April 2021

REVIEW OF THE AUSTRALIAN FINANCIAL COMPLAINTS AUTHORITY

Joint Consumer Submission to The Treasury

TABLE OF CONTENTS

Executive summary

Thank you for the opportunity to comment on The Treasury's Review of the Australian Financial Complaints Authority (**AFCA**).[1] The following organisations have contributed to and endorsed this submission:

- Centacare Catholic Country SA
- CHOICE
- Consumer Action Law Centre
- Consumers' Federation of Australia
- Consumer Credit Legal Service (WA) Inc
- Financial Counselling Australia
- Financial Rights Legal Centre
- Indigenous Consumer Assistance Network Ltd (ICAN)
- Queensland Consumers Association
- Super Consumers Australia
- Uniting Communities Consumer Credit Law Centre SA
- Victorian Aboriginal Legal Service
- WEstjustice

This submission also includes a section on family law settlements provide by the Economic Abuse Reference Group (**EARG**).

Contributors to this submission have supported and represented thousands of people in disputes with financial services providers and superannuation funds over many years. This includes extensive experience with AFCA, as well as its predecessor schemes, the Financial Ombudsman Service (**FOS**), Credit and Investments Ombudsman (**CIO**) and the Superannuation Complaints Tribunal (**SCT**), and with courts and tribunals.

One of the most significant advances in consumer protection in the past 25 years has been the establishment of mandatory external dispute resolution (**EDR**) schemes in many industry sectors, like AFCA. In its two years of operation, AFCA has provided access to justice for thousands of people who would have otherwise been unable to resolve disputes if they had to rely on existing courts and tribunals, which are expensive, slow, and largely inaccessible without legal representation. While there are areas for continuous improvement, many consumer advocates remarked that AFCA remains the most accessible and fair forum for people to take action against their lender, insurer, or other financial services provider.

Most of the topics in the current review have been covered in detail by the 3-year policy process that led to the establishment of AFCA in 2018. This short consultation process cannot supplant that expert-led process, nor can it replicate the more detailed periodic independent reviews to be commissioned by the AFCA Board. As such, in this submission we do not seek to provide detailed responses on settled policy, nor provide a comprehensive assessment of AFCA against the benchmarks for EDR. Instead, we focus on key implementation issues, and make suggestions for continuous improvement until its next periodic review. We also make recommendations for the future expansion of AFCA's jurisdiction to ensure access to justice for banking, insurance, superannuation, and financial services consumers.

[1] https://treasury.gov.au/consultation/c2021-147524.

Summary of key points:

- Overall, AFCA is meeting its statutory objectives to be fair, efficient, timely and independent.
- Overall, AFCA's dispute resolution approach and capability generally produces good outcomes. While consistency of outcomes is important, fairness in all the circumstances will mean that outcomes can, and should, vary depending on the fairness overlay.
- Areas for improvement include:
    - avoiding an overreliance on banking (or other industry) advisors;
    - in addition to banking experts, AFCA should appoint financial counselling and family violence experts;
    - fully investigating a consumer's complaint and obtaining evidence, including expert reports;
    - including a fairness section/heading in the Preliminary Assessment and other templates to ensure a fairness overlay; and
    - improving the feedback loop between ombudsmen and case managers, increasing staff training, and enhancing the quality assurance program.
- Areas for clarification or expansion of AFCA's powers include:
    - codify AFCA's critical role in assisting consumers to lodge complaints;
    - the Federal Government amending the *Bankruptcy Regulations* to empower the Official Receiver to change the National Personal Insolvency Index to give effect to AFCA determinations.
- On debt management firms (**DMFs**) and paid representatives:
    - AFCA needs clear powers to tackle poor conduct by, and ban, DMFs;
    - AFCA needs power to refer DMFs to legal services commissioners;
    - the Federal Government should immediately progress reforms to licence debt management firms to prevent the problems created by DMFs spruiking 'credit repair'.
- Following consultation with stakeholders, AFCA should publish its approach to responsible lending complaints, and to its Fairness jurisdiction.
- On jurisdictional issues:
    - AFCA's $5,400 cap on compensation for non-financial loss should be removed or increased substantially;
    - AFCA's compensation cap should be increased in a staged manner to align with the monetary limits;
    - the monetary limits for complaints from strata schemes or owners' corporations should be increased;
    - AFCA should update its approach to the definition of 'claim' for the purposes of assessing monetary claim limits so as to better allow for the disaggregation of claims to bring more consumer complaints within jurisdiction;
    - AFCA's jurisdiction should be expanded and clarified to better capture matters with family law settlements, linked credit, and garnishee order; and
    - all jurisdictional decisions should be provided in writing.

- A further internal review mechanism is not warranted at this stage.
- The Federal Government must immediately implement its commitment to establish a compensation scheme of last resort as recommended by the Ramsay Review and the Financial Services Royal Commission.
- To improve data reporting of AFCA complaints, AFCA should:
    - reinstate the FOS relative measure of 'Complaints per 100,000 policies';
    - provide a regular overview on the complaints resolved at registration and referral stage to identify issues which are occurring in the industry; and
    - make raw complaints data exportable in an accessible file format (**.csv** or **.xml**).
- Significant changes to AFCA's role and structure should not be made following this current limited review. Any substantive changes should be the result of a thorough policy process led by an independent review panel with both consumer and industry expertise.
- The Treasury should publish a report and its recommendations from this review and provide an opportunity for feedback on any proposals.

Information about the contributors is available at **Appendix A**.

Summary of Recommendations

RECOMMENDATION 1. The Treasury should publish a report and its recommendations from this review and provide an opportunity for feedback on any proposals.

RECOMMENDATION 2. Periodic independent reviews of AFCA should be commissioned by the AFCA Board, taking account of the Consumers' Federation of Australia good practice principles, including an assessment of its performance against the general considerations in section 1051A of the AFCA Act and against ASIC RG267.

RECOMMENDATION 1. AFCA should be given a clear power to ban debt management firms and other paid representatives from acting for consumers in the AFCA process where those firms are causing harm or not acting in their client's best interests.

RECOMMENDATION 2. The Treasurer should immediately make regulations to require debt management firms to hold an Australian Credit Licence, and introduce tailored conduct obligations including an obligation to act in the client's best interests, a ban on upfront fees, and minimum training and ethical standards.

RECOMMENDATION 3. AFCA's referral powers should be extended to allow it to refer matters to state-based Legal Services Commissioners.

RECOMMENDATION 4. The Federal Government amend the Bankruptcy Regulations to empower the Official Receiver to amend the NPII to give effect to AFCA determinations.

RECOMMENDATION 5. Following consultation with stakeholders, AFCA should publish its approach to responsible lending complaints, and to its Fairness jurisdiction.

RECOMMENDATION 6. Proceed with Ramsay Review recommendation 4.2 by implementing a staged increase in the compensation cap until it aligns with the general monetary limit.

RECOMMENDATION 7. Remove the sub-limits of $5,400 on compensation for indirect financial loss and non-financial loss, and instead empower AFCA to award compensation for these types of claims within the applicable compensation cap. Alternatively, substantially increase these limits.

RECOMMENDATION 8. AFCA should update its approach to the definition of 'claim' for the purposes of assessing monetary claim limits so as to better allow for the disaggregation of claims to bring more consumer complaints within jurisdiction.

RECOMMENDATION 9. Increase the monetary limits for complaints from strata schemes or owners' corporations.

RECOMMENDATION 10. Revise AFCA's Operational Guidelines to specifically acknowledge that a family law property settlement or court order does not preclude a complaint being made to AFCA about the conduct of Financial Firm but may be relevant to the determination of loss and compensation.

RECOMMENDATION 11. AFCA ensure open communication between all parties—the consumer, lender, car dealer, insurer and/or potentially the remediation scheme—when consumers need to run parallel matters through a court/ tribunal and AFCA.

RECOMMENDATION 12. When consumers are running a claim against a trader in civil tribunal (for example, under the linked credit claims in section 278(1) of the Australian Consumer Law), the consumer should be able to put in a request to AFCA that the loan payments be put on hold and that interest not accrue until the tribunal matter is resolved.

RECOMMENDATION 13. Require AFCA to provide written reasons to complainants in all jurisdictional disputes.

RECOMMENDATION 14. The Federal Government immediately implement its commitment to establish a compensation scheme of last resort as recommended by the Ramsay Review and the Financial Services Royal Commission.

RECOMMENDATION 15. To improve data reporting of AFCA complaints, we recommend that AFCA: a) reinstates the FOS relative measure of 'Complaints per 100,000 policies'; b) provides a regular overview on the complaints resolved at registration and referral stage to identify issues which are occurring in the industry; and c) make the raw complaints data exportable in an accessible file format (.csv or .xml)

Policy settings for dispute resolution in financial services

Before providing our comments on the terms of reference for the current review, we note that the policy settings for dispute resolution in financial services were considered in detail from 2016-2018 through a multi-stage process of review and policy development, commencing with the *Review into External Dispute Resolution and Complaints Framework (***Ramsay Review**)[2] and culminating in the establishment of AFCA. The Expert Panel engaged in thorough public consultation via an issues paper, interim report, supplementary issues paper, and hosted several stakeholder roundtables to investigate best practice and alternative models for dispute resolution here and abroad. The detailed and excellent Final Report[3] and Supplementary Final Report[4] included recommendations on many of the issues under consideration here, including the complaints process, consistency of outcomes, fee model, systemic issues, and appeal mechanisms. After the Hon Scott Morrison MP (then Treasurer) accepted all 11 recommendations of the Final Report, [5] further consultation was then undertaken to implement these recommendations, including by:

- a FOS-SCT joint working group
- the AFCA Transition Team
- the Treasury on the establishment of the Australian Financial Complaints Authority
- the Treasury on exposure draft legislation to establish AFCA
- the Senate Economics Legislation Committee on the Bill to establish AFCA
- AFCA on its proposed funding model
- AFCA on its draft Rules
- ASIC on its oversight of AFCA.

Since its establishment, AFCA has run many consultations of its own, including on approach documents, the fairness framework, and other topics. Consumer advocates, like industry groups and financial firms, provided detailed submissions to the above consultations.

[2] https://treasury.gov.au/review/review-into-dispute-resolution-and-complaints-framework.
[3] https://treasury.gov.au/publication/edr-review-final-report.
[4] https://treasury.gov.au/publication/supplementary-final-report.
[5] The Hon Scott Morrison MP, Treasurer, *Media release: Building an accountable and competitive banking system*, 9 May 2017 available at https://ministers.treasury.gov.au/ministers/scott-morrison-2015/media-releases/building-accountable-and-competitive-banking-system – see *Attachment B: Government Response to the Ramsay Review*, available at: https://cdn.tspace.gov.au/uploads/sites/72/2017/05/MR044b.pdf.

