Chapter 3

Views on the bill

Support for AFCA

3.1 Support for the establishment of a one-stop shop for financial complaints was in most cases based on the ease with which consumers would be able to use the system. A joint submission from consumer groups declares that:

> Consumer advocates are very supportive of the move to [a] new one-stop shop external dispute resolution (EDR) scheme…

and offers the view that:

> Once established, AFCA should remove inconsistency and confusion in dispute resolution, and make it easier to resolve complaints with banks, insurers, super funds and other financial institutions.[1]

3.2 Consumer representatives also welcomed the increased accountability in the new scheme, with ASIC having more power to direct the authority.[2]

3.3 ASIC observes that this is just the last stage in a process of rationalisation which has seen six finance and credit complaints schemes gradually amalgamated into the Financial Ombudsman Scheme (FOS).[3] Apparently there has been no formal evaluation of the effects of those processes.[4] However, a subsequent review of FOS found improved performance.[5]

3.4 It notes that its powers in the new arrangement will be similar to its current powers, but more flexible, and in particular will enable sanctions short of the current power to close down an EDR scheme. It also welcomes the fact that superannuation complaints will now be dealt with on a user pays model for the first time, instead of being dependent on Budget funding.

3.5 ASIC makes the further point, which is not dealt with in this bill, that a single scheme would be a better basis for a scheme of last resort compensation. The Ramsay

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1 Consumer Action Law Centre, Consumer Credit Legal Centre SA, Consumer Credit Legal Service WA, Consumers' Federation of Australia, Financial Rights Legal Centre, Financial Counselling Australia, *Submission 9* (referred to hereafter as Joint Consumer Groups), p. 1, p. 2.

2 Mr Gerard Brody, Chief Executive Officer, Consumer Action Law Centre, *Committee Hansard,* 10 October 2017, p. 5.

3 Australian Securities and Investments Commission, *Submission 2*, p. 2.

4 Mr Greg Kirk, Senior Executive Leader, Strategy Group, Australian Securities and Investments Commission, *Committee Hansard*, 9 October 2017, p. 51.

5 Australian Securities and Investments Commission, Answers to questions taken on notice from a public hearing on 9 October 2017.

review was given an additional term of reference to deal with this matter, but has not yet reported on it.[6]

3.6 There is broad support for a tightening of supervision of internal dispute regulation (IDR) schemes, largely because it will create a basis of comparison between firms.

The bill in the context of policy for the financial sector

3.7 Several submitters and witnesses took the measure to be part of a response to scandals in the banking industry.[7] Some suggested that it was a diversion from the proposal for a Royal Commission into the banking industry.[8]

3.8 However there is little in the announcements of the Ramsay inquiry and its reports, or in the second reading speech, to suggest that the measure is directly targeted towards abuses in the financial sector, as opposed to improving the existing administration of a continuing function. Further, one witness argued that the new arrangements would in fact favour banks over other, smaller players in the financial system, and so could not be construed as in any way a reaction to dissatisfaction with the behaviour of the banks.[9]

3.9 A witness from the Treasury emphasised that this measure is not about the performance of the financial system:

> The purpose of the Ramsay review was to examine the EDR schemes and determine what changes are needed to ensure that they're fit for purpose going into the future. The purpose of EDR is to provide efficient, free access for the resolution of independent disputes. Whilst the schemes do have an important role in reporting to the regulator on systemic issues that they come across, their primary purpose is not to fix issues relating to some of the scandals you've talked about.[10]

3.10 ASIC similarly pointed out that the role of the EDR schemes is to investigate individual cases and give individuals access to justice, not to mend the industry culture.[11]

3.11 One witness suggested that the measure is simply a rebranding exercise.[12] However, Ms Helen Davis of the Superannuation Complaints Tribunal in particular

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6 Australian Securities and Investments Commission, *Submission 2*, p. 3.

7 See for example Association of Securities and Derivatives Advisers of Australia Ltd, *Submission 1*, p. 2.

8 See for example Mr Raj Venga, Chief Executive Officer and Ombudsman, Credit and Investments Ombudsman, *Committee Hansard*, 9 October 2017, pp. 6–7.

