



15 June 2016

By email to: EDR@treasury.gov.au

Manager
Financial Services Unit
The Treasury
Langton Crescent
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Dear Sir / Madam

EDR Review – Treasury Laws Amendment (External Dispute Resolution) Bill and Regulations 2017 exposure draft

Thank you for the opportunity to comment on:

- Exposure draft, Treasury Laws Amendment (External Dispute Resolution) Bill 2017 (**draft Bill**);
- Exposure draft, Treasury Laws Amendment (External Dispute Resolution) Regulations 2017 (**draft Regulations**) (together, the **draft legislation**);
- Treasury Consultation Paper, *Improving dispute resolution in the financial system* (May 2017) (**Consultation Paper**);
- Treasury Consultation Note, *Australian Financial Complaints Authority: Consultation on the authorisation process* (5 June 2017) (**Consultation Note**).

Consumer Action Law Centre coordinated this joint consumer submission. The following organisations have contributed to and endorsed this submission:

Consumer Action Law Centre
Care Inc Financial Counselling Service and the Consumer Law Centre of the ACT
Caxton Legal Centre
Consumer Credit Law Centre SA
Consumer Credit Legal Service (WA) Inc
Consumers' Federation of Australia
Financial Counselling Australia
Financial Rights Legal Centre

Details about each contributing organisation are contained in Appendix A.

Consumer advocates welcome the move to a one-stop shop external dispute resolution (**EDR**) scheme for all disputes in the financial system. The *Review of the Financial System Dispute Resolution and Complaints Framework (Ramsay Review)* was a timely opportunity to build upon the success of the external dispute resolution framework, and ensure that all Australians have access to free, fair, fast and

effective dispute resolution in financial services. We commend the Government on committing to implement the sensible and considered recommendations of the Ramsay Review.

However, haste in implementation creates a risk of failing to effectively deliver on this commitment. The Government should consider longer timeframes to consult appropriately (including with consumer representatives) on the new framework, transitional matters and, importantly, the draft Terms of Reference, before the new EDR scheme is formally authorised. We consider that it may take until 1 July 2018 for a new high-quality scheme to be in a position to apply for scheme authorisation, and to ensure that the recommendations of the Ramsay Review are implemented.

We have serious concerns about the transitional arrangements, particularly the proposal for the existing EDR schemes to continue during a run-off period after commencement of the new scheme. We strongly recommend that the new scheme take over the assets, processes and staff of the Financial Ombudsman Service (**FOS**) and the Credit & Investments Ombudsman (**CIO**) from the date of commencement of the new scheme. Otherwise, the proposed transition will see the loss of experienced staff and the beneficial systems, processes and culture of the existing schemes, particularly FOS.

From the outset of the Ramsay Review, consumer advocates consistently called for a merger of FOS and CIO—not an entirely new scheme. The effective merger that we recommend would ensure that the new scheme builds upon the success of the existing schemes and that the beneficial features of these schemes, which have resulted from years of continual improvement, are not lost. It will also give certainty to the staff of those schemes and avoid disruption to the quality of dispute resolution for active complaints.

For the above reasons, we are strongly opposed to a competitive tender process for scheme authorisation.

We are also concerned about the governance and independence of the new scheme. It is essential that the new scheme adopt the successful governance model of the existing EDR schemes. Once authorised, the new scheme must be independent from stakeholders and Government influence.

Consumer advocates are concerned that the proposed name of the new scheme, the 'Australian Financial Complaints Authority' will pose considerable barriers to access. The name should be a decision left to the board of the scheme.

More broadly, the new framework should clearly enshrine the important role of consumer advocates. The new scheme is intended to be accessible, accountable, fair, efficient and effective, and the role of consumer advocates will be critical to achieving these aims.

A list of recommendations is available at Appendix B.

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Transitional arrangements

Question 4: Are there any additional issues that should be considered to ensure an effective transition to the new EDR scheme?

FOS/CIO

We strongly recommend that the new EDR scheme take over the assets, processes and staff of FOS and CIO from commencement of the new scheme, rather than FOS and CIO continuing to operate separately after the commencement. This is vital to ensure an effective transition.

The draft legislation, Consultation Paper and Consultation Note lack clarity and detail on the transitional arrangements that will apply in the lead up to the commencement of the new scheme and during the run-off period, where it is proposed that four schemes will be in operation—FOS, CIO, the Superannuation Complaints Tribunal (**SCT**) and the new scheme. This needs to be resolved to provide confidence to all stakeholders, including the staff and boards of the existing schemes, industry and consumers.

While in theory FOS and CIO could continue to operate for existing complaints, this should be done within the new scheme. Otherwise there is a real risk of disruption in effective dispute resolution: FOS and CIO will lose experienced staff, and the new scheme will need to re-employ staff and get up to speed very quickly. We note that FOS alone took over 34,000 complaints in the 2015/16 financial year¹ and has received this same amount already in the financial year to March 2017.² CIO took just under 5,000 complaints in the 2015/16 financial year.³ Between these two schemes alone there are likely to be near to 50,000 complaints per annum which must be managed through the transition. Any disruption to the complaint handling process is likely to cause backlogs and detriment to people waiting on the fair and timely resolution of their disputes. It will also adversely impact on industry and consumer confidence in the new scheme and external dispute resolution generally.

Consumer advocates are concerned that the proposed transition will see the loss of more than just staff, but also the beneficial systems, processes and culture of the existing schemes. From the outset of the Ramsay Review,⁴ consumer advocates consistently called for a merger of FOS and CIO—not an entirely new scheme.⁵ The effective merger that we recommend would ensure that the many beneficial features of these schemes, which have resulted from years of continual improvement, are not lost. This will also help to minimise the loss of rapport with external stakeholders, including consumer advocates, which has developed over many years. The new scheme should not attempt to reinvent the wheel. Instead, the new scheme should build upon the success of the existing EDR schemes, particularly FOS, and incorporate the recommendations of the Ramsay Review and beneficial aspects of the CIO.⁶

From a practical perspective, there may also be problems with ongoing funding of the existing schemes to manage run-off. If the industry licensing requirement moves to imposing membership of the new

¹ FOS Annual Review 2015-16, p4, available at <https://www.fos.org.au/publications/annual-review/>.

² Information provided to Consumer Liaison Group about complaint volumes.

³ CIO Annual Report on Operations 2016 available at <http://www.cio.org.au/publications/annual-report-on-operations.html>.

⁴ *Review of the financial system external dispute resolution and complaints framework: Final report* (April 2017) (**Ramsay Final Report**).

⁵ Joint consumer submission to Issues Paper, p 61; Joint consumer submission to Interim Report, p10.

⁶ These include the requirement that member implement the finding of systemic issue investigations and the ability to consider disputes (in limited circumstances) after a court judgment has been entered. For further information, see our submission to the Ramsay Review Interim Report pp 14-15, including case studies demonstrating the benefit of these jurisdictional features, available at <http://consumeraction.org.au/edr-review-interim-report/>.

scheme as a condition of maintaining an Australian Credit License or Australian Financial Services License, then the existing schemes will lose this source of funding from 1 July 2018. We are aware that schemes are funded by a mix of membership and complaint fees and it is unclear to what extent the loss of membership fees will impact the ongoing viability of FOS and CIO. Alternatively, the Government would need to mandate dual membership until all existing complaints have been finalised. Our recommendation that the new scheme take over the assets, processes and staff of FOS and CIO would ensure efficiency so that financial firms face only one membership fee throughout the transition period.