There is no need to reinvent the wheel or provide industry with another opportunity to re-litigate settled policy. Indeed, the section of the AFCA Act requiring the current review only refers to the feedback of complainants, not firms.[6]

We note that the Government accepted Recommendation 2 of the Ramsay Review Final Report that the EDR body (now AFCA) be subject to 'regular independent reviews with the reports of reviews and the EDR body's response to recommendations reported publicly.'[7] We support this recommendation and encourage The Treasury to publicly report on the recommendations from the current review. Stakeholders should be provided with an opportunity to comment on proposals, and AFCA's response should also be published.

Following this statutory review, future reviews of AFCA should adhere to the well-established process where the board of an EDR scheme commissions an independent review of the scheme's performance against the EDR Benchmarks,[8] which were incorporated into the AFCA Act as the general considerations of accessibility, independence, fairness, accountability, efficiency and effectiveness.[9] These independent reviews, typically every 3-5 years, are an important opportunity to comprehensively assess and address issues within EDR schemes. Indeed, consumer group support for an ombudsman model was provided in part because these reviews, and a focus on engagement and continuous improvement, are part of the culture and process of EDR schemes but largely missing from courts and tribunals. The Consumers Federation of Australia has published a set of good practice guidelines to support effective consumer input into such reviews. The principles also set out consumer sector expectations for review processes.[10]

RECOMMENDATION 1. The Treasury should publish a report and its recommendations from this review and provide an opportunity for feedback on any proposals.

RECOMMENDATION 2. Periodic independent reviews of AFCA should be commissioned by the AFCA Board, taking account of the Consumers' Federation of Australia good practice principles, including an assessment of its performance against the general considerations in section 1051A of the AFCA Act and against ASIC RG267.

Delivering against statutory objectives

TOR1. Is AFCA meeting its statutory objective of resolving complaints in a way that is fair, efficient, timely and independent?

Yes.

Overall, we consider that AFCA is clearly meeting its statutory objective of resolving complaints in a way that is fair, efficient, timely and independent.

In preparing this submission, we consulted with a number of lawyers and financial counsellors working in consumer and community organisations and legal aid commissions. While there are areas for improvement, detailed below, and issues have arisen in individual cases, on balance, AFCA delivers fair, timely and efficient dispute resolution.

In forming this overall view, many advocates have compared AFCA to their experience of running credit, insurance, and financial services complaints through other forums, such as courts and tribunals, and through predecessor EDR schemes. For example, at the time of the Ramsay Review, both the CIO and the SCT had significant delays and

[6] *Treasury Laws Amendment (Putting Consumers First—Establishment of the Australian Financial Complaints Authority) Act 2018* (Cth) s 4(2).
[7] Ramsay Review, Final Report, Page 11: https://treasury.gov.au/sites/default/files/2019-03/R2016-002_EDR-Review-Final-report.pdf.
[8] https://treasury.gov.au/publication/benchmarks-for-industry-based-customer-dispute-resolution.
[9] Section 1051A.
[10] Consumers' Federation of Australia, *Guidelines for development and review of industry codes and EDR schemes*, 24 May 2018: http://consumersfederation.org.au/good-practice-principles/.

backlogs—up to four years in some cases. By comparison to these alternatives, AFCA appears to be managing its high case load well.

By comparison to courts and tribunals, AFCA has useful features that contribute to strong justice outcomes:

- providing accessible services, such as telephone conciliations and accepting complaints online or over the phone;
- reducing the otherwise enormous power imbalance between consumers and financial firms by assisting people to lodge their complaint;
- crucially, making complaints is free for consumers and firms cannot charge consumers indemnity costs, as they can in other fora;
- greater accessibility and faster dispute resolution compared to legalistic tribunals—AFCA can adapt its systems and resourcing much faster than courts and tribunals, so it can reduce backlogs when new issue arrives, such as the unexpected COVID-19 related travel insurance complaints in 2020;
- greater flexibility in resolving disputes, including on the basis of what is fair and reasonable not just the 'black letter' law, which can otherwise provide harsh and unjust outcomes for consumers;
- membership is a condition of holding a relevant licence, so all businesses in a licensed industry must participate;
- industry has appropriate financial incentives to minimise and prevent consumer disputes;
- the independent board has equal members with consumer and industry experience and an independent chair, so governance of the dispute resolution processes are fair and balanced;
- the schemes provide flexible solutions to disputes but also have 'teeth' because AFCA can make decisions binding upon the trader;
- a funding model that responds to demand and does not depend on appropriation bills, which can be unreliable if a problem is no longer 'flavour of the month'; and
- the systemic issues function can provide solutions for individual disputes but also help solve bigger problems at their source via systemic issues and contributing to improvements in industry practice over time.

While there is certainly room for improvement, the existing EDR framework is world class and an extremely important alternative to the court system. A robust, well-resourced AFCA with appropriate scope and design, together with a well-funded regulator and (the long-awaited) compensation scheme of last resort, can provide a free, fair, accessible, and effective dispute resolution framework in the financial system. This benefits both firms and consumers through increased trust and confidence in the financial system, and improved business conduct.

Daniel's story

Daniel is from a refugee background, and borrowed $475,000 from a lender to purchase a home for his family in 2017. Although he has very limited written and spoken English, he was assisted by a family member in interpretation at the time and was confident he could meet repayment obligations through his full-time work.

A car accident in 2018 and marital separation affected his income significantly and at this time he tried to contact the lender himself. On both occasions the lender did not proactively attempt to understand his situation and conduct hardship assessments or offer hardship assistance. Instead, it sent him default notices through its lawyer. Daniel returned from a family funeral overseas in mid-2019 to discover the locks changed on his house.

Given the hardship issues and concerns with the default notices we notified the matter to AFCA, emphasising its relative urgency.

AFCA's preliminary assessment was based on both appropriate legal interpretations of the strict compliance obligations under the NCC and National Consumer Credit Regulations (which the default notices had not complied with) with a circumstantial consideration of the lender's hardship obligations and its discretionary power to vary

the credit contract. The end result was that Daniel was granted possession of his home with immediate effect, compensation to be taken off the balance of the mortgage, and variations that would allow him to get back on top of payments on his return to the home.

While sooner is always better in a matter involving a client's homelessness/imminent loss of a home, we believe that the result secured through AFCA was more holistic and at least more timely than the equivalent court outcome could have been.

Case study provided by WEstjustice

Tabatha's story – C142115

Tabatha is a 58-year-old widow living in rural NSW. Her husband Tony was in construction, but in later life they purchased a contract to operate a bus line. One day in 2013, there was a knock on the door. It was a door-to-door insurance salesman and Tony, who was concerned about his 30 years in the sun doing construction work, signed up on the spot for what he believed were several types of life insurance that would pay for "anything but suicide".

In 2017, Tabatha contacted Financial Rights on the Insurance Law service advice line. In early 2017 she had lost her husband to skin cancer. She had claimed on the insurance, including income protection when he was sick and, on his death, the funeral insurance and death benefits. The insurer had paid substantially less then she expected on the income protection claim, and denied her claim outright for the funeral and death benefits. It turned out that her husband was not, as he believed, covered by life insurance; rather he had an accidental death benefits policy only. Tabatha had since been contacted by the insurer who offered a refund of premiums as a result of an ASIC enforceable undertaking taken against the insurer following an investigation into their sales conduct.

On her behalf we raised a complaint with the internal dispute resolution (IDR) of the insurer. The insurer had declined her claim of $200,000, and indicated the appropriate remedy was a refund of $4,764.24 in premiums.

Financial Rights represented Tabatha in AFCA against the insurer in relation to the misleading and deceptive conduct of the insurer's representative. The Insurer was not able to establish that it provided either a copy of its statement of advice to Tony, or the annual renewal statements that would have revealed that Tony was given accidental and not life cover.

Financial Rights and Tabatha were successful in their arguments and Tabatha has been awarded in excess of $220,000 from life and funeral cover as well as some refunded premiums. Tabatha was also awarded interest from the date of the original internal dispute resolution complaint. You can read the decision, by searching 546131 on the AFCA determination page.

Case study provided by Financial Rights Legal Centre

Kim's Story

Kim is an older Aboriginal woman and sole carer to her 5 grandchildren, including one with a disability. Her sole income is Centrelink.

Kim instructed CCLSWA to bring a dispute to AFCA in late 2018, about her car loan.

CCLSWA claimed the car loan was unaffordable and the lender had breached responsible lending obligations. The lender denied the claims and the case went to conciliation in early 2019.

The conciliation was particularly stressful as Kim had no option but to bring her youngest grandchild (age 3) with her to the telephone conciliation at CCLSWA's office in Perth.

AFCA's conciliator and case manager ran the conciliation with independence, efficiency and in a way that was fair and considerate to Kim's circumstances—particularly the significant noise and distraction understandably associated with Kim's granddaughter's presence. Kim was also anxious to avoid a fine for parking with limited time outside CCLSWA's office.

The conciliator responded to Kim's circumstances with understanding, arranging with both parties' consent, for a 15-minute break at one point for Kim to manage her granddaughter's needs and her car parking concerns. This meant Kim could return to the conciliation with focus. This flexible approach reflected a great understanding of fairness, particularly where there is a significant power imbalance between the parties.

Case study provided by Consumer Credit Legal Service (WA) Inc

As demonstrated by Kim's story, AFCA provides more accessible, timely, cost-effective, and fair outcomes for our clients who are experiencing a situation of vulnerability, rather than going through a court or tribunal process. CCLSWA, like many community legal centres, does not have the capacity to provide resource intensive court representation. We find that we can often achieve positive outcomes for our clients through AFCA without incurring costly legal and court fees.

The prohibitively high cost associated with the court process means that low value claims may not be pursued, despite their merits. The ability to resolve these types of complaints through AFCA removes "cost" as a barrier to justice for these aggrieved consumers. The cost-effectiveness of AFCA is not just beneficial for consumers, financial counsellors, and community legal centres, but also for firms—which would otherwise face much higher legal costs and longer delays—and for the justice system generally, by removing these types of claims from already overburdened courts and tribunals. We strongly consider that AFCA being free for consumers is an essential feature of the external dispute resolution scheme and maintaining access to justice, and overall fairness for consumers.

Further, financial firms cannot charge indemnity costs whilst AFCA determines a matter. Take, the Supreme Court of NSW possessions list – consumers who file a defence or negotiate are invariably charged indemnity costs under the mortgage. The same dispute in AFCA will have no cost to the consumer, which ensures the consumer is more likely to be able to overcome the hardship and retain the home or sell with dignity.

