29 September 2017

Committee Secretariat
Senate Standing Committees on Economics
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Dear Sir/Madam

Treasury Laws Amendment (Putting Consumers First—Establishment of the Australian Financial Complaints Authority) Bill 2017

Our organisations are pleased to make this submission to the Committee's inquiry into the Treasury Laws Amendment (Putting Consumers First—Establishment of the Australian Financial Complaints Authority) Bill 2017 (**Bill**).

The following consumer organisations have contributed to and endorsed this submission:
Consumer Action Law Centre
Consumer Credit Legal Centre SA
Consumer Credit Legal Service WA
Consumers' Federation of Australia
Financial Rights Legal Centre
Financial Counselling Australia

Further information about the contributing organisations is available at Appendix A.

Consumer advocates are very supportive of the move to new one-stop shop external dispute resolution (**EDR**) scheme that implements the considered recommendations of the *Review of the Financial System External Dispute Resolution and Complaints Framework* (**Ramsay Review**). The new Australian Financial Complaints Authority (**AFCA**) can build on the success of the existing system for EDR, and extend the benefits of EDR to superannuation customers for the first time.

Australians need a free, fair, fast and effective service to help resolve disputes against financial firms. Whether it is stopping the unwarranted repossession of the family home or challenging an insurer's decision to deny an income protection claim, these disputes can be incredibly stressful and adversely impact upon lives until resolved. Once established, AFCA should remove inconsistency and confusion in dispute resolution, and make it easier to resolve complaints with banks, insurers, super funds and others financial institutions.

As detailed in previous submissions to the Ramsay Review, we strongly support the industry ombudsman EDR model. However, our caseworkers have seen inconsistent outcomes in a multi-scheme environment. The multi-scheme environment causes confusion for consumers and inefficiencies for their advisors, who must be across different rules and procedures for the three existing schemes, the Financial Ombudsman Service (**FOS**), Credit & Investments Ombudsman (**CIO**) and the Superannuation Complaints Tribunal (**SCT**). We appreciate that there are some risks inherent in having a single scheme compared to the multi-scheme environment. On balance, however, these are outweighed by the advantages. The Bill provides for certain mandatory requirements, general considerations and stronger oversight powers for ASIC—this gives comfort that there will be high levels of accountability for AFCA.

Industry ombudsman schemes have been a hallmark of consumer protection, and it is good that the AFCA legislation adopts the principles of the schemes, including accessibility, independence and fairness, as the general considerations for scheme authorisation. We also support the mandatory requirements in the Bill, which confirm that accessing AFCA will be free of charge for complainants, and that its determinations will be binding on financial firms.

We encourage the Government and the AFCA Transition Team to work collaboratively and expeditiously with representatives of the FOS and CIO boards, and representatives of the SCT advisory council, during the transition period. This will give certainty that there will be no disruption to the quality of dispute resolution for the 50,000 new disputes each year that must be managed through the transition period. For a successful transition, the existing EDR schemes and their expert staff must be the backbone of AFCA. AFCA should be given the capacity to resolve all legacy complaints under the existing FOS and CIO terms of reference.

It is essential to get AFCA's terms of reference right, and ensure it incorporates and builds on the beneficial features of the CIO and FOS terms of reference that have resulted from years of continuous improvement and consumer advocacy.

This submission is broadly supportive of the legislation establishing AFCA but recommends some minor technical amendments to the Bill, including to:

- require an independent chair of the AFCA board;
- require AFCA to monitor and address systemic issues, in addition to referring such matters to regulators;
- require AFCA to refer certain matters to other relevant authorities or industry code monitoring committees;
- give AFCA power to compel information or documents;
- require membership for debt management firms including debt agreement administrators, and permit voluntary membership.

This submission also responds to some of the matters announced in the Government's response to Treasury's consultation on the exposure draft legislation (**Treasury Fact Sheet**),[1] including:

- the monetary limits and compensation caps;
- decision-making criteria;
- exclusions from jurisdiction; and
- referral of complaints back to internal dispute resolution (**IDR**).