9 Mr Thomas Beregi, Chief Executive Officer, Credit Corp Group, *Committee Hansard*, 9 October 2017, p. 5.

10 Ms Neena Pai, A/g Principal Adviser, Financial System Division, Treasury, *Committee Hansard, p. 58.*

11 Australian Securities and Investments Commission, *Submission 2*, p. 2.

argued that the bill contains multiple changes to how superannuation complaints are dealt with.[13]

3.12 The Government may wish to amend the bill to address the concerns raised by Ms Davis.

3.13 A consumer representative pointed out that the measure was only one of several reforms that were in the pipeline. In general those reforms were intended to make the law more effective or clearer. The EDR function is only the decision maker after the event.[14]

Opposition to the amalgamation of the complaints bodies

Concern about single approach

3.14 Several submissions opposed the creation of a single body. Organisations representing small financial players, including brokers and small lenders, and some individuals, are concerned that the operation of the scheme will be dictated by the big companies at the expense of the smaller ones, and that a one-stop shop cannot accommodate the diversity of the industry.[15] In particular, there is concern that the bigger players have more capacity to absorb administrative costs and even that there will be cross-subsidy of bigger firms by smaller ones.[16] For example, the Association of Financial Advisers said:

> It should not be lost that this is a new regime that will also impact a large number of small business financial service providers, who have much less capacity to pay, when compared to the big institutions, that seem to be emphasised in the [second reading] speech.[17]

3.15 Even entities who support the 'one-stop shop' approach have some concerns in this area. One witness asserted, 'AFCA's been designed for the needs of the banks', but went on to say that attention to this in the drafting of the terms of reference, and careful supervision could make the model work.[18]

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12 Mr Raj Venga, Chief Executive Officer and Ombudsman, Credit and Investments Ombudsman, *Committee Hansard*, 9 October 2017, p. 7.

13 Ms Helen Davis, Chairperson, Superannuation Complaints Tribunal, *Committee Hansard*, 9 October 2017, p. 20.

14 Ms Karen Cox, Coordinator, Financial Rights Legal Centre, *Committee Hansard*, 10 October 2017, p. 4.

15 See for example Australian Collectors and Debt Buyers Association, *Submission 3*, p. 5; Mr Ivano Lino, *Submission 27*; Mr Michael Horne, *Submission 28*.

16 For example, Commercial Asset Finance Brokers Association of Australia, *Submission 22*, p. 4, p. 5, endorsed by Council of Small Business Australia, *Submission 24*; Credit and Investments Ombudsman, *Submission 15*, p. 4.

17 Association of Financial Advisers, *Submission 23*, p. 2.

18 Ms Anne Scott, Principal Adviser, Australian Small Business and Family Enterprise Ombudsman, *Committee Hansard*, 9 October 2017, p. 29.

3.16 Several of these submitters emphasised the difference in scale and kind of complaints to the Credit and Investments Ombudsman compared to those to the Financial Ombudsman Service. The CIO has 24,000 members, 97 per cent of which are sole traders and small businesses.[19]

3.17 While the Australian Collectors and Debt Buyers Association claims that its members have very good complaint handling processes and few progress to EDR, it also notes that its members make up over 40 per cent of the complaints volume of the CIO. Each complaint even now has a high cost of settlement compared with the value of the transaction.[20] The Association is worried that there will be anti-competitive consequences because only the bigger companies will be able to absorb any failures and inefficiencies of the new body. It also suggests that there is an implicit focus on financial advice in the new arrangements as opposed to the transaction services its members provide.[21]

3.18 Some submitters are more sweeping. For example:

> MFAA [Mortgage and Finance Association of Australia]…believes that the entire premise on which [the legislation] is written—the establishment of a single scheme for EDR—remains an ill-advised one…[There is] no evidence of genuine customer confusion or detriment, and as such the Ramsay Review should not have contended that there was any inherent complexity from the existence of two schemes…[22]

and:

> The Bill subjects all financial services providers, other than those in the superannuation industry, to uncertain and unpredictable decision-making by an unaccountable single private body.[23]

3.19 More specifically, the Self Managed Super Fund (SMSF) Association was concerned about costs rising for financial advisers and counsellors, because these would flow on to charges for their members.[24]

3.20 Representatives of ASIC argued that the efficiencies of having a single body would put downward pressure on costs, which could flow into lower charges for members. Further, the costs involved in an ombudsman model are lower than those for a legal model, so to the extent that the new body replaces a legal body costs will be lower.[25]

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19 Credit and Investments Ombudsman, *Submission 15*, p. 5.