While it is still developing, we have seen some good early decisions under AFCA's fairness framework. For example, Determination 617615,[11] which involved a credit reporting dispute in the circumstances of family violence, is a good example of how AFCA's fairness approach can provide for fairness in all the circumstances, when the 'black letter' law may have resulted in a harsh and unfair outcome.

Areas for improvement

We appreciate that AFCA has faced challenges beyond its control in the last 2 years—from an incredibly short deadline for the merger of the existing schemes (a mere 6 months compared to the 18-month merger of the ombudsman schemes that resulted in the creation of FOS) to COVID-19, and the large influx of staff needed to respond to AFCA's expanded jurisdiction, legacy complaints jurisdiction, legacy caseload from the CIO and FOS, and high complaint volumes following the Financial Services Royal Commission.

With the goal of continuous improvement—a longstanding feature of EDR scheme reviews—community lawyers and financial counsellors identified the following areas for improvement, noting that some of these matters are currently being addressed by AFCA.

[11] https://service02.afca.org.au/CaseFiles/FOSSIC/617615.pdf.

Timeliness

There will always be a trade-off between speed, cost, and quality of decision-making in any dispute resolution forum. While AFCA is generally timely, we considered some improvements would assist in better meeting this balance.

- Ensuring there is no pressure on staff to close cases early, without a sufficient investigation of the consumer's complaint—for example, ensuring consumers do not need to use magic words like 'maladministration'.
- Communicating to caseworkers and consumers the expected timeframes for preliminary assessments and determinations.
- Allowing flexibility for consumers and under-resourced caseworkers to seek extensions of time for providing information and documents. We are conscious that people in vulnerable and difficult situations who are self-representing at AFCA may not understand their rights to request extension of deadlines or may face barriers in doing so. Financial counsellors can also have high caseloads and/or only work part-time and report that AFCA time pressures can pose challenges for them.
- Where delays do arise, AFCA should review its process to identify and expedite complaints and matters awaiting a determination for people who are in difficult circumstances (for example, experiencing family violence, financial hardship, or housing insecurity) or where the impact of the potential compensation is very high for the consumer (for example, those who are struggling to make ends meet).
- Where complaints move between streams or case managers, those complaints should be prioritised, with the new case manager being given sufficient time in their workload to get across the matter quickly.

Staff training and quality assurance

In our experience of AFCA to date, occasional issues with decision-making tend to be with newer case managers, somewhat to be expected given the large influx of staff, high complaint numbers, and short transition period. In its next phase of operation, AFCA should seek to embed processes to support high-quality decision-making at all levels.

We are concerned that some complainants may drop out of the AFCA process as a result without ever reaching a determination despite having a meritorious complaint, particularly those who are vulnerable or are already suffering complaint fatigue. Consumers can be discouraged from continuing at AFCA at various stages:

- They may be discouraged from lodging a complaint, because the frontline staff do not believe it is within jurisdiction and are not empowered to escalate concerns to senior staff (and have refused to do so when specifically asked to);
- Conciliators can express a dim view of the merits of a complainant's case, diminishing any changes of successful resolution;
- Preliminary Assessments are sometimes incomplete or fail to take into account all of the consumer's issues.

AFCA has committed to a range of staff training and development initiatives, which is important, but these must filter down to all staff. AFCA should emphasise ongoing staff training on understanding vulnerability and applying it to processes and decision making, acknowledging that best practice is constantly evolving with new research and practices, for example with family violence.

We support measures to improve AFCA's quality assurance program and to make it more transparent. AFCA should improve the feedback loop between highly skilled Ombudsman and newer and junior staff, particularly

where a determination overturns a preliminary assessment on issue of law. This work—training, mentoring, reflective practice, case outtakes, updating precedents—takes committed resourcing, and a culture of quality over pressure to close files. AFCA should also expedite determinations where the impact to the consumer of any delay would be high, but not at the expense of investigation or quality decision-making.

We support the increased use of file audits, which can serve to challenge internal wisdom and bring a new perspective for the benefit of decision-making in future disputes. We suggest that the best way to do so is that a larger random selection of disputes be periodically externally quality-assessed. The quality assessment should encompass whether the outcome was fair and legally correct, as well as the appropriateness of the conduct of the dispute resolution process. If some public transparency is given to the external assessment process, this can also build stakeholder confidence and enhance the credibility of the dispute resolution scheme. AFCA could consider a process for stakeholders to recommend a file be assessed under the quality assurance program.

Fairness section on forms

To ensure case managers are turning their mind to AFCA's fairness jurisdiction, we recommend that AFCA's Preliminary Assessment and other templates have a default section on Fairness to ensure the case manager and decision-maker articulates and considers fairness issues in every matter. As described below, we also consider there is benefit for a specific AFCA Approach document on fairness, building on its Fairness Project, and/or specific articulation about fairness in all Approach documents and Fact Sheets.[12]

Investigating the matter

Consumers should not have to use legal jargon and buzzwords like 'maladministration'—instead, AFCA should fully investigate the consumer's 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 are generally a 'repeat player' that understands the EDR process and how to best articulate their response to the claim. Some caseworkers note that the 'spirit' of complaint handling and investigation can be missing in some cases—a sense that the process is 'going through the motions' in a tick box approach rather than identifying the consumer's underlying concerns in the complaint. To support this, AFCA should encourage a culture of investigation, and examine whether KPIs or other targets for staff are creating pressure to close matters, rather than fully investigate matters.

We recommend that investigation should more often include listening to call recordings and other contemporaneous evidence. This is particularly important in circumstances where complainants have particular disabilities or vulnerabilities that the financial firm claims to not to have been aware of, or where the complaint revolves around conflicting evidence about representations made.

Florence's story

Florence (name changed) is a parent of a young child. Her income is a Centrelink payment. She received a car loan to purchase a used car when she was approximately 20 years old, but she struggled with the payments after only a few months.

A few years later, Florence received a notice of a remediation scheme linked to her car loan, and stopped payments because she thought it meant the loan was finalised. She contacted the Lender by phone and also attempted to respond with documents they requested, but the Lender never received her response and removed her from the scheme.

[12] https://www.afca.org.au/about-afca/fairness/fairness-project.

After a debt collector attempted to repossess her car a couple of years after that, Florence lodged a complaint in AFCA about the remediation scheme. However, she was informed this wasn't a valid basis for complaint. Later, AFCA reviewed her matter from the lens of hardship but did not review whether it was an irresponsible loan.

Consumer Action assisted Florence to reach a settlement.

Case study provided by Consumer Action Law Centre

Overreliance on banking specialists

Consumer advocates raised concerns that case managers over-rely on the views of the banking specialists/advisors, which can lead to unfair outcomes for consumers. While we do not have specific examples, we understand that there are other industry advisers as well. Banking advisors are *not* experts on the law, or on fairness, or even on good industry practice—they are technical experts on *current* industry practice. Their input should only be one factor in a decision.

Referring to relevant experts

Applicable laws can vary state-by-state. We recommend AFCA refer to local experts on state-based laws that may apply. We also recommend that AFCA appoint other relevant experts in roles analogous to banking specialists. This should include financial counselling specialists to have the benefit of a financial counselling lens, and family violence experts from the family violence sector.

Expert reports and access to evidence

Consumers are in a power imbalance in obtaining evidence. Financial firms are well resourced and connected. AFCA is not a Court, and so it does not take evidence on oath but for many consumer disputes what they heard or saw will be their only evidence.

Whilst AFCA has the power to require a financial firm to obtain an independent expert or, in exceptional circumstances, require the firm to pay for the complainant's expert report, in our experience this is not common. Consequently, consumers are often less able to provide sufficient medical evidence, expert building or car assessments. This is further compounded by experts being unwilling to assist consumers as they do not want to interfere with their relationship with the insurer. We recommend AFCA consistently and proactively apply these benefits and to have relationships with independent experts to ensure that consumers are not unfairly impacted.

John's story – C151499

Financial Rights provided legal assistance to John in his dispute against a debt management firm (**DMF**). John sought the DMF's help to pay off his credit cards. He paid a total of almost $11,000 in fees over a period of four and a half years, only to end up in a worse position.

At the time of entering the contract, John was working in a supported employment position on account of his disability. John has an intellectual disability as well as severe mental illness.

John supplied AFCA with evidence from a psychiatrist and psychologist that post-dated his entering the relevant contract. The psychiatrist found that John suffered from, among other things, schizoid personality disorder which he had from birth. This severely impacts John's communication skills and academic abilities. John was found to be in the extremely low range, and it was noted his conditions are permanent and untreatable. Despite this the AFCA Preliminary Assessment held that the report was not contemporaneous enough to support John's complaint.

Throughout the dispute, the DMF refused to supply the recordings of its dealings with John which, we believe, was crucial evidence as to John's understanding of the service offered and the extent to which the DMF would have been aware of his disabilities. AFCA did not require the DMF to produce the recordings.

In its Preliminary Assessment, AFCA recommended that a very small portion of the fees taken by DMF be refunded to John. Because of his disabilities and mental illness, John found the IDR and AFCA process very difficult. Finding his participation in the dispute a harrowing process, John accepted AFCA's initial recommendation rather than continue the dispute.

Case study provided by Financial Rights Legal Centre

Areas for clarification or further powers for AFCA

The issues below are not problems with AFCA's operation of EDR, but rather areas for AFCA or government to clarify its role and outline particular powers.

AFCA's role in assisting consumers

It is critical that AFCA facilitate access to justice for people who may require extra help or have complex needs. When the consumer's matter is lodged and articulated with the assistance of an AFCA team member, it usually contributes to efficient identification of the issues in dispute and a faster resolution of the matter. AFCA's role in assisting consumers is essential to overcoming the huge power imbalance between consumers and financial firms. Firms often have access to internal and external legal advice, and staff that specialise in dispute resolution—the vast majority of consumers do not. Firms are repeat players in the AFCA system—they know how to articulate their case, can easily find and rely on past decisions, and have teams dedicated to dispute resolution—whereas most consumers only ever bring one claim. A recent court case queried AFCA's ability to help consumers formulate their claim.[13] The passing view expressed in that case, while not determinative of the matter, is regressive and counterproductive to a fair, efficient and effective dispute resolution scheme. The Treasury should clarify that AFCA *can and should* support consumers to lodge and articulate their claim. Doing so would contribute to AFCA meeting the general considerations of accessibility and effectiveness of the AFCA scheme under the *Corporations Act* (see s1051A(a) and (f))[14].

Debt management firms (**DMFs**)

AFCA requires stronger powers to deal with and, where warranted, ban DMFs from acting for consumers at AFCA either for a defined period or forever in appropriate circumstances. Poor conduct by such firms causes extensive harm to the consumers they represent as outlined below. It also causes additional costs for other financial firms and AFCA itself.

