court of Australia Amendment Act 1991* (Cth). See generally Damian Grave, Ken Adams and Jason Betts, *Class Actions in Australia* (Thomson Reuters, 2nd ed, 2012); Michael Legg and Ross McInnes, *Annotated Class Actions Legislation* (LexisNexis Butterworths, 2014).

52 Commonwealth, *Parliamentary Debates*, House of Representatives, 14 November 1991, 3174 (Michael Duffy, Attorney-General).

53 Ibid 3177; *P Dawson Nominees Pty Ltd v Multiplex Ltd* (2007) 242 ALR 111, 117 [24]–[25] (Finkelstein J).

Richards v Macquarie Bank Ltd ('the Richards class action') was commenced on 24 December 2010; and *Lee v Bank of Queensland* ('the Lee class action') was commenced on 5 December 2012.[54] The causes of action included in each class action were effectively a combination of those in the Doyle and UMIS proceedings. Further, all of the class actions were funded by a subset of group members. There was no third party litigation funder.

The Richards class action was commenced by Mrs Richards on behalf of a group of about 1050 members who, on advice from Storm Financial, borrowed money in the form of margin loans from MBL between 15 February 2005 and 31 October 2008, and then used that money to invest in one or more of nine managed investment schemes and had those investments redeemed or sold in, or after, October 2008. MBL settled the proceedings for $82.5 million including costs and disbursements of about $8.8 million.[55]

As part of the court approval, the applicant sought a 'funder's premium' of 35% for those group members who co-funded the litigation. This meant that group members who contributed to the legal costs and disbursements involved in running the class action recovered 42% of their losses, while those who did not contribute only recovered 17.602% of their losses. The percentage used was determined by reference to a range of premiums that third party litigation funders had previously charged for funding class actions.[56] Due to the novel nature of the funder's premium, ASIC intervened in the proceedings.[57] At first instance, the settlement was approved.[58] ASIC appealed.

The Full Federal Court overturned the settlement and the 35% uplift in recovery for group members who self-financed the cost of prosecuting their class action.[59] A further settlement, without a funder's premium, was approved on 13 December 2013.[60] The approval also included additional costs and disbursements of about $1 million.[61]

The Sherwood class action was brought by Mr and Mrs Sherwood and Mr and Mrs McArdle who were former clients of Storm Financial and borrowed money from CBA through margin loan agreements on or after 18 May 2007.

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54 Commonwealth Courts Portal, *Sherwood v Commonwealth Bank of Australia and Colonial First State Investments Ltd,* Federal Court of Australia File No NSD811/2010; Commonwealth Courts Portal, *Richards v Macquarie Bank Ltd,* Federal Court of Australia File No QUD590/2010; Commonwealth Courts Portal, *Lee v Bank of Queensland Ltd*, Federal Court of Australia File No QUD732/2012.

55 *Richards v Macquarie Bank Ltd (No 4)* [2013] FCA 438 (3 May 2013) [2], [26] (Logan J); 'Notice of Settlement: Class Action Against Macquarie Bank and Storm Financial Limited' (26 March 2013) Federal Court of Australia File No QUD590/2010.

56 *Richards v Macquarie Bank Ltd (No 4)* [2013] FCA 438 (3 May 2013) [26], [32] (Logan J).

57 ASIC has a broad ability to intervene in litigation. For example, the *Corporations Act 2001* (Cth) s 1330(1) provides that 'ASIC may intervene in any proceeding relating to a matter arising under this Act'. ASIC's approach to intervening is set out in ASIC, 'ASIC's Approach to Involvement in Private Court Proceedings' (Information Sheet 180, June 2013).

58 *Richards v Macquarie Bank Ltd (No 4)* [2013] FCA 438 (3 May 2013) (Logan J).

59 *Australian Securities and Investments Commission v Richards* [2013] FCAFC 89 (12 August 2013) (Jacobson, Middleton and Gordon JJ).

60 *Richards v Macquarie Bank Ltd (No 5)* [2013] FCA 1442 (13 December 2013) (Logan J).

61 ASIC, 'ASIC and Bank of Queensland Reach Storm Financial Settlement', above n 17.

The money was then invested in funds or other securities approved by CBA. Some of the approved funds were managed by Colonial First State Investments Limited ('CFS'), a wholly-owned subsidiary of CBA. The investments were redeemed or sold between about October and December 2008.[62] The group definition excluded those persons who had previously settled their claim with CBA, were found to have suffered no loss, or were involved in the operation of Storm Financial.[63] The case went to trial in March 2013 and concluded in November 2013.[64] Judgment was reserved. The Sherwood class action was settled for $33 680 000 of which $10 340 062 was to be deducted for costs. The number of group members was estimated to be 143 clients, although some would be joint borrowers. The compensation paid to group members would be first applied to reducing or paying off any amounts owing to CBA in relation to margin loans. Where the compensation was insufficient to completely pay off the amounts outstanding, CBA would write off the balance of the loan, subject to the realisation of any security.[65]

The Lee class action was commenced on 5 December 2010 by Mr and Mrs Lee on behalf of themselves and 392 group members who had borrowed money from BoQ in the period between 28 November 2002 and 2 December 2008 in order to invest in a Storm Financial branded index share fund in accordance with financial advice given by Storm Financial.[66] The proceedings were settled for $19 639 694 of which $2 675 000 was to be used for legal costs. However, group members were required to elect whether to claim compensation or remain on the current terms and conditions of their loans. The latter may have been previously renegotiated with BoQ. Further any compensation amount would first be applied against any indebtedness to BoQ.[67]

All class actions were settled on the basis of no admission of liability. The outcomes in the different redress mechanisms will now be compared across compensation achieved, cost and delay.

VI Compensation

The payment of compensation aims to 'restore and redress the balance of fairness or justice' that has been upset by a wrongdoer's contravention of the law.[68] To compensate someone for something is to provide that person with an equivalent for that thing. If they are given more than that they have been over-compensated, and if given less, under-compensated. The idea of over- or under-compensation implies

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62 *Sherwood v Commonwealth Bank of Australia (No 3)* [2012] FCA 1149 (22 October 2012) [7]–[9] (Reeves J); *Sherwood v Commonwealth Bank of Australia (No 5)* [2015] FCA 688 (7 July 2015) [11] (Collier J) ('*Sherwood (No 5)*').

63 *Sherwood (No 5)* [2015] FCA 688 (7 July 2015) [11]–[13] (Collier J). The last two exclusions were added as part of the settlement.

64 '*Sherwood v Commonwealth Bank of Australia,* Notice of Proposed Settlement' (NSD 811/2010, 3 March 2015).

