29 November 2017

By email: AFCA@treasury.gov.au

Head of Secretariat
AFCA Transition Team
Financial Services Unit
The Treasury
Langton Crescent
PARKES ACT 2600

Dear Sir/Madam

Establishment of the Australian Financial Complaints Authority

Thank you for the opportunity to comment on the *Establishment of the Australian Financial Complaints Authority – Consultation Paper* (November 2017). The following organisations have contributed to and endorsed this submission:

- Consumer Action Law Centre
- Consumer Credit Law Centre SA
- Consumer Credit Legal Service (WA) Inc
- Consumers' Federation of Australia
- Financial Counselling Australia
- Financial Rights Legal Centre
- Public Interest Advocacy Centre

Information about the contributors to this submission is available at **Appendix 1**.

Consumer advocates are very supportive of the move to a 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 proposed Australian Financial Complaints Authority (**AFCA**) can build on the success of the existing EDR framework, and extend the benefits of EDR to superannuation customers for the first time.

It is essential to get AFCA's terms of reference right, and ensure it incorporates and builds on the beneficial features of the Credit and Investments Ombudsman (**CIO**) and Financial Ombudsman

Service (**FOS**) that have resulted from years of continuous improvement and consumer advocacy. This submission identifies some of the most important features of an effective and accessible external dispute resolution scheme.

This submission refers to the *Treasury Laws Amendment (Putting Consumers First—Establishment of the Australian Financial Complaints Authority) Bill 2017* (**Bill**) before the Senate as at 20 November 2017. As this consultation has occurred in advance of the passage of legislation and without draft terms of reference available for comment, we strongly recommend that any entity ultimately authorised as AFCA consult on its draft terms of reference before commencing operation.

A summary of recommendations is available at **Appendix 2**.

Contents

Part 1 – Terms of Reference

Guiding Principles

Question 1: Are there any other principles that should be included in the guiding principles for AFCA's establishment?

Consumer advocates support the guiding principles for AFCA's establishment outlined in the Consultation Paper.

Under the principle of "incorporation of better practice principles for dispute resolution", we recommend that the AFCA Transition Team also have regard to Benchmarks[1] and Key Practices[2] for Industry-based Customer Dispute Resolution, re-released by the Government in March 2015. These well-developed principles have provided strong foundations for many EDR schemes in Australia and New Zealand and are reflected in the General Considerations in proposed section 1051A of the *Corporation Act 2001* (Cth) in the Bill.

"Efficient and effective transitional arrangements" will require that people are supported through the transition process, particularly those in situations of vulnerability or disadvantage. For example, people will need clear information about the process for switching schemes, should that be permitted for superannuation complaints, and advice on the consequences, particularly where the switch may compromise their claim. Vulnerable consumers will need specific and directed assistance.

Monetary Limits

Question 2. As AFCA will be a new EDR scheme, is it appropriate to maintain specific limits for: income stream risk disputes; general insurance broking disputes; and third-party motor vehicle insurance?

Question 3. If these limits are to be retained, should there be an increase in the limits?

AFCA's monetary jurisdiction should be, as far as possible, uniform and consistent across claims, compensation, and types of disputes. A uniform threshold would reduce the substantial confusion about limits faced by consumers, industry, and their advisors. It would improve consistency of outcomes and simplify jurisdictional disputes for AFCA.

Please refer to our comments in response to Question 11 on the need for all limits to be reviewed after 18 months of operation.

<u>General insurance broking</u>

We support the removal of the insurance broking specific limit, unless there is robust evidence of a credible and disproportionate impact on insurance brokers' professional indemnity insurance. There is no principled reason why insurance broking should be treated differently to other products. If retained, a consumer could end up with the anomalous result that their claim is above the specific limit but under the general limit and thus be excluded and disadvantaged for using a broker. Further, it may be appropriate time to remove this specific limit given that many small businesses use insurance

[1] Australian Government, The Treasury, *Benchmarks for Industry-based Customer Dispute Resolution* (February 2015).
[2] Australian Government, The Treasury, *Key Practices for Industry-based Customer Dispute Resolution* (February 2015).

brokers and AFCA will have an expanded small business jurisdiction.[3] If retained, we recommend an increase in this limit commensurate with AFCA's increased monetary jurisdiction.

Income stream risk

We recommend that AFCA retain a specific limit but increase the limit to $20,000 per month.

Third party motor vehicle insurance

The current monetary limit of $5,000 is too low given the rising costs of car repair. Uninsured drivers are often a vulnerable group of consumers with many experiencing financial hardship when their car is damaged. This specific limit should be increased to $15,000, providing an alternative to court-based dispute resolution which can be costly for both insurers and the uninsured driver.

Financial and non-financial consequential loss

Consequential losses due to misconduct by financial firms can have disastrous impacts on people, including the loss of a home, relationship breakdown, and mental and other health issues.[4] Given these serious and often lasting impacts, the specific limit on consequential financial or non-financial loss of $3000 at FOS and CIO is inadequate. This limit is also in stark contrast to compensation for privacy and discrimination complaints in other forums. The Office of the Australian Information Commission has no limit on non-financial loss. The Queensland Civil and Administrative Tribunal can award compensation of up to $100,000 for loss or damage (including injury to feelings or humiliation) in privacy complaints, and there is no limit on compensation for discrimination complaints in Queensland.[5] Due to these differing limits there is a marked disparity in potential financial outcomes for otherwise similar disputes, which may encourage forum shopping. This specific limit should be removed, with AFCA empowered to award fair and reasonable compensation for consequential loss. Alternatively, this specific limit should be increased substantially.

General claim limit and compensation cap

While consumer advocates are very supportive of increased monetary limits and compensation caps for AFCA, we maintain our recommendation that the appropriate general monetary limit and compensation cap is $2 million. A higher compensation cap is needed considering rising house prices, particularly in Sydney and Melbourne. Should the consumer take their meritorious complaint to court instead, the costs of unsuccessfully defending litigation would be much higher for the financial firm. Higher limits would also cater for the needs of the rapidly increasing number of consumers living in multi-dwelling communities. where some insurance claims are likely to be made by the body corporate in relation to common property and one or more individual dwellings.

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 professional indemnity (**PI**) insurance.

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[3] In 2016-17, 13% of accepted small business/farm insurance disputes at FOS related to a general insurance broker: Financial Ombudsman Service, *Annual Review 2016-17*, page 76.

[4] See e.g. See joint consumer submission, *Response to the St John Report on Compensation Arrangements for Consumers of Financial Services* (July 2012); Australian Securities and Investments Commission (**ASIC**), Report 240, *Compensation for retail investors: the social impact of monetary loss* (May 2011).

[5] https://www.oic.qld.gov.au/information-for/information-privacy-officers/case-notes/how-to-put-a-price-on-damage-suffered-as-a-result-of-a-privacy-breach; https://www.adcq.qld.gov.au/complaints/resolving-complaints/complaint-outcomes.

