Additional Comments by Labor Senators

Overall views on the bill

1.1 The inquiry has clearly shown that the Government's new 'one-stop-shop' complaints authority will not have any new or additional powers that existing disputes resolution bodies don't already have. The truth is that in relation to non-superannuation disputes, this bill is largely a rebranding exercise.

1.2 In relation to superannuation disputes, which are currently dealt with by the statutory Superannuation Complaints Tribunal, the bill is much worse than a rebranding exercise and will weaken outcomes and protections for consumers.

1.3 Superannuation complaints should continue to be dealt with by the Superannuation Complaints Tribunal, which should not be abolished.

Background to the bill

1.4 In October 2016, in an attempt to distract attention from the urgent need for a Royal Commission into the Banking and Financial Services Sector, the Prime Minister promised that 'we will get a low cost, speedy tribunal to deal with these types of consumer complaints, customer complaints against banks and this will be real action.'[1]

1.5 Barely two months later in December 2016, the Minister for Revenue and Financial Services had to walk back from this and argue that the Prime Minister had only really meant a 'little t' tribunal and not a 'big T' tribunal.[2]

1.6 The 2017 budget announced a new body to be called the Australian Financial Complaints Authority. Contrary to what its name suggests, the explanatory memorandum confirms that the new Australian Financial Complaints Authority will be another ombudsman in the form of an industry-established private company limited by guarantee that is approved by the Minister.[3]

Changes made by the bill—non-superannuation disputes

1.7 At the moment there are three external dispute resolution schemes in existence. The Financial Ombudsman Services (FOS) and the Credit and Investments Ombudsman (CIO) deal with disputes in relation to banks, insurers, financial advisers, mortgage brokers and payday lenders, and other non-superannuation disputes. There is also a statutory Superannuation Complaints Tribunal, which is discussed later in the additional comments.

1.8 In relation to non-superannuation disputes, the bill is largely a merger and rebadging of the CIO and the FOS.

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1 Radio 5AA, 7 October 2016.

2 ABC News Online, 6 December 2016, 'Government backs away from banking tribunal, implements another ombudsman instead'.

3 See paragraph 1.14.

1.9 The Government had promised higher monetary thresholds for the disputes that can be heard than currently exist under FOS and CIO, however these are not specified in the bill.

1.10 The additional oversight powers given to ASIC including powers to publish data on internal dispute resolution are welcome.

1.11 However, ASIC has confirmed that the bill grants AFCA no new or additional powers to resolve disputes that the existing ombudsman schemes do not already have.

1.12 There were a number of proposals to strengthen the external dispute resolution (EDR) schemes that were raised through the inquiry and warrant further consideration. Labor Senators are disappointed that the Government has wasted an opportunity to consider further reforms. This includes consideration of issues such as powers to obtain documents, joining third parties, time limits for resolving disputes and enforcing binding decisions.

1.13 Labor Senators note that this bill has been used by the Government to demonstrate that they are 'getting tough on the banks', but concerns were raised that this bill could do the opposite. Many stakeholders are concerned that the new scheme will be designed to suit the big banks, when the scheme would also have to settle disputes raised against smaller financial services firms.

1.14 Labor Senators maintain their position that the Turnbull Government should establish a Royal Commission into Australia's banking and financial services sector. This bill is no substitute for a Royal Commission.

1.15 Labor Senators will continue to call for a Royal Commission because it is the one thing that can get to the bottom of the systemic failures and cultural issues within the banking and financial services sector, ensure that consumers are protected from the rip-offs and scandals of the past and that Australians banking and financial system remains strong, profitable and well led.

Name of the new scheme

1.16 Questions on Notice number 203 asked of Treasury during the previous round of budget estimates confirmed that the name 'Australian Financial Complaints Authority' was decided on by the Minister’s office and that no market testing had been carried out.

1.17 The Consumer Action Law Centre has raised concerns that the word 'authority' raises concerns of policing powers or oversight and might make people, including some of society’s most vulnerable, uncomfortable in approaching the organisation. In addition, the Explanatory Memorandum is very clear in setting out the organisation is based on the ombudsman model and will be established by industry as a company limited by guarantee.

1.18 The naming of organisations matters. It is not a trivial matter and policymakers should be careful in determining a name that accurately describes the organisation and encourages people to use the service.

Superannuation Complaints Tribunal

1.19 There was clear evidence from a range of stakeholders supporting the existing Superannuation Complaints tribunal (SCT).

1.20 The SCT was established as part of the suite of reforms in 1993 to establish the universal compulsory superannuation system. Labor is proud of its record when it comes to superannuation, enabling people to retire with a higher standard of living and taking pressure off the federal budget.

1.21 Stakeholder groups such as the Association of Superannuation Funds Australia and the Australian Institute of Superannuation Trustees stated that the SCT remains a superior EDR scheme. Stakeholders were almost unanimous in stating that problems with the SCT were around funding levels rather than its structure as a tribunal.