If, contrary to our recommendation, the existing schemes will continue to operate to provide run-off of existing complaints, we submit that all complainants should have the option to transfer their complaint to the new scheme. The draft Bill only provides this option for superannuation complaints.

Recommendation 1

- a. The new scheme should be an effective merger of the existing schemes, FOS and CIO. That is, the new scheme should take over the assets, processes and staff of FOS and CIO from the date of commencement of the new scheme.
- b. The legislation should specify that all active FOS and CIO complaints be taken over by the new scheme from the date of commencement.

Superannuation complaints

During the transition phase, significant experience may be lost in superannuation complaints handling if proper arrangements are not put in place. Separate transitional arrangements will be necessary for the SCT due to its statutory nature, including employment arrangements (i.e. SCT employees are public servants employed by ASIC).

Without well-structured transitional arrangements, people with superannuation disputes may be left worse off. The Consultation Paper envisages that people with active superannuation complaints will have the option to switch to the new scheme once operational. People will need clear information about the process for switching schemes and, importantly, advice on the consequences, particularly where the switch may compromise their claim. Vulnerable consumers, in particular, will need specific and directed assistance. This should be addressed specifically in the Bill as a transitional matter.

Under the proposed transition, the SCT is expected to continue operations until 1 July 2020 but must accept complaints until commencement of the new scheme. Given the current backlog of cases, and loss of staff that can be expected under the proposal, a two-year run-off is unlikely to be sufficient to finalise all cases. There is no provision in the draft Bill that regulates the resolution of incomplete cases.

Similarly, the draft Bill does not provide an allowance or contingency for appeals that are extant at 1 July 2020. It is unlikely that all appeals from matters lodged with the SCT before 1 July 2018 will be concluded by 1 July 2020. On hearing an appeal, the Federal Court (or High Court) could determine to remit the case to the SCT for reconsideration, with such appeal decisions two to three years in the making. Thus, it is possible that the Federal Court or High Court will determine to remit a matter to the SCT after the SCT is abolished.

To resolve this issue, we recommend that either the SCT remain active until all outstanding complaints, including appeals, are finally determined, or a contingency be put in place to transfer such matters to the new scheme (if lawful).

Further, the draft Bill has no provision for the disposal or housing of SCT records after its repeal. The Bill should be amended to provide for the maintenance of all records currently held by the SCT, including to allow for complainants and relevant third parties to access such records.

Finally, we note with concern that the SCT's funding was effectively cut in the recent Federal Budget for 2017 to 2020. We recommend that the SCT's funding be scaled to the number and type of complaints being managed until all cases are finalised.

Recommendation 2

- a. If consumers have the choice to transfer their superannuation complaint to the new scheme, they will need clear guidance and advice on the process to switch scheme and the consequences. People experiencing vulnerability, disadvantage or other barriers will need specific and directed assistance.
- b. The SCT should remain in existence until all outstanding complaints, including appeals, are finally determined, or a contingency be put in place to transfer to the new scheme matters that are remitted to the SCT upon appeal (if lawful).
- c. The Bill should provide for the maintenance of all records currently held by the SCT, including to allow complainants and relevant third parties to access such records.
- d. The SCT's funding should immediately be scaled to the number and type of complaints being managed until all cases are finalised.

Authorisation process

We note the recent announcement to put the new scheme out to competitive tender.⁷ We are opposed to this process for the reasons outlined above.

Timeframes

The timeframes for authorisation proposed in the Consultation Note are too short to achieve a high-quality scheme and sensible transition. The Government has committed to deliver on the recommendations of the Ramsay Review.⁸ While it is important to provide certainty to the existing schemes, particularly their staff, there is a real risk of failing to deliver on these recommendations and of unintended consequences if the proposed timeframes are followed. It appears unlikely that a high-quality and effective scheme could be in a position to apply for ministerial authorisation in the second half of 2017, as proposed in the Consultation Note, given that legislation must be passed, transitional matters addressed and new Terms of Reference drafted before scheme authorisation.

The Government should consider longer timeframes for scheme authorisation to consult appropriately (including with consumer representatives) on the new framework, transitional matters and, importantly, the draft Terms of Reference, before the scheme is formally authorised. We consider that it may take until 1 July 2018 for a new high-quality scheme to be in a position to apply for scheme authorisation.

This recommendation, together with our recommendation that the new scheme take over the assets, processes and staff of FOS and CIO, can provide certainty to the existing EDR schemes and their staff, while ensuring sufficient time for a sensible and considered transition to a high-quality new scheme that builds upon the success of the existing EDR framework and incorporates the recommendations of the Ramsay Review.

⁷ Treasury Consultation Note, Australian Financial Complaints Authority: Consultation on the authorisation process (5 June 2017).

⁸ The Hon Scott Morrison MP, Media release, Building an accountable and competitive banking system – Attachment B: Government Response to the Ramsay Review (9 May 2017) (**Government Response**), available at <https://cdn.tspace.gov.au/uploads/sites/72/2017/05/MR044b.pdf>.

Principles

The following principles and recommendations should be considered by the Minister in deciding whether to authorise a scheme:

1. The recommendations of the Ramsay Final Report, particularly Recommendations 2, 3, 4, 5, 6, 9. We note that the Government agreed to implement each of these recommendations.⁹
2. *ASIC Regulatory Guide 139: Approval an oversight of external dispute resolution schemes (ASIC RG139)*, which contains detailed and well-developed guidance on approval of EDR schemes. This useful and relevant guidance should not be lost in the transition from ASIC approval to Ministerial authorisation.
3. *Benchmarks for Industry-based Customer Dispute Resolution (EDR Benchmarks)*¹⁰ and *Key Practices for Industry-based Customer Dispute Resolution (Key Practices)*.¹¹ These are well developed, Government endorsed principles and practices for best practice in external dispute resolution.

One authorisation

The draft Bill gives the Minister power to authorise, and to revoke an authorisation, of an external dispute resolution scheme in proposed section 1046 of the *Corporations Act 2001* (Cth) (**Corporations Act**). Consumer advocates expect that, in practice, scheme authorisation will only occur once, and the power to revoke an authorisation will be treated as a reserve power.

Recommendation 3

- a. The new scheme should not be the subject of a competitive tender process.
- b. The Government should allow for longer timeframes for consultation on the new framework, transitional matters and development of draft Terms of Reference before authorising the new scheme.

Independence

It is vitally important that, once authorised, the new scheme is able to maintain its independence. This is necessary to ensure that the new scheme complies with the EDR Benchmarks and the recommendations of the Ramsay Review.

As stated by the EDR Benchmarks, independence requires the 'processes and decisions of the office to be objective and unbiased, and are seen to be objective and unbiased'. As an arbiter of complaints, the scheme should be independent not only of industry members but of Government influence. After considering alternative models such as UK FOS, the Ramsay Review *did not* recommend ministerial involvement in the appointment of the board, annual work plan or any other involvement beyond formal approval of the scheme.¹² The Key Practices contain further useful guidance about what the independence (and other) benchmarks mean in practice—the extent to which the scheme complies with these practices should be considered during authorisation.