Guarantee disputes

We strongly support the Government's announcement that there will be no monetary limits or compensation caps for disputes about whether a guarantee should be set aside where it has been supported by a mortgage or other security over the guarantor's primary place of residence.

Life insurance

There is no principled reason why the monetary jurisdiction for life insurance should differ based solely on whether a life insurance policy is held through superannuation. AFCA should have no cap on life insurance claims, consistent with existing unlimited jurisdiction of the Superannuation Complaints Tribunal (**SCT**). Alternatively, we recommend a specific limit of $2 million.

Question 4. Are there any anticipated effects on firms that will be disproportionate to any increase in specific increased monetary limits?

We have seen no evidence of disproportionate impacts on PI insurance from the proposed increases in the monetary jurisdiction. As the Ramsay Review found, the limits have been far too low for too long. By contrast, we have seen many consumers excluded from access to external dispute resolution—and often, therefore, any form of accessible justice—due to the low monetary jurisdiction.

RECOMMENDATION 1	
TYPE OF CLAIM	MONETARY LIMIT / COMPENSATION CAP
Claim limit (general)	$2 million
Compensation cap (general)	$2 million
Income stream risk	Retain specific limit and increase to $20,000 per month
General insurance broking	Remove specific limit (alternatively, retain and increase commensurate with the increase of general monetary limits)
Third party motor vehicle	Increase specific limit to $15,000
Consequential financial and non-financial loss	Remove specific limit and empower scheme to award fair and reasonable compensation within the general compensation cap (alternatively, increase limit substantially)
Life insurance	No cap (alternatively, $2 million)

Enhanced decision-making

Questions 5. What measures may assist in ensuring AFCA's decision-making processes promote consistency, while: deciding each case on its merits based on the facts and circumstances of the complaint; and maintaining the objective of achieving fairness and flexibility to adapt to changed circumstances?

Consistent with the principle of adopting what's already working well, AFCA should:

- develop and publish its approach to particular legal or procedural issues—CIO's Positions Statements and FOS's Approach documents provide well-considered and useful guidance to consumers and firms, and promote consistent, fair and predictable decision-making;
- adopt a 60-day, expedited process for simple claims;
- publish anonymised decisions.

We strongly support the existing EDR scheme's decision-making criteria 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. We want to avoid making EDR more court-like, as one of the great benefits of EDR is that it reduces the barriers to accessing justice that consumers

experience in the court system. Similarly, we don't support a shift to a system of precedence with decision-makers bound by earlier decisions, which is likely to make decision-making more complex and legalistic. Any such shift may also impede AFCA's decision-making from adapting as community expectations change and good industry practice evolves.

Question 6. Are there any other principles that may assist in ensuring AFCA provides fair, efficient, timely and independent decisions?

It is fairly easy to assess whether decision-making is timely and efficient. However, it is much harder to determine whether decision-making is fair. We have set out several principles below that may assist in ensuring AFCA provides fair decisions.

Investigation

AFCA should take an inquisitorial rather than adversarial approach when ascertaining the grounds of a dispute or complaint. Not all complainants are able to articulate in 'legal speak' their grounds of dispute properly and this may result in perceived and/or actual unfairness, particularly to unrepresented consumers. By contrast, financial firms have an inherent advantage—they have access to records and internal or external legal advice, and will be a 'repeat player' that understands the EDR process and how to best defend the claim. Case managers should therefore be more pro-active when evaluating claims to determine the actual grounds of dispute rather than the consumer's perceived dispute. This approach will ensure that AFCA's decision-making is fair, accessible and efficient and consistent.

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. All relevant documents should also be provided to the other side of the dispute before recommendations or determinations are made. 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.

Specialist advice

We recommend that AFCA utilise specialist advice from a Financial Counsellor in responsible lending and maladministration cases brought by complainants on low incomes, particularly when assessing income and expenditure. Just as a banking advisor provides the decision-manager with useful advice on the practical realities of banks, so too a Financial Counsellor should provide advice on the practical realities of people living in poverty. Decision-makers can otherwise be very disconnected from these experiences.

Progress from recommendation to determination

Some advocates have raised concerns that some unrepresented consumers are unaware that they have the right to proceed from an unfavourable recommendation at FOS to determination by an

ombudsman that may come to a different conclusion. By reference to the FOS Terms of Reference[6] (**FOS ToR**) this issue could be resolved by amending clause 8.5 to add "*If the Recommendation is partially or wholly in the FSP's favour, AFCA will clearly inform the Application of the option to request that the matter proceed to a Determination*" or similar.

Quality assessment

There can be a trade-off between the quality and timeliness of decision-making in ombudsman schemes. While timeliness is important, it should not be at the expense of quality and the fair resolution of disputes. The assessment of whether decision-making is fair and high-quality must go beyond satisfaction surveys. While surveys are useful in identifying trends, consideration must also be given to feedback from vulnerable and unrepresented consumers, and periodic external quality assessment, including file audits. External file audits can serve to challenge internal wisdom and bring a new perspective for the benefit of decision-making in future disputes. We recommend that a random selection of disputes be periodically externally quality-assessed by an external independent expert, encompassing whether the outcome was fair and legally correct, and the appropriateness of the conduct of the dispute resolution process. We recommend public transparency for the external assessment process, which would build stakeholder confidence and enhance the credibility of AFCA.

RECOMMENDATION 2: To ensure fair, timely, efficient and independent decision-making, AFCA's terms of reference should include:

- better powers to compel information and documents;
- a requirement to inform consumers of their right to proceed from a recommendation partially or wholly in favour of the financial firm to a determination of the dispute by an ombudsman.

RECOMMENDATION 3: To ensure fair, timely, efficient and independent decision-making, AFCA's operational guidance should include:

- a directive that decision-makers investigate claims, rather than taking a narrow approach to the scope of the dispute;
- guidance on the use of specialist advice from a Financial Counsellor in responsible lending disputes;
- requirements for periodic independent quality assessment and file reviews.

Use of Panels

Question 8. How should AFCA balance the advantages of using panels in certain circumstances against efficiency and service implications including cost and timeliness of its decision making?

Question 9. Are there other factors that should be taken into account when considering whether a panel should be used?

While it may not be efficient for the vast majority of determinations, expert panels are an important mechanism to ensure that AFCA delivers high quality decision-making, particularly in novel or complex cases. Even low-value claims can raise complex issues that require careful investigation, and can involve disproportionate detrimental impacts on people receiving low of fixed incomes or experiencing vulnerability.

AFCA should apply a set of factors that trigger a referral to a panel. Similar to those recommended by the Ramsay Review, we recommend the following factors:

- the legal or factual complexity of the dispute;

[6] Financial Ombudsman Service, *Terms of Reference: 1 January 2010 (as amended 1 January 2015)*.