65 *Sherwood (No 5)* [2015] FCA 688 (7 July 2015) [24], [37], order 3 (Collier J).

66 *Lee v Bank of Queensland Ltd* (2014) 103 ACSR 436, 438 [2] (Collier J).

67 Ibid 443–4 [19].

68 Peter Cane, *Atiyah's Accidents, Compensation and the Law* (Cambridge University Press, 8th ed, 2013) 403, 416–17.

that the notion of compensation is to provide an exact equivalent — neither more nor less.[69] Consequently, an important criterion for measuring the success of a redress mechanism is that all of those persons 'who are entitled to compensation … actually receive compensation and in the amount to which they are entitled'.[70] This means that the efficacy of a mechanism in achieving redress requires a comparison between the losses suffered and the compensation achieved.

Unlike many proceedings where the value of the claim and the outcome achieved is confidential, or at least not publicly available, the recovery as a percentage of the loss suffered has been published by ASIC or in the judgments approving the class action settlements. The only exception is FOS, where outcomes are confidential. Further, the outcomes have been the subject of comment by both ASIC and the lawyers acting in the class actions due to the competing nature of the proceedings.

The settlement between ASIC and CBA in relation to the UMIS proceedings was the subject of a letter-writing campaign by some Storm Financial clients. The letters asked whether the settlement that ASIC had negotiated was a better outcome than what could be achieved in the Sherwood class action.[71] ASIC responded that it had retained forensic accountants who created a financial model of the losses that Storm Financial customers' suffered. The model calculated the profit or loss for each investment made, based upon the income and realisation proceeds received on the investment, and the cost of financing or otherwise acquiring the investment. Where the model determined that a loss had been made, the Storm Financial customer was entitled to compensation. The model then allocated those losses to each bank based on the bank being the source of the funds invested with Storm Financial.[72] The model calculated that Storm Financial investors who borrowed from CBA suffered losses of $478 million of which $373 million was attributed to CBA. The funds for compensation provided by CBA amounted to $268 million, comprised of $132 million under the CBA Resolution Scheme and $136 million pursuant to the UMIS proceedings settlement. In total, CBA paid 72% of the lost $373 million in compensation. However, as the CBA Resolution Scheme provided compensation on a different basis to ASIC's model, ASIC had also negotiated the settlement on the basis that a recovery of 55% of losses would be the minimum recovery for a Storm Financial investor who had borrowed funds from CBA. For some Storm Financial clients it would be a higher amount.[73]

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69 Robert E Goodin, 'Theories of Compensation' (1989) 9(1) *Oxford Journal of Legal Studies* 56, 59. See also Benjamin C Zipursky, 'Civil Recourse, Not Corrective Justice' (2003) 91(3) *Georgetown Law Journal* 695, 701 ('The defendant must pay not just any amount, but the amount of the plaintiff's injury, because the payment is not a penalty per se, but the rectification of an injury that the defendant inflicted').

70 Cane, above n 68, 409.

71 ASIC, *ASIC Responds to Storm Investors' Queries regarding the ASIC–CBA Settlement* (16 April 2013) <http://storm.asic.gov.au/settlements/cba-settlement/asic-responds-to-storm-investors-queries-regarding-the-asic-cba-settlement/>.

72 The operation of the model is set out in more detail in ASIC, *FAQs on CBA Settlement*, above n 35.

73 ASIC, *ASIC Responds to Storm Investors' Queries*, above n 71.

The settlement of both the Doyle proceedings and the Richards class action sparked another round of comparisons. In the media release that followed the settlement of the Doyle proceedings, ASIC noted that the proceedings had provided a template for similar allegations to be raised in the Richards and Sherwood class actions, but that the settlement, in achieving full recovery for the Doyles, was a better result than the Richards class action.[74] The judge who approved the Richards class action recorded that the settlement achieved a recovery of 30.57%.[75] The ASIC model calculated that those who borrowed from MBL suffered losses of $340 million, of which $278 million was attributed to MBL. When the Richards settlement less legal costs, an amount of $72.7 million, is compared with $278 million it gives a recovery of 26%.[76] If costs are not removed, the recovery is 29%.[77]

The later settlements in the Lee and Sherwood class actions saw the ASIC model embraced by the plaintiffs' lawyers, who employed it, with ASIC's assistance, in calculating the loss suffered by group members. Indeed, the Federal Court in approving the settlements found the ASIC model to be a 'fair and reasonable tool for calculating losses of group members'.[78] The ASIC model calculated that losses to group members caused by BoQ loans was $38 110 044 and that a settlement of $19 639 694 resulted in a 45% return on the total loss suffered by group members.[79] In relation to CBA, the amount allocated to it was $52 277 795 — which, with a settlement of $28 752 787, resulted in a 55% recovery.[80]

Table 1 demonstrates that the Doyle proceedings were clearly the most effective in terms of the financial compensation outcome achieved, although that outcome was for only two investors. In relation to the other dispute resolution mechanisms, ASIC's actions directly or indirectly altered outcomes. ASIC intervened in the CBA Resolution Scheme and Richards class action as well as providing a financial model that was employed in the Sherwood and Lee class actions. CBA customers recovered at least 55% of their losses regardless of whether they participated in the bank's Resolution Scheme or the class action. Although arguably this result owes much to ASIC's UMIS proceedings and role in developing the ASIC model to calculate losses. This is further borne out by the Lee class action, which also employed the model achieving a 45% recovery. Where negotiated outcomes were achieved without ASIC the recoveries were lower. The Richards class action and CBA Resolution Scheme prior to ASIC's UMIS proceedings only recovered 29% and 35% respectively. Parts VII and VIII below analyse these outcomes more closely in terms of cost and delay respectively.

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74 ASIC, 'ASIC Settles in Storm Financial Proceedings', above n 43.

75 *Richards v Macquarie Bank Ltd (No 4)* [2013] FCA 438 (3 May 2013) [26] (Logan J).

76 ASIC, *ASIC Responds to Storm Investors' Queries*, above n 71.

77 *Richards v Macquarie Bank Limited (No 6)* [2015] FCA 299 (17 March 2015) [4] (Logan J).

78 *Lee v Bank of Queensland Ltd* (2014) 103 ACSR 436, 448 [39] (Collier J). See also *Sherwood (No 5)* [2015] FCA 688 (7 July 2015) [23] (Collier J).

79 *Lee v Bank of Queensland Ltd* (2014) 103 ACSR 436, 443–4 [19] (Collier J).

80 *Sherwood (No 5)* [2015] FCA 688 (7 July 2015) [24] (Collier J).