20 Australian Collectors and Debt Buyers Association, *Submission 3*, Annexure B, pp. 5–7;

21 Australian Collectors and Debt Buyers Association, *Submission 3*, p. 6.

22 Mortgage and Finance Association of Australia, *Submission 5*, p. 2, p. 6.

23 Credit Corp Group Ltd, *Submission 11*, p. 1.

24 Self Managed Super Fund Association, *Submission 31*, p. 2.

25 Mr Greg Kirk, Senior Executive Leader, Strategy Group, Australian Securities and Investments Commission, *Committee Hansard*, 9 October 2017, pp. 51, 53.

Arguments for keeping superannuation separate

3.21 It was argued that, because the resolution of disputes over superannuation is under administrative law, while complaints against financial service providers are questions of contract or consumer law, a separate superannuation body should be maintained. Such a body would have specialist expertise that is not relevant to most financial complaints:

> On a practical level, the skill sets and technical knowledge of the staff of the SCT and any industry-based dispute resolution scheme are going to be very different. A different approach and culture is required and it is difficult to imagine how the two could co-exist in the same scheme.[26]

3.22 The Association of Superannuation Funds of Australia would also prefer to keep a separate body. However, if that was not going to happen, the complexity of superannuation issues suggested that there should be provision for a formal review of the new arrangements after one year.[27]

3.23 The Community and Public Sector Union, supported by the Australian Council of Trade Unions, said there was little case for inclusion of the Superannuation Complaints Tribunal in a single scheme:

> …the issues they have identified with the SCT are because of underfunding and a failure to modernise governance arrangements…[It would be better] to properly fund the current tribunal which is independent, robust and offers Australians a high level of consumer protection and enforceability that the proposed AFCA will not provide.[28]

3.24 However, the Financial Ombudsman Service noted that FOS had been working closely on the transition with the SCT on developing the terms of reference, designing new processes, and forecasting. They had demonstrated that the combined body could work. Likewise, the SCT noted that in working with FOS they had identified a number of concerns, which could be dealt with in the terms of reference.[29]

Fairness versus law

3.25 The difference between the two approaches was a matter of concern to several submitters. The Association of Securities and Derivatives Advisers of Australia Ltd said that if there was to be a single body it should be a single statutory tribunal. Because the FOS was not bound by the rules of evidence and it appeared that AFCA would operate in a similar way, financial advisers and service providers were denied the right to a fair hearing.[30]

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26 Credit and Investments Ombudsman, *Submission 15*, p. 10.

27 Association of Superannuation Funds of Australia, *Submission 21*, p. 3, p.6.

28 Community and Public Sector Union, *Submission 25*, p. 2; Australian Council of Trade Unions, *Submission 29*.

29 Financial Ombudsman Service, *Submission 7*, p. 14; Superannuation Complaints Tribunal, *Submission14*, pp. 3–4.

30 Association of Securities and Derivatives Advisers of Australia Ltd, *Submission 1*, p. 6.

3.26 Others saw the problem as one of uncertainty, and suggested that a legal approach was preferable, especially if the limits on claims were to be increased.[31]

3.27 However, consumer groups supported the criterion of 'Fairness in all the circumstances' rather than a legalistic approach.[32] A legalistic approach would limit access for consumers:

> For example, they have to go off and get their own experts, rather than the responsibility being on the scheme to investigate the dispute and obtain information from the financial service providers in order to resolve it.[33]

What is not in the bill

3.28 Much of the operational detail of the measure will be contained in the terms of reference for the new body. These are being developed by the transition team. As an ASIC representative noted, 'there is a lot of work for the terms of reference to do…'[34]

3.29 Many submissions made suggestions as to provisions that should be in the bill but are not. In some cases, submitters conceded that they might be dealt with in the terms of reference, but in general they thought they should be legislated.