- the amount of loss;
- whether an adverse outcome has the capacity to significantly impact on the claimant;
- whether the dispute raises a systemic issue; and
- whether the dispute raises novel issues and may set an industry standard in a particular context;
- whether the dispute relates to new or emerging products or practices;
- whether the claimant has requested the use of panel.

Question 10. How best can AFCA provide clear guidance to users about when a panel should be used?

AFCA should develop and publish a position statement or approach document on when it will consider using a panel.

RECOMMENDATION 4: In addition to the other factors recommended by the Ramsay Review, AFCA should consider using an expert panel where requested by the complainant.

Independent Reviews

Question 11. Apart from the review of the impact of the higher compensation cap, are there other aspects of AFCA's operations that should be subject to independent review within the first three years of its commencement?

Independent periodic reviews are intrinsic to the success and continual improvement of industry ombudsman schemes. The first independent review will be particularly useful for AFCA to tackle any early problems or lingering transitional issues. We recommend that AFCA's first full independent review occur not less than 3 years after operations commence, and thereafter not less than every 5 years. A similar process occurred following the merger of three EDR schemes into FOS. However, we recommend that the following issues are reviewed within 18 months:

- *Monetary jurisdiction* – The review should be focussed on whether AFCA's monetary jurisdiction is fit-for-purpose, not merely the impact on financial firms' PI insurance. Once operational, AFCA should keep and publish data on all enquiries and lodged claims are outside jurisdiction to assist this review. However, we note that many people with claims above the higher limits may not enquire or lodge a complaint with AFCA, particularly where they have received advice on the limits.

- *Jurisdictional disputes* – Beyond the monetary limits, all decisions that a dispute is outside AFCA's terms of reference should be reviewed to ensure that there are not unreasonable barriers to accessing EDR, and to ensure that consumers are not worse off than under the current framework. The timeliness of jurisdictional disputes should also be reviewed.

- *Quality assessment* – A random selection of files should be quality assessed, encompassing whether the outcome was fair and legally correct, and whether the conduct of the dispute resolution process was appropriate.

- *Accessibility and outreach* – The effectiveness of AFCA's promotion and outreach, particularly to marginalised and underrepresented communities should be reviewed to ensure the scheme is accessible.

RECOMMENDATION 5: Within 18 months of operation, AFCA should review: its monetary jurisdiction; jurisdictional disputes; the effectiveness of its accessibility and outreach; and a random selection of files as part of a quality assessment.

Exclusions from jurisdiction

Question 19. Do existing exclusions from FOS and CIO jurisdictions present any unreasonable barriers to accessing the schemes?

Yes, there are a number of exclusions in the FOS and CIO jurisdiction that unfairly deny access to EDR. There are also gaps in coverage where firms are not required to be a member of an EDR scheme approved by the Australian Securities and Investments Commission (**ASIC**) as a licensing condition. This includes firms that provide debt management, negotiation, budgeting or credit repair services, administer debt agreements under Part IX of the *Bankruptcy Act 1966* or provide unregulated loans for small businesses and managed investment schemes. In some cases, the firm is a member of an EDR scheme due to its other activities (for example, if it provides consumer credit) but the particular product or service is not covered. For example, some debt management services provided by don't fit within the definition of 'financial service'. We expand on these issues in response to Question 24, below.

Dealer-issued warranties

Through our case work and contact with people using Consumer Action's website DemandARefund.com, advocates have noticed an increase issues relating to dealer-issued warranties. It appears providers consider that they do not fall within the *Corporations Act 2001*. The warranties purport to be provided by the dealer and administered by the warranty company.

We are concerned that these products provide extremely poor value for money and vulnerable consumers are often left to pay the significant cost. Even where a claim is paid, the financial limits on the products mean the payment is often insufficient to cover the cost of repairs. Further, not all parts are covered. Anecdotally, it appears some dealers use the existence of cover (or lack thereof) to avoid accepting liability under the ACL.

Consumer Action has seen examples of unfair sales pressure, for example:

- A female customer instructs that she refused to buy a warranty. She says that the dealer went out to talk to her husband, who was not in the car yard office at the time, then came back and told her that her husband thought she should buy it for peace of mind. She felt she had no choice but to agree. According to the customer, the warranty provider and the dealer subsequently refused to provide a refund that the customer requested only a week later. The customer then lodged a complaint with the Department of Commerce in WA and ultimately the dealer agreed to provide a partial refund, but she had to prepare to litigate in the Magistrates' Court in WA. Most people are unable or unwilling to do this and so do not receive a refund.
- According to another DemandARefund.com user, the dealer told the customer that the warranty would improve his chances of getting a loan, which he later discovered was incorrect. He then proceeded without finance and asked the dealer to remove the warranty. He alleges that the dealer told him he could only do this if he paid him a cash amount.

Consumer Action has seen an increase in complaints about dealer-issued warranties since the launch of DemandARefund.com in March 2016. DemandARefund.com assists people to write a letter of demand to an insurer/warranty company to claim a refund on mis-sold add-on insurance and extended warranties. Half of all claims made through DemandARefund.com are in relation to extended warranties. ASIC is proposing to introduce a deferred sales model in relation to add-on insurance and

warranties within the ambit of the *Corporations Act 2001* (ASIC Consultation Paper 294). We are concerned that this will provide greater incentive for car dealers to increase the sale of dealer-issued warranties as an alternative for revenue.

We understand the issue of whether or not dealer-issued warranties fall within the ambit of the Act has not been litigated. At present, FOS's view is that these disputes fall outside its terms of reference because its member (that is, the warranty company) only *administers* the product and the car dealer, who is not a member of FOS, is the product issuer.

Requests for refunds for mis-selling are met with referrals to the car dealer, and complaints to the dealers do not appear to be successful very often, if at all. Consumers are often unable or unwilling to proceed to a court or tribunal in the absence of access to EDR. Likewise, consumers report difficulties when making a claim and are unable to have the dispute heard by FOS.

RECOMMENDATION 6: AFCA's terms of reference should clarify that it has jurisdiction to hear disputes about dealer-issued warranties. Taking FOS's terms, one solution would be to amend 4.2 (b)(i) of the FOS terms of reference to include '*provision and administration of a Financial Service*' or similar.

Discrimination

Concerning levels of apparent disability discrimination in both the general and life insurance industries, particularly on the basis of mental health, have been widely reported. However, it is unclear from the FOS ToR whether an applicant can raise arguments based on federal discrimination law in FOS.

The *Disability Discrimination Act 1992* (Cth) (**DDA**) prohibits insurers from discriminating against a person on the basis of a disability by refusing to offer insurance or on the terms on which an offer of insurance is made unless the discrimination is based on actuarial or statistical data that is reasonable for the insurance provider to rely on, and reasonable having regard to that data and all 'other relevant factors'.[7]

Historically, claimants with multiple grounds for complaint against an insurer have elected to lodge a disability discrimination claim under the DDA (or state or territory equivalent) or lodge a claim with FOS in accordance with FOS ToR. Until recently, there has been no overlap between the two.