Table 1: Outcomes of Storm Financial dispute resolution mechanisms

Dispute Resolution Mechanism	Outcome (without costs deducted)
CBA Resolution Scheme and ASIC UMIS proceedings against CBA	• 35% of losses recovered before UMIS settlement. • 72% of losses recovered with a minimum of 55% of losses recovered for all clients after UMIS settlement. • Both based on ASIC financial model.
Doyle proceedings brought by ASIC	• 100% of losses recovered.
Richards class action against MBL	• 30.57% of losses recovered albeit after ASIC intervened to have the Full Federal Court overturn the funder's premium. • 29% based on ASIC financial model.
Lee class action against BoQ	• 45% of losses recovered — ASIC financial model employed.
Sherwood class action against CBA	• 55% of losses recovered — ASIC financial model employed.
Financial Ombudsman Service	• Outcomes are confidential.

VII Cost

Costs in Australian litigation usually fall into two categories. First, a plaintiff's own legal costs paid to their lawyer and disbursements such as filing fees and expert witness fees. Second, their opponent's costs if a party is unsuccessful and is required to pay an adverse costs order.[81] The person liable for these costs varies, depending on the mechanisms for redress that are employed.

Where the state, through a regulator, brings the litigation it is the regulator who incurs the legal costs and risk of an adverse costs order, even when compensation is sought for particular persons.[82] The cost to ASIC of its combined actions in relation to Storm Financial was $50 million as at February 2014.[83] Class actions operate within the above system of costs, but it is usually the representative party alone that is liable for these costs and not group members.[84] However, third party litigation funding may contractually change this dynamic. Usually the funder pays the first category of cost but all funded group members agree to reimburse the funder for those costs if the class action is successful, and removes the second

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81 Bernard Cairns, *Australian Civil Procedure* (Thomson Reuters, 10th ed, 2014) [17.10].

82 Where ASIC relies on s 50 of the *ASIC Act*, ASIC requires the consent of the persons on behalf of whom it is bringing the action, which provides an opportunity for costs to be addressed, usually on the basis that the person is not liable for either category of costs discussed above. A person entering into a s 50 arrangement may seek their own legal advice, which will come at a cost.

83 Senate Economics References Committee, Parliament of Australia, *Performance of the Australian Securities and Investments Commission* (2014) 272.

84 See, eg, *Federal Court of Australia Act 1976* (Cth) s 43(1A). Group members can become liable for costs if they become a representative of a sub-group or seek the determination of an individual issue: *Federal Court of Australia Act 1976* (Cth) ss 33Q–33R.

category of cost through indemnifying all participants in the class action against an adverse cost order. However, utilising litigation funding will involve paying a percentage of any recovery to the funder.[85] As litigation funding is a contractual arrangement, variations on the usual approach may occur.

In the Richards, Sherwood and Lee class actions, there were no litigation funders. Some, but not all, of the group members funded the litigation, meaning they paid the legal costs and disbursements. The group members in those class actions were not at risk of an adverse cost order, only the applicant was, due to the operation of the class actions legislation. No indemnity from the funding group members existed.

A person using ADR may avoid both of the above categories of costs, unless legal representation is obtained so that legal costs and disbursements are incurred. Even then, the legal advisers may act on a conditional or 'no-win no-fee' basis so that there must be some recovery before the costs become payable.[86] The costs of the ADR process, such as mediator fees and room hire, will usually be shared between the parties, but other arrangements can be agreed. Under the FOS scheme, the procedures employed are free of charge to the claimants. As a result, a claimant may incur the costs of legal advisers, but will not incur the cost of the ADR process. The CBA Resolution Scheme involved no costs for participants unless they expended greater than $5000 on legal representation.

The position of each dispute resolution mechanism on costs, including class actions generally and in relation to the Storm Financial collapse, is summarised in Table 2 below. This analysis demonstrates in broad terms that litigation is more expensive than ADR and that class actions have the highest transaction costs for consumers of any form of dispute resolution.

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[85] Michael Legg, 'Reconciling Litigation Funding and the Opt Out Group Definition in Federal Court of Australia Class Actions — The Need for a Legislative Common Fund Approach' (2011) 30(1) *Civil Justice Quarterly* 52, 56.

[86] *Legal Profession Act 2006* (ACT) s 283(3); *Legal Profession Uniform Law* (NSW) s 181; *Legal Profession Act* (NT) s 318(3); *Legal Profession Act 2007* (Qld) s 323(3); *Legal Practitioners Act 1981* (SA) s 42; *Legal Profession Act 2007* (Tas) s 307(3); *Legal Profession Uniform Law* (Vic) s 181; *Legal Profession Act 2008* (WA) s 283.

Table 2: Costs of Storm Financial dispute resolution mechanisms

Form of Dispute Resolution	**Consumer's Financial Costs if Successful**	**Consumer's Financial Costs if Unsuccessful**
Regulator-initiated litigation (Doyle and UMIS)	• No cost to consumer. • ASIC bears costs.	• No cost to consumer. • ASIC bears costs.
Class action with third party litigation funding	• Consumer reimburses funder for legal costs and pays percentage of recovery to funder.	• No cost to consumer. • Funder (and possibly lawyer) bears costs.
Richards, Sherwood and Lee class actions	• Group members pay legal costs: - Richards — $9.8 million. - Sherwood — $10.3 million. - Lee — $2.675 million.	• Applicant liable for adverse costs order. • Funding group members pay legal costs.
FOS	• No cost to consumer unless legal representation obtained.	• No cost to consumer. • Cost of legal representation payable: (a) if obtained; and (b) not on a no-win no-fee basis.
CBA Resolution Scheme	• No cost to consumer unless legal representation obtained that costs greater than $5000.	• No cost to consumer • Cost of legal representation payable: (a) if obtained; (b) not on a no-win no-fee basis; and (c) greater than $5000.

VIII Delay/Time to Resolution

The Storm Financial disputes were time-sensitive for many of the Storm Financial clients because they had lost retirement incomes and had no prospect of employment, or were at risk of losing their home with nowhere to live.[87]

The informality of ADR allows for it to proceed expeditiously. This is borne out by the experience with the FOS scheme generally and with the CBA Resolution Scheme in particular. Table 3 sets out the time taken to resolve disputes through FOS from 2010–11 through to 2013–14. The CBA Resolution Scheme, although not as quick as FOS, still managed to resolve 80% of claims within 12 months. However, some of those claims may have received further compensation as part of ASIC's settlement of its UMIS proceedings with CBA.

[87] Parliamentary Joint Committee on Corporations and Financial Services, above n 9, 19.

