Legal Analysis on the Role of Ombudsman in Banking and Finance Disputes: A Comparative Study between Malaysia and Australia

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ABSTRACT

Financial Markets Ombudsman Service (FMOS) in Malaysia is a form of Alternative Dispute Resolution (ADR) that provides an accessible and affordable resolution mode for financial consumers. The FMOS was previously known as the Ombudsman for Financial Services (OFS) and had recently consolidated with the Securities Industry Dispute Resolution Centre (SIDREC) under the Securities Commission Malaysia. Before the consolidation with SIDREC, which took effect in January 2025, OFS had the jurisdiction to hear financial disputes between individuals and Financial Service Providers, as well as claims against private organisations or individuals. Meanwhile, SIDREC was able to cater to disputes involving capital markets services and products. However, although the new integration offers alternative dispute resolution to consumers, service providers, investors, and sole proprietors, the FMOS continues to experience low public patronage. The OFS Annual Report 2024 recorded that only 1856 new cases were registered. However, the number of financial disputes has increased significantly over the years, and statistically, the report also shows that awareness of the OFS remains at only 12.7%. Moreover, the FMOS can only adjudicate claims up to RM250,000, a threshold far below the current average house price of RM490,376, limiting its relevance for disputes involving high-value claims. These structural and procedural constraints show why complainants rely on the judicial system rather than alternative dispute resolution mechanisms. By employing qualitative research methodology using the doctrinal legal research method, this article concentrates on the challenges and jurisdictional limitations faced by the current FMOS framework when dealing with Conventional and Islamic banking disputes after its consolidation with SIDREC in January 2025, as well as the inadequacies in the Financial Services Act 2013 and Islamic Financial Services Act 2013 regarding its monetary jurisdiction. Moreover, this study is grounded in access to justice theory and institutional legitimacy theory to evaluate the effectiveness of the FMOS in resolving conflicts in Conventional and Islamic finance in Malaysia. These theories will also guide the comparative analysis between the FMOS and Australia's Financial Complaints Authority (AFCA). Findings reveal that the FMOS's structural and procedural constraints, including its limited jurisdiction, weak enforcement powers, and low public awareness, resulted in its inadequacy. Therefore, reforms are necessary to strengthen the FMOS's credibility and adequacy, gain public confidence, and abide by the principle of justice.

Keywords: Financial Ombudsman Scheme, Ombudsman for Financial Services, Financial Markets Ombudsman Services, Securities Industry Dispute Resolution Centre, Alternative Dispute Resolution, Financial Services Act 2013, Islamic Financial Services Act 2013, Capital Markets and Services (Dispute Resolution) Regulations 2010

INTRODUCTION

It is beyond dispute that Malaysia's banking and finance sector has grown tremendously in the last decade, particularly with the emergence of the Islamic Banking industry. Developing an effective dispute resolution mechanism is a key criterion for the growth and expansion of the banking and finance industry. As a result,

Malaysia has developed numerous institutional mechanisms for financial dispute resolution as an alternative to the judicial system. For instance, the Ombudsman for Financial Services (OFS), a body corporate that operates a financial ombudsman scheme, was established on October 1 2016, under Section 126 (2) of the Financial Services Act 2013 (FSA 2013) and Section 138 (2) of the Islamic Financial Services Act 2013 (IFSA 2013), in accordance with Section 42A of the Development Financial Institutions Act 2002 and approved under Section 379(b) of the Capital Markets and Services Act 2007. Subsequently, the OFS received its mandate from Bank Negara Malaysia (BNM) and was approved by the Central Bank of Malaysia Act 2019 (CBMA 2019) to operate the financial ombudsman scheme.

OFS originally was a public company limited by guarantee and a non-profit organisation that served as an alternative dispute resolution mechanism. OFS resolves disputes between its members, the financial service providers (FSPs) licensed or approved by the BNM, and financial consumers. Tun Ariffin Zakaria (2013), the then Chief Justice, believed that introducing OFS is "a bold step in the right direction". Since 2016, the OFS has substantially benefited Malaysians by offering a different path for the fair resolution of financial disputes.

In January 2025, the OFS changed its name to FMOS due to the consolidation with the Securities Industry Dispute Resolution Centre (SIDREC). Despite these institutional mergers, public engagement with the FMOS remains low, and many people in Malaysia are still unaware of the FMOS. Empirical findings indicate that only 12.7% of the respondents had heard of the OFS before (Nadiah et al., 2022). Apart from the low level of awareness and patronage, the FMOS can only adjudicate claims up to RM250,000, a threshold far below Malaysia's current average house price of RM490,376, as reported by the National Property Information Centre (NAPIC, 2024). This monetary limitation has become a constraint for the FMOS in dealing with high-value claims filed by the consumers. These structural and procedural constraints show why complainants rely on the judicial system rather than alternative dispute resolution mechanisms.