A summary of the problems and solutions are below, however, for detailed information, please see the recent submissions to The Treasury's consultation on licensing of DMFs,[15] and the detailed examination by the University of Melbourne of the credit repair industry in 2015.[16]

While some businesses stepped up to help Australians to recover from the COVID-19 crisis, others have simply sought to profit from people's desperate financial circumstances. Debt management firms (also known as "debt vultures") are among the most exploitative financial services businesses—promising a life free from debt but instead charging large fees, giving bad advice, and leaving people in even worse financial strife. Concerningly, approximately 1.4 to 1.9 million Australians paid a DMF last year. DMFs have a ready-made market, with 2 in 5 people struggling to pay everyday bills. With mortgage deferrals and temporary COVID-19 assistance winding up, and high advertising reach by DMFs, the number of people at risk from poor practices in the debt management sector is expected to grow in 2021.

[13] *D H Flinders Pty Ltd v Australian Financial Complaints Authority Limited* [2020] NSWSC 1690 (26 November 2020).
[14] The Explanatory Memorandum to these provisions states "When considering whether the EDR scheme is 'accessible', the Minister may consider matters such as: whether the scheme will make it easy for consumers and small businesses to lodge a complaint".
[15] For example, see the joint submission of seven consumer groups, 15 February 2021, available at: https://consumeraction.org.au/licensing-debt-management-firms-exposure-draft-regulations/.
[16] Ali, O'Brien and Ramsay, *A Quick Fix? Credit Repair in Australia*, Australian Business Law Review, Vol. 43, No. 3, pp. 179-205, 2015: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2616619.

Problems with the conduct and practices of DMFs can include:

- Not acting in their clients' best interest and failing to provide holistic advice—for example, failing to seek instructions on settlement offers; settling one debt or removing one credit report listing for high fees without regard to whether that will improve the consumer's overall position.
- Failing to inform consumers that they can resolve credit reporting disputes for free by approaching the creditor, credit reporting body, or AFCA—many people report that they would not have used a paid credit repair company if they knew they could resolve the matter themselves for free. Financial counsellors can also assist consumers in dealing with credit reporting issues.
- Slowing down dispute resolution, by not returning information in a timely way.
- Charging expensive upfront or hidden fees—often thousands of dollars and far more than the value of the dispute—and refusing refunds, meaning that customers are engaged with the firm's services early and without a proper assessment of the merits of their claim—for example, before the credit report is even accessed. Even where a credit report listing is removed, people are often stung with hidden "success" fees for each listing removed. Some firms have even required customers to sign contracts agreeing to a charge over the same home they are trying to save from repossession as a condition of the firm providing services.
- DMFs having poor understanding of the credit reporting laws, and the options to address financial hardship.
- DMFs engaging in unconscionable conduct by, for example, charging fees for credit repair services that will not assist in achieving the customer's aim of trying to save the family home or access credit because factors other than the credit report will get in the way of approval.

It is clear the problems lay with conduct of unregulated DMFs, rather than AFCA. We understand that other ombudsman services, such as energy and water ombudsman services, also experience problems with credit repair firms.

There are solutions to these problems.

First, and as a matter of priority, the Federal Government must immediately progress its proposed licensing of DMFs. We support the Federal Government moving to require some DMFs to hold an Australian Credit Licence and join AFCA. This will improve access to justice by enabling consumers to bring complaints about DMFs to AFCA. ASIC must then refuse a licence to predatory operators. We also strongly support the licensing requirement applying to firms that act behind the scenes, providing advice and making suggestions but not representing consumers in internal and external dispute resolution. This reform would see 'credit repair' companies join AFCA, and finally have a stake in the efficient and fair resolution of complaints.

Second, as part of the licensing regime, the Federal Government must introduce tailored conduct obligations for all DMFs—this was the primary recommendation of the University of Melbourne researchers.[17] Licensing alone will not stop self-serving behaviour from DMFs because, time and again, our services see problems with DMFs that *already hold an Australian Credit Licence*. The tailored rules that would best address the harm include:

- A best interests' duty;
- A ban on upfront fees;
- Requirements to signpost to the free services that can assist;

[17] Ali, O'Brien and Ramsay, *A Quick Fix? Credit Repair in Australia*, Australian Business Law Review, Vol. 43, No. 3, pp. 179-205, 2015: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2616619.

- Obligations on budgeting services and DMFs that hold client money on trust without any safeguards;
- Ongoing data collection by ASIC to better understand this currently unregulated market and assess the impact of these reforms, ahead of a 2-year review from commencement;
- Minimum educational and training obligations to ensure DMF staff understand the relevant laws and regulations apply.

The community expects nothing less. Consumer research from Quantum Market Research confirms that Australians overwhelmingly want DMFs subject to a best interests' duty, minimum education and training requirements, and a ban on advance fees.[18]

Tailored conduct rules also allow specific rules to be put in place for particular activities, like credit repair. For example, under the UK rules, a DMF offering credit repair must not (among other things):

- claim to be able to remove negative but accurate information from a customer's credit file, including entries concerning adverse credit information and court judgments; or
- mislead a customer about the length of time that negative information is held on the customer's credit file or any official register.[19]

The United Kingdom has already put in place tailored rules for its debt management industry.[20] A separate study by Monash University found that 'the UK has had better success with its stricter licensing regime that enables the regulator to intervene as new business models emerge.'[21] In the USA, by comparison, 'variations in state-based regulations and the limited scope of US federal rules have resulted in debt management firms circumventing the rules by reinventing their business models or moving their operations to less-regulated states.'[22] We have concerns that the most predatory DMFs currently operating in Australia will also seek to avoid any rules in place, including any changes at AFCA.

There is broad support for reform of DMFs across consumer and industry groups, ombudsman schemes, academia, and regulators.[23] Until this is done, these firms will continue to cause harm, inefficiency and needless cost, to consumers, financial firms and AFCA.

Referrals to regulators

Some DMFs engage in behaviour that may be captured by the bans on unqualified legal practice. AFCA should report such conduct to the relevant state legal services commissioner. AFCA's power to refer matters to regulators should be expanded to enable such referrals.

Credit reporting complaints

Importantly, we do not support harsh measures to stop people making complaints to AFCA about credit reporting issues. There have been high rates of errors on credit reports, and the opaqueness and complexity of the credit reporting system is part of the problem. Creditors and credit reporting bodies do not always make it easy for people to challenge listings—or even obtain a free copy of their credit report. Reforms to simplify credit reporting may assist. Improvements to complaint handling process at the Credit Reporting Bodies would also assist in reducing complaints to AFCA.

[18] https://consumeraction.org.au/debt-management-quantum-market-research/.
[19] FCA Handbook, Chapter CONC 8.10, Conduct of business: providing credit information services, Rule CONC 8.10.3: https://www.handbook.fca.org.uk/handbook/CONC/8/10.html.
[20] Background to the reforms here: https://www.fca.org.uk/firms/consumer-credit-research-debt-management.
[21] Vivien Chen and Michelle Welsh, *Things You Need To Know Before Using A Debt Management Company*, 2 February 2021: https://www2.monash.edu/impact/articles/legal/things-you-need-to-know-before-using-a-debt-management-company/.
[22] Ibid.
[23] See https://consumeraction.org.au/debt-management-firms-comm/.

RECOMMENDATION 1. AFCA should be given a clear power to ban debt management firms and other paid representatives from acting for consumers in the AFCA process where those firms are causing harm or not acting in their client's best interests.

RECOMMENDATION 2. The Treasurer should immediately make regulations to require debt management firms to hold an Australian Credit Licence, and introduce tailored conduct obligations including an obligation to act in the client's best interests, a ban on upfront fees, and minimum training and ethical standards.

RECOMMENDATION 3. AFCA's referral powers should be extended to allow it to refer matters to state-based Legal Services Commissioners.

Power to amend the National Personal Insolvency Index

A current limitation of the Bankruptcy Regulations is that they do not appear to give effect to certain AFCA determinations on misconduct and breaches of the law by registered Debt Agreement Administrators (**RDAAs**).

As a result of the Government's 2018 reforms to Part IX Debt Agreements,[24] registered Debt Agreement Administrators were required to join AFCA, effective from 1 January 2021. This is a critical reform to ensure the people have access to free, fair and accessible dispute resolution when their Administrator breaches the law, and to restore trust and confidence in the RDAA sector. Some RDAAs are already members. AFCA may hear disputes about RDAAs under its terms of reference.

A common problem we encounter in our casework is where RDAAs (and others) make misleading representations on the impacts and suitability of Part IXs. This can include advice on the impact of proposing or entering a Part IX on the debtor's ability to obtain credit in future, and the impact of listings on the NPII and credit reports. RDAAs are subject to the general consumer law, including prohibitions on misleading and deceptive conduct, unconscionable conduct, and requirements to provide services that are fit-for-purpose and with due care and skill – claims that may be available based on the pre-agreement conduct of the RDAA.

While a debtor could pursue these remedies through the courts, the reality is that such litigation is complex, inaccessible, expensive and risky for most people, and entirely inaccessible without legal representation. The Government has acknowledged the benefits of external dispute resolution over courts and tribunals with the establishment of AFCA, and acknowledged the need for additional consumer protections in relation to Part IX Debt Agreements with the 2018 reforms.

A recent determination of AFCA details this problem. AFCA found, among other breaches of the law, that:

> *The financial firm misled the complainant about the effect of the agreement on her credit file and her employment prospects when it told her that:*
>
> - *there would be no further impact on her credit file if she entered into the agreement because she had an existing default listing her credit file; and*
> - *a National Personal Insolvency Index listing would not affect her employment prospects.*[25]

AFCA determined that the financial firm (which is a RDAA) must 'do all things necessary to remove the listing of the complainant's name and listing from the National Personal Insolvency Index'.[26] However, we understand that the Official Receiver takes the view that it is not empowered under the Bankruptcy Regulations to remove listings to give effect to AFCA determinations to amend NPII listings.

[24] *Bankruptcy Amendment (Debt Agreement Reform) Act 2018* (Cth).
[25] Case Number 661320, 9 June 2020, accessed 21 August 2020, p 1, available at https://service02.afca.org.au/CaseFiles/FOSSIC/661320.pdf.
[26] Ibid p 2.

Where a firm engages in misleading conduct, the general principle underlying the remedy is that the consumer should be put back in the position they would have been, but for the misleading representation. Thus, the NPII listing should be removed, where the person would not have entered the Part IX if not for the misleading representation. The inability to amend NPII listings perpetuates injustice for people who have been misled by an RDAA and entered a Part IX as a result.

On one view, the Official Receiver could amend the NPII under Reg 13.04(1)(c) as being inaccurate. However, to put this beyond doubt, we recommend that the Bankruptcy Regulations be amended to specifically require the Official Receiver to give effect to determinations of AFCA. Until such reform, the intent of the Government's reforms to Part IXs will be undermined. This reform would also incentivise RDAAs to provide accurate advice to debtors in the first place.