Table 3: FOS — Days taken to close disputes[88]

Days taken to close disputes	**Percentage of disputes resolved**			
	2010–11	**2011–12**	**2012–13**	**2013–14**
0 to 30	10%	12%	15%	18%
31 to 60	40%	40%	40%	38%
61 to 90	10%	11%	11%	11%
91 to 180	20%	18%	15%	15%
More than 180	21%	19%	19%	18%

In contrast, class actions and regulatory proceedings can take a number of years to resolve, as shown in Table 4 below.

Table 4: Time to resolution of dispute

Dispute Resolution Mechanism	**Commencement**	**Trial Completed**	**Settlement**
CBA Resolution Scheme	1 Sep 2009	no trial	1 Sep 2010 (12 months)*
Doyle proceedings	22 Dec 2010	no trial	29 May 2013 (29 months)
UMIS proceedings against CBA	22 Dec 2010	no trial	14 Sep 2012 (21 months)
UMIS proceedings against BoQ	22 Dec 2010	Feb 2013 (26 months)	22 Sep 2014 (45 months)
UMIS proceedings against MBL	22 Dec 2010	Feb 2013 (26 months)	12 Sep 2014 (33 months)
Richards class action against MBL	23 Dec 2010	Feb 2013 (26 months)	13 Dec 2013 (36 months)
Sherwood class action against CBA	1 Jul 2010	Nov 2013 (40 months)	Jul 2015 (60 months)
Lee class action against BoQ	5 Dec 2012	no trial	Dec 2014 (24 months)

* 80% of claims finalised.

88 FOS, *2012–2013 Annual Review*, 49; FOS, *2013–2014 Annual Review*, 47 (note: rounding means that the total percentage for 2010–11 is greater than 100%).

IX Regulatory Litigation, Class Actions and ADR Compared

A *ADR — The First Choice*

The Storm Financial case study clearly demonstrates that ADR is quicker than both regulatory proceedings and class actions. ADR also costs far less than class actions and regulatory litigation. The findings in the case study are consistent with the literature comparing ADR and regular litigation that have recommended ADR on the basis that it is cheaper and faster.[89] However, where the regulator bears the cost of litigation, the consumer may be able to obtain redress at a cost on par with, or lower than, ADR. There is a clear incentive for consumers to call for the regulator to act. There is a significant cost, but it falls on the taxpayer. The use of ADR may reduce not only the costs borne by consumers, but also the costs borne by the state.

Quick and cheap dispute resolution may be less desirable if the compensation achieved compared to the actual loss is lower than other mechanisms. In the Storm Financial case study, no data in relation to FOS was available. However, FOS resolutions are not binding on the consumer, so that if a recovery appeared to be lower than what might be achieved elsewhere, it could be rejected. Similarly, the CBA Resolution Scheme offered an efficient resolution of claims that clients could reject if unsatisfied with the amount. ADR mechanisms, where available but not binding on consumers, should be the first approach in seeking redress.

The compensation achieved through the CBA Resolution Scheme raises for consideration the effectiveness of ADR in delivering compensation in relation to novel causes of action. The final outcome of the CBA Resolution Scheme was an average recovery of 72% of losses with a minimum of 55% for each client, meaning it outperformed all litigation, except for the Doyle proceedings. However, this was after ASIC's UMIS proceedings. Prior to that, recovery was an average of 35% of losses. In the confidential ADR process, ascribing a cause to an outcome is very difficult.[90] However, it is reasonable to assume that rational parties will reach an outcome based on an assessment of the prospects of success and risk of adverse outcomes, including costs.

The increase in the percentage of recovery suggests that there must have been a recalibration of the risk of an unfavourable outcome for CBA, either on the merits or in terms of greater costs. If it is assumed that there was a change in the merits, then the case study suggests that even with ADR there needs to be persuasive material supporting fault and loss, especially if untested legal claims are being pressed.[91] Otherwise, assuming equally knowledgeable and skilful negotiators, a lack of supporting law or 'evidence' can see a claim discounted. If the supporting law or quantum of loss is uncertain, then ADR may need to be

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89 See, eg, Hilary Astor and Christine Chinkin, *Dispute Resolution in Australia* (LexisNexis Butterworths, 2nd ed, 2002) 52–63; Susan Blake, Julie Browne and Stuart Sime, *The Jackson ADR Handbook* (Oxford University Press, 2013) 18–20.

90 Hodges, above n 3, 233.

91 See Roger Fisher, William Ury and Bruce Patton, *Getting to Yes: Negotiating an Agreement without Giving In* (Penguin, 2nd ed, 1991) 81–94.

supported by litigation and the threat of an adverse outcome to shift preconceptions about liability and damages. While private parties with the aid of their lawyers may be able to provide this, in the case of Storm Financial it would appear that it was ASIC through its financial model and willingness to argue novel legal points that provided the necessary persuasion to secure greater redress. ASIC's use of litigation is discussed below. The other explanation is that ASIC's legal proceedings created the prospect of further costs for CBA, such as legal fees, diversion of management and harm to reputation, which it sought to avoid.

This article's focus on compensation received compared to loss may be critiqued in the context of ADR, because it may be argued that the adequacy of compensation is determined by whether the parties reach agreement. Consent to an amount of compensation is the test for fairness and effectiveness, rather than mirroring what would be achieved through the application of the law.[92] But this must be informed consent, where the consumer has information as to what they may be entitled to through other processes such as the court system applying the law. Further, an agreed amount may be accepted because other concerns in addition to compensation are met through the ADR process such as 'participation, empowerment, dignity, respect, empathy and emotional catharsis, privacy [or] efficiency'.[93] This article has not sought to evaluate these concerns, except for efficiency, due to them being subjective and difficult to obtain data upon. However, for individual consumers they may play an important role in their satisfaction with a dispute resolution process. Just as a consumer may accept less compensation because they can obtain it quickly and cheaply, the consumer may accept less because their financial details are kept confidential or they are able to individually participate in the process. The above concerns should not be dismissed. Rather, the position taken here is that in evaluating a resolution it is still highly relevant to know how a recovery compares to the financial losses suffered.

B *ASIC's Direct and Indirect Compensation Role*

ASIC is given standing by a number of statutory provisions to pursue compensation for consumers. However, ASIC weighs a number of factors in determining whether to initiate action, including whether doing so is 'in the public interest, beyond the interests of the affected consumers' and whether alternative mechanisms for redress are available to consumers.[94] These conditions help ASIC determine if the consumer or the taxpayer should bear the cost of litigation. The advent of FOS and class actions may provide substitutes for action by ASIC.[95]

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92 Craig A McEwen and Richard J Maiman, 'Mediation in Small Claims Court: Achieving Compliance through Consent' (1984) 18(1) *Law & Society Review* 11, 47; Karen Yeung, *Securing Compliance: A Principled Approach* (Hart, 2004) 177, 180.