According to Hong Leong Investment Bank (HLIB) Research (2023), loan growth in Malaysia is likely to pick up in the latter part of 2023, in line with expectations that the overnight policy rate (OPR) will remain steady for the rest of the year. This growth spurt will likely lift the full-year loan growth number to 4.5% to 5%. Malaysia's banking sector will revert to a pre-pandemic state of modest growth and profitability in 2024 (Bernama, 2023). Indeed, the reduction in the OPR by Bank Negara Malaysia in July 2025 has resulted in a 5% year-on-year increase in loan applications compared to August 2024 (Banking sector gains traction as loan growth picks up post-OPR cut, 2025). According to S&P Global Ratings, Malaysia remains Asia-Pacific's most significant Islamic banking market, with two-thirds of the institutions' total assets amounting to USD 400 billion, equivalent to RM 1.9 trillion (The Star, 2024). This indicates that more consumers will opt for financial assistance from service providers. With this growth, conflicts and disputes arising from banking matters cannot be prevented.

Accordingly, this study employs a qualitative research methodology using the doctrinal legal research method to evaluate the effectiveness of the FMOS as an independent alternative dispute resolution and further to analyse the legal, institutional and jurisdictional challenges faced by the FMOS that contribute to its low awareness and patronage in resolving the Conventional and Islamic financial disputes. Furthermore, this study also seeks to strengthen the roles of the FMOS and to suggest a review or necessary statutory amendments to the Financial Services Act (FSA) 2013 and Islamic Financial Services Act (IFSA) 2013 in strengthening the role of FMOS in settling financial disputes by adopting relevant practices or legislation from Australia, specifically in reference to Australia's Financial Complaints Authority (AFCA), as a potential model for Malaysia.

LITERATURE REVIEW

Conceptual Framework

Ombudsman for Financial Services (OFS) was officially launched and approved by the Central Bank of Malaysia Act 2019 (CBMA) as the scheme operator of the financial ombudsman scheme on October 1 2016, pursuant to the Financial Services Act 2013. OFS resolves disputes between its members, the financial service providers (FSPs) licensed or approved by Bank Negara Malaysia (BNM), and financial consumers. However, the Ombudsman for Financial Services is an independent redress mechanism that requires minimal formality for

financial consumers to resolve disputes with financial service providers. Its services are an alternative to, not a replacement for, legal actions taken in a court of law (BNM, 2017).

Section 121 FSA 2013 defines the “financial ombudsman scheme” as "a scheme for resolving disputes between an eligible complainant and a financial service provider regarding financial services or products”. The eligible complainant would be the customer, while the financial service provider is the financial institution. On the other hand, Section 126 FSA 2013 addresses the administration of disputes between financial service providers and their clients. Meanwhile, Section 133 IFSA 2013 defines the “financial ombudsman scheme” as “a scheme for the resolution of disputes between an eligible complainant and a financial service provider in respect of financial services or products”. The eligible complainant would be the customer, while the financial service provider is the Islamic financial institution. (Umar A. Oseni et al., 2014).

On the other hand, Section 138 IFSA 2013 addresses the administration of disputes between Islamic financial service providers and their clients. This dispute resolution can also be extended to any other innocent third party who may be directly or indirectly affected by the concluded Islamic financial service transactions. (Nor Razinah et al., 2014). The Financial Ombudsman Scheme (FOS) is a distinct dispute resolution mechanism for Islamic financial services in Malaysia (Nor Razinah et al., 2014). 2016 the Financial Ombudsman Service (FOS) was established, and the Ombudsman for Financial Services (OFS) was designated to operate it. Introducing the financial ombudsman scheme does not portend to oust the jurisdiction of the Court to hear and determine related Islamic finance disputes. (Umar A. Oseni et al., 2014).

Legal Framework

In response to the rising volume of disputes within the commercial and Islamic finance industries, as well as capital markets services, regulators from both the Ombudsman for Financial Services (OFS) and the Securities Industry Dispute Resolution Centre (SIDREC) proposed the merger of the Ombudsman for Financial Services (OFS) and the Securities Industry Dispute Resolution Centre (SIDREC). The proposal reflects the regulators’ recognition of the OFS’s mandate in handling banking and insurance-related companies, while SIDREC specialises in resolving disputes about capital markets and investment services. Accordingly, the primary objective of merging these two institutions is to enhance the mechanism for resolving disputes involving financial service providers and capital markets investors in the near future (Muhamad Ikhwan Mohd Zain, et al., 2024).