In 2017, FOS accepted and determined a disability discrimination complaint concerning a blanket mental illness exclusion in a travel insurance policy (Case Number: 428120). Although it is not expressly set out in its ToR, FOS has stated publicly that it will continue to consider disability discrimination claims in the context of general insurance.

The current position in relation to FOS's willingness and/or ability to consider disability discrimination claims concerning life insurance products is less clear. Paragraph 5.1(d) of the FOS ToR states that FOS does not consider disputes "*about underwriting or actuarial factors leading to an offer of a Life Insurance Policy on non-standard terms*". However, the determination of a claim of disability discrimination will necessarily involve an analysis of the actuarial and statistical data on which the

[7] Section 46 of the *Disability Discrimination Act 1992* (Cth). Similar provisions can be found in state and territory anti-discrimination legislation.

decision was based. Although it has been suggested that paragraph 5.1(e) of FOS ToR creates the exception by which such complaints can be determined by FOS,[8] this is not sufficiently clear.

There are likely to be broader jurisdictional issues that will need to be considered in consultation with the Australian Human Rights Commission should AFCA be constituted to accept discrimination complaints in the context of insurance. However, if AFCA is to accept discrimination complaints, there would appear to be no sensible basis to accept such complaints in respect of general insurance policies but to exclude them in respect of life insurance policies. Any decision to accept discrimination complaints in AFCA must be clearly and expressly articulated in its terms of reference.

RECOMMENDATION 7: If AFCA is to accept discrimination complaints in the context of insurance:

- this should be clearly and expressly articulated in AFCA's terms of reference;
- AFCA should consult with the Australian Human Rights Commission on, at a minimum, jurisdictional issues.

Family Court proceedings

It is important that AFCA's terms of reference do not unfairly exclude disputes against financial firms due to existing family law proceedings. The Treasury Fact Sheet on AFCA 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.[9]

If poorly drafted, this exclusion 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 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.

This does not mean in any way that we want to exclude consumers from being able to make complaints against firms, including creditors, after legal proceedings are initiated or following a court judgment. Please refer to our comments on this issue in response to Questions 22 and 23.

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[8] FOS ToR 5.1(e) states that FOS does not consider disputes "*about a decision to refuse to provide insurance cover except where (i) the Dispute is that the decision was made indiscriminately, maliciously or on the basis of incorrect information; or (ii) the Dispute pertains to medical indemnity insurance cover*".

[9] Australian Government, The Treasury, *Treasury Fact Sheet: The Australian Financial Complaints Authority (AFCA) — the Government's response to consultation* (November 2017): https://treasury.gov.au/consultation/c2017-232832/.

Aggregating claims

Some consumer advocates have raised concerns that the aggregation of claims within a dispute can produce unfair exclusions from EDR. One area of concern is body corporate disputes, where the individual unitholder's claim against an insurer is small but the total value across all units is above the limits. Another area of concern is in cases of multiple withdrawals from a bank account, draining an account. If unfairly applied, the aggregation of claims can operate to leave a person outside EDR jurisdiction but without funds to litigate in a court.

Not a member at the time of complaint

Consumer advocates report that the CIO Rule 10.1(b) that permits exclusion of a complaint about someone who is not a member of CIO at the time the complaint is made is too often used to exclude disputes. AFCA should take a more flexible approach.

Resolving jurisdictional disputes

Consumer advocates are concerned about the process for, and timeliness of, disputes about a decision that a complaint is outside jurisdiction. Current delays on jurisdictional disputes create unreasonable barriers to justice—EDR schemes should not raise jurisdictional issue after months or years of consideration.

We recommend that AFCA permit an internal appeal to an ombudsman from a decision that dispute is outside jurisdiction, including for superannuation disputes.

RECOMMENDATION 8: AFCA should determine jurisdictional disputes quickly and permit an internal appeal of that decision to an ombudsman.

Question 20. Is there more that could be done so that complaints lacking substance are excluded from being dealt with by AFCA?

We have seen little evidence to suggest that there is a significant issue with vexatious disputes at FOS or CIO. Of the 39,481 disputes closed by FOS in 2016-17, only 35 were classed as frivolous, vexatious, or lacking substance.[10] Rather than unmeritorious disputes progressing through EDR, we are more concerned with meritorious disputes being knocked out at an early stage by junior case managers. It important to have highly skilled staff deciding whether a dispute is within jurisdiction to ensure there are no unfair barriers to access.

There is, however, an ongoing problem with unregulated and unscrupulous providers of so-called "credit repair" services rorting the EDR system. These firms encourage people to lodge credit reporting disputes that may in fact have low merit, such as where a default has been validly listed. In our experience, consumers have often been misled by the credit repairer about their prospects of success—the problem is not a vexatious consumer but a commercial third party trying to make a quick buck. This problem is exacerbated by certain members of EDR schemes like credit reporting bureaus and mortgage brokers that refer consumers to credit repair agencies.

Few Australians understand our credit reporting system, and this low awareness is exploited by credit repair companies for profit. We have seen many examples of consumers signed up to credit repair services for a large or hidden fee (often far more than the amount in dispute) even where the credit repairer should have known the prospects of success were low. We have even seen cases where there was no adverse listing on the credit report in the first place.

[10] Financial Ombudsman Service, *Annual Review 2016-17*, page 67.

Chris's story – Credit repair

Chris called a credit repair company after seeing an ad on TV promising to wash his credit history clean. Chris had some business debt from running a dairy farm in Gippsland, and was concerned about his creditworthiness. The salesperson called back with good news: they would be able to fix his credit history! They promised to send him a booklet, forms to return, and to assign him a case manager to help fix his credit history. The salesperson said that he needed to pay over $1000 immediately, otherwise they'd have to start the process all over again.

But as Chris discovered, "they were more than happy to take the money, but they did not provide the service". In fact, Chris didn't have any defaults or incorrect listings to "fix". The credit repairer hadn't bothered to check his credit report. Chris's repeated requests for a refund were ignored until Consumer Action got involved. Chris described the credit repair industry as "vultures" that are "preying on people in the community that can least afford to be parting with money".

Source: Consumer Action Law Centre

Despite the problems with the conduct of credit repair firms, there are many valid credit reporting disputes. It must be acknowledged that there are significant problems with the credit reporting system. A 2013 survey by the Office of the Australian Information Commissioner found that 30% of Australians who had ordered their credit report found mistakes in it, and of these, only 60% were able to have the mistake corrected. In 2016-17, 26% of complaints to the CIO related to credit reporting.[11]

The problem of low merit credit repair disputes should be resolved at its source by implementing a seamless regulatory framework for all credit repair and other commercial debt management firms. It would be inappropriate and unfair were the Government to limit access to EDR for potentially valid credit reporting disputes before it implements:

- Ramsay Review Recommendation 10 that all debt management firms join EDR; and
- the commitment at the recent meeting of Australian Consumer Affairs Ministers to commence work on bringing debt management firms into the financial services regulatory framework.[12]

The problems caused by credit repair firms is set to get much worse should the Government proceed with plans to mandate comprehensive credit reporting. With more information on credit reports, more errors and more consumer confusion, business will be booming for these unscrupulous operators unless the Government moves quickly to implement long overdue regulation of the credit repair sector.