93 Carrie Menkel-Meadow, 'Whose Dispute Is It Anyway?: A Philosophical and Democratic Defense of Settlement (In Some Cases)' (1995) 83(7) *Georgetown Law Journal* 2663, 2669–70.

94 ASIC, 'ASIC's Approach to Enforcement' (Information Sheet 151, September 2013) 6; ASIC, 'ASIC's Approach to Involvement in Private Court Proceedings', above n 57, 5–6.

95 Joanna Bird, 'ASIC's Role as Intervener: When Should the Regulator Intervene in Private Litigation?' (2010) 28(7) *Company and Securities Law Journal* 460, 466; Michael Legg, 'Public and Private Enforcement — ASIC and the Shareholder Class Action' in Michael Legg (ed), *Regulation, Litigation and Enforcement* (Thomson Reuters, 2011) 151.

However, the Storm Financial experience demonstrates that these mechanisms may not be available or, if available, the operation of those mechanisms may require ASIC's intervention to effectively compensate consumers.

The scale of losses in relation to financial services can be large. The losses suffered by some Storm Financial clients were outside the jurisdiction of FOS — the Doyles' $1.1 million claim being a clear example. Further, as explained above, FOS and the bank resolution schemes would be expected to resolve matters based on existing legal principles so that novel claims would need to be convincingly substantiated. The ASIC proceedings were effectively test cases on the liability of the banks based on novel causes of action — such as being a linked credit provider or the existence of an unregistered managed investment scheme — in the context where the primary responsible party, Storm Financial, was insolvent.

An ideal test case is one that puts squarely in issue the law or requirement that is uncertain and has application beyond the instant parties due to the operation of *stare decisis* or precedent. The use of test cases to resolve uncertain areas of law is an accepted role for the regulator, as it can determine contested views around legal requirements so as to ascertain how compliance may be achieved or the need for further regulation.[96] However, does it assist with redress? The Doyle and UMIS proceedings illuminate the issues around this question.

The Doyle proceedings achieved full compensation and were a clear success in terms of redress for Mr and Mrs Doyle. However, the Doyle proceedings may be critiqued on the basis that it only compensated two persons who had a very strong case. It has been argued that ASIC should have chosen a case that was less certain or brought claims on behalf of two or three persons with different circumstances so that more consumers' situations would have been addressed. The settlement of the Doyles' case also meant no precedent was created.[97]

The combination of a test case with seeking redress for consumers has both advantages and disadvantages. The Doyle proceeding, even without going to trial, provided direction for other consumers as shown by the class actions including the same causes of action. While a true test case requires judgment to establish a precedent that must be followed by later courts and provides a stronger bargaining position for the consumer, a settlement may still provide guidance, albeit in a weaker form. A significant settlement may indicate that there is merit to an allegation and the law has been violated.[98]

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[96] Binh Tran-Nam and Michael Walpole, 'Independent Tax Dispute Resolution and Social Justice in Australia' (2012) 35(2) *University of New South Wales Law Journal* 470, 476–7; Tess Hardy, John Howe and Sean Cooney, 'Less Energetic but More Enlightened? Exploring the Fair Work Ombudsman's Use of Litigation in Regulatory Enforcement' (2013) 35(3) *Sydney Law Review* 565, 596.

[97] See Stewart A Levitt, *The ASIC Media Release: 'ASIC Settles in Storm Financial Proceedings'* (30 May 2013) Levitt Robinson Solicitors <http://levittrobinson.com/the-asic-media-release-asic-settles-in-storm-financial-proceedings/>; Senate Economics References Committee, above n 83, 263.

[98] James Park, 'Rules, Principles and the Competition to the Enforce Securities Laws' (2012) 100(1) *California Law Review* 115, 160. Cf Richard Frankel, 'The Disappearing Opt-Out Right in Punitive-Damages Class Actions' (2011) *Wisconsin Law Review* 563, 608 ('A settlement is little more than a truce between the parties, that is, an agreement to resolve a dispute rather than any

ASIC could have included further consumers through joining them in a single proceeding, or seeking to consolidate multiple individual proceedings.[99] However, while it may have provided a greater variety of circumstances, it would have undoubtedly weakened the case and made it more costly to prepare. Some weaker cases can be desirable in a test case format as explained above. Yet, in other cases brought by ASIC, the courts have suggested that ASIC is best served by a clear, narrow case as this reduces cost and delay, and allows for the main issues to be focused upon.[100] The effective management of the litigation, including limiting the regulator's costs exposure, is a legitimate issue to be factored into determining which claims are pressed.[101]

In the instant case, the idea that ASIC should have refused the settlement offer may have created a divergence of interests with the Doyles, who were being offered full compensation. Although ASIC was funding and directing the case, it was the Doyles' claim and their financial future that hung in the balance.[102] Where ASIC is seeking compensation for a consumer then that consumer's interests must be taken into account. This, in turn, can allow a defendant to avoid an unhelpful precedent by proffering a full settlement.[103] If ASIC were only seeking an injunction or declaration, a defendant could not offer money to avoid a judgment. Equally, this type of relief may not allow for some aspects of a consumer's claim to be tested, such as causation and calculation of damages.

Turning to ASIC's UMIS proceedings, it can be seen that the pursuit of a test case had the direct effect of increasing the compensation that CBA customers received. However, there was no judgment. The UMIS proceedings against MBL and BoQ went to trial and could have produced a judgment, but ASIC discontinued the proceedings as part of the Richards and Lee class action settlements. It is likely that the respondents would have made settlement of the class actions conditional on discontinuance of the UMIS proceedings. Alternatively, if ASIC's goal was only to obtain compensation, and as the same consumers would benefit from the

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statement about the defendant's wrongdoing.'); *Paxtours International Travel Pty Ltd v Singapore Airlines Ltd* [2012] FCA 426 (27 April 2012) [50] (Robertson J).

99 See *Federal Court Rules 2011* (Cth) rr 9.02, 9.05, 30.11. ASIC has also previously combined *ASIC Act* s 50 and the class action procedure under pt IVA of the *Federal Court of Australia Act 1976* (Cth): *Rikys v Bongiorno Financial Advisers (Aust) Pty Ltd* [2009] FCA 1603 (15 December 2009) (Finkelstein J). However, there is an issue as to whether ASIC requires the consent of all group members under such an approach.