3.30 It was suggested that monetary limits on claims and caps on settlements should be specified in the bill, at least initially, and not left to the terms of reference.[35] In addition, requirements for AFCA to consult with stakeholders, especially with respect to increases in the financial limits on claims and settlements, should be legislated.[36] One witness suggested that the caps should be 'soft' and that AFCA should have some flexibility to consider a case that had merit but was marginally outside the limits. This would be part of a more generally principles based, rather than rules bound, approach.[37]

3.31 Consumer groups in particular argued that AFCA should be required in the legislation to monitor and address systemic issues, in addition to referring such matters to regulators.[38] However, ASIC argued that that was not the role of a

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31 National Insurance Brokers Association of Australia, *Submission 18*, p. [5]; Credit Corp Group Ltd, *Submission 11*, pp. 4–5.

32 Joint Consumer Groups, *Submission 9*, p. 10.

33 Mr Gerard Brody, Chief Executive Officer, Consumer Action Law Centre, *Committee Hansard*, 10 October 2017, p. 3.

34 Ms Clare McCarthy, Senior Policy Adviser, Behavioural Research and Policy Unit, Australian Securities and Investments Commission, *Committee Hansard*, 9 October 2017, p. 51.

35 Westpac, *Submission 10*, p. 2; Financial Services Council, *Submission 20*, p. 3.

36 Insurance Council of Australia, *Submission 19*, p. 2.

37 Mr James Strachan, Advocacy Manager, Australian Small Business and Family Enterprise Ombudsman, *Committee Hansard*, 9 October 2017, p. 27.

38 Joint Consumer Groups, *Submission 9*, p. 2.

complaints handling body, although clearly it could have a valuable role in identifying problems.[39]

3.32 AFCA will have the power that the SCT currently has to compel people to give evidence or produce documents, but it will have it only for superannuation cases. It was argued that it should be available for all cases, not just superannuation.[40]

3.33 The Financial Ombudsman Service suggested that traditional trustee company disputes should be brought into the bill to operate under the same framework as superannuation complaints, as like them they involve multiple parties. At present, in the absence of legislation, they can be resolved effectively only if all parties agree.[41]

3.34 The Ramsay review identified as a gap in coverage the fact that debt management firms were not covered.[42] Consumer groups in particular urged that such firms, including credit repair, administrators of debt agreements, debt negotiators, and personal budgeting services, be included.[43]

3.35 The Ramsay Report, examining the recommendation by the Australian Small Business and Family Enterprise Ombudsman (ASBFEO) that valuers, investigating accountants and receivers appointed by a bank should be included in the EDR framework, did not agree that those entities should be members of an EDR scheme. Meanwhile, AFCA will have the power that the SCT currently has to join third parties in a dispute, but only for superannuation cases. ASBFEO now argues that AFCA should be able to join third parties, including valuers, investigating accountants and receivers, in all disputes, not just superannuation.[44]

3.36 ASBFEO argues that borrowers who have been through farm debt mediation should have recourse to AFCA.[45]The Ramsay Report looked at this matter and concluded that it should be further considered.[46] However, the Australian Bankers' Association argued that it should be kept separate.[47]

3.37 Consumer groups and ASFBEO argued that AFCA should not be precluded from investigating matters where court proceedings have begun. Such proceedings can

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39 Mr Greg Kirk, Senior Executive Leader, Strategy Group, Australian Securities and Investments Commission, *Committee Hansard*, 9 October 2017, p. 53.

40 Joint Consumer Groups, *Submission 9*, p. 2; Australian Small Business and Family Enterprise Ombudsman, *Submission 26*, p. 3.

41 Financial Ombudsman Service, *Submission 7*, p. 10.

42 Ramsay Report, pp. 198–9.

43 Ms Karen Cox, Coordinator, Financial Rights Legal Centre, *Committee Hansard*, 10 October 2017, p. 5–6; see also Mr Raj Venga, Chief Executive Officer and Ombudsman, Credit and Investments Ombudsman, *Committee Hansard*, 9 October 2017, p. 12.

44 Australian Small Business and Family Enterprise Ombudsman, *Submission 26*, p. 1, pp. 4–5.

45 Ms Anne Scott, Principal Adviser, Australian Small Business and Family Enterprise Ombudsman, *Committee Hansard*, 9 October 2017, p. 31.