In the interim, many EDR schemes have developed useful guidance on credit repair complaints. For example, FOS can refuse to consider a dispute where the credit repair or other commercial agent is engaging in inappropriate conduct which is not in the best interests of the Applicant or fails to provide information required by FOS.[13] We support this approach for AFCA.

RECOMMENDATION 9: Introduce a seamless regulatory framework for all debt management firms.

[11] Credit & Investments Ombudsman, *Annual Report on Operations 2016-17*, page 2.
[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/.
[13] FOS ToR 6.1(d).

Question 21. What, if any, further practices should be adopted to ensure the correct balance between accessibility to the scheme and ensuring that complaints not appropriate for consideration by an EDR scheme are excluded?

The balance should always weigh in favour of inclusion, not exclusion. This aligns with the general consideration and EDR Benchmark of Accessibility.

Other issues to be addressed in the terms of reference

The terms of reference will be crucial to AFCA's 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.

RECOMMENDATION 10: The company ultimately authorised by the Minister to operate the AFCA EDR scheme should undertake consultation with consumer stakeholders before finalising its terms of reference.

Question 22. What requirements relating to accessibility should be included in AFCA's terms of reference?

It is essential that AFCA engage in effective outreach and promotion to reach vulnerable groups and ensure accessibility. This important function should be captured in AFCA's Constitution and/or operating guidance. ASIC Regulatory Guide 139, and the existing approach of FOS and CIO, provide useful guidance on features that promote accessibility.

Community outreach and scheme promotion are essential to ensure accessibility, particularly for people and communities experiencing vulnerability. Many FSPs fail to effectively inform their customers about EDR, with financial counsellors and consumer lawyers reporting that people are often unaware of FOS and CIO, even after proceeding through IDR. As recognised in ASIC RG 139.54, certain groups of consumers do not access EDR in proportion to their use of financial or credit products and services due to geographic, economic, mental health or other reasons. Some of the most vulnerable members of our community are subject to targeted and predatory provision of financial and credit services. For example, given the number of payday loans and the systemic non-compliance with the law by payday lenders,[14] the number of complaints are comparatively low. This may because payday lenders target vulnerable borrowers who may be unaware of their rights, the existence of EDR or may be facing a multiplicity of more pressing challenges, from gambling addiction to substance abuse.

Consumer advocates support the accessibility features of FOS and CIO. Both schemes are to be commended on their efforts to continuously improve the accessibility of their service. As stated in previous submissions to the Ramsay Review, EDR schemes are far more accessible than courts and tribunals. Features that improve accessibility include:

[14] For example, 54% of the payday loans reviewed by ASIC triggered the presumption that the loan was unsuitable, with the vast majority of lenders maintained no records at all to show how this presumption was rebutted. See ASIC Report 436: http://asic.gov.au/about-asic/media-centre/find-a-media-release/2015-releases/15-056mr-asic-puts-payday-lending-industry-on-notice-to-lift-standards/.

- accepting complaints by telephone[15] and assisting complainants to prepare their claim;[16]
- maintaining an accessible website and producing documents in accessible form that can be read via relevant technologies; and
- accepting complaints after a creditor has initiated court proceedings and, in limited circumstances, after judgment.

We make the following recommendations to further improve accessibility and ease of process:

- AFCA should establish and improve outreach programs to underrepresented communities, like the Electricity and Water Ombudsman NSW.[17] This should include culturally and linguistically diverse, indigenous, Deaf, and newly arrived communities.
- AFCA should engage with health and community workers. In our experience, disputes involving vulnerable clients are often activated by a family member or community worker with an established relationship with the consumer. People in situations of extreme vulnerability are more likely to remain engaged with their dispute if supported by a worker.
- AFCA should pilot a face-to-face option for the most disadvantaged and vulnerable consumers.
- AFCA should improve access to interpreters, including Auslan interpreters where relevant. For example, the first page of the online CIO complaint form asks if the person requires an interpreter. If the answer is yes, the person is then expected to complete the rest of the form without accessing an interpreter. Interpreting services should be available at the point that the consumer indicates their need for an interpreter.
- AFCA should play a greater role in obtaining documents and information from the FSP than the current scheme, particularly where the consumer faces technological or other barriers to providing documents. This will remove some of the pressure from vulnerable clients who may not understand or hold the documentation that is needed, and go some way to redressing the large power imbalance between consumers and financial firms.

Special consideration should be given to accessibility during the transition period to ensure no person, and no dispute, is left behind. There will need to be extensive community education about the new scheme, including appropriate advertising, communication with key agencies assisting consumers in financial distress and outreach to particularly vulnerable communities, such as remote Aboriginal communities.

Referral of complaints back to the firm

Financial firms should take ownership of problems that arise in their business and act quickly to satisfactorily resolve their customers' complaints. To that end, we support Ramsay Review Recommendation 9 that AFCA register and track complaints referred back to the firm for a final opportunity to resolve the dispute.

Consumers are often confused when they are referred back to IDR after lodging a complaint with an EDR scheme. If badly managed, it can result in customers accepting an inferior resolution or abandoning the dispute altogether due to complaint fatigue or a perception that nothing will be done. According to the FOS Annual Review, 48% of complaints were received post-IDR and 43% of these disputes were closed after the referral back to IDR. This is a significant number of disputes so it is vital that this process works for, rather than against, consumers.

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[15] CIO Rule 14.2.
[16] FOS ToR 6.1(b); CIO Rule 14.3.
[17] See <http://www.ewon.com.au/index.cfm/publications/newsletters/ewonews-issue-31/community-outreach/>.

Where complaints are "resolved" after referral to IDR, AFCA should have a mechanism to ensure that the outcome was fair, for example a formal sign-off by the complainant that the complaint has been resolved. It would helpful for AFCA to enquire about the consumer's satisfaction with the way the complaint was handled, not just the outcome of the complaint. This information could feed into the new IDR reporting requirements in the Bill.

RECOMMENDATION 11: AFCA should adopt the features of FOS and CIO that promote accessibility, including:

- accepting complaints by telephone;
- maintaining an accessible website and producing documents in accessible form that can be read via relevant technologies; and
- accepting complaints after a creditor has initiated court proceedings and, in limited circumstances, after judgment.