Disputes arising from banking matters are usually litigated in Court, and Islamic banking disputes are referred to the Muamalat Division at the Kuala Lumpur High Court. No other Court in Malaysia has a Muamalat Division within its territory. For the selection of judges in the Muamalat Court, the judges are not required to have adequate knowledge of Shariah laws, Islamic banking, and finance (Hizri Hasshan, 2016). When he was the Chief Justice of Malaya, Tun Ariffin Zakaria admitted that there is no specific training for a judge sitting in the Muamalat Court to prepare him with the knowledge of Islamic banking and finance. In this regard, Tun Ariffin encourages Islamic financial disputes to be referred to alternative dispute resolution to dispose of the matter speedily (Zakaria, 2013).

It is also not disputed that when matters are channelled through the formal court system, the parties tend to be farther apart after the judgment. The Court's decision leads to a win-lose situation where one party rejoices with pomp, while the other wallows in anguish. To avoid a winner-takes-all syndrome as generally occasioned in litigation, effective alternatives were created which satisfy the needs of many litigants. (Umar A. Oseni et al., 2014).

Meanwhile, in Australia, on February 14 2018, the Australian government enacted the Treasury Laws Amendment (Putting Consumers First – Establishment of the Australian Financial Complaints Authority) Act 2018 (‘AFCA Act’), which formally established the Australian Financial Complaints Authority (AFCA). This statutory body consolidated and replaced the Financial Ombudsman Service (FOS), the Credit and Investments Ombudsman (CIO) and the Superannuation Complaints Tribunal (SCT). AFCA now serves as the single external dispute resolution scheme for financial service providers that previously fell under the jurisdiction of these three separate bodies.

AFCA is the dispute resolution scheme that follows the model of the industry ombudsman scheme. The model aims to provide a free, informal, speedy and cost-effective alternative to litigation. Section 912A(1)(g)(i) and 912A(2)(c) of the Corporations Act now require Australian financial services licensees (AFS), licensees who provide services to retail clients, to be members of AFCA. As of June 2023 - 2024, AFCA has received 104,861 complaints, compared to 96,987 registered cases in 2022–2023. One hundred four thousand two hundred three complaints have been resolved, reflecting a 21% increase from 2022 to 2023. The complainants managed to secure $313,903,256 million in compensation and refunds. According to AFCA Annual Review 2023 – 2024, the highest complaints received are from banking and finance sectors, which shows a rise of 12% to 60,076, personal transactions with 16%, financial difficulty with 18%, home loan complaints with 16% and general insurance claims with 5% from 27,924 to 29,335 (AFCA Annual Review, 2024).

THEORETICAL FRAMEWORK

Access to Justice and Institutional Legitimacy Theories

Access to justice theory is one of the theoretical concepts adopted in this study, particularly in explaining the functions of the FMOS as an alternative and equitable dispute resolution mechanism in Malaysia, especially in matters concerning conventional and Islamic banking. The theory of access to justice focuses on a system that is accessible to all consumers and must be equally and socially fair and just for consumers to seek remedies through alternative dispute mechanisms (Garth & Cappelletti, 1978). Empirical studies often recognise an Ombudsman as a scheme providing an alternative dispute resolution (ADR) to resolve disputes involving citizens, public services, and the private sector.

Theoretically, access to justice encompasses a form of dispute resolution mechanism, an integral part of the justice system. One of the familiar mechanisms for alternative dispute resolution is the Ombudsman, which operates as a scheme to address individual complaints in both the public and private sectors (Beqiraj et al., 2018). Hence, this theory helps to analyse how the FMOS's structural and procedural methods affect the consumers' ability to seek redress effectively, because low public awareness and patronage of the FMOS can lead to a deficit in the access to justice system. By comparing FMOS with AFCA, the latter clearly provides for broader and unlimited jurisdiction, higher monetary thresholds, wider aspects of claims and a stronger statutory framework. Therefore, access to justice theory offers an analytical framework and a normative standard to evaluate the FMOS and determine whether it advances or impedes equitable access to financial dispute resolution.

Complementing the access to justice theory is the institutional legitimacy theory, which explains how one institution evolves towards a broader institutional field that includes Bank Negara Malaysia, Securities Commission Malaysia, financial service providers and statutory regulators. According to DiMaggio and Powell (1983), these institutions are within the same environment that governs banking and financial dispute resolution. The structure of the FMOS is fashioned through expectations, norms, and regulatory standards aligned with Malaysia's economic structure. Conforming to these institutional pressures enhances the FMOS's legitimacy and credibility in banking and the Islamic financial system. Nevertheless, excessive conformity may decrease its autonomy and innovation in addressing the needs of the consumers.