A list of recommendations is available at Appendix B.

Mandatory requirements

We support the mandatory requirements in proposed section 1051 of the *Corporations Act 2001* (Cth) (**Corporations Act**). As detailed in previous submissions,[2] it is essential that AFCA:

- is free to complainants;
- is operated not-for-profit;
- is governed by an equal number of directors with industry and consumer experience and an independent chair;
- resolves complaints in a way that is fair, efficient, timely and independent;
- issues determinations that binding on members but not complainants;
- takes reasonable steps to ensure members comply with its determinations;
- is funded by members; and
- is subject to regular independent reviews.

We are pleased that these requirements are specified in the Bill.

We strongly support the Ramsay Review recommendation that the new scheme be "governed by an independent board (with an independent chair and equal numbers of directors with industry and consumer backgrounds)" (Recommendation 2). This is an important and long-standing feature of EDR schemes in financial services. As the Ramsay Review found, this governance model has been highly successful. The operator requirements in the Bill partially implement this recommendation in proposed section 1051(3)(d) of the Corporations Act. Section 1051(3)(e) also provides that the Minister may, within 6 months of the authorisation of AFCA, appoint the independent chair. However, there is no provision regarding the independence of the chair beyond the initial appointment. Given the importance of the governance model, the Bill should specify that the board of AFCA be governed by an independent chair.

RECOMMENDATION 1
Amend the Bill to require an independent chair of the AFCA scheme's board (in addition to the requirement to have equal numbers of directors with industry and consumer backgrounds).

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[1] https://static.treasury.gov.au/uploads/sites/1/2017/04/AFCA_Fact_Sheet.docx.

[2] See Joint consumer submission to Treasury consultation on the Treasury Laws Amendment (External Dispute Resolution) Bill and Regulations 2017 exposure draft (**Exposure Draft Consultation**), p8-12: http://policy.consumeraction.org.au/2017/06/22/edr-review-treasury-laws-amendment-external-dispute-resolution-bill-and-regulations-2017-exposure-draft.

General considerations

We strongly support the general considerations in proposed section 1051A of the Corporations Act, being the accessibility, independence, fairness, accountability, efficiency and effectiveness of the scheme.

The general considerations reflect the Government's Benchmarks for Industry-based Customer Dispute Resolution.[3] Consumer advocates strongly endorse these Benchmarks and the accompanying Key Practices,[4] re-released by the Government in March 2015. These benchmarks are incorporated into existing financial services regulation as well as the approach taken by the Australian Securities and Investments Commission (**ASIC**) in approving EDR schemes. The Benchmarks and Key Practices are well-developed principles and practices that have provided a strong foundation for many EDR schemes in Australia and New Zealand. It is appropriate that these principles should underpin AFCA.

Systemic issues

A robust systemic issues function is one of the key benefits of the industry ombudsman model upon which FCA is based. We note that 'systemic issues' appear in:

- the Explanatory Memorandum, as a matter that may be considered by the Minister under the 'accountability' general consideration;[5] and
- the requirement to report systemic issues to ASIC in proposed section 1052(4) of Corporations Act.

In our view, AFCA's systemic issues function should be expressed more broadly that mere reporting; it also has a role to play in investigating and responding to systemic issues, for example by working with the financial firm to improve its practices or provide redress for all affected customers. This was reflected in Recommendation 2 of Ramsay Review, which was accepted by the Government: 'The single EDR body will have the following key features: Improving industry practice: it will monitor, address and report systemic issues to the appropriate regulator.' Indeed, the Regulation Impact Statement notes that one of the benefits of the preferred reform option is that industry ombudsman schemes have the capacity to instigate and conduct investigations to identify systemic issues.[6]

Similarly, ASIC Regulatory Guide 139.127 requires the existing ASIC-approved EDR schemes to:

- identify systemic issues and cases of serious misconduct that arise from the consideration of consumer complaints and disputes;
- refer these matters to the relevant scheme member or members for response and action; and

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

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

[5] Explanatory Memorandum, Treasury Laws Amendment (Putting Consumers First—Establishment of the Australian Financial Complaints Authority) Bill 2017, 1.55.