With the COVID-19 crisis expanding the market for RDAAs, it is more important than even that people receive accurate, good quality advice on their options for managing debt, and are fully aware of the negative consequences of Part IX debt agreements.

RECOMMENDATION 4. The Federal Government amend the Bankruptcy Regulations to empower the Official Receiver to amend the NPII to give effect to AFCA determinations.

TOR1.1. Is AFCA's dispute resolution approach and capability producing consistent, predictable and quality outcomes?

Consistency of outcomes

On balance, we think that AFCA's dispute resolution approach and capability generally produces good outcomes. While consistency of outcomes is important, we note that fairness in all the circumstances will mean that outcomes can, and should, vary depending on the fairness overlay. However, we do see, from time-to-time, decisions that are not consistent, as Matthew's story demonstrates.

Matthew's Story

Matthew and his partner took out joint loans to purchase land and build their home. Matthew's partner became ill and was unable to work. As a result, Matthew and his partner began to rely on credit cards to meet their general living expenses.

Matthew's multiple credit cards offered a 0% interest-free period on any balance transfers. So, Matthew and his partner lived off his partner's credit cards, and then Matthew would transfer the balances from his partner's cards to his own credit cards, to avail of the 0% interest-free period. This increased the amount of credit available on his partner's credit cards to continue to fund their general living expenses.

Matthew contacted CCLSWA for help after he had accumulated over $60,000 of unsecured credit card debt with 3 different lenders. The debt accumulated from a variety of objectively small credit limit increases and balance transfers.

Matthew was working an unsustainable amount of overtime to supplement his income. It is apparent from the assessments provided to CCLSWA that some of Matthew's lenders assessed his income to include the unmaintainable overtime. Further, the assessments do not evidence any reasonable inquiry or steps taken by the lenders to verify Matthew's financial position.

Matthew's mental and physical health suffered because of the unsustainable amount of overtime. However, Matthew continues to work overtime as, without the additional income, he would not be able to meet his repayment obligations.

As authorised representative, CCLSWA lodged a complaint with AFCA against Lender A in relation to one of Matthew's credit cards (**CCLSWA's Case**). Concurrently, Matthew brought a complaint to AFCA in relation to his partner's credit card and their joint home loan with Lender B (**Matthew's Case**).

Both cases related to credit products obtained over the same period of time. In relation to Matthew's Case, AFCA determined that the lender had failed to comply with its responsible lending obligations and the credit card and limit increases, and home loans were unaffordable.

However, in CCLSWA's Case, AFCA determined that only the last credit card limit increase was unaffordable—despite the fact that Lender A's credit card and limit increases occurred during the same time period as the home loans and credits cards with Lender B.

The discrepancy was due in part due to AFCA including Matthew's overtime in the affordability assessment carried out in relation to CCLSWA's case, but not including it in the assessment undertaken in Matthew's Case. AFCA's justification for the discrepancy was that reasonable inquiries are scalable and that the level of inquiries required are higher for a home loan compared to an unsecured personal loan.

However, it does not logically follow that while the home loan and credit cards with Lender B were deemed unaffordable, the credit card and credit limit increases obtained concurrently with Lender A were determined to be responsibly lent.

Case study provided by Consumer Credit Legal Service (WA) Inc

We acknowledge that AFCA has grown rapidly since its establishment in 2018 and believe that this may be a contributing factor to the discrepancies we have experienced, as staff are inducted and trained. We acknowledge also that in addition to the many challenges that would ordinarily face a new organisation, AFCA's diverse staff of 800, located mostly in NSW and Victoria, have at the same time been required to respond to the challenges of working from home during the COVID-19 pandemic.

In our experience, AFCA is and open and responsive to feedback. AFCA's various consumer and industry panels provide opportunity to identify systemic issues and inform AFCA's continued improvement. We are confident that "teething issues" may be rectified by appropriate and ongoing training for staff to ensure consistent outcomes. We advocate for the expansion of AFCA's resources to ensure this outcome.

AFCA Approach documents

We support the usual process of AFCA consulting on a public approach document, which should continue. We have seen AFCA approach documents improve through consultation, and we consider that the publication of approach documents is an important mechanism to increase the transparency and consistency of determinations.

We have not had the opportunity to comprehensively review and collate consumer advocate views on each of AFCA's current approach documents. However, consumer advocates have raised concerns about AFCA's (unpublished) approach to responsible lending complaints. While we have seen some fair and flexible outcomes through conciliation, in other matters we had concerns about the internal approach to remedies for responsible lending and unjust contracts, including:

- discounts for the purported 'benefit' of use of the product, which can lead to very harsh outcomes for the consumer, no actual loss to the lender despite a finding of irresponsible lending, and in the worst cases, a windfall gain to the lender even after a finding of irresponsible lending;
- surrendering a car for car loan matters even where a consumer has paid significant fees in excess of the goods' true value;

- requirements of properties being sold, where other remedies such as life estates may be appropriate and fair in the circumstances;
- remedies for refinance matters not taking into account the principles of *Bank of Western Australia v Tannous* [2010] NSWSC 1319 or prior FOS decisions such as 217587;
- principles of fairness, including consumer liabilities being inflated as cars were sold at inflated prices or other unfair conduct of intermediaries like dealers in entering the transaction.

We consider that these issues would benefit from a public approach document, which could be consulted on with stakeholders, including consumer groups and financial firms.

Isaiah's story

Isaiah is 56-year-old Samoan man, who has a wife and 2 kids and earns about $42,000 per year. He has a $250,000 mortgage and supports the family with no Centrelink assistance. English is his second language.

In November 2015, Isaiah was encouraged by a friend to attend a car dealership, as they "assist islanders" obtain expensive cars very cheaply. At the time he had a vehicle, with an estimated trade in value of $4,000. He entered into a contract for $50,000 to purchase a vehicle. He struggled with the repayments, and in June 2017 after many defaults and difficulty he surrendered the vehicle to the financial firm.

The vehicle was subsequently sold and the shortfall was $24,000. We argued in AFCA that the loan was not responsible based on the client's financial information at the time.

AFCA's banking expert agreed with us—they assessed a deficit of $89 per month after taking into account his verifiable monthly expenses from the application. AFCA, however, applied the remedy from the AFCA approach to responsible lending on a secured vehicle, assuming the vehicle's lost value between the purchase and sale was equivalent to the benefit obtained by the client, and applying $2,500 compensation. This only reduced the $24,000 shortfall to $11,000. We were unhappy with the application of the approach. We disputed the recommendation and argued it failed to take into account the following:

a) the trade in value of $4,000 and, had the sale not occurred, our client would not have lost his former car;

b) the bad bargain entered—Isaiah did not get value for money but instead obtained an overpriced vehicle;

c) the time the client spent trying to surrender the car to the lender

We submit that the compensation should put the client back in the same position as if the poor lending decision did not occur. The recommendation was rejected and, while awaiting a determination, the bank contacted us and agreed to our resolution, which we believed was fairer, that the shortfall be waived and the bank pay our client $500 in compensation. In absence of any word from AFCA, and a risk we would not do better than the recommendation our client happily accepted the offer.

Case study provided by Financial Rights Legal Centre

As noted above, we also consider that AFCA should consult on and develop a public approach to its Fairness jurisdiction. AFCA has consulted with stakeholders as part of its Fairness Project, which it describes as contributing to "certainty about how AFCA assesses what is fair in a way that is clearly understood by all stakeholders". AFCA is currently consulting on an Engagement Charter as part of this project, which we welcome. However, we consider ultimately AFCA should be publishing its Approach, framework and tools related to its fairness jurisdiction. Such an approach should go beyond procedure fairness, and address issues of fair dealing, fair service and fair treatment, allowing a recognition of the vulnerability of particular complainants to prevent unfair outcomes.

RECOMMENDATION 5.Following consultation with stakeholders, AFCA should publish its approach to responsible lending complaints, and to its Fairness jurisdiction.

TOR1.2 Are AFCA's processes for the identification and appropriate response to systemic issues arising from complaints effective?

AFCA's systemic issues function is a critically important part of its role. We strongly support the continuation and expansion of its work, which can provide highly efficient redress and promote good industry practice.

In our experience, systemic issues investigations and remediations are easier where the problem is an error, such as a firm charging the wrong fee. It can be more difficult when the issue is a predatory business model, or a recalcitrant trader that refuses to engage in the process. However, it is these issues, while difficult, that can have the greatest impact on people's lives if resolved through systemic issues, and should be prioritised by AFCA.

Early identification of issues is also important, because it can be more difficult to find and remediate affected customers down the track. This is particularly true for people who are struggling with insecure housing, or poverty impacting their ability to maintain a constant phone service, or victim/survivors leaving situations of family violence who may deliberately change their contact details due to safety concerns.

Feedback from consumer advocates on ways to strengthen and enhance AFCA's systemic issues function include:

- Increasing transparency and reporting of outcomes—although there is some information in the annual report, additional context and detail would be helpful to understand the team's work and the changes in industry or a trader's practice, and to assist us to identify additional consumers who may be affected;
- Naming the trader, where appropriate, for example where the contravention is serious or where AFCA is unable to resolve the systemic issue with the firm;
- Maintaining a dedicated email address so that consumers and advocates can directly contact the systemic issues team about potential systemic issues.

We are aware that AFCA has commissioned a review of its systemic issues function. We suggest that The Treasury await the outcome of this work before finalising recommendations.

TOR1.3 Do AFCA's funding and fee structures impact competition? Are there enhancements to the funding model that should be considered by AFCA to alleviate any impacts on competition while balancing the need for a sustainable fee-for-service model?

We broadly support the following principles for the funding model:

- **The overall resourcing level is sustainable and sufficient to ensure timely, high quality decision-making** – adequate resourcing is critical to ensure predictable, quality, and consistent outcomes;
- **There be a user-pays element, with fees reflecting the frequency and length of complaints** – this reduces costs for financial firms that do not cause complaints, and properly incentivises firms to resolve disputes at internal dispute resolution (**IDR**) stage.
- **The funding model should not disincentivise or prevent a proper investigation of the consumer's dispute or pressure consumers to close matters early**; and
- **Critically, that AFCA remains free to consumers** – this was a key feature of the Ramsay Review recommendation accepted by government and long supported by consumer advocates. Removing the cost barrier is one significant way in which AFCA provides access to justice for any Australian with a complaint against their bank, insurer, or super fund.