RECOMMENDATION 12: At the end of the timeframe for IDR after a referral back to the firm, AFCA should contact the complainant to confirm whether or not the firm has satisfactorily resolved their complaint including, for example, a formal sign-off by the consumer if the dispute has been resolved.

Essential features of AFCA's terms of reference

Question 23. Having regard to the current FOS terms of reference and CIO rules, what principles and topics are of sufficient ongoing significance that they should be addressed in the AFCA terms of reference?

If AFCA is to effect the Government's commitment of improving dispute resolution in financial services, its terms of reference must include and build on the beneficial features of the FOS ToR and CIO Rules[18] that have resulted from years of continuous improvement and consumer advocacy. We consider the following to be essential features of AFCA's terms of reference.

- *Hardship disputes* – The ability to hear disputes and vary contracts on grounds of hardship has been transformational.[19] In addition to hardship on regulated credit, AFCA should adopt the CIO hardship jurisdiction on unregulated credit, which will be particularly beneficial for struggling small business complainants who are not covered by the *National Consumer Credit Protection Act 2009* (Cth).[20]

- *Systemic issues function* – This involves monitoring and requiring the firm to address systemic issues, and where relevant reporting to the appropriate regulator or regulators.[21] AFCA should adopt the CIO's requirement to implement findings of systemic issues investigations and the capacity to receive systemic issues referrals that are not linked to a complaint.

- *Accept complaints after legal proceedings issued* – This has enabled many people to avoid stressful, risky and expensive litigation, particularly where the family home is at risk. This also removes any incentive for creditors to commence legal proceedings precipitously to oust the

[18] CIO, *Credit and Investments Ombudsman Rules* (10th edition) (**CIO Rules**).
[19] FOR ToR 18.1(f); CIO Rule 9.6.
[20] CIO Rule 18.1.
[21] CIO Rule 41.

jurisdiction of EDR and reduces pressure on the court system by allowing some matters to be diverted to EDR.[22]

- *Post-judgment jurisdiction* – AFCA should adopt, at a minimum, the CIO's approach to this important, limited jurisdiction to consider complaints following a court judgment. AFCA should also be able to accept a complaint after a court judgment has been set aside. For an example of the impact this can have on consumers, please refer to Anna's story in the Joint Consumer Submission to the Ramsay EDR Review Interim Report.[23]

- *Holding enforcement action while the dispute is on foot* – This is essential for EDR to provide fair and effective dispute resolution.[24] We recommend that AFCA adopt the CIO's approach to this issue, which does not permit the sale of the asset that is the subject of the dispute, such as a car. By comparison, FOS ToR 13.1(b) allows the FSP to freeze, preserve or sell the asset that is the subject of the dispute.

- *The available remedies*, including the capacity to vary or waive a debt;[25]

- *Beneficial time limits* – Where the scheme can consider a complaint outside the applicable time limit in exceptional circumstances, or where the FSP and EDR scheme agree;[26]

- *Third party rights in insurance* – Including third party beneficiaries, and third party claimants in low value motor vehicle accident disputes involving insurers;

- *Ability to obtain specialist advice* – This can greatly assist the quality, fairness and consistency of decision-making by, for example, engaging a handwriting expert to determine whether a signature was forged.[27]

- *Test case provisions* – These permit novel or contentious areas of law to be referred to a court.[28]

- *Voluntary membership* – 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 dispute resolution for their customers. EDR can be of benefit to a company, allowing it to identify and address systemic issues, thereby improving customer satisfaction.

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.

There are some other differences between the FOS ToR and the CIO Rules that AFCA should reconcile. For example:

- The CIO has jurisdiction to consider linked credit – AFCA should retain this feature;

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[22] FOS ToR 13.1; CIO Rule 17.
[23] Joint consumer submission to Review of the Financial Resolution Framework – Interim Report (3 February 2017), page 14: http://consumeraction.org.au/edr-review-interim-report/.
[24] FOS ToR 13.1; CIO Rule 17.
[25] FOS ToR 9; CIO Rule 9.
[26] FOS ToR 6.2; CIO Rule 6.4
[27] FOS ToR 17.3; CIO Rule 19.1(g).
[28] FOR ToR 10.

- The CIO approach to confidentiality is too restrictive (see CIO Rules 33 and 33.8) – we prefer the FOS approach;
- The CIO can convene a hearing of the issues under Rule 22.2 where a questions and answer format would assist in resolving the complaint – AFCA should retain this feature; and
- The CIO has the ability to suspend or expel a member for failing to comply with its Rules.[29] This power was useful in a two-scheme environment. In moving to one scheme, it is more appropriate for such breach to trigger regulatory action, such as the cancellation of a licence by ASIC in serious cases. This issue should also be considered in the context of a compensation scheme of last resort.[30]

Anna's story – Post-judgment jurisdiction

Anna sought advice from CCLSWA through her legal administrator. Anna had a court judgment against her in relation to a loan which was secured against her home. Anna had taken out the loan several years previously with the intention of starting her own business, although she had no business experience, but had used the funds for living expenses. Anna did not work and was later diagnosed with a mental illness. Anna lived in her home by herself. Anna had inherited her home from her parents when they passed away.

Anna had been served with a Property (Seizure and Delivery) Order (**PSDO**) which would allow the lender to take possession of Anna's home, leaving her homeless.

CCLSWA lodged a dispute with CIO on the basis that the lender had been dealing with Anna and not her administrator, in circumstances where it knew that an administrator had been appointed. Lodging the dispute prevented the lender from being able to execute the PSDO. This hold on enforcement gave CCLSWA enough time to provide the administrator with legal advice in relation to the loan, and to seek the opinion of a pro bono barrister in appealing the default judgment.

The complaint at CIO was closed and the parties entered into a confidential settlement.

If not for the CIO's ability to consider disputes post-judgment, CCLSWA would have been unable to prevent the PSDO from being executed unless it brought an application in the Supreme Court of WA, and Anna would have been homeless.

Source: Consumer Credit Legal Service WA

RECOMMENDATION 13: AFCA's terms of reference should include these (non-exhaustive) features:

- Jurisdiction to resolve disputes about hardship (including on unregulated credit);
- A systemic issues function, including a requirement to implement findings of systemic issues investigations and the capacity to receive systemic issues referrals that are not linked to a complaint;
- Capacity to lodge a complaint after legal proceedings have been issued and, in limited circumstances, after judgment;
- Holding enforcement action while the dispute is on foot;
- Beneficial time limits;
- The current available remedies, including the capacity to vary or waive a debt;
- Third party rights in insurance;

[29] CIO Rule 27.1.

[30] A joint consumer submission to the Ramsay Review Supplementary Issues Paper on a compensation scheme of last resort is available here: http://policy.consumeraction.org.au/2017/07/05/edr-review-supplementary-issues-paper/.

- Ability to obtain specialist advice;
- Test case provisions;
- Voluntary membership.

