CHOICE

25 February 2021

Mr Mark Fitt
Committee Secretary
Senate Standing Committee on Economics
Email: Economics.Sen@aph.gov.au

Dear Senate Economics Committee

Written Question on Notice

What could be done to improve the operation of and access to the Australian Financial Complaints Authority (AFCA)?

We thank the Committee for the opportunity to respond to this question.

From the questions asked at the hearing on 19 February we understand the Committee to be interested in whether AFCA can fill the gap that would be created by repealing responsible lending laws. It is simply impossible for AFCA to replace a legislative responsible lending regime that is enforced by the Australian Securities and Investments Commission (ASIC), for the reasons set out below.

1. AFCA is not a law enforcement agency

Under the current law, ASIC is responsible for enforcing safe lending laws. Section 1(2)(g) of the *Australian Securities and Investments Commission Act 2001* states that ASIC is to:

> *take whatever action it can take, and is necessary, in order to enforce and give effect to the laws of the Commonwealth that confer functions and powers on it.*

The ASIC Act and *Corporations Act 2001* provide ASIC with a range of powers to allow it to fulfil this role in relation to responsible lending laws, including coercive investigatory powers. The Government provides significant funding to support ASIC's enforcement work.

These powers and resources allow ASIC to pursue enforcement action in relation to breaches of responsible lending laws, with the ability to seek fines of up to $10.5 million, three times the

benefit derived from the contravention, or 10% of annual turnover, up to $525 million. In February 2018, for example, as a result of ASIC action the Federal Court found that ANZ business Esanda had breached responsible lending laws and ordered ANZ to pay a penalty of $5 million.

In comparison, AFCA has no such legislative powers to investigate breaches of responsible lending laws, pursue enforcement action in the courts or seek civil penalties. AFCA is a private company limited by guarantee, authorised by the Minister to provide dispute resolution for particular types of complaints. That is completely different to the role played by ASIC under the current regime.

2. AFCA can't be expected to initiate large-scale remediation schemes

Large-scale remediation schemes are a common outcome of ASIC enforcement action. These typically involve a business entering a court-enforceable undertaking, under which it agrees to establish a scheme to compensate customers who have suffered loss as a result of the business breaching the law. These generally require the business to identify and contact affected customers, rather than waiting to see whether customers realise they have been suffered loss and lodge a complaint.

These remediation schemes come about as an alternative to litigation, which for the business involves the risks of significant legal costs, reputational damage and large civil penalties.

ASIC has negotiated the establishment of a number of successful remediation programs for breaches of responsible lending laws. The Hayne Banking Royal Commission found that between 2010 and 2018, over 590,000 people received compensation totalling over $350 million.[1]

In comparison, as noted above, AFCA cannot undertake the type of enforcement action that creates the incentive for businesses to establish large remediation schemes; nor can it enter court-enforceable undertakings with businesses about the establishment and operation of remediation schemes. Where AFCA identifies a systemic issue - affecting a class of consumers of a particular business - its role is typically to report the issue to a body such as ASIC. As the AFCA website states:

> We are not a regulator of the financial services industry. Any regulatory action that arises from a systemic issue is appropriately addressed by the relevant regulator.[2]

3. AFCA's jurisdiction is limited

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[1] Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry, Interim Report, p.35-37
[2] https://www.afca.org.au/about-afca/systemic-issues (25 February 2021)

AFCA's ability to assist consumers is limited by monetary limits and compensation caps. For claims submitted to AFCA on or after 1 January 2021, the cap for financial loss is $542,500.[3] While these may be reviewed from time to time, the Government has made it clear that monetary limits and compensation caps are expected to be a permanent feature of AFCA. This means that people and small businesses who have suffered losses that exceed these caps are unable to be compensated through the AFCA system. Their only option is to go to court - an option that will be removed if the Bill proceeds.

4. Addressing these limits to AFCA's role

AFCA would need to be completely reconstituted as a statutory authority, with extensive powers and provision of significant budget funding to address these gaps. We understand this scale of reform to be beyond the scope of the Committee's current inquiry. As a result, there is no way that AFCA could be improved that would address the significant gaps in law enforcement and compensation for consumers that would be created by the passage of the Bill.

5. Other comments - APRA's role

We also note that the Committee was interested in whether the Australian Prudential Regulation Authority's prudential standards could address the gap created by the repeal of responsible lending laws. Like AFCA, APRA cannot fill the gap that would be created by these changes, because:
- APRA does not pursue enforcement action in the courts for breach of prudential standards.
- In any case, there are no civil penalties for breaching an APRA prudential standard.
- APRA does not play a role in creating large-scale remediation schemes for borrowers.

We trust that this information is of assistance. For further information, please contact Patrick Veyret on ████████████████████

Yours sincerely

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Alan Kirkland
Chief Executive Officer
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[3] Australian Financial Complaints Authority 2021, Complaint Resolution Scheme Rules, p.41