The draft Bill fails to enshrine the independence of the new scheme. Given the importance of this matter, it should be moved to the legislation.

⁹ Government Response, above n 8.

¹⁰ Australian Government, The Treasury, *Benchmarks for Industry-based Customer Dispute Resolution* (4 March 2015).

¹¹ Australian Government, The Treasury, *Key Practices for Industry-based Customer Dispute Resolution* (4 March 2015).

¹² Ramsay Final Report, Chapter 9.

Recommendation 4

The Bill should enshrine the independence of the new scheme (including its decision-makers and staff) from industry participants and Government.

Governance

Consumer advocates strongly support the governance model of the existing EDR schemes, FOS and CIO, which should be replicated in the new scheme. Under this model, the schemes are independent of industry and Government, and are governed by boards that consist of an independent chair and equal numbers of directors with consumer and industry backgrounds. The Ramsay Review found that this governance model has been critical to the success of the existing industry ombudsman schemes, and recommended that the new scheme 'be governed by a board with an independent chair and equal numbers of directors with industry and consumer backgrounds' (Recommendation 2). This model is also consistent with the 'independence' benchmark of the EDR Benchmarks and Key Practices.

Given the importance of this matter, it should be moved from the Terms of Reference to the legislation. In accordance with the Ramsay Review and the EDR Benchmarks and Key Practices, the legislation should enshrine the principle that the new scheme should have an equal numbers of directors with consumer and industry backgrounds and an independent chair.

We note that the short-hand terms 'consumer representative' and 'industry representative' are often used to refer to board members with industry or consumer experience. Properly understood, the board members are not, nor should be, a true representative of a particular stakeholder group (consumer or otherwise) or industry segment. We do not support an approach where any particular consumer stakeholder or any/each industry sector considers that it is entitled to a 'seat at the board.' Rather, board members must have relevant consumer or industry experience and expertise, in addition to governance skills and other appropriate qualifications. Importantly, once they are appointed, directors act in the interests of the company, in accordance with corporations' law requirements.

The draft Bill is silent on the question of what comes first: the board or the Terms of Reference. If draft Terms of Reference for the new scheme are developed before the appointment of the board, then there must be a formal role for consumer advocates in the development of the Terms of Reference.

We would welcome the establishment of a working group made up of directors of the existing schemes (advisory council members in the case of the SCT) that would consult with stakeholders and develop the Terms of Reference. Either way, the Bill should specify that the board of the new scheme consist of equal numbers of directors with consumer and industry backgrounds and an independent chair.

Recommendation 5

- a. The Bill should specify that the board of the new scheme consist of equal numbers of directors with consumer and industry backgrounds and an independent chair.
- b. A working group of directors of the existing schemes should be established to consult with stakeholders (including consumer representatives) to develop the Terms of Reference.

Scheme must be not-for-profit

The draft Bill fails to specify that the new scheme must be not-for-profit. Consumer advocates are strongly opposed to a for-profit scheme.

Proposed section 1048(1)(a) of the Corporations Act should be amended to specify that authorisation is subject to the condition that the operator of the scheme be a not-for-profit company limited by guarantee. This could be achieved by amending the wording of proposed section 1048(1)(a).

Recommendation 6

The new scheme must be not-for-profit. This requirement should be added as a condition to authorisation by amending proposed section 1048(1)(a) of the Corporations Act.

Role of consumer advocates

The important role of consumer advocates is largely missing from the draft legislation and the Consultation Paper. Consumer advocates are essential in assisting some of the most vulnerable members of our community to pursue complaints against financial firms and achieve a fair outcome. Our initial submission to the Ramsay Review detailed the inconsistent and inferior outcomes for unrepresented consumers compared to those assisted by a consumer advocate. Consumer advocates have been central to the continual improvement of FOS and CIO through consumer liaison functions and advocacy.

The new scheme is intended to be accessible, accountable, fair, efficient and effective, and the role of consumer advocates will be critical to achieving these aims.

Recommendation 7

The important role of consumer advocates in assisting, in particular, vulnerable consumers should be enshrined in the new framework, either in the draft legislation or the Terms of Reference.

Terms of Reference

Question 3: Are there any issue that are currently in the Bill that would be more appropriately placed in the Terms of Reference or issues that are currently absent from the Bill that should be included in the Bill?

The development of appropriate Terms of Reference will be critical to the success of the new scheme. Consumer advocates expect there will be no loss of the beneficial features of existing Terms of Reference of FOS and CIO. These features were discussed in detail in our joint submissions to the Ramsay Review.

Consumer advocates recommend the movement of the following matters from the new scheme's Terms of Reference to the Bill:

- The independence of the new scheme (see Recommendation 4 above);
- Principles underlying the appointment of the board (see Recommendation 5 above);
- The role of consumer advocates (see Recommendation 7 above);
- Various changes and additions to the scheme's functions (see Recommendation 10 below);
- That the scheme is free to consumer and small business complainants;
- That a determination of the scheme is binding on the member but not on the consumer complainant (until a determination is accepted), in accordance with the existing EDR framework.

Other matters absent from the draft Bill are addressed throughout this submission.

Recommendation 8

- a. The Bill should mandate that the new scheme is free to consumer and small business complainants.
- b. The Bill should mandate that a determination of the scheme is binding on the member but is not binding on the consumer complainant (until the consumer complainant accepts a determination).

Name of the new scheme

Consumer advocates have serious concerns about the proposed name, the 'Australian Financial Complaints Authority.' The type of body proposed in the draft Bill and recommended by the Ramsay Review is an external dispute resolution scheme in the form of an industry ombudsman scheme—not an authority. The name should reflect this.

The use of 'authority' is a misnomer that will cause unnecessary confusion about the scheme's purpose and create barriers to access, particularly for many people from marginalised and vulnerable communities.

The word 'authority' brings to mind Government and policing, not an external dispute resolution scheme. The new scheme will have to waste time and resources countering this confusion. Worse still, many of the most marginalised people in our community will not feel comfortable approaching an authority with their complaint. Thus, the use of the word 'authority' runs counter to the scheme's aims to be an accessible form of dispute resolution.¹³ This would be a particularly disappointing outcome given the efforts by the existing EDR schemes to engage marginalised communities and continually improve the accessibility of their services.

The word 'authority' also suggests that the scheme will be able to order civil and even criminal penalties against a financial firm. This may lead to a gap between the expectation of complainants and the orders that the scheme can actually make.

Instead, the name of the scheme should include the word 'ombudsman'. An ombudsman is understood by the community to mean an impartial and independent decision-maker. According to the Australian and New Zealand Ombudsman Association, an ombudsman is a 'free, informal, speedy and cost-effective alternative to court action.'¹⁴ The fundamental role of an ombudsman is 'independent resolution, redress and prevention of disputes.'¹⁵ This reflects the dispute resolution model proposed in the draft Bill.

There is significant name recognition value in the term 'ombudsman' that would be lost in a name change. The term ombudsman is immediately recognisable to consumers who have used similar services, such as the two existing financial services ombudsman schemes, Telecommunications Industry Ombudsman (**TIO**) and the various state based energy and water ombudsman schemes. Over the years, consumer advocates have played a significant role in educating marginalised consumers about the meaning and functions of the Ombudsman schemes. Consistency of language is important for stressed consumers, who may need to utilise multiple ombudsman schemes if they have complaints relating to credit, utilities and phone bills. The use of the word 'ombudsman' will also give the new scheme continuity with the predecessor EDR schemes.