[6] Ibid 4.23.

- report information about the systemic issue or serious misconduct to us, in accordance with these guidelines.

RECOMMENDATION 2
AFCA should monitor and address systemic issues, and where relevant report them to the appropriate regulator or regulators. This important function should be expressed in the legislation (or alternatively the terms of reference, or ASIC's regulatory guidance).

Referring to appropriate authorities

Other relevant authorities

We strongly support the requirement for AFCA to report certain matters to relevant regulators. Proposed section 1052E of the Corporations Act requires referral to ASIC, APRA or the Commissioner of Taxation. However, it would appear that AFCA is unable to report contraventions to all relevant authorities. For example:

- a complaint to AFCA about a credit provider's listing on a credit report may reveal a significant contravention of the law or systemic issue in relation to the privacy or credit reporting laws, which should be referred to the Office of the Australian Information Commissioner;
- a complaint against a credit provider who is also a debt agreement administrator may reveal a serious contravention of the law, relevant to its ongoing registration by the Australian Financial Security Authority.

To prevent the problems inherent in fixing an exhaustive list, particularly where AFCA may review and expand its jurisdiction over time, we recommend a minor technical amendment to proposed sections 1052E(1), (3) and (4) of the Corporations Act to permit referral to any other appropriate authority. This would ensure that the appropriate regulator or authorities can be notified of systemic issues and serious contraventions of the law. It will also save the need for future legislative amendment should the relevant regulators or authorities change.

RECOMMENDATION 3
Amend the Bill so that section 1052E(1), (3) and (4) of the Corporations Act permit a referral to 'any other appropriate authority'.

Industry Codes

To align with the move towards co-regulation,[7] AFCA should refer any significant or systemic breaches of industry codes to the relevant code monitoring committee. The recent Independent Review of the Code Compliance and Monitoring Committee (which monitors compliance with the Code of Banking Practice) recommended that the Committee should:

[7] ASIC Enforcement Review Position and Consultation Paper 4: Industry Codes in the Financial Sector (28 June 2017): https://treasury.gov.au/consultation/industry-codes-in-the-financial-sector/.

> broaden and deepen its sources of information about the effectiveness of and compliance with the Code including by … establishing arrangements with external dispute resolution schemes to be notified of systemic banking issues.[8]

AFCA will be in a position to gather useful information to enable the code monitoring committees to perform their role more effectively. The focus of this reporting should be on assisting the committee to promote good practice in the banking industry (and other industries with industry codes) by monitoring compliance with the code, rather than determining individual complaints. This reporting requirement is not designed to be unduly onerous on AFCA, but rather assist it in working with code compliance committees in their shared goal of improving industry practice over time.

RECOMMENDATION 4 AFCA should report any significant breach of an applicable industry code to the relevant code monitoring body.

Power to compel documents and information

FOS and CIO currently have the power to request information and documents from parties and, if not provided, make an adverse inference. Consumer advocates have raised concerns that, in practice, the schemes tend not to use these powers. Even when the schemes do request documents, financial services providers do not always provide the relevant information or documents. This is problematic where the documents held by a financial service provider are needed to prove its unlawful conduct or enable the EDR scheme to make appropriate findings of fact and come to a fair and just determination. Consumer advocates support new powers for AFCA to overcome these difficulties.

We recommend that new schemes require the financial firm to provide all relevant documents in a dispute. In the digital age, competent and well-managed financial service providers 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.

RECOMMENDATION 5 AFCA should have the power to obtain information and documents for all complaints (not just for superannuation complaints).