46 Ramsay Report, p. 205.

47 Australian Bankers' Association, *Submission 13*, p. 3.

be a way of applying pressure to settle, and are sometimes embarked on before the consumer knows all her options.[48]

3.38 Several issues were raised about time limits. The Law Council of Australia argued that there should be time limits within which complaints about disability benefits can be made. These are critical to the effective review of trustee decisions about superannuation disability benefits because they recognise the essential nexus between entitlement to such a benefit and the cessation of employment due to disability.[49] More generally, ASBFEO thought there should be time limits for the bringing of a complaint, and for its settlement, as involvement in complaints is costly for small businesses.[50] Time limits on life insurance claims which are in the present superannuation legislation should be carried over to AFCA.[51]

3.39 The Law Council of Australia pointed out that the bill should exclude complaints about the management of a superannuation fund as a whole. Such a constraint is in the existing legislation, which is to be repealed.[52]

3.40 There was some discussion of appeal rights. Currently decisions made within the office of the Superannuation Complaints Tribunal are subject to judicial review:

> The 90 per cent of decisions that occur within the office—these are for something like: is the complaint within the jurisdiction or out of jurisdiction; or is it withdrawn for something like lacking in substance; or requesting information by using a power to get information from a third party—no longer have a review appeal.[53]

3.41 This type of review will no longer be available because AFCA is not a statutory body. The Law Council of Australia argued that the bill should allow appeals against AFCA decisions such as not to consider a complaint. It concedes that a right to procedural fairness will probably be included in the terms of reference.[54]

3.42 The Superannuation Complaints Tribunal suggested that confidentiality provisions should be included in the bill.[55] Others suggested specifically that the

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48 Ms Karen Cox, Coordinator, Financial Rights Legal Centre, *Committee Hansard*, 10 October 2017, p.3; Ms Anne Scott, Principal Adviser, Australian Small Business and Family Enterprise Ombudsman, *Committee Hansard*, 9 October 2017, p. 28.

49 Law Council of Australia, *Submission 16*, p. 2.

50 Australian Small Business and Family Enterprise Ombudsman, *Submission 26*, p. 3–4.

51 Ms Helen Davis, Chairperson, Superannuation Complaints Tribunal, *Committee Hansard*, 9 October 2017, p. 19.

52 Law Council of Australia, *Submission 16*, p. 3.

53 Ms Helen Davis, Chairperson, Superannuation Complaints Tribunal, *Committee Hansard*, 9 October 2017, p. 15.

54 Law Council of Australia, *Submission 16*, p. 3.

55 Superannuation Complaints Tribunal, *Submission 14*, p. 3.

confidentiality of conciliation conferences should be assured.[56] So should the confidentiality of information exchanged in EDR proceedings.[57]

3.43 There was concern that people had little recourse if determinations have not been complied with. Two submissions suggested that the bill should include stronger enforcement measures.[58]

3.44 The Australian Lawyers Alliance suggested that the form and content of reporting of IDR data should be set out in legislation.[59]

Comments on measures in the bill

3.45 Two submissions drew attention to a change in who can bring a superannuation complaint about a death benefit. The current qualification is 'an interest in a benefit', whereas the bill refers to 'an interest in the payment of a benefit'. Both submissions suggest that the existing wording is preferable.[60] A Treasury officer explained:

> The death benefits issue, I think, arises from the concern that the language of the current Superannuation (Resolution of Complaints) Act differs from the new AFCA legislation. The intent was that the policy remain the same and the powers be read in the same way. Due to the need to draft in the form of the bill that's currently before the Senate, there were some changes to the language, but that change of itself does not imply a change in the intent. We feel that the legislation achieves the intent of replicating the provisions that are currently within the Superannuation (Resolution of Complaints) Act.[61]

3.46 There was some discussion about what constitutes appropriate expertise and how it is to be ensured. It was suggested that all assessors should have relevant degrees and work experience, including financial analysis, not only law.[62] Another submission suggested that parties should be consulted as to the appropriate expertise for dealing with a case.[63]

3.47 Several submissions suggested that their specific sector, or that each sector, of the industry should be represented on the Board of AFCA. The Australian Collectors

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56 Law Council of Australia, *Submission 16*, p. 3.