Further, the name of the scheme should be:

- easily searchable online;
- not easily confused with other scheme names in the financial system; and
- determined following market research on a shortlist of names to ensure that the final name does not create barriers or confusion for users of the scheme.

Ultimately, the name of the new scheme should be decided by the board of the scheme.

¹³ Explanatory Memorandum [1.4]; proposed ss 1047 and 1046(2)(d) Corporations Act.

¹⁴ ANZOA, *Ombudsman: A particular model of alternative dispute resolution*, available at <http://www.anzoa.com.au/about-ombudsmen.html>.

¹⁵ *Ibid.*

Recommendation 9

The name of the new scheme should:

- a. be a decision left to the board of the new scheme following market research;
- b. be easily searchable online and not easily confused with other scheme names;
- c. include the word 'ombudsman';
- d. not include the word 'authority'.

Scheme functions (s1047)

Community engagement and outreach

Community engagement and outreach to vulnerable and disadvantaged groups is critical to the success of the scheme, and goes beyond accessibility. As such, the requirement in proposed section 1047(b) of the Corporations Act is not sufficient. Community engagement and outreach functions should be added as a separate scheme function.

The new scheme must proactively promote its existence, purpose and services to the public. In engaging in this promotion, the scheme should be conscious that there are groups of complainants who, due to geographic, economic, social, language or other barriers, are less likely to access dispute resolution in proportion to their use of financial products and services. Building on the approaches taken by the existing EDR schemes, the new scheme should develop targeted and effective strategies to reach groups underrepresented in the breakdown of complainants. ASIC RG139 gives further guidance on these functions at 139.46-139.63.

Vulnerable consumers are likely to need specific and directed assistance in the transition to the new scheme. This should be addressed specifically as a transitional matter, and funded accordingly.

Stakeholder consultation

One of the strengths of the existing EDR schemes has been stakeholder engagement. This should be reflected in the legislation as a separate scheme function.

Reporting contraventions of the law to ASIC (s1047(h)(i)) and s1065)

The draft Bill requires the new scheme to report to ASIC (and to ASIC and APRA for superannuation complaints) on contraventions of any law that may have occurred in proposed section 1047(h)(i) and 1065(1)(a) respectively of the Corporations Act.

The provision is very broadly drafted and arguably unclear. "Contraventions of any law that *may* have occurred" is very broad, could potentially relate to almost every complaint (for example, some misleading and deceptive conduct is frequently alleged), and does not in any way confine the reporting requirement to breaches that have been upheld during the investigative/decision making process. In its current form, this function may present a very large task for the scheme, and would include a one-off minor potential contravention of laws that are not within the remit of ASIC or APRA.

The reporting of contraventions may provide a useful source of surveillance for ASIC and APRA in undertaking its regulatory duties. Consumer representatives support the regulators having access to the intelligence required to do its job effectively. However, it is concerning that the proposed requirement would include a one-off potential minor contravention of laws that are not within the remit of ASIC or APRA.

Consumer advocates would prefer that the new scheme focus on reporting any systemic issues and matters involving serious misconduct. This function should be included in the legislation. If all contraventions are to be reported, the scheme must have the capacity to work flexibly with ASIC and other stakeholders to produce useful intelligence without generating excessive work that detracts from the core responsibility of dispute resolution.

Systemic issues (s1047(h)(v))

The systemic issues work of FOS and CIO is one of the main strengths of the existing framework,¹⁶ and must be maintained in the new EDR framework. The systemic issue function is about more than mere reporting: it also involves resolving systemic issues thereby improving industry conduct. The Ramsay Final Report recommended that: 'The EDR body must monitor, address and report systemic issues.'¹⁷

As drafted, proposed section 1047(h)(v) is too narrow, and appears to unduly limit the scheme's systemic issues function to problems with internal dispute resolution. We recommend the approach taken in ASIC Regulatory Guide 139.117, where a scheme must report on 'any systemic issues and matters involving serious misconduct.' The legislation should adopt this wording and specifically require the EDR scheme to resolve systemic issues.

One important feature of the CIO's Terms of Reference is a requirement that scheme members implement the findings of systemic issues investigations. This requirement should be included in the Terms of Reference.

Compliance with determinations (s1047(g))

Proposed section 1047(g) requires the new scheme to take reasonable steps to ensure that members comply with determinations. While we support this function, it must be considered in the context of a compensation scheme of last resort, the subject of an ongoing consultation by the Ramsay Review.

The new scheme should not be required to take legal action against an insolvent member to enforce an unpaid determination as a precondition to a consumer applying to the last resort compensation scheme. Any such requirement would simply delay compensation for the consumer and add further cost for the new scheme and, in turn, industry. Instead, the scheme's right to take legal action to enforce its determination could be transferred to the last resort compensation scheme after the consumer has been compensated by the scheme. That is, the compensation scheme could recover from the financial service provider on a subrogated basis.

Independent reviews (s1047(k))

Independent periodic reviews are intrinsic to the success and continual improvement of industry ombudsman schemes. Given the importance of the review process, the timeframes for commissioning independent reviews should be moved from the Terms of Reference to the legislation. The independent review will be particularly useful for the new scheme in its early years, and should occur at a shorter interval. This occurred following the merger into present-day FOS.

We recommend that proposed section 1047(k) be amended to include a timeframe for the commissioning of independent reviews. The timeframe should be:

- for the scheme's first independent review: not less than three years after commencement;
- for subsequent reviews: not less than every five years.

¹⁶ Ramsay Final Report, p 198.

¹⁷ Ramsay Final Report, p 136.

Decision-making criteria

The new scheme should adopt the existing FOS decision-making criteria for non-superannuation complaints, being 'fairness in all the circumstances having regard to: legal principles; applicable industry codes; good industry practice; and previous FOS decisions (although FOS is not bound by these).

We support the existing FOS decision-making criteria and EDR processes because it enables flexible and practical dispute resolution. Legalistic processes or an over-reliance on black letter law is likely to make dispute resolution less accessible to consumers. The Productivity Commission supported this criteria in its report on Access to Justice Arrangements.

Voluntary membership

The existing schemes have always permitted voluntary membership in addition to those who are compelled to be members as part of licensing conditions. This has been a very useful feature, especially for emerging industries who want to provide access to free and credible access to dispute resolution for their customers. It has provided useful consumer protection for consumers who would not otherwise have access to justice. A number of debt management firms, for example, have been members of FOS or CIO without any legislative requirement to do so. It should be clear that the new entity should continue to provide this facility to appropriate service providers.

Expulsion of members

The new scheme must have the power to expel members that do not comply with the requirements of scheme membership or a determination. This is necessary to incentivise financial firms' compliance with existing laws, the rules of the scheme, and determinations. As drafted, proposed section 1047(a) of the Corporations Act suggests that the new scheme will be required to keep membership open to non-complying members. The draft Bill should be amended to confirm that the scheme may expel and refuse membership to members that do not comply with the requirements of scheme membership or a determination.