Transition

We support the more detailed transitional arrangements that are set out in the Bill and Treasury Fact Sheet, giving greater flexibility and specificity to the transitional arrangements.

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[8] Phil Khoury, *Independent Review: Code Compliance Monitoring Committee* (February 2017), Recommendation A: http://ccmcreview.crkhoury.com.au/wp-content/uploads/sites/3/2017/02/Report-of-CCMC-Independent-Review-2017.pdf.

We strongly recommend that AFCA resolve legacy disputes of FOS and CIO under the terms of reference of the original scheme (the second option outlined in the Treasury Fact Sheet) to dispense with the need for dual memberships or the temporary operation of four schemes. We are also concerned that requiring FOS and CIO to continue during a 'run-off' period will create significant operational challenges, including increasing delays in dispute resolution as these schemes inevitably lose talented staff to AFCA or elsewhere.

AFCA should bring together the existing EDR schemes—that is, it should build on the strengths and infrastructure of FOS and CIO by taking over the assets, staff and processes. This will give certainty to the experienced staff of those schemes, and avoid disruption to the quality of dispute resolution for the 50,000+ new disputes each year that must be managed through the transition period. Importantly, it will also ensure that the beneficial features of FOS and CIO that have resulted from years of continuous improvement and consumer advocacy will not be lost.

For these reasons, we strongly support the Government's decision not to proceed with a competitive tender.[9]

Membership

<u>Voluntary membership</u>

The existing EDR schemes permit voluntary membership in addition to membership for firms that are compelled to join under licensing conditions. This has been a very useful feature, especially for emerging industries, such as FinTechs and some debt management firms, who want to provide access to free and credible access to dispute resolution for their customers. We note that EDR can be of benefit to a company, allowing it to identify and address systemic issues, improving customer satisfaction.

Voluntary membership has provided useful consumer protection for consumers who would not otherwise have access to justice. It should be clear, either in the Bill or the terms of reference, that AFCA will continue to provide this facility to appropriate service providers.

<u>Debt management firms</u>

So-called "debt management firms" are a clear example of the exploitative behaviour that can emerge in the absence of appropriate consumer protection laws and regulation. These firms target vulnerable people in financial difficulty or concerned about their creditworthiness to sell a range of interconnected services. With few barriers to entry and two million Australians in high financial stress,[10] business is booming for these companies. However, these largely unregulated businesses can cause significant consumer detriment. Problems include:

- recommending high cost 'solutions' to debt problems that are not in the consumer's best interests, potentially leaving them in a worse financial position;

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[9] Commonwealth, *Parliamentary Debates*, Senate, 14 September 2017, p 30 (second reading speech).
[10] http://theconversation.com/two-million-aussies-are-experiencing-high-financial-stress-64367

- high, hidden and upfront fees that leave even less money for putting food on the table or paying existing creditors, even when there is a free dispute resolution service available to the consumer;
- misleading and deceptive, unfair and predatory conduct; and,
- most relevant to this inquiry, a lack to access to justice for aggrieved consumers because, unlike other financial firms, there is no requirement to maintain membership of an EDR scheme.

EDR schemes and creditors also face unnecessary costs in dealing with debt management firms. The Ramsay Review found that debt management firms 'can hamper the efficiency of EDR schemes by diverting scheme resources from other disputes, especially where the dispute brought to EDR by [the debt management firm] does not have merit.'[11]

Consumer advocates strongly support Recommendation 10 of the Ramsay Review, accepted by the Government, that debt management firms should be required to be members of the new EDR body. However, the Bill does not effectively implement this recommendation as there is no law or license requiring EDR membership for these services at present.