Moreover, Suchman (1995) emphasises that legitimacy is not just about legal compliance or formal recognition; it is more about public perception and social acceptance. Legitimacy will arise when people believe that one organisation is doing what is right, fair, and appropriate within its institutional scope. In relation to the FMOS, legitimacy is of the utmost importance because it operates under the FSA 2013 and IFSA 2013. It still faces challenges if consumers believe that the FMOS is unfair, inadequate, or lacks authority. Therefore, the institutional legitimacy theory is relevant in this study to explain why public trust and confidence are key factors in determining the effectiveness of the FMOS as an alternative mechanism in resolving banking and Islamic finance disputes.

Hence, by adopting these two theories, this study presents a comprehensive conceptual framework that explains the practical challenges contributing to FMOS's low public awareness and patronage, as well as its limited monetary jurisdiction compared to AFCA.

METHODOLOGY

The research methodology employed in this study utilises a qualitative approach by using the doctrinal research category, incorporating analytical and comparative methods. The doctrinal legal research is an analytical study of existing laws, related cases and authoritative materials as a whole, on some specific matter. The primary focus is on legal doctrines, statutes, and regulations pertinent to the subject matter. Key primary sources include the Financial Services Act 2013, Islamic Financial Services Act 2013 and the Financial Services (Financial Ombudsman Scheme) Regulations 2015. These legal frameworks serve as foundational documents for understanding the regulatory landscape surrounding financial services and the functioning of the Financial Ombudsman Scheme.

Furthermore, the research relies on case law, examining judicial decisions related to disputes within the financial sector, especially those involving the ombudsman scheme. These cases contribute to the analytical aspect of the research, providing insights into how legal principles are applied in real-world scenarios. In addition to primary sources, a comprehensive array of secondary sources is employed. Academic journals, books, and online databases, including Current Law Journal, HeinOnline, and LexisNexis, offer in-depth analysis, commentaries, and scholarly perspectives on the legal aspects of financial disputes and ombudsman schemes. Newspaper articles are also included, providing a broader context and practical insights into public perceptions and real-life instances. This combination of primary and secondary sources ensures a robust and thorough exploration of the subject matter, enhancing the depth and reliability of the research findings.

FINDINGS AND DISCUSSION

OFS's Annual Report 2024

The findings of this study reveal that FMOS's challenges extend beyond its low public awareness and patronage to include institutional perception and legitimacy. In contrast, AFCA possesses a higher degree of legitimacy in its structural and procedural mechanisms due to its transparency, broader jurisdiction, and strong institutional powers, which eventually enhance public trust and confidence in the system.

This can be further explained by analysing the OFS's Annual Report in 2024 (the final edition issued under the OFS), which states that a total of 4150 disputes were handled, encompassing matters related to commercial banking, Islamic finance, payment systems sectors, insurance, and takaful. The report also revealed that over half of the complaints were directed at the banking, Islamic banking and payment systems sectors. Specifically, 1498 cases involved commercial disputes, 275 cases involved Islamic banking and 77 cases involved payment systems sectors. The OFS annual report further indicated that the commercial banks accounted for the largest share of disputes at 56%, followed by insurance companies at 13% and Islamic banks at 10% (OFS, 2024). The nature of complaints primarily involved the unauthorised online transactions from scams, lost/stolen cards, e-money unauthorised online transactions, non-receipt of notification letters, unfair terms and conditions, as well as delay in refunding fire insurance premiums (OFS, 2024).

Australia Financial Complaints Authority (AFCA)

Compared with Australia, the Annual Review 2023 – 2024 revealed that the number of complaints received and registered under AFCA has increased significantly from 96,987 in 2023 to 104,861 in 2024. The highest complaints received were from banking and finance sectors, followed by personal transactions, home loan complaints and general insurance claims (AFCA Annual Review, 2024).

Thus, it can be said that there is a significant difference in the number of complaints between OFS in Malaysia and AFCA in Australia, given that Malaysia's population is 34 million, compared to Australia's 27 million, as of March 2025. The massive gap between Malaysia and Australia is the lack of marketability of OFS in Malaysia,

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the range of disputes provided, and the monetary jurisdiction, which only offers a limit of up to RM250,000.00 for Malaysia's OFS. In contrast, AFCA offers a limit of up to $5 million, equivalent to RM1,513,136.00 (Complainant Resolution Scheme Rules).