Recommendation 10

In respect of the scheme's functions in proposed section 1047 of the Corporations Act:

- a. The Bill should require the new scheme to undertake community outreach and engagement activities to raise awareness of the scheme amongst all users, especially vulnerable consumers.
- b. The Bill should require the new scheme to engage in consultation with consumer and industry stakeholders.
- c. Section 1047(h)(v) should be amended to require the EDR scheme to report systemic issues and serious misconduct, more broadly than "issues affecting complaints management functions of members of the scheme."
- d. Section 1047 should be expanded to require the EDR scheme to resolve systemic issues (in addition to reporting on them).
- e. Section 1047(k) should be expanded to include a timeframe for the commissioning of independent reviews, being:
 - i. for the first review: not less than three years after commencement of the scheme;
 - ii. for subsequent reviews: not less than every five years.
- f. The new scheme should adopt the existing FOS decision-making criteria.
- g. The new scheme should permit voluntary membership.
- h. The new scheme should have the power to expel and refuse membership to financial firms that do not comply with the requirements of scheme membership or a determination.

Power to obtain information and documents

Proposed section 1054 of the Corporations Act gives the new scheme the power to compel information and documents only for superannuation complaints.

FOS and CIO currently have the power to request information and documents from parties and, if not provided, make an adverse inference. However, this power has proven inadequate as, in practice, the schemes tend not to make adverse inferences.

Even when the schemes do request documents, financial services providers do not always provide the relevant information or documents. This is problematic where documents held by a financial service provider are needed to prove its unlawful conduct. If the new scheme cannot compel the financial service provider to provide all relevant documents, then it may not have sufficient information to make appropriate findings of fact and come to a fair and just determination.

In the digital age, competent and well-managed financial firms should be able to provide all relevant documents quickly in digital format. As such, this requirement should not unduly delay the proper resolution of a dispute nor impose a significant time or cost burden on the financial firm.

Together, the existing schemes' inability to compel discovery and reluctance to make an adverse inference has been an obstacle to a fair and just outcome in some disputes. This should be rectified in the new scheme by giving it the power to obtain information and documents for all complaints, not just superannuation complaints.

Recommendation 11

Proposed section 1054 of the Corporations Act should be amended to apply to all complaints, not just superannuation complaints.

Monetary limits

Question 5: Would moving immediately to a compensation cap of \$1 million have significant impacts on the availability / price of professional indemnity insurance?

A substantial increase to the compensation cap is long overdue. The Ramsay Review found that the current limits and caps have fallen so far behind what is needed that they 'bear little relationship to the value of some financial products' such as mortgage balances, home insurance policies and some investments.¹⁸ It is essential that the broken link between the value of disputes and the monetary jurisdiction is rectified in the new scheme.

Contributors to this submission maintain our support for the following jurisdictional limits and compensation caps for consumer disputes:

Limit/Cap	Recommendation 12
Claim limit (general)	\$2 million
Compensation cap (general)	\$2 million
Consequential financial loss	Remove existing carve out. Empower scheme to award fair and reasonable compensation within the general compensation cap
Consequential non-financial loss	Remove existing carve out. Empower scheme to award fair and reasonable compensation within the general compensation cap

¹⁸ Ramsay Final Report, p9.

Uninsured third party motor vehicle claims	\$15,000
Life insurance claims	No cap (alternatively, \$2 million)
General insurance broking	Remove existing carve out and include within general compensation cap

In the alternative, we support Recommendation 4 of the Ramsay Final Report.

The monetary jurisdiction for a life insurance dispute in the existing framework depends on whether the policy is held through superannuation and, consequently, whether it is heard by the SCT or FOS. In moving to one EDR scheme, this inconsistency should be resolved, with no loss of rights for consumers. The sensible resolution of this inconsistency is for all life insurance disputes to have an unlimited jurisdiction, regardless of whether the policy is held through superannuation.

The compensation cap should only start at the lower end of the Ramsay recommendations (not less than \$500,000) if there is genuine, credible evidence that professional indemnity insurance is not available at a higher compensation cap.

We are aware that some professional indemnity insurance policies have clauses linked to the current jurisdiction of FOS. These policies will need to be updated. However, this is not without precedent—the monetary jurisdiction of industry ombudsman schemes has increased over time. Increasing the compensation cap now will help to future-proof the cap. If the compensation cap is set at \$500,000, it will need to be increased again in the very near future, requiring a further change to professional indemnity insurance policies.

The monetary limits should be clearly set out in the new scheme's Terms of Reference.

Question 6: Are the existing sub-limits of different insurance products still required?

No. There is no principled reason to maintain different sub-limits for particular insurance products. It is desirable for the scheme's monetary jurisdiction to be, as far as possible, uniform across claims, compensation and types of disputes. A uniform monetary jurisdiction would create efficiencies for the scheme itself when assessing whether a dispute is within its jurisdiction and for professional advisors, including consumer advocates, when advising potential claimants.

Superannuation complaints

Question 1: Are there other statutory powers that the EDR body will need to resolve superannuation complaints effectively?

While we recognise that there needs to be some additional legislative provisions relating to superannuation complaints, as a general principle the procedures and powers of the new scheme in respect of such complaints should be left to the Terms of Reference. An approach based on Terms of Reference has proven effective in ensuring compliance by industry participants, because these can be enforced against them under contract. A failure to comply with the rules of the scheme can lead to expulsion, with consequences for the ability to hold a relevant license. In many respects, this is more effective in ensuring industry compliance with dispute resolution determinations as compared to a statutory Tribunal, which can involve costly appeals.

The experience from the ombudsman schemes is that the majority of consumers stand to benefit from a fast, fair and flexible scheme. Adding court and tribunal based processes has the potential to disrupt

this balance. These should only be transposed from the existing legislation if necessary for the effective resolution of superannuation complaints or the constitutionality of the new scheme.

Death benefits disputes

Perhaps the greatest success story of the SCT has been its role in the resolution of death benefit disputes. The *Superannuation (Resolution of Complaints) Act 1993* (**SROC Act**) requires:

- the identification of potential beneficiaries; and
- advising potential beneficiaries in writing of decisions, rights of complaint and time limits.

Together, these requirements are known as 'claims-staking'. The draft legislation does not include any claims-staking processes.

In addition, compulsory conciliation and SCT determinations can bind the parties and allow trustees to pay death benefits without the risk of having to pay death benefits again if disgruntled persons later challenge payment decisions in separate court proceedings. This has resulted in superannuation death benefit disputes being resolved in a relatively timely and cost-effective manner with minimal disputation in what can be a highly charged and stressful area of dispute resolution.

It is very important that these successes are not lost in the move to the new scheme.

Whilst claims-staking could be included in the new scheme's Terms of Reference, this would not bind persons who claimed to be potential beneficiaries but did not participate in the dispute resolution process.

Similarly, whilst determinations of the new scheme could potentially bind the parties who participated in disputes, without statutory underpinning, trustees may be exposed to a potential double payment in separate court proceedings.

Accordingly, we recommend that the claims staking process set out in the SROC Act be replicated in the Bill to provide trustees with certainty and to support the timely payment of death benefits.

