The Senate

Economics Legislation Committee

Treasury Laws Amendment (Putting Consumers First—Establishment of the Australian Financial Complaints Authority) Bill 2017

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Chapter 1

Introduction

1.1 On 14 September 2017, the Senate referred the Treasury Laws Amendment (Putting Consumers First—Establishment of the Australian Financial Complaints Authority) Bill 2017 to the Economics Legislation Committee for inquiry and report by 17 October 2017.[1]

Conduct of the inquiry

1.2 The committee advertised the inquiry on its website. It also wrote to relevant stakeholders and interested parties inviting submissions by 29 September 2017. The committee received 31 submissions, which are listed at Appendix 1.

1.3 The committee held public hearings in Canberra on 9 October 2017 and in Sydney on 10 October 2017. The names of the witnesses who appeared at the hearings are at Appendix 2.

1.4 The committee thanks all individuals and organisations who contributed to the inquiry.

1.5 Hansard references throughout this document relate to the Proof Hansards. Please note that page numbering may differ between the proof and final Hansards.

Overview of the bill

1.6 The bill's Explanatory Memorandum (EM) states that the bill 'will amend the Corporations Act 2001 (Corporations Act) and other Commonwealth Acts to introduce a new external dispute resolution (EDR) framework and an enhanced internal dispute resolution (IDR) framework for the financial system.'[2]

1.7 Further, the EM notes that the new EDR framework is intended to allow consumers easy access to a single EDR scheme. As such the bill provides for the establishment of a single body to deal with complaints against financial institutions to be known as the Australian Financial Complaints Authority (AFCA), which will resolve disputes about products and services provided by financial firms.

1.8 The AFCA scheme will replace the Superannuation Complaints Tribunal (SCT) and the existing EDR schemes approved by the Australian Securities and Investments Commission (ASIC)—the Financial Ombudsman Service (FOS), the Credit and Investments Ombudsman (CIO).

1.9 The new body will be overseen by the Australian Securities and Investments Commission. The bill provides for ASIC to set the AFCA's regulatory requirements and for an increase in the power of supervision by ASIC of internal disputes resolution in financial firms.

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1 *Journals of the Senate*, 14 September 2017, pp. 2007–9.

2 Explanatory Memorandum, p. 3.

1.10 The arrangements will be funded from the industry.

Reviews and consultation

1.11 There have been several processes to consider consumer redress in the financial industry. This committee is currently conducting an inquiry into consumer protection in the banking, insurance and financial sector, referred on 30 November 2016 with a reporting date of 30 March 2018. The Parliamentary Joint Committee on Corporations and Financial Services inquiry into Impairment of Customer Loans considered issues of dispute resolution in its report of May 2016. Following this, the Office of the Australian Small Business and Family Enterprise Ombudsman conducted an inquiry into the adequacy of the law and practices with regard to small business loans. The House of Representatives Standing Committee on Economics in its *Review of the Four Major Banks: First Report* in November 2016 made recommendations covering much of the ground covered in this bill.

1.12 The bill is explicitly a response to a more focused review, the Review of the Financial System External Dispute Resolution and Complaints Framework, undertaken by a panel chaired by Professor Ian Ramsay.[3] The review was commissioned by the Government in May 2016, and involved extensive consultation and attracted nearly 200 submissions in all.[4] It reported to government in April 2017.[5] In the May Budget, the Treasurer announced the establishment of a new Australian Financial Complaints Authority (AFCA).

1.13 The Government released an exposure draft of the bill, an explanatory memorandum, a consultation paper and a fact sheet in May 2017 for comment by 14 June 2017. Submissions to this process were published on 5 October 2017, timing which drew some comment in the hearing on 9 October 2017.[6]

1.14 In July 2017 the Government established a transition team headed by Dr Malcolm Edey (formerly Assistant Governor, Financial Markets, at the Reserve Bank of Australia) initially to advise on structure, funding and terms of reference for the new body, and then, after the legislation is passed, to oversee the new arrangements.[7]

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3 Details of the review and access to the report are available at The Treasury, *Review into Dispute Resolution and Complaints Framework*, https://treasury.gov.au/review/review-into-dispute-resolution-and-complaints-framework/ (accessed 28 September 2017). It is referred to frequently in the Explanatory Memorandum to the bill, for example at page 4.