OFS in Malaysia and AFCA in Australia

The table below shows the differences between OFS in Malaysia and AFCA in Australia:

	OFS in Malaysia	**AFCA in Australia**
Who can complain?	i) Individuals (for personal, domestic or household purposes) ii) Small and Medium Enterprise (SME) iii) Financial consumers, insured persons under group insurance, takaful, third-party claim for property damage involving a motor vehicle iv) Guarantor of a credit facility, nominee or beneficiary under a life policy/takaful or personal accident claim or takaful	i) Credit, finance and loans ii)Insurance, domestic, travel iii) Pet, death, motor vehicle iv) Life insurance claim v) Small business, including farm, strata title and medical indemnity vi) Banking deposits and payments vii) Investment and financial advice
Monetary Jurisdiction	RM250,000.00 (unless consented by both parties in disputes to increase the limit)	i) Up to $5 million = RM1,513,136.00 ii) For a superannuation complaint, the monetary claim is unlimited
Methods of Settlement	i) Methods of settlement provided are mediation, negotiation and conciliation ii) If the Financial Service Provider and the Complainant failed to enter into a settlement, then the case will be adjudicated by the Ombudsman	i) Methods of settlement provided are negotiation and conciliation ii) If the complainant disagreed, the AFCA would determine the dispute. iii) The complaint may be determined by an Ombudsman, an Adjudicator or an AFCA Panel
Awards and Decisions	i) The decision of the Ombudsman will be binding upon both parties. ii) If the parties are not satisfied with the award, the parties may pursue their case to the Court or other alternative dispute resolution, such as arbitration	i) Decision of the AFCA will be binding upon both parties; ii) If the parties are unsatisfied with the award, they may file an appeal, which is available under the Corporation Act 2001 or pursue their case in Court.

Monetary Value of Disputes Handled by Sector

Monetary Range	Banking and Islamic Banking	Conventional Insurance	Takaful	Payment Systems	Total Disputes
RM5,000 and below	563	234	65	63	**925**
RM5,001 to RM10,000	460	86	21	4	**571**
RM10,001 to RM25,000	469	90	32	10	**601**
RM25,001 to RM50,000	174	73	26	0	**273**
RM50,001 to RM100,000	73	59	26	0	**158**
RM100,001 to 250,000	33	51	19	0	**103**
Above 250,000	7	12	5	0	**24**

Limitations under the OFS

Numerous studies suggest that OFS only admits financial dispute cases within its monetary jurisdiction, which is RM250,000.00. However, the Terms of Reference (TOR) may allow the OFS to handle disputes exceeding this limit if both parties mutually consent to the TOR.

Figure 1 Monetary Value of Disputes Handled by Sector. Source: OFS Annual Report, 2024.

As shown in Figure 1, in 2024, over half of the disputes lodged with OFS were for RM10,000 or less. Meanwhile, 874 cases fell within the range of RM10,001 to RM50,000. As enacted, OFS only admits financial dispute cases within its monetary jurisdiction, as shown in Table 1 below. A dispute involving financial services or products offered by its members to be heard before OFS has a monetary limit of RM250,000.00.

Apart from the economic range of disputes handled by OFS, the report also disclosed that 2520 cases had been closed in 2024, of which 1958 were related to banking, Islamic banking, and payment systems. The report also indicated that 1499 cases were resolved at the case management stage and 1021 cases were proceeded with adjudication. A total of 765 cases were resolved within six months from the date of registration until the closure date.