100 *Australian Securities and Investments Commission v Rich* (2009) 236 FLR 1, 21 [25], 32 [65]; *Australian Securities and Investments Commission v Macdonald (No 11)* (2009) 256 ALR 199, 386 [1265]–[1266]; *Forrest v Australian Securities and Investments Commission* (2012) 247 CLR 486, 503 [27].

101 *Commonwealth v Director, Fair Work Building Industry Inspectorate* (2015) 326 ALR 476, 503–4 [108]–[109] (Keane J).

102 See *Somerville v Australian Securities Commission* (1995) 60 FCR 319, 324–5; *Australian Securities Commission v Deloitte Touche Tohmatsu* (1996) 70 FCR 93, 117 stating that consent of a natural person is essential to both the commencement and carrying on of s 50 proceedings, which could create difficulties for ASIC if it were to reject a settlement that a person wished to accept.

103 Court procedures such as offers of compromise and Calderbank letters may be used to exert pressure for settlement through exposing a party that unreasonably refuses a settlement offer to the risk of a costs order on an indemnity basis: see *Federal Court Rules 2011* (Cth) pt 25; *Australian Competition and Consumer Commission v Black on White* [2002] FCA 1605 (20 December 2002) [6] (Spender J).

UMIS proceedings as the class action, then the UMIS proceedings may have ceased to have utility.

The above discussion demonstrates that test cases can improve compensation outcomes by creating an exposure to liability that may otherwise have been treated as non-existent or remote. The way this may play out was discussed above in relation to the CBA Resolution Scheme. However, where the test case occurs at the same time as claims for compensation, the goal of a judgment and precedent to establish liability beyond existing claims may need to be compromised in the interests of redress for current claimants.

The Storm Financial experience also demonstrates that ASIC can be very effective in procuring redress where it provides active oversight, rather than pursuing redress itself. Three examples of this are: ASIC oversight of the CBA Resolution Scheme; ASIC intervention in the Richards class action; and ASIC's retention of forensic accountants to develop a financial model for quantifying loss. If a regulator is not going to pursue redress itself because it relies on ADR mechanisms or class actions, then it should at least exercise oversight to foster fair outcomes.[104] It may be said that litigation, in particular class actions, are subject to judicial oversight. This does lessen the concern to a degree, but the judge asked to approve a class action settlement often receives no countervailing views. The representative party and the defendant, having negotiated the settlement, explain the settlement so as to obtain the court's approval. ASIC may act as a guardian for group members' interests.[105] In resolution schemes designed by potential defendants, oversight is much more of a necessity to ensure that the scheme is fair to consumers and not constructed in the potential defendants' interests alone. The CBA Resolution Scheme sought to achieve that oversight through an independent panel of two retired judges and a barrister. This may be sufficient. However, it may be necessary for the regulator to provide that oversight, or at least select the person to provide oversight, to ensure fealty to the regulatory aims of fair compensation, including ensuring that competing interpretations of fact or legal requirements are resolved in a fair and transparent manner.

C *Class Actions: Slow and Expensive before Settling*

Class actions have been welcomed as providing compensation where otherwise there may have been none.[106] Indeed, the ASIC Chairman has embraced class actions as a source of compensation.[107] The strength of the class action, when used

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[104] Hodges, above n 3, 233; ASIC, 'ASIC To Give Guidance on Review and Remediation in the Financial Advice Industry' (Media Release, 15-101MR, 6 May 2015).

[105] Michael Legg, 'Class Action Settlements in Australia — The Need for Greater Scrutiny' (2014) 38(2) *Melbourne University Law Review* 590, 611–13.

[106] Vicki Waye and Vince Morabito, 'Collective Forms of Consumer Redress: Financial Ombudsman Case Study' (2012) 12(1) *Journal of Corporate Law Studies* 1, 10; James Mayanja, 'Enhancing Private Enforcement of Australia's Corporate Continuous Disclosure Regime: Why Unshackling Litigation Funders Makes Eminent Sense' (2010) 25(1) *Australian Journal of Corporate Law* 48, 61.

[107] See Alex Boxsell, 'Regulators Praise Private Court Actions', *The Australian Financial Review* (Sydney), 5 April 2012, 59 (reporting on the Chairman of ASIC stating that if a class action was likely to seek compensation, then ASIC would use its resources elsewhere).

in appropriate cases, is that the resolution of issues common to all claims means that those issues do not need to be re-resolved in each and every dispute, and may provide sufficient direction for all claims to be settled.[108] Class actions can also benefit defendants because they are the most effective mechanism at achieving closure by binding all consumers who meet the group definition, regardless of whether they consent.[109] The only consumers who will not be bound are those that opt out of the class action.[110]

Nonetheless, concerns remain about the size of transaction costs and the proportion of compensation compared to losses.[111] The class action will reduce the legal costs per consumer due to the sharing of costs and economies of scale compared to the costs that would be incurred if litigation in a superior court was pursued alone. However, high transaction costs persist, as shown by the legal fees incurred in each of the class actions pursued against the banks. The high costs of litigation may be a side effect of resolving disputes according to law and ensuring procedural fairness.[112] Class actions can generate even greater costs than other litigation as the representative and aggregative character of the class action gives rise to additional steps necessary to ensure fairness, including notices advising of the right to opt out and approval of a settlement by the court.[113] Class actions can also be subject to a 'long and drawn out procedural Stalingrad', where there is greater interlocutory disputation due to the high stakes nature of the dispute so that greater cost ensues.[114] While class actions can facilitate claims for compensation, they do so at greater cost than other mass redress mechanisms. The difference is clearly captured when the CBA Resolution Scheme is compared with the Sherwood class action against CBA. Both achieved a recovery of 55%, although it may have been higher for some participants in the CBA Resolution Scheme, but the 143 group members in the class action had to pay substantial costs, about $10 million or an average of $70 000 each, which reduced the compensation they

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[108] See, eg, *Bright v Femcare Ltd* (2002) 195 ALR 574, 589 [77] (Lindgren J), 602–3 [136] (Kiefel J). It needs to be remembered that the efficiencies that the class action offers can fail to be realised if the group is too disparate or lacks cohesion as the resolution of the representative party's claim will have limited utility in resolving the claims made by the group members. See *Timbercorp Finance Pty Ltd (in liq) v Collins* [2015] VSC 461 (2 September 2015) [462] (Robson J) ('A group proceeding can encompass issues which have both common and idiosyncratic dimensions.'); *Madgwick v Kelly* (2013) 212 FCR 1, 39 [151] (Jessup J).