While firms may raise concerns about the "costs" of AFCA, we see the other side—the needless costs that arise from firms failing to do the right thing in the first place, failing to respond appropriately in IDR, and even failing to respond to AFCA's request for documents or attend a conciliation. Frustratingly, we still see some lenders and insurers refuse to pay a valid claim, or provide basic documents (such as the contract, policy or statement of

account) within the legally prescribed timeframes, and we get no traction until an AFCA complaint is lodged. We have even seen firms contest liability at AFCA for conduct that is the subject of an active remediation scheme.

This unnecessary stalling and gaming by financial firms increases the consumer's complaint fatigue and wastes the very limited resources of our organisations, and creates extra work for AFCA.

In discussions on "cost", it's also important to recall the impacts and "cost" to the consumer of needing to escalate a complaint to AFCA (and pursue it to a determination, if necessary) can be far greater than the cost to the firm—it can mean housing insecurity, living out of their car, stress and strain on relationships and worse. For victim/survivors of family violence, it can mean the time spent chasing documents or negotiating with the firm when they could be spending this valuable time on very important steps to ensure the safety and recovery of themselves and their family from the family violence.

We also note that, on average, the cost to a firm of an AFCA complaint would be considerably less than that of court proceedings, allowing for time, the use of litigation lawyers, and the wider potential for adverse costs orders against the firm.

Firms which indicate that they resolve cases without consumer merit, due to fee schedules, must acknowledge that for a consumer to feel warranted to bring a claim to AFCA there must have been some form of ambiguity or concern in the first instance. It is also important that claims by financial firms of such behaviour are substantiated by evidence.

We also refer to our comments above on the broader reforms Government must enact to stop unscrupulous credit repair and debt management firms from causing harm to consumers, and needless cost to firms and AFCA.

Monetary jurisdiction

TOR 2. Do the monetary limits on claims that may be made to, and remedies that may be determined by, AFCA in relation to disputes about credit facilities provided to primary production businesses, including agriculture, fisheries and forestry businesses remain adequate?

Our organisations do not have sufficient experience with these types of disputes to comment. However, we do consider it important that AFCA engage appropriately with affected stakeholders on this issue.

General compensation cap

The Government accepted Ramsay Review Recommended 4.2 that, following this post-implementation review, the general compensation cap (currently $542,500) should be increased in a staged manner until it aligns with the general monetary limit (currently $1,085,000), unless the review finds evidence of a substantial lessening of competition. This refers to the current caps for credit facilities (other than for small business and primary production disputes) and the limits for 'all other claims' (e.g., insurance), noting there are specific compensation caps for other claims (insurance broking, superannuation etc).

We have not observed a substantial lessening of competition in the market. Accordingly, Recommendation 4.2 should be implemented by proceeding with a staged increase of the general compensation cap.

AFCA's monetary jurisdiction should be, as far as possible, uniform and consistent across claims, compensation, and dispute type. 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.

RECOMMENDATION 6. Proceed with Ramsay Review recommendation 4.2 by implementing a staged increase in the compensation cap until it aligns with the general monetary limit.

Non-financial and indirect financial 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.[27] Given these serious and often lasting impacts, the specific limits on indirect financial loss and non-financial loss of $5,400 are inadequate.

In particular, the very low cap on non-financial loss is in stark contrast to available 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.[28] 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 within the general compensation cap. Alternatively, this specific limit should be increased substantially.

RECOMMENDATION 7. Remove the sub-limits of $5,400 on compensation for indirect financial loss and non-financial loss, and instead empower AFCA to award compensation for these types of claims within the applicable compensation cap. Alternatively, substantially increase these limits.

Disaggregation of complaints

For the purposes of assessing whether claims are within the monetary claim limit, AFCA has the power to disaggregate claims where appropriate. Its Operational Guidance, AFCA says "We do not aggregate a number of claims into one claim just because the claims all arise from an ongoing relationship between a Financial Firm and a Complainant .... Rather, a 'claim' for the purposes of the Rules constitutes a set of events and facts that together lead to the losses, and give the Complainant the right to ask for a remedy".[29]

We have seen instances where jurisdiction is denied because AFCA considers that the claim limit has been exceeded—commonly in scam cases. Scams can often be the result of a number of smaller transactions. We have seen cases where the smaller transactions are quite different in nature (i.e., different transaction method, different times etc) yet AFCA treats all the transactions as the one 'claim'.

This may be because of the following statement in AFCA's Operational Guidance: "If the Complainant claims a bank allowed a third party to access funds from the Complainant's account without the proper authority, we are likely to treat this as one claim and will aggregate all the unauthorised withdrawals. This is because the withdrawals all arose from the same set of circumstances, that is, the bank allowing the third-party unauthorised access to funds in the account." We do not consider the final sentence to be fair nor provide for a scheme that is effective in resolving consumer complaints (as required by section 1051A(f) of the *Corporations Act*). This is because it will necessarily exclude complaints which would more effectively dealt with through AFCA rather than the cost and complexity of court proceedings.

RECOMMENDATION 8. AFCA should update its approach to the definition of 'claim' for the purposes of assessing monetary claim limits so as to better allow for the disaggregation of claims to bring more consumer complaints within jurisdiction.

[27] 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).
[28] 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.
[29] Page 158.

Complaints from strata schemes or owners' corporations

The current claims and compensation limits can restrict the ability of people to access AFCA when an unresolved disputed claim or compensation has to be made through the body corporate/owners corporation because it has the contract, and dispute, with the financial services provider.

The restrictions can occur with many types of disputes for example with investments, borrowings, and insurance. Some body corporate claims or compensation requests may exceed the current limits because they relate to:

- all members of the body corporate (for example an insurance claim for damage to body corporate property), and/or
- to several members (for example an insurance claim for damage to property individually owned by several members and caused by one event).

This is unfair and means that these consumers miss out on accessible justice. Many people now live in strata schemes (on one estimate is that there are 270,000 schemes covering 2 million individual lots)[30] and the number is growing. The current monetary limits should be increased for body corporate claims and compensation. If the limit of such claims does not increase, then AFCA should disaggregate strata claims (see above).

RECOMMENDATION 9. Increase the monetary limits for complaints from strata schemes or owners' corporations.

Other jurisdictional issues

Excluding matters with a family law settlement

The following content has been provided by the Economic Abuse Reference Group (**EARG**), which is a network of community organisations that advocates for people who have experienced domestic and family violence, including financial abuse.

EARG is concerned that AFCA uses its discretion to exclude too many credit disputes, where the conduct of an ex-partner in relation to the credit may have been taken into account in a Family Court property settlement or order.

The Family Court does not usually take into account the conduct of one of the parties in property disputes. Currently, while credit providers can be joined in these matters it is impractical, as it would increase costs and the Family Court is unlikely to consider the application of credit laws. We have called for s 90AE of the *Family Law Act* to be amended to strengthen the Court's power to deal with debts. While this may assist some of our clients, there would still be credit disputes that would need to be dealt with by AFCA.

While we understand AFCA has some concerns about potential "double-dipping", the most likely impact of AFCA refusing to consider a matter is that a victim/survivor of financial abuse continues to suffer financial loss. EARG intends to have further discussions with AFCA regarding this issue, but we believe that AFCA should accept these disputes, despite the fact that there may be some challenges in assessing the level of compensation.

AFCA's operational guidelines (including the example cited at page 143 regarding Family Law property settlement or court orders)[31] should be revised to specifically acknowledge that a Family Law property settlement or court orders do not preclude any complaint being made to AFCA regarding the conduct of a Financial Firm but may be relevant to the determination of loss and compensation.

[30] https://www.ourbodycorp.com.au/body-corporate/#:~:text=The%20concept%20of%20the%20Strata,million%20individual%20lots%20across%20Australia

[31] AFCA, Operational Guidelines, page 143: "If a Family Law property settlement or court orders are obtained between the Complainant and their spouse or de-facto partner before we have finished our consideration of a complaint, it may not be possible to continue with the complaint. This is because of the possibility that the allocation of assets and/or liabilities in the property settlement has taken into account the benefit obtained by the other party Australian Financial Complaints Authority because of the Financial Firm's error, and additional compensation through our Determination would not be appropriate."

RECOMMENDATION 10. Revise AFCA's Operational Guidelines to specifically acknowledge that a family law property settlement or court order does not preclude a complaint being made to AFCA about the conduct of Financial Firm but may be relevant to the determination of loss and compensation.

Linked credit

Car dealerships are a site of ongoing and high consumer harm. People are often mis-sold a trifecta of junk—a lemon car, irresponsible car loan, and junk add-on insurance and extended warranties.

The limitations of the linked credit provisions, and AFCA's inability to hear consumer law claims about defective goods, means that consumers often must pursue the lender through AFCA on the loan and insurance, and separately pursue the car dealer via civil tribunals about the lemon car, or via a remediation scheme. Further, any requirement to surrender the car as part of an AFCA complaint also impairs the consumer's ability to gather evidence about the defective car, such as an expert mechanic's report, which is generally needed to pursue the car dealer or manufacturer.

Timely decision-making and open communication from AFCA are critical for disputes involving cars and linked credit, which can involve time-sensitive decisions on consumer law claims against the car dealer. The delays in finalising the defective car matter can mean that interest is accruing on the irresponsible car loan.

To better assist consumers in this complex situation, we recommend that:

RECOMMENDATION 11. AFCA ensure open communication between all parties—the consumer, lender, car dealer, insurer and/or potentially the remediation scheme—when consumers need to run parallel matters through a court/ tribunal and AFCA.

RECOMMENDATION 12. When consumers are running a claim against a trader in civil tribunal (for example, under the linked credit claims in section 278(1) of the Australian Consumer Law), the consumer should be able to put in a request to AFCA that the loan payments be put on hold and that interest not accrue until the tribunal matter is resolved.

Jurisdictional disputes

AFCA should provide written reasons in jurisdictional disputes where AFCA decides it does not have jurisdiction. As described throughout this submission, AFCA is generally the most accessible forum for consumers, so decisions to exclude disputes as outside jurisdiction should not be made lightly. To aid transparency in matters where people are being denied access to AFCA, and to understand areas of consumer concern for future expansions of jurisdiction, AFCA should provide written reasons where it rejects jurisdiction.

RECOMMENDATION 13. Require AFCA to provide written reasons to complainants in all jurisdictional disputes.

Garnishee orders

AFCA Rule A.7.1.(c)(1) says that while AFCA is considering a complaint a financial firm must not take any action to recover a debt which is the subject of the complaint, including enforcement of a default judgment obtained in court. However, AFCA will not require a Financial Firm to stop a garnishee it has issued prior to a complaint being lodged, even where the complainant may have a strong case for a set aside application. This can have an immediate and harsh impact on such clients, who are left with no option but to deal with the court proceedings, with all the risks and complexities that entails, or to go bankrupt to stop the garnishee. In this case the situation was made even worse by the fact that woman was being sued interstate in contravention of regulation 36(3) of the NCCP Regulations.