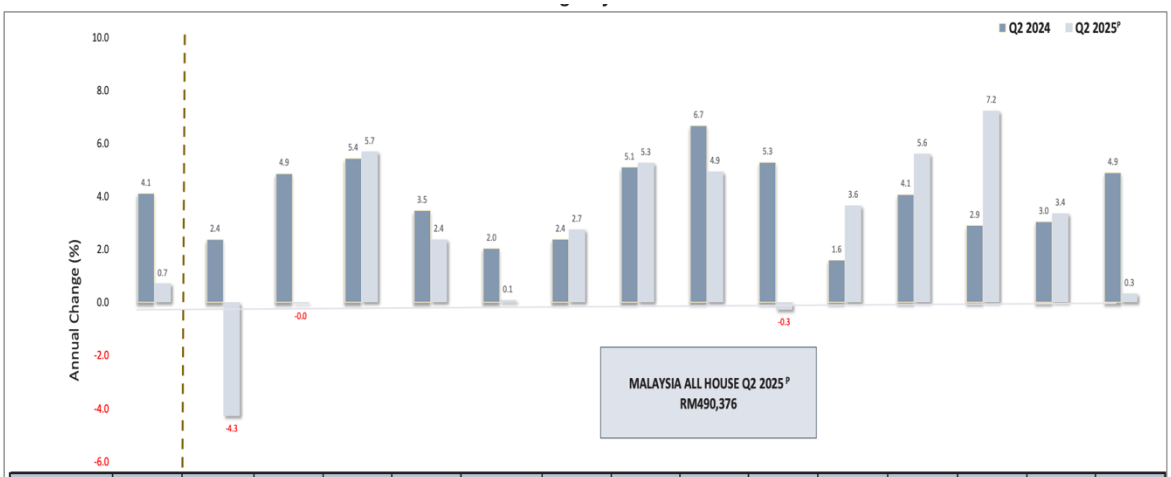
THIRD SCHEDULE

[Regulation 18]

MONETARY LIMIT

No.	*Type of dispute*	*Monetary limit*
1.	A dispute involving financial services or products developed, offered or marketed by a member, or by a member for or on behalf of another person, other than a dispute under paragraphs 2 and 3.	RM250,000.00
2.	A dispute on motor third party property damage.	RM10,000.00
3.	A dispute on — *(a)* an unauthorized transaction through the use of a designated payment instrument or a payment channel such as Internet banking, mobile banking, telephone banking or automatic teller machine (ATM); or *(b)* an unauthorized use of a cheque as defined in section 73 of the Bills of Exchange Act 1949 [*Act 204*].	RM25,000.00 RM25,000.00

Table 1: Third Schedule of the Financial Services (Financial Ombudsman Scheme) Regulations 2015



YEAR		MALAYSIA	KUALA LUMPUR	SELANGOR	JOHOR	PULAU PINANG	NEGERI SEMBILAN	PERAK	MELAKA	KEDAH	PAHANG	TERENGGANU	KELANTAN	PERLIS	SABAH	SARAWAK
Q2 2024	Index Point	225.7	202.9	231.2	277.9	215.1	240.9	236.6	216.5	235.3	211.3	192.0	230.3	216.1	199.8	210.3
	Average House Price	RM486,992	RM805,804	RM560,581	RM433,652	RM482,307	RM323,328	RM270,888	RM238,780	RM305,793	RM278,895	RM302,606	RM263,527	RM235,923	RM512,564	RM536,481
Q2 2025P	Index Point	227.3	194.2	231.1	293.7	220.2	241.1	243.1	227.9	246.9	210.7	199.0	243.2	231.7	206.5	211.0
	Average House Price	RM490,376	RM771,057	RM560,386	RM458,325	RM493,869	RM323,677	RM278,335	RM251,301	RM320,958	RM278,065	RM313,570	RM278,280	RM252,956	RM529,550	RM538,126

Malaysian House Price Index Q2 2025 by state and average house price. Source: National Property Information Centre (NAPIC, 2025)

Figure 2 shows that the average house price in Malaysia is RM490,376. Based on this and assuming a financing rate of 2.5% per annum over a tenure of 35 years, the estimated monthly instalment would be RM1,654.73. Over the whole loan period, the total repayment amount would accumulate to approximately RM700,000.00. This reflects the combined principal and interest obligations borne by the consumer upon full settlement.

The OFS's monetary jurisdiction presents a significant limitation in addressing most financial disputes, particularly those involving higher-value claims. Given that the average house price in Malaysia now exceeds RM250,000, this monetary limitation restricts many consumers' access to alternative solutions. Hence, to ensure that society can benefit from the OFS's services, expanding the OFS's monetary jurisdiction is imperative. Although Regulation 18 (4) of the Financial Services (Financial Ombudsman Scheme) Regulations 2015 allows claims exceeding the economic limit to be lodged with the OFS, such claims remain contingent upon the mutual consent of all parties involved, including the OFS and its members.

Notably, the AFCA in Australia applies a monetary jurisdiction limit of up to AUD 1 million. Therefore, Malaysia should consider adopting a more comprehensive and sustainable OFS like the AFCA in Australia by increasing its monetary limit to ensure that OFS services can cater to most disputes in Malaysia.

In addition to the limitation with regards to the monetary jurisdiction of the OFS, it is also crucial to highlight the appointment of the OmbudsmanOmbudsman, which is provided under Rule 2 of the Financial Services (Financial Ombudsman Scheme) Regulations 2015 to define "Ombudsman" as: "An officer of the scheme operator appointed by the board of directors of the scheme operator to adjudicate disputes referred to the approved financial ombudsman scheme".