Penalties for non-attendance at conciliation

Proposed subsection 1055(4) of the Corporations Act creates a penalty for non-attendance at a conciliation conference. This is inappropriate and likely to cause significant detriment to people experiencing disadvantage or vulnerability. There may be a valid explanation for a person's inability to attend a conference. A person with a total and permanent disability claim, for example, may have complex medical issues that prevent them from attending on the day. Single parents or carers for elderly family may not be able to attend at the last minute if alternative care arrangements fall through.

This section is contrary to the principle of accessibility in the EDR Benchmarks and Recommendation 2 of the Ramsay Final Report. A penalty may provide a chilling effect, discouraging people from pursuing a superannuation complaint.

Proposed subsection 1055(3) is a sufficient power to permit the new scheme to deal with complainants who repeatedly fail to attend.

If subsection 1055(4) is designed to deal with parties other than the consumer complainant or a potential third party beneficiary, it should be amended accordingly. Otherwise, it should be removed.

Withdrawn complaints

The SROC Act provides for the withdrawal of complaints if the SCT finds that a complaint is “trivial, vexatious, misconceived or lacking in substance” (section 22(3)(b)). All industry ombudsman schemes have similar provisions. However, unlike the SCT, there is no right of appeal against a decision of an EDR scheme to treat a complaint as withdrawn.

The statutory right of review of a decision of the SCT to treat a complaint as withdrawn is found in the *Administrative Decisions (Judicial Review) Act 1977* (Cth) (**ADJR Act**). Such a right of review only extends to decisions of statutory bodies. As the new scheme is not a statutory body, the appeal rights in the draft Bill do not extend to decisions of the new scheme to treat complaints as withdrawn.

Accordingly, it would be appropriate to mandate that the new scheme's Terms of Reference include a right of review to a panel or decision-maker of a withdrawn complaint. This would provide a level of accountability to arbitrary decisions to exclude complaints.

Test of unfairness or unreasonableness

The draft Bill limits the test of unfairness or unreasonableness to members (or former members) of a superannuation fund and beneficiaries (or former beneficiaries) of superannuation funds. It is not clear that potential beneficiaries are included in the definition of ‘superannuation complaint’ in proposed section 1052 of the Corporations Act.

Under SROC Act, persons who claim to be entitled to benefits are able to make a complaint. The draft Bill should be amended to extend the test of unfairness and unreasonableness to parties who may have or who claim to have an interest, including those who may not be parties to the complaint.

Management of the fund as a whole

The SROC Act excludes from the SCT's jurisdiction complaints about the management of the superannuation fund as a whole. The draft Bill is silent on this matter.

The courts have adopted a narrow approach to what constitutes the 'management of the fund as a whole.'¹⁹ This approach has, in our opinion, operated effectively to allow trustees to manage the day-to-day operation of superannuation funds for the benefit of all members without undue scrutiny by the SCT as to how such actions may affect individual members.

This narrow approach should be replicated in the new Terms of Reference or the Bill. Without this being included, there is a risk that the new scheme could take a wide interpretation, limiting the scheme's ability to effectively resolve consumer disputes.

Group insurance complaints against insurer

The Bill limits the operation of superannuation disputes to those where an insurer is not the person against whom a claim/complaint is made. However, an insurer can be joined to a complaint under proposed section 1053 of the Corporations Act.

In a claim/complaint regarding the payment of an insurance benefit in a group contract held by a trustee, if the claim/complaint is made directly with the insurer, or perhaps with both the trustee and insurer, the

¹⁹ *Vision Super Pty Ltd v Poulter* [2006] FCA 849.

complaint must be dealt with by the new scheme under its general (non-superannuation) Terms of Reference.

However, in practice, many insurance claims/complaints involving a trustee, are dealt with directly between the insurer and the claimant, perhaps after initially being lodged with the trustee or a fund manager.

Under the draft Bill, these claims might be excluded from the superannuation complaints stream of the new scheme, despite the fact that trustees have specific prudential obligations to obtain, review and pursue insurance benefits/claims. Such obligations should be reviewable by the new scheme as part of the overall consideration of a claim/dispute.

We recommend that proposed sections 1052 and 1053 of the Corporations Act be clarified and expanded so that the definition of superannuation complaint includes complaints made directly with a group insurer.

Recommendation 13

In respect of superannuation complaints:

- a. The claims-staking process in the SROC Act should be replicated in the Bill.
- b. The penalty provision for non-attendance at a conciliation conference in proposed section 1055(4) of the Corporations Act should not apply to consumer complainants or third party beneficiaries.
- c. Mandate that the new scheme's Terms of Reference include a right of review to a panel or decision-maker of a withdrawn complaint (although this undermines the basis of a withdrawal process, which is to fast-track complaints that have no real merit).
- d. Amend the Bill to extend the test of unfairness and unreasonableness to other parties who may have or who claim to have an interest in a death benefit, including those who may not be parties to the complaint.
- e. Amend the Bill to exclude management of the fund as a whole from the new scheme's jurisdiction—this should replicate the narrow exclusion recognised by the courts.

Reference of questions of law to Federal Court (s1056)

In the existing EDR schemes:

- the consumer always has the option to take their dispute to Court, as the determination is only binding on the financial service provider; and
- the Terms of Reference permit a test case.

We recommend that the new scheme adopt the existing EDR approach for all disputes.

Alternatively, the existing EDR arrangements should be replicated for non-superannuation disputes and the draft Bill should be amended to confirm that proposed section 1056 of the Corporations Act only applies to superannuation complaints.

Role of ASIC

We support an increased role and powers for ASIC in regulating the new scheme. We agree with the analysis of the Ramsay Review that in a single scheme environment 'it is even more critical for ASIC to have increased powers, because it will be more difficult for ASIC to apply its current sanction of revoking approval for the scheme.'²⁰

²⁰ Ramsay Final Report [9.57].

Following in the tradition of the largely successful co-regulatory approach to ASIC-approved EDR schemes, ASIC's increased power should only be used as a last resort and after substantial consultation with the new scheme, as recommended by the Ramsay Review.²¹

It is appropriate that the increased oversight of the new scheme should sit with ASIC—not with the Minister. This is consistent with Recommendation 7 of the Ramsay Review, which the Government accepted.²²

ASIC's general direction powers (s1051)

ASIC will play a vital role in ensuring the ongoing maintenance of standards and compliance with benchmarks for the new scheme. There have been iterative improvements to the existing schemes over many years which have greatly improved their accessibility and contributed to fairer outcomes for consumers. While the multi-scheme environment has had many significant downsides for consumers, it allowed consumer advocates to push each scheme be *at least* as responsive to consumer concerns as their counterpart. There is a risk that without ASIC oversight, these gains could be eroded over time in a single scheme environment.

We note particularly the following beneficial features of the Terms of Reference of FOS and CIO:

- the capacity to lodge a complaint after the issue of legal proceedings;
- the capacity to vary contracts on grounds of hardship;
- third party rights in insurance (3rd party beneficiaries, 3rd party claimants in low value motor vehicle accident disputes involving insurers);
- some post-judgment jurisdiction;
- test case provisions; and
- beneficial time limits.

This list is not exhaustive, but it identifies some of the most important access issues for consumers. These features have gone some way to redress the enormous imbalance of power between consumer complainants and their industry respondents. If the new scheme is to meet its objectives then ASIC should be tasked with ensuring the scheme does not only meet the minimum standards for authorisation but has a vital role in ensuring the continuous improvement of external dispute resolution for the benefit of all.