We note that at the recent Consumer Affairs Forum, Ministers for Consumer Affairs from around Australia:

> acknowledged that addressing the conduct of debt management firms will require a coordinated Commonwealth policy approach. Ministers noted the Commonwealth will commence work in 2018 to determine the merits and feasibility of debt management firms coming into the financial services regulatory framework. States and Territories will provide full assistance to identify data to support this work.[12]

We strongly encourage the Government to move quickly on this commitment.

In the interim, these unregulated companies continue to exploit a loophole in the financial services laws to sell high cost, low value services or conflicted advice to Australians who can least afford it.

RECOMMENDATION 6
Debt Management Firms should be required to maintain membership of the AFCA scheme. The Government should commence work immediately on a uniform regulatory framework, including requirements for AFCA membership, for debt management products and services.

Debt Agreement Administrators

Debt Agreement Administrators are a type of debt management firm with limited effective regulation and no requirement to provide IDR or EDR to resolve customer complaints. This is a gap in external dispute resolution that AFCA should resolve.

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[11] Ramsay Review Final Report, p 199 (Panel Finding).
[12] Legislative and Governance Forum on Consumer Affairs, *Joint Communique: Meeting of Ministers for Consumer Affairs* (31 August 2017): http://consumerlaw.gov.au/communiques/meeting-9-2/.

Consumer advocates are increasingly concerned about the consumer harm arising from the growing use of debt agreements. Although heavily marketed as 'one easy payment' that 'stops the debt collectors' and 'freezes interest' a debt agreement is form of insolvency under the *Bankruptcy Act 1966* (Cth) with very serious consequences. Debt agreements generally only suitable for a very narrow band of debtors, being people who:

- own or have equity in their home (because under bankruptcy, the debtor would lose the home) or earn an income in excess of threshold for repayments under the *Bankruptcy Act*); or
- would have their employment restricted by bankruptcy, for example, company directors.

Debt agreements are at an all-time high.[13] The growing use of debt agreements is concerning given that our casework experience reveals that many consumers are entering debt agreements that are plainly unsuitable for their circumstances. Many people entering a debt agreement appear to be unaware of their other, often better, options (such as temporary hardship variation or bankruptcy) and without understanding the true consequences of the debt agreement. This is likely due to a combination of:

- the financial incentive for debt agreement brokers and administrators to place people into a debt agreement (under which the administrator can take upwards of 25% of every repayment, plus set-up fees running into the thousands) rather than a temporary hardship variation or bankruptcy;
- heavy (and occasionally misleading)[14] advertising of debt agreements, despite the regulator's guidelines;[15]
- inappropriate entry thresholds which see people on low incomes or social security payments making repayments to creditors that they can't afford and would not have to make if properly advised of more appropriate debt solutions.

Worse still, debt agreement administrators may be effectively 'let off the hook' when an aggrieved customer ends up bankrupting anyway. Once bankrupt, private court action against the administrator is difficult or futile as consent from the Trustee in Bankruptcy is required to initiate legal proceedings, and the person may not receive any refund of fees (which may be distributed among creditors).

A recent evaluation of the debt agreement framework by Chen, O'Brien and Ramsay recommends, among other much-needed reforms, that all debt agreement administrators should

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[13] According to the Australian Financial Security Authority, "Debt agreements in the June quarter 2017 are the highest on record both by number and proportion of total personal insolvencies (48.2%). The year-on-year increase in debt agreements in the June quarter 2017 is the eighth in succession": https://www.afsa.gov.au/statistics/quarterly-statistics-commentary.

[14] *ASIC crackdown on misleading advertising by debt agreement administrators* (3 May 2017): http://asic.gov.au/about-asic/media-centre/find-a-media-release/2017-releases/17-130mr-asic-crackdown-on-misleading-advertising-by-debt-management-firms; Consumer Action Law Centre, *Fresh start or false hope: A look at the website advertising claims of debt agreement administrators* (April 2013) available at: http://consumeraction.org.au/wp-content/uploads/2013/05/Fresh-start-or-false-hope-April-2013.pdf.