The appointment of an Ombudsman is made by board members, who will establish a link between these two parties. This may lead to internal pressure or conflict of interest, especially in adhering to the OFS' principles of independence, fairness, convenience, accountability, openness and utility (Nadiah et al., 2022). Accordingly, it is recommended that the appointment of the Ombudsman by Bank Negara Malaysia be made with strict qualifications and thorough evaluation to uphold an effective system of checks and balances between the Ombudsman and the board of members.

In comparison with Australia, three (3) different categories determine the disputes between the parties: the Ombudsman, the Adjudicator, and the AFCA Panel. This ensures checks and balances and avoids any conflict

of interest between the disputing parties and the persons hearing the disputes (AFCA, 2021-22). It is also pertinent to highlight herein that when the Ombudsman has decided the conflicts between the parties, the decision shall be binding upon both parties. However, suppose one of the parties is dissatisfied with the Ombudsman's decision, the aggrieved party has other options: they can seek alternative dispute resolution, such as arbitration, or pursue their case in a court of law (AFCA, 2021-22).

If the disputing parties seek to challenge the OFS's decision, a pertinent legal question arises as to whether the decision can be subjected to Judicial Review before the Court. To date, very few reported cases directly address or clarify the issue. The matter remains unresolved, as neither the FSA nor the IFSA expressly provide for judicial review as part of the mechanism for appeal.

For discussion purposes, the case of Prudential Assurance Malaysia Bhd v Ombudsman Perkhidmatan Kewangan & Anor [2022] MLJU 2366 illustrates a procedural challenge in seeking judicial review of an Ombudsman's decision. In this matter, the applicant filed a judicial review application under Order 53 of the Rules of Court 2012, seeking to quash the decision of the Ombudsman. The adjudication in question was issued pursuant to the Financial Ombudsman Scheme operated by the first Respondent, in accordance with Section 126 of the Islamic Financial Services Act 2013 (IFSA), the Financial Services (Financial Ombudsman Scheme) Regulations 2015, and the Terms of Reference governing the OFS. The award was made by an Ombudsman named S. Kalyana Kumar, who was notably not named as a party to the proceedings. The Court held that the omission of the adjudication Ombudsman as a named party rendered the judicial review application procedurally defective. Despite the application being filed adequately under Order 53, the Court refrained from addressing the substantive merits of the case or determining the legal principle governing the party's right to seek judicial review against the Ombudsman's award.

The applicant in the case of Loh Swee Liang (suing as administrator of the Guan Song, deceased) & Anor v Am General Insurance Bhd [2021] MLJU 1434 whereby had adopted a different procedural approach, wherein rather than pursuing for judicial review, the applicant filed a fresh suit by way of a writ of summons against the Respondent, following the dissatisfaction with the decision of the OmbudsmanOmbudsman in dismissing his complaint. The matter proceeded to a full trial, resulting in the dismissal of the applicant's claim. He subsequently appealed to the High Court, citing among his grounds that the Magistrate's Court had failed to overturn the Ombudsman's decision. However, the High Court dismissed the appeal and did not address the legal status of the Ombudsman, specifically whether the Ombudsman's decision was subject to review or could be quashed.

The situation in Australia

In comparing the judicial approach in Malaysia with that of Australia, it is evident that the Australian courts have made a more apparent distinction regarding the availability of judicial review in relation to decisions made by the Ombudsman. In BFJ Capital PTY LTD & Ors v Financial Ombudsman Services Ltd & Ors [2019] VSC 71, the Ombudsman declined to adjudicate the disputes, stating that the courts more appropriately resolved the matter. BFJ filed a judicial review against the decision, contending that the Ombudsman's decision is subject to judicial review. The applicant relied on the principle established in R v Panel on Take-Overs and Mergers; Ex-Parte Datafib Plc ('the Datafin principle'), where the Court held that judicial review is not available when the private entity's authority is derived solely from contract. However, where such an entity performs functions imbued with public duty or exercises powers with a public element, judicial review may be applicable.

A contrasting judicial approach was adopted in Mickovski v Financial Ombudsman Service Ltd [1995] LRLR 101, where the Court of Appeal held that Section 912A of the Corporation Act 2001 does not confer upon the Ombudsman Service any public duty or function of a public nature. Similarly, in R v Insurance Ombudsman Bureau; Ex Parte AEGON Life Assurance Ltd, the Court affirmed that the Ombudsman's authority remains purely contractual, despite its integration into a broader regulatory framework. In a nutshell, even though it has been woven into a governmental system, the Ombudsman is considered a private law determination, lacking the characteristics of governmental action or public law enforcement. Consequently, the Ombudsman Service is not subject to judicial review.