ASIC may direct scheme to increase limits (s1048(3))

Under the recommendations of the Ramsay Review, there may be a split claim limit and compensation cap in the early stages of the new scheme. Given this, ASIC's power to direct the scheme to increase its monetary jurisdiction must apply to the claim limit *and* the compensation cap.

This power is important in the move to one scheme, and in the context of the clear difficulties faced by FOS and CIO in maintaining a fit-for-purpose monetary jurisdiction. Financial firms have an interest in keeping the compensation cap as low as possible, which can create difficulties for the scheme in changing the Terms of Reference to increase the monetary jurisdiction.

Recommendation 14

Proposed section 1048(3) of the Corporations Act should be amended to clarify that ASIC may give directions to increase the compensation caps as well as the monetary limits.

²¹ Ibid [9.58].

²² Government Response, above n 8.

Credit representatives

Question 7: Are there any reasons why credit representatives should be required to be a member of an EDR scheme?

Some consumer advocates support the removal of the existing requirement for credit representatives to be a member of an ASIC-approved EDR scheme on the following enforceable conditions:

1. Credit representatives be required to cooperate with the new scheme, for example, by providing information and documentation;
2. A searchable public list of all credit representatives and the license under which they operate is maintained;
3. Credit representatives be under a specific obligation to facilitate dispute resolution, for example, by putting the consumer in touch with the licensee;
4. The licensee be liable for the conduct of the credit representative even where the credit representative acts outside the authority of the licensee, including in cases of fraudulent or illegal activity; and
5. These changes are reviewed two years after implementation to ensure that there are no gaps or unintended consequences.

However, some consumer advocates prefer that credit representatives should be required to maintain membership of new EDR scheme until it is clarified through further research or legislative reform that consumers have effective access to justice in the case of fraudulent or illegal activity by credit representatives.

Regulatory impacts

Question 8: What will be the regulatory impact of the new EDR framework?

The Consultation Paper only identifies the potential for the new EDR framework to cause an *increase* in the regulatory burden for industry. There is no mention of measuring the impact on consumers, community organisations, or the potential *decrease* in the regulatory burden for industry of the new framework. Indeed, the recommendation to replace the three existing schemes with one scheme was based, in part, on removing the unnecessary costs to industry, the regulator and stakeholders in the existing multi-scheme framework.

The Ramsay Review found that the existence of two EDR schemes caused duplicative and unnecessary costs for firms, the regulator and stakeholders.²³ Costs include:

- Duplicated governance arrangements, including separate boards;
- Duplicated case management systems, membership services, stakeholder management, consumer outreach / engagement and communications;
- Duplicated administrative and regulatory reporting obligations and arrangements (including for firms switching schemes);
- Duplicated statistical, systemic issues and serious misconduct processes and reporting requirements;
- Administration of multiple and different sets of Terms of Reference and guidelines;
- Commissioning and participating in multiple independent reviews.

These costs represent 'increased costs on the financial system as a whole, compared to the costs that would be incurred under a single-scheme model. These costs are passed on to financial firms and, ultimately, consumers.'²⁴

²³ Ramsay Final Report, 109-11.

²⁴ Ramsay Final Report [5.96].

Duplicative costs for stakeholders in the existing framework include:

- Participating in multiple independent reviews;
- Advocacy to schemes about best practice in dispute resolution and current issues affecting consumers;
- Participation in reviews of multiple Terms of Reference and guidelines.

Duplicative costs for ASIC in the existing framework include:

- Duplication in the ongoing monitoring of two schemes' statistical and systemic issues reporting and processes;
- Approval and oversight of two schemes;
- Oversight of two independent reviews;
- Managing the regulatory arbitrage in a two-scheme environment;
- Overseeing the movement of members between schemes – changes to ASIC's registers and notification requirements.

The reduction in these costs should be included in the Treasury's assessment of the new framework.

Under the transition proposed in the Consultation Paper and draft legislation, many of the above costs will increase during the run-off period due to the addition of a new, fourth scheme. Consumer, industry and regulatory stakeholders will need to engage with the new scheme—providing consultation on development of processes, procedures, Terms of Reference, guidance notes, and participation in advisory committees and governance—in addition to their current engagement and roles with FOS, CIO and/or SCT. However, this additional burden can be avoided for consumer advocates, industry, and ASIC by supporting our recommendation that the new scheme take over the assets, processes and staff of FOS and CIO from commencement. This would allow stakeholders to focus on the new scheme and transitional issues, without having to maintain years of engagement with the existing schemes.

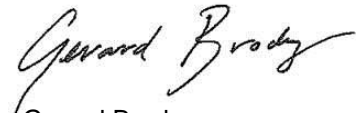
Recommendation 15

Treasury should assess the costs and the benefits to industry, consumers and the regulator of the new EDR framework.

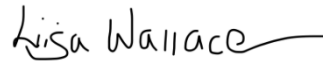
The contributors to this submission would be pleased to discuss the issues addressed in this submission in further detail.

Please contact Policy Officer Cat Newton at Consumer Action Law Centre on 03 9670 5088 or at cat@consumeraction.org.au if you have any questions about this submission.

Yours sincerely



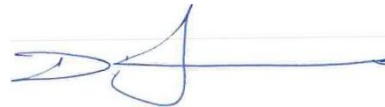
Gerard Brody
Chief Executive Officer
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Chair
Consumers' Federation of Australia




Liisa Wallace
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**Care Inc Financial Counselling Service and
the Consumer Law Centre of the ACT**



Scott McDougall
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David Ferraro
Managing Solicitor
Consumer Credit Law Centre SA



Gemma Mitchell
Acting Centre Manager and Principal Solicitor
Consumer Credit Legal Service (WA) Inc



Fiona Guthrie
Chief Executive Officer
Financial Counselling Australia



Karen Cox
Coordinator
Financial Rights Legal Centre

APPENDIX A: ABOUT THE CONTRIBUTORS

Care Inc Financial Counselling Service and the Consumer Law Centre of the ACT

Care Inc. Financial Counselling Service has been the main provider of financial counselling and related services for low to moderate income and vulnerable consumers in the ACT since 1983. Care's core service activities include the provision of information, counselling and advocacy for consumers experiencing problems with credit and debt. Care also has a Community Development and Education program, provides gambling financial counselling, outreach services in the region and at the Alexander Maconochie Centre, and operates the ACT's first No Interest Loans Scheme, established in 1997, and makes policy comment on issues of importance to its client group.

Caxton Legal Centre

Established in 1976, Caxton Legal Centre Inc. is Queensland's oldest community legal centre. Caxton is a non-profit community organisation providing free legal advice to people on low income or who face other disadvantage. Caxton has a specialist Consumer Law Service providing advice and assistance to people with legal problems arising out of consumer disputes and consumer credit contracts.

Consumer Action Law Centre

Consumer Action Law Centre is an independent, not-for-profit consumer organisation based in Melbourne. We work to advance fairness in consumer markets, particularly for disadvantaged and vulnerable consumers, through financial counselling, legal advice and representation, and policy work and campaigns. Delivering assistance services to Victorian consumers, we have a national reach through our deep expertise in consumer law and policy and direct knowledge of the consumer experience of modern markets.