Question 24. Are there any matters not currently included in the FOS terms of reference/CIO rules that warrant inclusion in AFCA's terms of reference?

Industry Codes

To align with the move towards co-regulation,[31] 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:

> 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.[32]

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.

Debt management firms

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 licence requiring EDR scheme membership for most of 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.[33]

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.

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[31] Australian Government, *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/.

[32] 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.

[33] 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/.

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.

Debt agreements are at an all-time high.[34] 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)[35] advertising of debt agreements, despite the regulator's guidelines;[36]
- 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 any refund of fees from legal action would likely be distributed among creditors. In this situation, many people simply abandon their dispute against the administrator.

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 be required to join an ASIC-approved EDR scheme and establish clear and consistent IDR processes.[37]

Small business lending

At present, there are firms that lend to small businesses and sole traders that are not required to maintain membership of an ASIC-approved EDR scheme. In our experience, many people with small business loans:

- can be as unsophisticated in financial and legal matters as any individual consumer;
- hold very little bargaining power in negotiating products and services contracts; and

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[34] 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.

[35] *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.

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

[37] 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.

- are often asked to sign non-negotiable standard form contracts.

The gap in coverage for small business lending can often impact upon people who agree to give a guarantee to help a family member with a new business venture. If the business fails, this can put the family home in jeopardy.[38] It can also impact upon workers in the "gig economy", for example people with unregulated and unaffordable car loans for Uber driving.

Consideration must be given to funding appropriate legal and financial counselling services to assist small business and sole traders who cannot afford private legal advice. At present, there is minimal or no free legal advice for small business borrowers.

Hadi's story – Small business lending and emerging industries

Hadi called Consumer Action Law Centre for advice and instructed us as follows. Hadi experiences significant mental health challenges. He lives in public housing, receives the disability support pension and has over $23,000 in debts. Hadi had been receiving DSP income for several years.

Hadi says that he hired a car from a "rent-to-buy" small business lender for the purpose of driving Uber. The lender's representative was aware that he intended to use the car solely for Uber. Hadi had registered as a sole trader and received an ABN ten years ago. Prior to entering into the rent to buy finance agreement, Hadi had not used the ABN for about four years. He says his ABN was used by the small business lender for entering into the finance agreement, even though he had not run a business for many years.

The finance costs were, according to Hadi, $295 per week or $15,340 per year.

Hadi says he drove Uber for two to three weeks approximately five days a week. Hadi was not making enough money to cover the rental payments. Hadi defaulted in his rental payments and asked the lender to cancel the deal and take the car back. They initially refused but after several weeks of non-payment have agreed to take the car back.

Hadi is considering going bankrupt due to his debts, ongoing concerns in relation to his mental illnesses and limited capacity to return to work. The small business lender is not required to be a member of an EDR scheme.

Source: Consumer Action Law Centre

Lending for managed investment schemes

A further gap in EDR coverage is borrowing for certain investments, such as managed investment schemes.[39] As with lending for small business purposes, many problems can arise in lending for managed investment schemes. Please refer to the joint consumer submission to the Ramsay Review Issues Paper at page 20 for further information on this issue.

Emerging industries

AFCA's terms of reference must be flexible enough to capture emerging products and services. This may include FinTechs, new forms of "interest-free" finance such as AfterPay and Certegy, and firms

[38] For further information and case studies on the impact of disputes about guarantees over the family home for small business loans, see e.g, Consumer Credit Legal Service WA's submission to the Senate Inquiry into Consumer Protection in the Banking, Insurance and Financial Sector: https://cclswa.org.au/senate-inquiry-into-consumer-protection-in-the-banking-insurance-and-financial-sector/.

[39] Some forms of lending for investment are covered AFS laws (such as margin lending but this only applies to loans whether the value of the shares or managed investment interest is used as security) or the *National Consumer Credit Protection Act 2009* (investment in residential property).

seeking access to banking data as part of Open Banking reforms. Many of these firms are not subject to current ASIC Australian Financial Services (AFS) or credit licensing requirements, and therefore not required to join an EDR scheme.

New entrants and untested products can lead to predatory behaviour. In the financial services sector, we have seen problems arising from credit card balance transfer offers, reward points and loyalty schemes, payday lenders, consumer leases and the development of the exploitative debt management firms sector, often under the guise of 'innovation'. Appropriate consumer protections, including access to EDR, must be put in place to ensure trust and confidence in emerging industries. AFCA's terms of reference must be flexible to capture and resolve complaints about new products and services.

RECOMMENDATION 14: AFCA should report any significant breach of an applicable industry code to the relevant code monitoring body.

RECOMMENDATION 15: All debt management firms, debt agreement administrators, small business lenders, and managed investment scheme lenders should be required to maintain membership of AFCA (among other reforms).

RECOMMENDATION 16: AFCA's terms of reference should be flexible enough to include emerging and unlicensed industries.

Part 2 – Superannuation

Consumer advocates have significant concerns about the transition process for the SCT. In particular, we are concerned to ensure that the SCT is sufficiently funded for the 'run off'. With the SCT complaints averaging 796 days to determination, the SCT may not be sufficiently resourced to resolve the existing backlog of complaints by 30 June 2020. We consider that there must be an urgent injection of funding to the SCT to deal with this issue.

RECOMMENDATION 17: The SCT's funding should immediately be scaled to the number and type of complaints being managed until all cases are finalised.

Question 27. What additional arrangements could be put in place to facilitate the transition of complaints that were lodged with the SCT prior to 1 July 2018, but are not yet 'dealt with', to be considered by AFCA? At what point could a complaint be considered to be 'dealt with' by the SCT?

Without well-structured transitional arrangements, people with superannuation disputes may be left worse off. If people are able to withdraw active SCT complaints and apply to AFCA, 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.

In our view, an SCT complaint should only be considered 'dealt with' for the purpose of any exclusion from AFCA's jurisdiction at the point of a successful conciliation or the issuance of a determination[40] by the Tribunal. For all other disputes, AFCA should have a discretion to accept the complaint.

[40] By reference to the 'Life Cycle of a Complaint' on page 13 of the SCT's *Annual Report 2016-17*, in referring to a determination we mean to a determination on the merits of the dispute at the 'Review and

Part 3 – 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.

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.

Part 4 – Funding

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 costly 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."[41] 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".[42] 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."[43] The Ramsay Review also found that 'competition' between industry ombudsman schemes:

Determination' stage, not a decision of the SCT on whether a complaint is outside jurisdiction or to treat a complaint as withdrawn at the Investigation stage.

[41] Ramsay Review, *Final Report – Review of the financial system external dispute resolution framework* (April 2017), page 111 (**Ramsay Review Final Report**).

[42] Credit & Investment Ombudsman, Submission to the Ramsay Review Interim Report, page 8.

[43] Ramsay Review Final Report, page 116.