[109] Law Reform Commission, above n 1, [115]; *Inabu Pty Ltd v Leighton Holdings Ltd* [2014] FCA 622 (6 June 2014) [17] (Jacobson J).

[110] *Federal Court of Australia Act 1976* (Cth) s 33ZB. Despite the class action legislation dealing with the effect of judgment, there remains uncertainty as to the scope and application of *res judicata*, issue estoppel and Anshun estoppel in the class action context, especially where proceedings are resolved by settlement. Cf *Clarke (as trustee of the Clarke Family Trust) v Great Southern Finance Pty Ltd (recs and mgrs. apptd) (in liq)* [2014] VSC 516 (11 December 2014) [125]–[132] (Croft J) with *Timbercorp Finance Pty Ltd (in liq) v Collins* [2015] VSC 461 (2 September 2015) [583], [596]–[611] (Robson J); *Kelly v Willmott Forests Ltd (in liq) (No 4)* [2016] FCA 323 (5 April 2016) [146]–[157] (Murphy J).

[111] Michael Legg, 'Shareholder Protection and Class Actions' (Paper presented at the Supreme Court of New South Wales Corporate Law Conference, Banco Court, Sydney, 29 July 2014).

[112] See *Halpin v Lumley General Insurance Ltd* (2009) 78 NSWLR 265, 287 [93] (Sackville AJA).

[113] *Federal Court of Australia Act 1976* (Cth) ss 33J, 33V, 33X.

[114] *Mercedes Holdings Pty Ltd v Waters (No 5)* [2011] FCA 1428 (14 December 2011) [78] (Perram J). See also *Bright v Femcare Ltd* (2002) 195 ALR 574, 607–8 [160] (Finkelstein J).

actually received. Large transaction costs can undermine the goal of redress as the harmed consumer does not receive the compensation to which they are entitled.

In the Storm Financial case study, class action recoveries varied from 29% to 55% of losses according to ASIC's financial model. While the approval of a class action settlement will consider the merits of a claim and the risks of establishing liability and loss, it also considers the 'complexity and likely duration of the litigation', as well as 'the attendant risks of litigation'.[115] In short, the approval criteria consider not just the merits, but also cost and delay. Indeed, the judgments approving the Richards, Sherwood and Lee class action settlements referred to the advice from senior counsel as to prospects of success and the costs that would be incurred if there was no settlement.[116] Consequently, the costs and uncertainty of litigation do not just result in a direct cost to consumers, they also become a bargaining chip in settlement negotiations that can reduce the compensation paid. Equally, those same factors impact a respondent's willingness to settle and the amount to be paid. The costs incurred in litigation cast a long shadow that impacts the effectiveness of litigation in achieving compensation.

Even when the recovery as a percentage of the loss suffered is known, there is a limitation to this study that must be noted. Where negotiated outcomes are being compared, a number of factors form part of an opaque negotiation process. Consequently, it cannot be said that the Richards class action was less effective than the Sherwood class action, recoveries of 29% and 55% respectively, because the claims may have been weaker so that a lower recovery reflects the prospects of success. Other factors may also have been at play, one respondent may have been more concerned about reputation than another, or more prepared to risk an adverse trial outcome. The available data does not permit a researcher to go behind the percentages.

D *More ADR?*

The effectiveness of ADR may be reason to expand its availability.[117] But, mass harm by definition means that there are many claims to be resolved so that consideration must be given to the impact of individually resolving all claims. Between 2010–11 and 2013–14 FOS received an average of about 32 500 disputes per year.[118] If all of the Storm Financial clients had utilised FOS, then it would

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[115] See generally Federal Court of Australia, *Practice Note No CM17 — Representative Proceedings Commenced under Part IVA of the Federal Court of Australia Act 1976 (Cth)*, 9 October 2013, [11.2]; *Darwalla Milling Co Pty Ltd v F Hoffman-La Roche Ltd (No 2)* (2006) 236 ALR 322, 338–9 [49]–[52] (Jessup J).

[116] *Richards v Macquarie Bank Ltd (No 4)* [2013] FCA 438 (3 May 2013) [13]–[14], [29] (Logan J); *Sherwood (No 5)* [2015] FCA 688 (7 July 2015) [43]–[45] (Collier J); *Lee v Bank of Queensland Ltd* (2014) 103 ACSR 436, 444–5 [23]–[24], 449 [43]–[44] (Collier J).

[117] In addition to reducing cost and delay ADR may also offer other benefits such as confidentiality, greater participation by consumers, flexible processes and creative resolutions: see, eg, Menkel-Meadow, above n 93, 2669–70; Astor and Chinkin, above n 89, 52–63; Blake, Browne and Sime, above n 89, 18–20.

[118] FOS, *2013–2014 Annual Review*, 44 (2010–11: 30 283 disputes, 2011–12: 36 099 disputes, 2012–13: 32 307 disputes, 2013–14: 31 680 disputes).

have needed to resolve an extra 3600 disputes.[119] Moreover, if class actions more generally were to be pursued through FOS, then the number of disputes would be even greater. For example, the bank fees class action, said to be the largest class action commenced in Australia, originally involved an estimated 185 300 claimants.[120] For FOS to be able to continue to deal with disputes quickly, an increase in capacity would clearly be needed.[121]

Another alternative would be to incentivise the development of resolution schemes such as that used by CBA. Potential defendants have an incentive to develop such schemes as they can reduce cost and deal with disputes that can adversely impact reputation and customer perceptions expeditiously.[122] The advantage of the CBA Resolution Scheme when it was first formulated was explained by one journalist as being that it drew 'much of the political heat, the consumer anger and reputational damage from the issue and contained the final costs to a few hundred million'.[123] However, the case study demonstrates that the CBA Resolution Scheme did not prevent the UMIS proceedings or the Sherwood class action, which meant that neither costs nor compensation amounts were capped within a relatively short timeframe. The proactive nature of the Resolution Scheme may have assisted in limiting reputational damage and fostering positive client relationships, but to minimise costs it is necessary to include all claimants within the scheme. The voluntary nature of resolution schemes means that the process and outcomes must be attractive, or at least fair, to consumers. ASIC has subsequently determined that it will develop a regulatory guide that sets out the issues to be considered in ensuring that a resolution scheme is 'a fair and effective

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119 *Australian Securities and Investments Commission v Storm Financial Ltd (recs and mgrs apptd) (in liq)* [2011] FCA 763 (9 June 2011) [31] (Reeves J).