Consumer Credit Law Centre South Australia

The Consumer Credit Law Centre South Australia was established in 2014 to provide free legal advice, legal representation and financial counselling to consumers in South Australia in the areas of credit, banking and finance. The Centre also provides legal education and advocacy in the areas of credit, banking and financial services. The CCLCSA is managed by Uniting Communities who also provide an extensive range of financial counselling and community legal services as well as a large number of services to low income and disadvantaged people including mental health, drug and alcohol and disability services.

Consumer Credit Legal Service (WA) Inc

Consumer Credit Legal Service (WA) Inc is a not-for-profit charitable organisation which provides legal advice and representation to consumers in WA in the areas of credit, banking and finance, and consumer law. CCLSWA also takes an active role in community legal education, law reform and policy issues affecting consumers. In the 2015 / 2016 financial year, CCLSWA provided comprehensive legal advice to 1350 clients on 1424 matters.

Consumers' Federation of Australia

The Consumers' Federation of Australia is the peak body for consumer organisations in Australia. CFA represents a diverse range of consumer organisations, including most major national consumer organisations. Our organisational members and their members represent or provide services to millions of Australian consumers.

Financial Counselling Australia

FCA is the peak body for financial counsellors. Financial counsellors provide information, support and advocacy for people in financial difficulty. They work in not-for-profit community organisations and their services are free, independent and confidential. FCA is the national voice for the financial counselling profession, providing resources and support for financial counsellors and advocating for people who are financially vulnerable.

Financial Rights Legal Centre

Financial Rights is a community legal centre that specialises in helping consumers understand and enforce their financial rights, especially low income and otherwise marginalised or vulnerable consumers. We provide free and independent financial counselling, legal advice and representation to individuals about a broad range of financial issues. Financial Rights operates the NSW answer point for the National Debt Helpline, which helps consumers experiencing financial difficulties. We also operate the Insurance Law Service which provides advice nationally to consumers about insurance claims and debts to insurance companies. Financial Rights took over 25,000 calls for advice or assistance during the 2015/2016 financial year.

APPENDIX B: LIST OF RECOMMENDATIONS

Recommendation 1

- a. The new scheme should be an effective merger of the existing schemes, FOS and CIO. That is, the new scheme should take over the assets, processes and staff of FOS and CIO from the date of commencement of the new scheme.
- b. The legislation should specify that all active FOS and CIO complaints be taken over by the new scheme from the date of commencement.

Recommendation 2

- a. If consumers have the choice to transfer their superannuation complaint to the new scheme, they will need clear guidance and advice on the process to switch scheme and the consequences. People experiencing vulnerability, disadvantage or other barriers will need specific and directed assistance.
- b. The SCT should remain in existence until all outstanding complaints, including appeals, are finally determined, or a contingency be put in place to transfer to the new scheme matters that are remitted to the SCT upon appeal (if lawful).
- c. The Bill should provide for the maintenance of all records currently held by the SCT, including to allow complainants and relevant third parties to access such records.
- d. The SCT's funding should immediately be scaled to the number and type of complaints being managed until all cases are finalised.

Recommendation 3

- a. The new scheme should not be the subject of a competitive tender process.
- b. The Government should allow for longer timeframes for consultation on the new framework, transitional matters and development of draft Terms of Reference before authorising the new scheme.

Recommendation 4

The Bill should enshrine the independence of the new scheme (including its decision-makers and staff) from industry participants and Government.

Recommendation 5

- a. The Bill should specify that the board of the new scheme consist of equal numbers of directors with consumer and industry backgrounds and an independent chair.
- b. A working group of directors of the existing schemes should be established to consult with stakeholders (including consumer representatives) to develop the Terms of Reference.

Recommendation 6

The new scheme must be not-for-profit. This requirement should be added as a condition to authorisation by amending proposed section 1048(1)(a) of the Corporations Act.

Recommendation 7

The important role of consumer advocates in assisting, in particular, vulnerable consumers should be enshrined in the new framework, either in the draft legislation or the Terms of Reference.

Recommendation 8

- a. The Bill should mandate that the new scheme is free to consumer and small business complainants.
- b. The Bill should mandate that a determination of the scheme is binding on the member but is not binding on the consumer complainant (until the consumer complainant accepts a determination).

Recommendation 9

The name of the new scheme should:

- a. be a decision left to the board of the new scheme following market research;
- b. be easily searchable online and not easily confused with other scheme names;
- c. include the word 'ombudsman';

- d. not include the word 'authority'.

Recommendation 10

In respect of the scheme's functions in proposed section 1047 of the Corporations Act:

- a. The Bill should require the new scheme to undertake community outreach and engagement activities to raise awareness of the scheme amongst all users, especially vulnerable consumers.
- b. The Bill should require the new scheme to engage in consultation with consumer and industry stakeholders.
- c. Section 1047(h)(v) should be amended to require the EDR scheme to report systemic issues and serious misconduct, more broadly than “issues affecting complaints management functions of members of the scheme.”
- d. Section 1047 should be expanded to require the EDR scheme to resolve systemic issues (in addition to reporting on them).
- e. Section 1047(k) should be expanded to include a timeframe for the commissioning of independent reviews, being:
 - i. for the first review: not less than three years after commencement of the scheme;
 - ii. for subsequent reviews: not less than every five years.
- f. The new scheme should adopt the existing FOS decision-making criteria.
- g. The new scheme should permit voluntary membership.
- h. The new scheme should have the power to expel and refuse membership to financial firms that do not comply with the requirements of scheme membership or a determination.

Recommendation 11

Proposed section 1054 of the Corporations Act should be amended to apply to all complaints, not just superannuation complaints.

Recommendation 12

Limit/Cap	Recommendation
Claim limit (general)	\$2 million
Compensation cap (general)	\$2 million
Consequential financial loss	Remove existing carve out. Empower scheme to award fair and reasonable compensation within the general compensation cap
Consequential non-financial loss	Remove existing carve out. Empower scheme to award fair and reasonable compensation within the general compensation cap
Uninsured third party motor vehicle claims	\$15,000
Life insurance claims	No cap (alternatively, \$2 million)
General insurance broking	Remove existing carve out; include within general compensation cap

Alternatively, we support Recommendation 4 of the Ramsay Final Report.

Recommendation 13

In respect of superannuation complaints:

- a. The claims-staking process in the SROC Act should be replicated in the Bill.
- b. The penalty provision for non-attendance at a conciliation conference in proposed section 1055(4) of the Corporations Act should not apply to consumer complainants or third party beneficiaries.
- c. Mandate that the new scheme's Terms of Reference include a right of review to a panel or decision-maker of a withdrawn complaint (although this undermines the basis of a withdrawal process, which is to fast-track complaints that have no real merit).
- d. Amend the Bill to extend the test of unfairness and unreasonableness to other parties who may have or who claim to have an interest in a death benefit, including those who may not be parties to the complaint.
- e. Amend the Bill to exclude management of the fund as a whole from the new scheme's jurisdiction—this should replicate the narrow exclusion recognised by the courts.

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Proposed section 1048(3) of the Corporations Act should be amended to clarify that ASIC may give directions to increase the compensation caps as well as the monetary limits.

Recommendation 15

Treasury should assess the costs and the benefits to industry, consumers and the regulator of the new EDR framework.