1.22 The SCT itself identified a number of significant instances in which this bill would leave consumers with fewer protections when compared to the SCT. This is largely due to the proposed change from a statutory tribunal to an ombudsman scheme established by industry as a private company limited by guarantee.

1.23 The Community and Public Sector Union (CPSU) also presented evidence that moving the SCT into an ombudsman service would leave consumers with fewer protections and rights. The CPSU stated that superannuation, being a compulsory scheme, is quite different to other contracts that people enter into when purchasing other financial services and products.

1.24 Labor Senators believe that superannuation is not simply another financial service. The compulsory nature of savings and the long term investment horizon mean that special care must be taken when considering policies for superannuation EDR. When the SCT was established, it was decided that a tribunal was the best way to handle disputes. No persuasive evidence was received during this inquiry that demonstrated that the SCT's arrangement was unsuitable, apart from its funding level.

1.25 The only real criticism levelled against the Superannuation Complaints Tribunal is that it has a backlog of complaints and it has been widely acknowledged that this backlog is due to staffing and funding reductions. These reductions have been allowed to occur despite the fact that the SCT's funding is already charged to industry by a levy.

1.26 In the 2013 Budget, the then Labor Government provided additional funding for the SCT. Since then, under the watch of the Abbott-Turnbull Government, there have been dramatic reductions to the SCT's funding and staff.

1.27 Since the 2013-14 financial year, in which the Abbott Government came to power, staff at the SCT have been cut by almost 30% (see table below).

1.28 Given the cuts under the current government, it is no surprise that there have been delays in resolving complaints at the SCT.

1.29 It is unacceptable for this Government to dramatically reduce funding and staff at the SCT, and then to turn around and complain it is too slow in resolving disputes.

1.30 It is even more unacceptable for this Government to then use this as an excuse to abolish the body and transfer its functions to a non-government private body and to reduce consumer protections in the process.

SCT Staffing Levels	2010-11	2011-12	2012-13	2013-14	2014-15	2015-16
Total Staff	44	45	42	45	39	32
Permanent	43	44	41	36	35	30
Temporary	1	1	1	9	4	2
Full time	38	41	40	43	35	26
Part time	6	4	2	2	4	6
Staff Turnover	20.69%	13.33%	14.89%	17.20%	16.67%	33.80%

Source: Page 88, Review of the financial system external dispute resolution and complaints framework (Ramsay Review) – Final Report, April 2017.

The Superannuation Complaints Tribunal should not be abolished

1.31 In abolishing the Superannuation Complaints Tribunal, the bill is much worse than a rebranding exercise of existing arrangements – it will weaken protections and outcomes for consumers.

1.32 Unlike the other two existing bodies, the Superannuation Complaints Tribunal was set up as a specialist Government statutory tribunal with expertise to deal with superannuation disputes.

1.33 Evidence showed the risk to consumer outcomes of moving superannuation complaints from an established Government body to the private company limited by guarantee that AFCA will be.

1.34 The Chairperson of the SCT, Helen Davis told the committee:

> I don't think it would be true to say, in relation to super, that it's a rebranding exercise. Arguably, it's quite a significant change for superannuation, specifically in terms of the external dispute resolution. It goes from a statutory body to a non-statutory body. It moved from a specialist body to a one-stop-shop body.

1.35 Given that this is a major change to the arrangements for handling superannuation complaints; it is up to the Government to justify why this change should be made.

1.36 Superannuation is not just another financial service. It is compulsory savings with a long-term horizon, and dispute resolution arrangements for super must be treated with special care.

1.37 When the SCT was established with the establishment of compulsory superannuation, it was decided that a tribunal was the best way to handle disputes.

1.38 The Superannuation Complaints Tribunal has expertise to deal with complicated superannuation disputes in a fair and accessible way that is free for consumers.

1.39 Superannuation law is very complicated. Superannuation life insurance disputes often require the involvement of a number of parties. These include very challenging 'death benefit' disputes where different family members disagree over the entitlement to the payment of a death benefit from a person's superannuation life insurance. The SCT has to deal with often charged situations in a fair way. The SCT has an established, fair and professional process for doing this.

1.40 Resolving technically difficult and sometimes heated superannuation disputes requires a very specific skill set. Abolishing the SCT risks losing the very skilled and professional staff at this body. Because the new AFCA will be a private body, it was not made at all clear in the course of the inquiry that the staff would be redeployed there, in the way that could more easily occur between public sector bodies. Indeed, under the Government's plans staff will have to be kept at the SCT for a number of years – the Government plans that it will continue to operate to resolve disputes lodged before the proposed commencement of AFCA on 1 July 2018.