[15] Australian Financial Security Authority, *Inspector-General Practice Guideline 1: Guidelines relating to advertising and marketing of debt agreements* (July 2016).

be required to join an ASIC-approved EDR scheme and establish clear and consistent IDR processes.[16]

To ensure that AFCA is truly able to resolve all types of disputes in the financial system, debt agreement administrators should be required to join AFCA.

RECOMMENDATION 7
Amend the *Bankruptcy Act 1966* (Cth) to require Debt Agreement Administrators to maintain membership of the AFCA scheme as a condition of registration.

Superannuation disputes

Consumer advocates strongly support the arrangements for superannuation disputes in the Bill, which includes important aspects of the SCT's jurisdiction while bringing the benefits of external dispute resolution to superannuation consumers for the first time.

Due to its statutory tribunal model, the SCT has struggled to provide the fast and flexible dispute resolution that can be provided by an EDR scheme. The time for disputes to be resolved in the SCT in 2015/16 was 635 days. This is clearly too long, particularly where some disputes involve people with serious or terminal illnesses and where delays can exacerbate financial hardship. We refer to Serena's story in the joint consumer submission to the Ramsay Review Issues Paper, which demonstrates the adverse impact of such delays.[17] A properly funded and governed EDR scheme could have prevented these delays become so endemic.

AFCA will also improve outcomes for superannuation consumers by providing more accessible dispute resolution, making it easier to pursue disputes involving multiple financial firms and decreasing consumer confusion. A particular problem for consumers is where the disputes relate to life insurance—access to timely dispute resolution can depend on whether insurance is purchased directly (or through an adviser), or is held through group superannuation arrangements.

By comparison, one of the key benefits of the EDR model over a statutory tribunal is the ability to engage in a process of continuous improvement, with regular independent reviews, stakeholder engagement, and the requirement to identify and respond to systemic issues. For example, following its last independent review, FOS implemented a 'fast track' process to expedite claims, such as those where the person is experiencing financial difficulty.

Consumer advocates strongly support the transition of the SCT to an EDR scheme. We agree with the Ramsay Review and the Government that that the long-standing problems with the SCT cannot be fully resolved within a statutory tribunal structure, even with reforms to its funding and governance. Indeed, the SCT's transition to an industry ombudsman scheme was recommended

[16] Chen, Vivien and O'Brien, Lucinda and Ramsay, Ian, *An Evaluation of Debt Agreements in Australia* (September 13, 2017) (2018) 44(1) *Monash University Law Review* (Forthcoming). Available at SSRN: https://ssrn.com/abstract=3036315.

[17] Joint consumer submission to Ramsay Review Issues Paper, p 38: http://consumeraction.org.au/edr-review/.

over 15 years ago.[18] Superannuation customers will not have to wait much longer to access the free, fair, fast, and accessible dispute resolution that can be offered by an industry ombudsman scheme model.

Matters to be addressed in the terms of reference

The terms of reference for AFCA will be crucial to its success, and whether or not it can provide fair, free, fast and accessible service to help people resolve disputes against their financial firms.

Given the critical importance of getting the terms of reference right, consumer advocates should have a formal role in its development and ongoing review.

If AFCA is to implement the Government's commitment of improving the EDR framework in financial services, its terms of reference must include and build on the beneficial features of FOS and CIO jurisdictions that have resulted from years of continuous improvement and consumer advocacy. We note particularly the following beneficial features of the terms of reference of FOS and/or CIO:

- powers to investigate and deal with systemic issues;
- 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.

<u>Monetary jurisdiction</u>

We are very supportive of increased monetary limits and compensation caps for AFCA. We note that the Treasury Fact Sheet announced:

- a claim limit of $1mil and compensation cap of $500,000—this is improvement on the existing caps and limits at FOS and CIO, which have been far too low for too long;
- no monetary limit on claims to set aside guarantees over the primary place of residence—this will have significant benefits for many people with guarantee disputes, at risk of losing the family home, that are currently excluded from FOS or CIO due to rising house prices.
- no limit on the value of superannuation disputes—this is consistent with the SCT's unlimited monetary jurisdiction and entirely appropriate given that compulsory nature of superannuation and large balances that can accumulate over a person's life.