AFCA's interpretation of this rule is likely to be an extension of the logic applied to home repossessions—AFCA will ask a lender to pause an application to take possession of a residential property but it will not require a lender to return a property that has already been repossessed—however a garnishee over wages/salary is not a one off execution of an order; it has an ongoing nature and an enormous impact on a debtor's to meet every day essential expenses.

In our experience many debt collectors will, upon the debtor lodging with AFCA, agree to stay a garnishee order and often provide the requested documents such as statements of claim, accounts statements and other information which assists the consumer to understand how a judgment was entered. Repayment arrangements can be entered. In other cases, steps can be taken to set aside default judgments by consent or the information will be available to assist a consumer to exercise their right to lodge an application to set aside. The process can be efficient and cost effective.

AFCA needs to reconsider its interpretation of Rule A 7.1(c)(1) in relation to garnishees, and require Financial Firms to stop a garnishee in appropriate circumstances.

Caroline's story

Caroline lives in Victoria and has no connection to NSW. She discovered a judgment debt against her in NSW when her wages were garnisheed. The debt pertains to a car loan taken out by Caroline's now ex-husband a number of years ago and the judgment is for an amount in excess of $42,000.

At the time the loan was taken out, Caroline was heavily pregnant with their third child, and was a stay at home mum. Caroline was introduced to her husband by her family when she was 15, and they married overseas when she was almost 18. Caroline was financially dependent, as her husband did not let her work. He developed a drug dependency and their life was chaotic. Caroline does not recall obtaining a loan or signing up for a credit contract—she thinks he probably presented her with documents to sign and she signed them. Caroline's husband had complete control of their finances. She understood that, as his wife, she had to do what he asked when it came to money and paperwork.

Caroline remembers that he got a car and crashed it within a short time after purchase. They separated 5 years ago and Caroline is trying to rebuild her life with a new partner. She currently works nights in a supermarket and has dependent children. Caroline says if her wages kept being garnisheed she would not be able to feed the family and keep a roof over their head. The lender initially refused to set aside the default judgment. The matter was in the general division of the Local Court. To set aside the default judgment, as well as the irregularity of obtaining judgment in a different state, the client needed a defence to the claim. Caroline had an arguable case that the loan was a breach of the responsible lending provisions of the NCCP. AFCA indicated verbally it was not able to progress the matter while a court judgment was in place, and ultimately dismissed the matter for want of jurisdiction.

Case study provided by Financial Rights Legal Centre

Internal review mechanism

TOR3. Is the scope, remit and operation of AFCA's Independent Assessor function appropriate and effective?

We broadly support the scope and remit of the Independent Assessor. It is too soon for us to say with certainty whether any changes are required.

TOR4. Is there a need for AFCA to have an internal mechanism where the substance of its decision can be reviewed? How should any such mechanism operate to ensure that consumers and small businesses have access to timely decisions by AFCA?

Internal review mechanism

No. We do not support a further internal review mechanism at this early stage. There is an existing review process, that is, AFCA makes a Preliminary Assessment and parties can seek review via a Determination made by an Ombudsman or other decision-maker. Rather than establishing a further level of internal review, we refer to our comments on TOR1 above, particularly in relation to improved staff training and quality assurance.

Finally, we note that it is hard to comment on an internal appeal mechanism without a specific proposal for its form and powers, and noting that there will be no further rounds of consultation as part of The Treasury's current review. We strongly recommend that if, contrary to our view, an internal review mechanism was to be considered, further public consultation be undertaken before its establishment.

External appeal rights

We do not support external appeal rights for firms, beyond those provided for superannuation complaints. This would be a feature stacked in favour of financial firms, which have access to internal and external legal advice, and deeper pockets to proceed through levels of appeal. As well as disadvantaging individual consumers, this would gradually skew precedent decisions in favour of financial firms, as they could choose which issues they wanted to pursue in court.

Appeals to court present significant costs risks for consumers, particularly those who own a home or other assets, and these risks could deter people from making meritorious complaints to AFCA in the first place, thereby *reducing* access to justice. AFCA is not a court, nor should it function as one. It is a dispute resolution scheme, with a critically important fairness jurisdiction. Changing these dynamics would fundamentally change the nature of the scheme and roll back the considered recommendation of the Ramsay Review Expert Panel.

In any event, appeal rights don't necessarily lead to fair and just outcomes. We also see issues with the quality of decisions from courts and tribunals. While in theory there are appeal rights, sadly the reality is that most people are unable to progress appeals in practice due to barriers including a lack of affordable legal assistance, costs risks (especially for a homeowner), and other risks. For example, where the consumer won on some claims and lost on others, pursuing the appeal may risk losing the claims on which they initially won. Further, appeal processes take years, meaning people live with uncertainty, fatigue and trauma for years. Often people are so fatigued by the initial court process that they just want it to be over, or don't want to be continuously re-traumatised, so don't pursue an appeal with merit.

Other matters

Compensation scheme of last resort

The long-overdue compensation scheme of last resort (**CSLR**) must be established immediately to ensure that all AFCA determinations for compensation are paid, where a financial firm is insolvent or otherwise fails to pay.

A series of financial scandals have left many Australians out of pocket and in some cases, resulted in the loss of the family home or a secure retirement. Scandals have not just occurred in relation to financial advice – many people have suffered uncompensated loss from the mis-selling of complicated investment products, collapse of managed investment schemes and predatory conduct by credit providers and funeral insurers. When the loss goes uncompensated, the impact on individuals and families can be severe, with flow-on costs for the community, Government, and reduced trust in financial firms. This is exacerbated where the consumer has spent considerable

time and energy pursuing a meritorious complaint through AFCA only to be left uncompensated because the firm fails to pay, or is no longer a member of AFCA.

The Federal Government did establish an unpaid determination scheme which paid consumers and small businesses who had determinations from FOS or CIO but never received payment because the financial firm was under external administration, deregistered or wound up. As described in the case studies below, this scheme made a significant impact for affected consumers.

Andrea's story

Andrea (name changed) signed up to a rent-to-buy contract for a car in mid-2011. At the time she signed up to the contract she was bankrupt and her sole income was Centrelink. Andrea understood that she would pay $100 per week and then she would own the car. Andrea paid $19 000 in payments, repairs and establishment fees and for a car with a market value of the car was just $4,000. We helped Andrea to obtain a favourable determination from the Financial Ombudsman Service (FOS) in 2014.

FOS found that the contract was consumer lease regulated under the National Consumer Credit Protection Act and that the lessor breached the responsible lending provisions because it should have been aware Andrea could not afford the payments. FOS awarded Andrea compensation of for approximately $11 000, however, it was never paid by the trader. FOS sued the trader in September 2015 for the unpaid determination and obtained default judgement. We took the claim to the Motor Car Traders Guarantee Fund but the application was rejected. The trader became insolvent.

We assisted Andrea to apply for payment under the unpaid EDR determination scheme established 1 July 2019 in response to the Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry. Andrea received payment of approximately $11,500 for the unpaid FOS determination. Andrea has told us that it was a big surprise to see the money finally in her account after so long. She has been able to use this money to buy a new washing machine, phone and sofa and has saved the rest.

Case study provided by Consumer Action Law Centre

Rebecca's story

In late September/early October 2012, Rebecca approached a 'rent-to-buy' caryard to trade in her old car and purchase a larger car. At that time, her sole source of income was Centrelink and she had no assets. She was also living in emergency accommodation and supporting three children. Due to misrepresentations by staff members, Rebecca believed that she was buying a car under finance. She traded-in her old vehicle as part of the deal. However, the lessor claimed that the agreement was for short-term rental only. At the end of 2012, the lessor repossessed the new car. The car dealer sold both her new car and her old car.

We lodged a dispute with FOS. In 2014, FOS made a determination in favour of Rebecca, finding that the lessor had engaged in misleading or deceptive conduct, irresponsible lending and inappropriate debt collection. FOS determined that Rebecca should be paid $13,071.61. FOS sued the lessor in September 2015 for the unpaid determination and obtained default judgement. We took the claim to the Motor Car Traders Guarantee Fund, but it was rejected. The lessor became insolvent.

We assisted Rebecca to apply for payment from the under the unpaid EDR determination scheme established 1 July 2019 in response to the Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry. Rebecca has now been paid $13,229.15 for the unpaid determination.

Rebecca told us that she never thought that she would get any of the money from the FOS determination, and she has put aside the money to buy a new car – the first new car in her life.

Case study provided by Consumer Action Law Centre

This need for, and design of, a CSLR was considered in detail in the Ramsay Review Supplementary Final Report, and recommendations were supported by the Financial Services Royal Commission recommended that the Ramsay Review's three principal recommendations be effected.[32] The current Federal Government agreed to establish, as part of AFCA, a forward-looking CSLR that is industry-funded, operated by the Australian Financial Complaints Authority (AFCA), extends beyond personal advice failures and has design features consistent with the recommendations of the Ramsay Review.[33] For views on the appropriate design and scope of a CSLR, please see a joint submission to The Treasury's discussion paper.[34]

The need for a CSLR is even more urgent in the context of COVID-19, with insolvencies expected to rise with the end of JobKeeper and other temporary support measures. The Federal Government must act immediately to prevent more people suffering needless harm from unpaid AFCA determinations.

RECOMMENDATION 14. The Federal Government immediately implement its commitment to establish a compensation scheme of last resort as recommended by the Ramsay Review and the Financial Services Royal Commission.

Improving AFCA data reporting

AFCA is required by ASIC to publish information about the complaints it receives and resolves including by financial firm name, and to ensure it is comparable by business size and industry sector.

AFCA's online 'Datacube' tool is an important source of comparative data for consumers and industry to understand the complaints AFCA receives. It has been a welcome introduction to ensure greater transparency and is useful to ensure financial firms are able to be held to account. However, as presented the data can not be meaningfully used by consumers to compare financial service providers.

To ensure AFCA's data is able to assist consumers, either through their direct use or through advocacy bodies, it should be improved to be more easily comparable and transparent.

Reinstate 'complaints per 100,000 policies'

Prior to AFCA's establishment, previously published comparison data was reported by 'complaints per 100,000 policies'. AFCA's decision to present data by business size distorts the relative number of complaints and significantly reduces the usefulness of the data for consumers trying to make comparisons. A stakeholder using the Datacube is not able to intuitively determine the worst performers without this ratio analysis

We have previously sought clarification on why the presentation of data has changed to broad based business size categories such as 'very large' and 'large' which do not mean much to consumers. AFCA detailed to us that the sizing information provided to them is confidential information provided by APRA.

This is not consistent with public records for the superannuation sector. APRA publishes the number of member accounts at each fund in its annual fund level statistics series. This data should be utilised to improve the Datacube.