Australian case law makes it clear that decisions of the Ombudsman are subject only to limited judicial review. Although the Ombudsman may perform functions that resemble those of a governmental body, its authority remains rooted in contract, meaning that the power is derived from private law. Consequently, the Ombudsman Service is generally not susceptible to judicial review. It will usually involve questions about the Ombudsman's jurisdiction to conduct an investigation, rather than attempts to review the substantive outcome of the adjudication.

Another pressing concern regarding the limitations of the functions and roles of the OFS is its struggle with marketability and public awareness of the service it offers. Despite its regulatory significance, Malaysia lags behind Australia, which has already settled with its Ombudsman Act 1976 and a comprehensive set of laws and regulations on the Ombudsman in Financial Services. As of March 2023, the government of Malaysia is still studying the Ombudsman policies and rules. The Ombudsman draft bill is still at its final stage and has yet to be tabled in Parliament (New Straits Times, 2023).

Considering that Malaysia's population stands at approximately 34 million and Australia's is around 27 million, Malaysia lags substantially behind Australia in the use of OFS. This disparity may be attributed to the limited public awareness and market visibility of the OFS. This issue was notably highlighted in a Malaysiakini publication titled 'Many still unaware of Ombudsman for Financial Services' (Malaysiakini, 2021). Although the publication was made in 2021, it remains relevant under the current FMOS. Therefore, the OFS must adopt proactive measures in marketing and educating the public on its role in resolving financial disputes.

Furthermore, the findings also show that although the FMOS was established under the FSA 2013 and IFSA 2013, the scheme lacks the concept of access to justice due to the limitation of its monetary jurisdiction of RM250,000. The annual review clearly shows that the FMOS is overly reliant on the concept of mutual covenant between the conflicting parties when the amount of disputes is over RM250,000. This technically indicates structural barriers to equitable redress. In addition to that, the absence of the right to appeal against the decision of the Ombudsman and limited public awareness have reduced the inclusivity of the mechanism. In comparison with Australia, the AFCA provides more comprehensive, structural and equitable access to justice by offering wider monetary jurisdiction, more vigorous enforcement and greater transparency. This clearly shows that proper access to justice requires not only legislative adequacy, but also institutional legitimacy and procedural fairness.

CONCLUSION AND RECOMMENDATIONS

The role of OFS in Malaysia, particularly in resolving banking and financial disputes, must be strengthened and acknowledged not only by private institutions but also by the judiciary and legislative bodies. Such acknowledgement is essential to cater for the needs of society at large in dealing with the settlement of their disputes through the OFS. Based on the findings, it is pertinent to highlight the importance of the monetary jurisdiction exercised by the OFS, which has a financial limit of only RM250,000.00. Therefore, this study recommends that the law be reformed to expand and increase the monetary jurisdiction, for instance, up to RM1,000,000.00, so that consumers can enjoy settling their disputes through OFS without needing a mutual covenant.

Furthermore, the FMOS also needs to be reformed institutionally, wherein the law must be reviewed and amended, particularly on the FSA 2013, to give more options to the OFS and the consumers in cases where one party is not satisfied with the decision of the OFS and vice versa, either party can file an appeal or a review to the High Court to seek relief. These options are essential to strengthen and expand the role and functions of the OFS, enabling the courts and society to acknowledge and resolve their disputes through it. This can help the courts dispose of the backlog of cases in a short period. Proper guidelines or additional provisions must be added to the FSA 2013 regarding the application for judicial review, ensuring that parties and courts have a clear understanding and guidance in deciding future disputes, as well as to enhance transparency, to provide checks and balances in the appointment of the Ombudsman and to launch a continuous campaign throughout Malaysia. These recommendations will eventually help the FMOS gain more potential consumers and become a trusted institution that provides access to justice and institutional legitimacy.

Apart from that, creating awareness about the role of the Ombudsman in resolving financial disputes in Malaysia is also essential to enable the public to resolve their conflicts with the OFS. This awareness should be cultivated not only through public education campaigns but also within the courts and legislative bodies in Malaysia. Platforms such as conferences, public forums, public discussions, or even legal proceedings in courts can provide valuable opportunities to promote the OFS. For instance, judges presiding over banking and finance matters could actively inform litigants of the option to resolve their disputes through the OFS or other alternative dispute resolution mechanisms, depending on the nature and circumstances of their claims.

Reference has to be made to the Australian Financial Complaints Authority (AFCA), which serves as a role model in demonstrating how a well-structured alternative dispute resolution mechanism can uphold justice and public confidence within its banking and financial sectors. Hence, this would be a benchmark for the FMOS to get aligned with AFCA in resolving banking and Islamic finance disputes.

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