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[18] Productivity Commission, *Review of the Superannuation Industry (Supervision) Act 1993 and Certain* Other *Superannuation Legislation: Inquiry Report* (10 December 2001), Recommendation 8.2: http://www.pc.gov.au/inquiries/completed/super/report/super.pdf.

In our view, the monetary limit and, in particular, the compensation cap should be higher. The joint consumer submissions to the Ramsay Review recommended a uniform monetary limit and compensation cap of $2 million, which we still support. A higher compensation cap is needed in light of rising house prices, particularly in Sydney and Melbourne. We note that, should the consumer take their meritorious complaint to court instead, the costs of unsuccessfully defending litigation would be much higher for the financial firm.

The Ramsay Review recommended that the compensation cap should only start at less than $1 million if it would result in a substantial lessening of competition (as a result of smaller firms being unable to obtain professional indemnity insurance and therefore being unable to enter or remain in the market). We have not seen any credible evidence about the impact of increased compensation caps on the market for PI insurance.

Given the long-standing problems in maintaining a fit-for-purpose monetary jurisdiction at FOS and CIO, consumer advocates strongly support ASIC's new power to direct AFCA to increase the monetary jurisdiction. This will be a useful reserve power in the future, should that prove necessary.

Decision-making criteria

AFCA's decision-making criteria will be based on achieving 'fairness in all the circumstances' for non-superannuation disputes.[19] We strongly support this criterion, which will enable 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.

Exclusions from jurisdiction: Family Court proceedings

It is important that AFCA's terms of reference do not exclude disputes against financial firms due to existing family law proceedings.

The Treasury Fact Sheet states:

> While it is a matter to be further considered by the AFCA transition team, the Government expects the terms of reference to exclude disputes already heard by an existing external dispute resolution scheme or by a court…

We are concerned that people who have Family Court property orders in place may be currently excluded from EDR in certain circumstances. This may prevent people, including women who have experienced family violence, from accessing free and fair resolution of disputes against the bank simply because they have a property settlement with their former partner. For example, it would be highly regressive if a victim of family violence was unable to lodge a dispute with AFCA against her bank for failing to respond to a hardship request, or a dispute that the bank breached the responsible lending laws, simply because her home is the subject of a Family Court property order. Unfortunately, the intersection of credit law and family law is incredibly complex and often

[19] Treasury Fact Sheet, p 3.

poorly understood, making it difficult for many women to get affordable and comprehensive advice on the intersecting issues. In any event, the dispute with the bank may arise after the property settlement.

This issue could be resolved by:

- ensuring that the exclusion from AFCA's jurisdiction only applies to proceedings issued by the creditor (including debt collectors) or the complainant against the creditor; or
- by including an exception to this exclusion for family law proceedings.

Cost of the scheme

Consumer advocates note that there are some stakeholders claiming that shifting to a single EDR scheme will lead to dramatically increased complaint numbers resulting in extraordinary costs for financial service provider members. In our experience working with consumers we have not seen any evidence for the claim that a new single EDR scheme will result in extraordinary complaint increases. Although there will be some increase in complaints numbers due to increased jurisdictional limits, there may also be some complementary reduction in expensive litigation for the same reason.

The Ramsay Review found that "the need to establish and run and, in the case of the regulator, approve and oversee multiple schemes, results in unnecessary duplicative costs and an inefficient allocation of resources."[20] Eliminating these duplicative costs would mean that a move to a single scheme will reduce costs for firms, the regulator and stakeholders.