[32] Recommendation 7.1, Final Report of the Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry, Vol 1: https://treasury.gov.au/publication/p2019-fsrc-final-report.

[33] Government Response to the Final Report of the Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry, 4 February 2019: , p 36: https://treasury.gov.au/sites/default/files/2019-03/FSRC-Government-Response-1.pdf.

[34] Consumer Action Law Centre, CHOICE, Consumer Credit Legal Service (WA) Inc, Financial Counselling Australia and Financial Rights Legal Centre, *Implementing Royal Commission Recommendation 7.1 – Establishing a Compensation Scheme of Last Resort*, 19 February 2020: https://consumeraction.org.au/establishing-a-compensation-scheme-of-last-resort/.

For example, Aware Super a 'large' fund has double the members of QSuper another 'large' fund but a very similar number of complaints (160 to 169). Their ratios per 100,000 members are 14.85 and 28.45 respectively. This context is lost in the datacube without member numbers or complaints ratios. [35]

Higher still are the complaints ratios of some medium sized funds. CARE Super has a ratio of 68.26 (157 from 230,000). A consumer using the Datacube is not able to intuitively determine the worst performers without this ratio analysis. Funds that are 'very large' or incorrectly categorised are penalised by their weight of numbers.

Reporting complaints by business size significantly reduces the usefulness of the data for consumers to compare performance of financial services firms, especially if a firm offers multiple products.

For example, when comparing complaints about travel insurance, the Commonwealth Bank is classed as 'Very Large' but their travel insurance business is relatively small. When ranked against other 'Very Large' insurance companies, the AFCA Datacube can create the misleading representation that the Commonwealth Bank has less complaints, simply due to their "Very Large" classification. This problem can be overcome by reporting complaints with the measure of 'Complaints per 100,000 policies'.

We understand that AFCA's has been hesitant to use the 'Complaints per 100,000 policies' measure due to potential commercial in confidence concerns. However, this was not an issue for FOS when they reported using this metric. Many sectors have product level data released publically, including by APRA. Additionally, firms often provide product level numbers in annual reports and shareholder information. The ability for a firm's competitors to unearth commercial information goes well beyond the AFCA Datacube. Consumers should not have to scour multiple data sources in order to retrieve data that enables them to compare firms more easily.

We recommend that more understandable size data and comparative ratios are included in the Datacube. For products where 100,000 policies may not be appropriate, other smaller ratios or likewise comparisons should be developed.

Provide information on case managed cases

Cases which are managed prior to decision are not published on AFCA's website. There is little information about the substance of these complaints or their merit other than high-level Datacube ratios.

It is important that more granular data or details are released on these cases so that trends can be identified in industry. For example, if the majority of superannuation complaints relating to account administration are being resolved prior to a decision it may be due to a level of poor disclosure that should be highlighted.

We recommend AFCA provide a regular overview on the complaints resolved at registration and referral stage to identify issues which are occurring in the industry.

Provide downloadable raw data

There is currently no way to download the AFCA complaints data to conduct analysis, or merge with other financial services sector data sets, other than by doing it manually.

In the Public Data Policy Statement, the Australian Government commits to optimise the use and reuse of public data, release non-sensitive data as open by default and to collaborate with the private and research sectors to extend the value of public data for the benefit of the Australian public. The Digital Transformation Agency provides data guidelines for Australian Government websites. [36]

We urge AFCA to make the raw data exportable in the most accessible file formats, **.csv** or **.xml**.

[35] APRA Annual fund-level superannuation statistics June 2020 and AFCA Datacube 1/7/19 to 30/6/20.

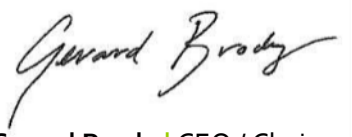
[36] https://www.dta.gov.au/help-and-advice/guides-and-tools/requirements-australian-government-websites/open-data.

RECOMMENDATION 15. To improve data reporting of AFCA complaints, we recommend that AFCA: a) reinstates the FOS relative measure of 'Complaints per 100,000 policies'; b) provides a regular overview on the complaints resolved at registration and referral stage to identify issues which are occurring in the industry; and c) make the raw complaints data exportable in an accessible file format (.csv or .xml)

Contact details

Please contact Senior 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 | CEO / Chair
CONSUMER ACTION LAW CENTRE / CONSUMERS FEDERATION OF AUSTRALIA

Karen Cox | CEO
FINANCIAL RIGHTS LEGAL CENTRE

Alan Kirkland | CEO
CHOICE

Roberta Grealish | Managing Solicitor (Acting)
CONSUMER CREDIT LEGAL SERVICE (WA) INC

Xavier O'Halloran | Director
SUPER CONSUMERS AUSTRALIA

Ian Jarratt | Vice President
QUEENSLAND CONSUMERS ASSOCIATION

Fiona Guthrie | CEO
FINANCIAL COUNSELLING AUSTRALIA

Melissa Hardham | CEO
WESTJUSTICE

On behalf of:

Alex Walters | Principal Managing Lawyer – Civil Law and Human Rights Practice
VICTORIAN ABORIGINAL LEGAL SERVICE

Jillian Williams | Operations Manager
INDIGENOUS CONSUMER ASSISTANCE NETWORK

Dr Jen Cleary | CEO
CENTACARE CATHOLIC COUNTRY SA

David Ferraro | Managing Lawyer
CONSUMER CREDIT LAW CENTRE SA

APPENDIX A – About the Contributors

Centacare Catholic Country SA

Centacare Catholic Country SA was established in the Port Pirie Diocese in 1995. Centacare Catholic Country SA provides services across much of the State, including the Yorke Peninsula and Lower North, Far North, Central Eyre Peninsula and West Coast regions. Centacare Catholic Country SA collaborates extensively with Government and non-government agencies, service provider networks, clients and community groups to ensure the ongoing relevance of our services and the effectiveness of the broader human service system.

CHOICE

Set up by consumers for consumers, CHOICE is the consumer advocate that provides Australians with information and advice, free from commercial bias. CHOICE fights to hold industry and government accountable and achieve real change on the issues that matter most.

Consumer Action Law Centre

Consumer Action is an independent, not-for profit consumer organisation with deep expertise in consumer and consumer credit laws, policy and direct knowledge of people's experience of modern markets. We work for a just marketplace, where people have power and business plays fair. We make life easier for people experiencing vulnerability and disadvantage in Australia, through financial counselling, legal advice, legal representation, policy work and campaigns. Based in Melbourne, our direct services assist Victorians and our advocacy supports a just marketplace for all Australians.

Consumers' Federation of Australia (CFA)

CFA is the peak body for consumer organisations in Australia. CFA represents a diverse range of consumer organisations, including most major national consumer organisations. CFA advocates in the interests of Australian consumers with and through its members, supports consumer representatives to industry and government processes, develops policy on important consumer issues and facilitates consumer participation in the development of Australian and international standards for goods and services. CFA is a member of, and co-chairs the Consumer Affairs Australia New Zealand's (CAANZ) Consumer Advocate Forum. CAANZ is the key forum for consumer affairs senior officials and supports the Legislative and Governance Forum on Consumer Affairs (CAF), which is the forum of Ministers that oversees consumer affairs matters. CFA is a full member of Consumers International, the international peak body for the world's consumer organisations.

Consumer Credit Legal Service (WA) Inc

Consumer Credit Legal Service (WA) is a not-for-profit charitable organisation which provides legal advice and representation to consumers in WA in the areas of banking and finance, and consumer law. We strengthen the consumer voice in WA by advocating for, and educating people about, consumer and financial, rights and responsibilities.

Financial Counselling Australia

FCA is the peak body for financial counsellors in Australia. We are the voice for the financial counselling profession and provide support to financial counsellors including by sharing information and providing training and resources. We also advocate on behalf of the clients of financial counsellors for a fairer marketplace.

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, and the Mob Strong Debt Help services which assist Aboriginal and Torres Strait Islander Peoples with credit, debt and insurance matters.

Indigenous Consumer Assistance Network

The Indigenous Consumer Assistance Network Ltd (ICAN) provides consumer education, advocacy and financial counselling services to Indigenous consumers across the nation, with a vision of "Empowering Indigenous Consumers". Aboriginal and Torres Strait Islander peoples living in regional and remote communities often experience heightened consumer disadvantage. Structural barriers and an uncompetitive marketplace create conditions in which consumer and financial exploitation occur. In its ten years of service delivery, ICAN has assisted people through a range of consumer and financial issues including: dealing with unscrupulous used car dealers, finance companies, payday lenders, telemarketers and door-to-door salesmen. In line with its vision to empower Indigenous consumers, ICAN provides Indigenous consumers with assistance to alleviate consumer detriment, education to make informed consumer choices and consumer advocacy services to highlight and tackle consumer disadvantage experienced by Indigenous peoples.

Queensland Consumers Association

QCA is a non-profit, non-political organisation established in 1976 to advance the interests of Queensland consumers. QCA is run by its volunteer members. QCA is a member of the Consumers' Federation of Australia and also works closely with a range of consumer/community organisations in Queensland and other parts of Australia.

Super Consumers Australia

Super Consumers Australia (Super Consumers), formerly known as the Superannuation Consumers' Centre , is an independent, not-for-profit consumer organisation formed in 2013. Super Consumers was first funded in 2018. We work to advance and protect the interests of low and middle income people in the Australian superannuation system. During its start up phase Super Consumers has partnered with CHOICE to deliver support services. Set up by consumers for consumers, CHOICE is the leading consumer advocate that provides Australians with information and advice, free from commercial bias.

Uniting Communities Consumer Credit Law Centre SA

The Consumer Credit Law Centre South Australia (CCLCSA) was established in 2014 to provide free legal advice 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.

Victorian Aboriginal Legal Service

The Victorian Aboriginal Legal Service Co-operative Limited (VALS) was established as a community controlled Co-operative Society in 1973. VALS plays an important role in providing referrals, advice/information, duty work or case work assistance to Aboriginal and Torres Strait Islander peoples in the State of Victoria. Solicitors at VALS specialise in Criminal Law, Family Law and Civil Law, and the service has recently established a strategic litigation team. VALS maintains a strong client service focus which is achieved through the role of Client Service Officers (CSOs) who act as a bridge between the legal system and the Aboriginal and Torres Strait Islander community.

WEstjustice

WEstjustice provides free legal advice and financial counselling to people who live, work or study in the cities of Wyndham, Maribyrnong and Hobsons Bay, in Melbourne's western suburbs. We have offices in Werribee and Footscray as well as a youth legal branch in Sunshine, and outreach across the West. Our services include: legal information, advice and casework, duty lawyer services, community legal education, community projects, law reform, and advocacy.