- 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.[44]

We note however, that the SCT has not received adequate funding to resolve complaints within an acceptable time for many. As such, the funding from the superannuation industry collected by a levy has not been sufficient, so we do not recommend that the amount of the current levy be used as an interim or permanent funding model.

AFCA's interim funding should facilitate smooth and timely transition, and should provide for a clear communication strategy, particularly to vulnerable consumers, including referrals to services where consumers can seek advice about the transition and their options.

RECOMMENDATION 18: AFCA should be adequately resourced to facilitate a smooth and timely transition. This should include resourcing for a clear communication strategy, and advice, for consumers on the transition, particularly for vulnerable consumers.

Part 5 – Dealing with non-superannuation legacy disputes

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.

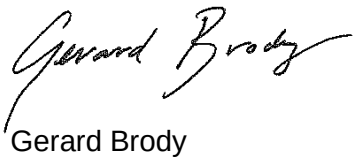
We strongly recommend that AFCA resolve legacy disputes of FOS and CIO under the terms of reference of the original scheme (the second option outlined in the Treasury Fact Sheet) to dispense with the need for dual memberships or the temporary operation of four schemes. We are also concerned that requiring 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.[45]

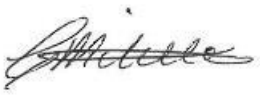
[44] Ibid page 117.
[45] Commonwealth, *Parliamentary Debates*, Senate, 14 September 2017, p 30 (second reading speech).

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

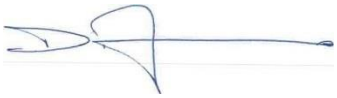


Gerard Brody
Chief Executive Officer
Consumer Action Law Centre,
Chair
Consumers' Federation of Australia



Gemma Mitchell
Managing Solicitor
Consumer Credit Legal Service (WA) Inc

Karen Cox
Coordinator
Financial Rights Legal Centre



David Ferraro
Managing Solicitor
Consumer Credit Law Centre SA

Fiona Guthrie
Chief Executive Officer
Financial Counselling Australia

Jonathon Hunyor
CEO
Public Interest Advocacy Centre

Appendix 1: 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.

Public Interest Advocacy Centre

PIAC is an independent, non-profit law and policy organisation that works for a fair, just and democratic society, empowering citizens, consumers and communities by taking strategic action on public interest issues. PIAC identifies public interest issues and, where possible and appropriate, works co-operatively with other organisations to advocate for individuals and groups affected.

Appendix B: Summary of Recommendations

RECOMMENDATION 1	
TYPE OF CLAIM	MONETARY LIMIT / COMPENSATION CAP
Claim limit (general)	$2 million
Compensation cap (general)	$2 million
Income stream risk	Retain specific limit and increase to $20,000 per month
General insurance broking	Remove specific limit (alternatively, retain and increase commensurate with the increase of general monetary limits)
Third party motor vehicle	Increase specific limit to $15,000
Consequential financial and non-financial loss	Remove specific limit and empower scheme to award fair and reasonable compensation within the general compensation cap (alternatively, increase limit substantially)
Life insurance	No cap (alternatively, $2 million)

RECOMMENDATION 2: To ensure fair, timely, efficient and independent decision-making, AFCA's terms of reference should include:

- better powers to compel information and documents;
- a requirement to inform consumers of their right to proceed from a recommendation partially or wholly in favour of the financial firm to a determination of the dispute by an ombudsman.

RECOMMENDATION 3: To ensure fair, timely, efficient and independent decision-making, AFCA's operational guidance should include:

- a directive that decision-makers investigate claims, rather than taking a narrow approach to the scope of the dispute;
- guidance on the use of specialist advice from a Financial Counsellor in responsible lending disputes;
- requirements for periodic independent quality assessment and file reviews.

RECOMMENDATION 4: In addition to the other factors recommended by the Ramsay Review, AFCA should consider using an expert panel where requested by the complainant.

RECOMMENDATION 5: Within 18 months of operation, AFCA should review:

- its entire monetary jurisdiction;
- jurisdictional disputes; and
- a random selection of files as part of a quality assessment.

RECOMMENDATION 6: AFCA's terms of reference should clarify that it has jurisdiction to hear disputes about dealer-issued warranties. Taking FOS's terms, one solution would be to amend 4.2 (b)(i) of the FOS terms of reference to include '*provision and administration of a Financial Service*' or similar.

RECOMMENDATION 7: If AFCA is to accept discrimination complaints in the context of insurance:

- this should be clearly and expressly articulated in AFCA's terms of reference;
- AFCA should consult with the Australian Human Rights Commission on, at a minimum, jurisdictional issues.

RECOMMENDATION 8: AFCA should determine jurisdictional disputes quickly and permit an internal appeal of that decision to an ombudsman.

RECOMMENDATION 9: Introduce a seamless regulatory framework for all debt management firms.

RECOMMENDATION 10: The company ultimately authorised by the Minister to operate the AFCA EDR scheme should undertake consultation with consumer stakeholders before finalising its terms of reference.

RECOMMENDATION 11: AFCA should adopt the features of FOS and CIO that promote accessibility, including:

- accepting complaints by telephone;
- maintaining an accessible website and producing documents in accessible form that can be read via relevant technologies; and
- accepting complaints after a creditor has initiated court proceedings and, in limited circumstances, after judgment.

RECOMMENDATION 12: At the end of the timeframe for IDR after a referral back to the firm, AFCA should contact the complainant to confirm whether or not the firm has satisfactorily resolved their complaint including, for example, a formal sign-off by the consumer if the dispute has been resolved.

RECOMMENDATION 13: AFCA's terms of reference should include these (non-exhaustive) features:

- Jurisdiction to resolve disputes about hardship (including on unregulated credit);
- A systemic issues function, including a requirement to implement findings of systemic issues investigations and the capacity to receive systemic issues referrals that are not linked to a complaint;
- Capacity to lodge a complaint after legal proceedings have been issued and, in limited circumstances, after judgment;
- Holding enforcement action while the dispute is on foot;
- Beneficial time limits;
- The current available remedies, including the capacity to vary or waive a debt;
- Third party rights in insurance;
- Ability to obtain specialist advice;
- Test case provisions;
- Voluntary membership.

RECOMMENDATION 14: AFCA should report any significant breach of an applicable industry code to the relevant code monitoring body.

RECOMMENDATION 15: All debt management firms, debt agreement administrators, small business lenders, and managed investment scheme lenders should be required to maintain membership of AFCA (among other reforms).

RECOMMENDATION 16: AFCA's terms of reference should be flexible enough to include emerging and unlicensed industries.

RECOMMENDATION 17: The SCT's funding should immediately be scaled to the number and type of complaints being managed until all cases are finalised.

RECOMMENDATION 18: AFCA should be adequately resourced to facilitate a smooth and timely transition. This should include resourcing for a clear communication strategy, and advice, for consumers on the transition, particularly for vulnerable consumers.