Some industry members have argued that a single scheme will act as a monopoly, and that "a monopoly not-for-profit organisation can cause the same amount of economic damage as a monopoly for-profit organisation by charging more and using the funds for unnecessarily high expenditure".[21] The Ramsay Review gave careful consideration to arguments that a single EDR body would engage in monopolistic behaviours and concluded that the shared commitment among stakeholders to provide effective non-court based dispute resolution, robust board and ASIC oversight, as well as new enhanced accountability measures "will ensure that the single EDR body will not engage in the practices that CIO has raised as a concern."[22]

The Ramsay Review also found that 'competition' between industry ombudsman schemes:

- cannot be expected to make the market for EDR services work in the long-term interests of consumers;
- is not the primary driver of innovation for EDR schemes; and
- does not provide the most effective outcomes for all users.[23]

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[20] Ramsay Review Final Report, p 111.
[21] Credit & Investment Ombudsman, Submission to the Ramsay Review Interim Report, p 8.
[22] Ramsay Review Final Report, p 116.
[23] Ibid p 117.

Should the Committee require further information on this issue, we refer to joint submission to the Ramsay Review's Interim Report, endorsed by eight leading consumer groups, which contained a detailed response to arguments against the move to one EDR scheme in the financial system.[24]

Internal dispute resolution

Referral of complaints back to the firm

According to the Treasury Fact Sheet, AFCA will:

> refer all new complaints received back to the financial firm for the final opportunity to resolve the dispute in a defined timeframe … subject to a discretion to exempt certain cases in limited circumstances.

We strongly support giving financial firms the opportunity to resolve their customer's complaint, however the complaints must be registered and tracked by AFCA, as recommended by the Ramsay Review (Recommendation 9).

If Recommendation 9 is implemented by AFCA, there will be benefits for consumers, including:

- incentivising financial firms to address complaints promptly;
- reassuring consumers that their dispute will be considered;
- reducing complaint fatigue;
- assisting the scheme to measure the effectiveness of IDR and identify systemic issues; and
- that the consumer will not need to understand the intricacies of ASIC Regulatory Guide 165 and the varying time limits for IDR.

IDR reporting regime

We strongly support the enhanced IDR framework in the Bill. At present, it is impossible to compare all financial firms on their IDR performance. This is due to different reporting among firms, and a lack of reporting by others. Some industries are already moving towards increased data reporting. For example, the General Insurance Code of Practice Code Governance Committee published its first *General Insurance Industry Data Report 2014-15*, which included data on claims and stage two IDR collected from Code subscribers.[25]

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

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[24] Joint Consumer Submission to Ramsay Review Interim Report, p 47: http://consumeraction.org.au/edr-review-interim-report/.

[25] General Insurance Code Governance Committee, *The General Insurance Industry Data Report 2014-2015*, p 31.

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

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Appendix A: About the contributors

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 National Debt Helpline, which helps NSW 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 almost 25,000 calls for advice or assistance during the 2016/2017 financial year.

Appendix B: List of Recommendations

1. Amend the Bill to require an independent chair of the AFCA scheme's board (in addition to the requirement to have equal numbers of directors with industry and consumer backgrounds).

2. AFCA should monitor and address systemic issues, and where relevant report them to the appropriate regulator or regulators. This important function should be expressed in the legislation (or alternatively the terms of reference, or ASIC's regulatory guidance).

3. Amend the Bill so that section 1052E(1), (3) and (4) of the Corporations Act permit a referral to 'any other appropriate authority'.

4. AFCA should report any significant breach of an applicable industry code to the relevant code monitoring body.

5. AFCA should have the power to obtain information and documents for all complaints (not just for superannuation complaints).

6. Debt Management Firms should be required to maintain membership of the AFCA scheme. The Government should commence work immediately on a uniform regulatory framework, including requirements for AFCA membership, for debt management products and services.

7. Amend the *Bankruptcy Act 1966* (Cth) to require Debt Agreement Administrators to maintain membership of the AFCA scheme as a condition of registration.