1.41 Submissions to the Senate Inquiry also made clear that issues that arise with the other two existing bodies, the FOS and CIO, do not arise with respect to the SCT.

1.42 Unlike the other two existing bodies there is far less overlap between the jurisdiction of the SCT and the other two schemes than there is between the other two existing bodies.

1.43 In relation to the prospect of increases on the monetary limits to the disputes that can be heard, it should be noted that any changes would only benefit complainants with disputes currently heard by the Financial Ombudsman Service and the Credit and Investments Ombudsman. In relation to superannuation disputes, the Superannuation Complaints Tribunal already has an unlimited and uncapped jurisdiction to hear disputes relating to superannuation.

1.44 In addition to these concerns and the significant change that is moving superannuation complaints from a statutory tribunal body to a private body, submissions identified a range of statutory powers that have not been given to the new AFCA body under the legislation as introduced. These included the following.

- The bill retains appeal rights for superannuation *determinations*, but, because the new AFCA body is a private body, the bill specifically excludes review of *administrative decisions* of the SCT. As the submission of the Law Council of Australia's Superannuation Committee pointed out, this means that complainants have effectively lost their right to appeal to the Federal Court if AFCA decides to exclude their complaint.
- The SCT currently has an explicit statutory power to cancel the membership of a life policy fund if it finds the conduct relating to the 'selling' of that fund was unfair or unreasonable. The SCT can order the money to be repaid with interest. As the SCT and the Law Council of Australia pointed out, this power is not given to the new AFCA in the bill.

- The SCT has the power to require parties to maintain confidentiality of information exchanged during dispute resolution for a superannuation complaint. There are currently legislated penalties for breaching these requirements. This power is not given to AFCA. According to the SCT, information collected during superannuation dispute resolution can be highly personal, sensitive, inflammatory and identifiable (for example, the assertions that are made in the context of family members disagreeing about who is entitled to a death benefit under a superannuation life insurance policy). As the SCT noted:

  '…the absence of a legislated arrangement requiring confidentiality of information exchanged and the subsequent potential for information to end up in a public arena creates a very real risk of harm to individuals'.

- A number of submissions stated that changes to the wording of provisions which will lead to uncertainty regarding the payment of death benefits.
- There is currently no limit on the value of the claim that the SCT is allowed to hear. This is important for disputes about life insurance policies held through super funds. The bill seeks to retain this 'unlimited jurisdiction' for superannuation disputes, however, the SCT states that it is unclear that all disputes involving life insurance in super would receive the benefit of this 'unlimited jurisdiction'.
- As a private body, the new AFCA is not subject to the *Freedom of Information Act 1982.*

1.45 It is notable that these issues are not new. They have previously been raised with the Government in the process of consulting on draft legislation and have not been addressed in the bill.

1.46 It was suggested that some of these issues may yet be dealt with by the terms of reference of the new AFCA, which have not yet been completed. However, there were no guarantees given that they would be.

1.47 In any case, the terms of reference of AFCA will be based on contract law, not on statute as the above protections and powers are. This would make it difficult to replicate many of these protections in AFCA's terms of reference.

Conclusion

1.48 This bill appears to be more about politics than policy. This bill is no substitute for a royal commission and is not the tribunal that the Prime Minister promised.

1.49 In relation to non-superannuation disputes, no new powers have been given to the proposed AFCA that will help it in the resolution of disputes.

1.50 In the case of superannuation, no compelling case has been made for the abolition of the Superannuation Complaints Tribunal. In fact, for superannuation complaints, in moving from a specialist statutory tribunal with rigour and expertise to a generic non-Government private body established by industry, this bill risks adversely impacting consumer outcomes. Abolishing the Superannuation Complaints

Tribunal will put superannuation disputes in the hands of a non-government body with less transparency, accountability and specialist expertise than the Superannuation Complaints Tribunal currently has.

1.51 No persuasive evidence was received as part of the Senate Inquiry into this bill that demonstrated that the Superannuation Complaints Tribunal's arrangement was unsuitable, apart from its current funding and staffing level, which is the result of significant reductions under the Abbott-Turnbull Government.

1.52 The Superannuation Complaints Tribunal has proven capable in resolving technically complicated and sometimes heated superannuation disputes in an accessible and professional way that is free to the consumer.

1.53 Labor senators are of the view that the new AFCA should not include the Superannuation Complaints Tribunal's jurisdiction in relation to superannuation disputes. No persuasive case has been made that the Superannuation Complaints Tribunal should be abolished; in fact evidence received by the committee demonstrates the opposite. The Superannuation Complaints Tribunal should be retained.

Recommendation 1

That the bill be amended to stop the Superannuation Complaints Tribunal from being abolished. Superannuation complaints should continue to be dealt with by the Superannuation Complaints Tribunal.

Senator Jenny McAllister
Acting Deputy Chair