120 Maurice Blackburn, 'Banking Revolution Begins with Landmark Federal Court Ruling' (Media Statement, 5 February 2014). The estimate was devised prior to *Paciocco v Australia and New Zealand Banking Group Ltd* (2015) 236 FCR 199, where the Full Federal Court overturned the trial court's decision and held that the late payment fees charged by ANZ on Mr Paciocco's consumer credit cards were not a penalty. In *Paciocco v Australia and New Zealand Banking Group Ltd* (2016) 90 ALJR 835, the High Court of Australia dismissed two appeals from the Full Federal Court's decision.

121 See *Goldie Marketing Pty Ltd v Financial Ombudsman Service* [2015] VSC 292 (19 June 2015) [105] (Cameron J) (FOS may 'take into account issues of staff resourcing, capability and availability in determining whether to exclude a dispute in the exercise of its discretion').

122 Chief Justice Spigelman, 'The Global Financial Crisis and Australian Courts' (2010) 84(9) *Australian Law Journal* 615, 617; Thomas J Stipanowich and J Ryan Lamare, 'Living with ADR: Evolving Perceptions and Use of Mediation, Arbitration, and Conflict Management in Fortune 1000 Corporations' (2014) 19 *Harvard Negotiation Law Review* 1, 9, 37–8 (describing corporate adoption of alternative dispute systems in response to 'significant transaction costs, including the expenses of legal counsel, supporting experts, preparation time and discovery'); Jaime Dodge, 'Privatizing Mass Settlement' (2014) 90(1) *Notre Dame Law Review* 335, 337 (referring to companies 'announcing the creation of private claims funds in the immediate aftermath of [a mass] tort as a component of their public relations rehabilitation or crisis management efforts').

123 Duncan Hughes, 'Two Ways of Tackling Storm Damage', *The Australian Financial Review* (Sydney), 26 June 2009, 58.

mechanism for customers to be properly compensated'.[124] A number of overseas sources may usefully inform ASIC's and other regulators' approaches.[125]

E *The Role for Litigation*

The cost and delay of traditional litigation led to the search for alternatives that have been discussed above. However, litigation in its traditional form, or as a regulatory suit or class action, has a number of positive attributes, many that only it can deliver. These attributes are the public resolution of a dispute by an independent judiciary considering evidence, applying the law and giving reasons for a decision.[126] Litigation also results in the development of precedent that guides the future action of all members of society.[127] Disputes resolved by litigation allow for the articulation of norms of conduct as embodied in, or worked out through, the law.[128] Indeed, litigation and court judgments are crucial to the development of, and adherence to, the rule of law.

In terms of redress or compensation, litigation may be necessary to establish a precedent for a right to compensation or to quantify the amount of compensation in novel circumstances. In regulatory litigation parlance, recourse to the courts will be in the public interest.[129] Consequently, consideration needs to be given to whether redress can be achieved through negotiation and consent, which suggests ADR and settlement, or instead there is a need for the compulsion of a court judgment. Further, the prospect of a judgment may facilitate negotiation, and as a consequence, redress. Litigation continues to have an important role, but cost and delay means that role has contracted. It appears to operate more as threat or warning for those who cannot agree on the extent of redress, rather than being the primary or final arbiter of redress.

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[124] ASIC, 'ASIC To Give Guidance on Review and Remediation in the Financial Advice Industry', above n 104; ASIC, 'Client Review and Remediation Programs and Update to Record-Keeping Requirements' (Consultation Paper 247, December 2015).

[125] See, eg, Deborah R Hensler, 'Alternative Courts? Litigation-Induced Claims Resolution Facilities' (2005) 57(5) *Stanford Law Review* 1429, 1432–3; Linda S Mullenix, 'Designing Compensatory Funds: In Search of First Principles' (2015) 3 *Stanford Journal of Complex Litigation* 1, 15 (setting out issues for the design of redress schemes); Competition and Markets Authority, *Guidance on the Approval of Voluntary Redress Schemes for Infringements of Competition Law*, CMA40 (2015) (giving effect to requirements in the *Competition Act 1998* (UK) and *Competition Act 1998 (Redress Scheme) Regulations 2015* (UK)).

[126] Michael Legg and Sera Mirzabegian, 'Appropriate Dispute Resolution and the Role of Litigation' (2013) 38(1) *Australian Bar Review* 55, 57–61.

[127] David Luban, 'Settlements and the Erosion of the Public Realm' (1995) 83(7) *Georgetown Law Journal* 2619, 2622–3, 2626.

[128] Owen M Fiss, 'Against Settlement' (1984) 93(6) *Yale Law Journal* 1073, 1085.

[129] The regulator may also need to invoke the formal court system when pursuing other public interests such as achieving general deterrence or holding an entity accountable. See, eg, *Commonwealth v Director, Fair Work Building Industry Inspectorate* (2015) 326 ALR 476, 482 [24] (French CJ, Kiefel, Bell, Nettle and Gordon JJ).

X Conclusion

This article has compared regulatory actions, class actions and ADR in the context of a case study dealing with mass financial harm — the collapse of Storm Financial. The above analysis assists government and regulators in seeking to determine the appropriate policy settings for consumer redress by analysing the successes, shortcomings and interactions of the mechanisms employed to obtain compensation for the clients of Storm Financial. The analysis also provides guidance to financial consumers as to which dispute resolution option, or combination of options, they should consider employing, assuming they are available.

The article recommends greater use of voluntary ADR due to it being cheaper and quicker than class actions and regulatory proceedings. However, ADR will work best when the consumer and the corporation are on a level playing field, most particularly in terms of knowledge as to the strengths and weaknesses of a claim. As consumers are almost always the weaker party, there needs to be regulatory oversight as to the design or structure of the process and assistance for the consumer within the process.

Regulatory litigation and class actions should only be needed when a fair resolution cannot be arrived at through ADR. Where the law is uncertain, or one or more parties are recalcitrant, then litigation in some form may become necessary as ADR may be unable to deliver a fair resolution. Regulatory litigation and class actions can act as substitutes for each other, as both can invoke legal proceedings. However, regulatory litigation and class actions can have very different outcomes for consumers in terms of cost. When the regulator takes action, the cost is borne by the taxpayer. In contrast, a class action will result in consumers bearing the cost of litigation, albeit shared with other group members. The costs of the class action may then reduce the compensation received by the consumer.

The Storm Financial case study also demonstrates that the government regulator can play an important role in seeking redress through a combination of direct action through test cases, but also through indirect action such as providing oversight and information. The indirect steps can result in more effective redress outcomes being delivered through ADR and class actions. The choice for regulators is not one of whether to vacate the field in relation to compensation because other mechanisms may be employed. Rather, the regulator needs to adopt a strategy that facilitates the effective use of the other mechanisms through oversight and engagement, but also by being prepared to employ litigation when needed.