57 Association of Superannuation Funds of Australia, *Submission 21*, p. 16.

58 Australian Lawyers Alliance, *Submission 17*, p. 6; Australian Small Business and Family Enterprise Ombudsman, *Submission 26*, p. 2.

59 Australian Institute of Superannuation Trustees, *Submission 6*, pp. 15–16; Westpac, *Submission 10*, p. 3.

60 Superannuation Complaints Tribunal, *Submission 14*, p. 5; Law Council of Australia, *Submission 16*, p. 3.

61 Ms Michelle Dowdell, Principal Adviser, Retirement Income Division, The Treasury, *Committee Hansard*, 9 October 2017, p. 57.

62 Association of Securities and Derivatives Advisers of Australia Ltd, *Submission 1*, p. 3.

63 Australian Lawyers Alliance, *Submission 17*, p. 9.

and Debt Buyers Association pointed out that there can be inherent conflicts of interest in a representative board.[64]

3.48 While the tightening of supervision of internal dispute resolution was generally welcomed, there were some critics. The Association of Securities and Derivatives Advisers said that this was just more red tape, and unnecessary because EDR is there precisely in case IDR fails. Further, the publication of IDR data could be very damaging to a firm, even though it might be based on subjective assessment.[65] The Australian Institute of Superannuation Trustees suggested that there was a need for further consultation on this matter, as ASIC regulatory guide 165 on IDR was not designed for superannuation funds. In particular, publication of data on IDR required legislative control.[66]

Analysis of effects of the measure

3.49 It was pointed out that there was no formal cost-benefit analysis for the measure. The Regulation Impact Statement attached to the EM essentially refers to the Ramsay review as sufficient supporting material. But according to some submitters and witnesses there was no rigorous modelling of the specific proposal.[67]

Transition to the new scheme

3.50 Several submissions, including that of the Financial Ombudsman Service, suggested that the time frame for transition to the new scheme was ambitious.[68] The Association of Superannuation Funds of Australia asserted that January 2019 was the earliest feasible starting date.[69]

3.51 One witness suggested the establishment of the transition team was pre-emptive:

> I think it is premature to talk about transition when the bill hasn't even been passed. It seems to me it becomes a fait accompli. It's a way of saying, 'Well, no-one's got objections, obviously, because they're all talking about transition.' It sort of makes it okay, when I don't think it is.[70]

3.52 There was concern about the composition of the transition team:

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64 Australian Collectors and Debt Buyers Association, *Submission 3*, p. 7.

65 Association of Securities and Derivatives Advisers of Australia Ltd, *Submission 1*, p. 5; see also National Insurance Brokers Association of Australia, *Submission 18*, [p.7].

66 Australian Institute of Superannuation Trustees, *Submission 6*, pp. 14–16.

67 Association of Securities and Derivatives Advisers of Australia Ltd, *Submission 1*, p. 2; Mr Thomas Beregi, Chief Executive Officer, Credit Corp Group, *Committee Hansard*, 9 October 2017, p. 1; Mr Raj Venga, Chief Executive Officer and Ombudsman, Credit and Investments Ombudsman, *Committee Hansard*, 9 October 2017, p. 13.

68 Financial Ombudsman Service, *Submission 7*, p. 4.

69 Association of Superannuation Funds of Australia, *Submission 21*, p. 11.

70 Mr Raj Venga, Chief Executive Officer and Ombudsman, Credit and Investments Ombudsman, *Committee Hansard*, 9 October 2017, p. 13.

> …with the people on the transition committee, we have a public servant, consumer representatives and staffers from the existing schemes—from SCT and FOS—but there is not any industry representation.[71]

3.53 Consumer groups believed that it would be useful to have the new scheme authorised as soon as the legislation is passed, even if it is subject to conditions, so that staff can be transferred and expertise maintained. This would also minimise delays with existing cases.[72]

71 Mr Thomas Beregi, Chief Executive Officer, Credit Corp Group, *Committee Hansard*, 9 October 2017, p. 5.

72 Mr Gerard Brody, Chief Executive Officer, Consumer Action Law Centre, *Committee Hansard*, 10 October 2017, p. 5.