4 The Treasury, *Review of the financial system external dispute resolution and complaints framework: Final report*, April 2017 (the Ramsay Report), p. 1.

5 An additional term of reference, on compensation schemes, was added in February 2017 and the panel was due to report on it in June 2017.

6 Mr Thomas Beregi, Chief Executive Officer, Credit Corp Group Ltd, *Committee Hansard*, 9 October 2017, pp. 4–5; Mr Raj Venga, Chief Executive Officer and Ombudsman, Credit and Investment Ombudsman, *Committee Hansard*, 9 October 2017, p. 12.

7 The Hon K O'Dwyer MP (Minister for Revenue and Financial Services), 'Overhauling the dispute resolution framework', media release, 26 July 2017, http://kmo.ministers.treasury.gov.au/media-release/071-2017/ (accessed 28 September 2017).

1.15 On 14 September 2017, the Minister for Revenue and Financial Services issued a media release, which, among other things, listed ways in which the draft bill had been varied in response to the consultations.[8]

Current consumer complaint handling procedures[9]

1.16 Under various licensing arrangements and/or the *Corporations Act 2001*, most firms in the Australian financial industry are required to operate internal dispute resolution (IDR) schemes, and to be members of an industry based external dispute resolution (EDR) scheme overseen by ASIC. Consumers must first raise a dispute through the IDR, and only if it is not settled do they move on to the EDR—although disputes registered with the EDR are usually referred back for a final, often successful, attempt at internal resolution.

1.17 At present there are two ASIC approved EDR schemes: the Financial Ombudsman Service (FOS), and the Credit and Investments Ombudsman (CIO). These are schemes which meet the key criteria for ombudsman schemes: accessibility, independence, clearly defined jurisdiction, powers to investigate systemic as well as individual complaints, procedural fairness, and accountability.[10] ASIC's Regulatory Guide 139 and Regulatory Guide 165 set out the requirements for EDRs.[11] Each scheme operates according to detailed terms of reference, which can be changed only with ASIC's approval. Both schemes are industry funded.

1.18 A third scheme, the Superannuation Complaints Tribunal (SCT), operates under legislation.

1.19 FOS, which deals largely with banking and insurance, was formed in 2008 as a merger of three existing schemes; it was later joined by two more schemes. So there is a history of mergers and rationalisation. FOS is the largest of the three remaining schemes. It had 13,576 members and 351 staff, handling around 34,000 disputes (83 per cent of the total for all schemes) in 2015–16. Of its revenue of $47 million in 2015–16, 74 per cent was from dispute resolution fees, with 11 per cent each from membership fees and user charges.

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8 The Hon K O'Dwyer MP (Minister for Revenue and Financial Services), ' Putting consumers first – improving dispute resolution', media release, 14 September 2017, http://kmo.ministers.treasury.gov.au/media-release/092-2017/ (accessed 28 September 2017).

9 The following material is drawn from Chapter 4 of the Ramsay Report, except where otherwise indicated.

10 Australia and New Zealand Ombudsman Association, 'Essential Criteria for Describing a Body as an Ombudsman', http://www.ombudsman.gov.au/__data/assets/pdf_file/0015/31434/ANZOA-Essential_criteria_for_describing_a_body_as_an_Ombudsman.pdf (accessed 28 September 2017).

11 ASIC, RG 139 Approval and oversight of external complaints resolution schemes, http://asic.gov.au/regulatory-resources/find-a-document/regulatory-guides/rg-139-approval-and-oversight-of-external-complaints-resolution-schemes/; and RG 165 Licensing: Internal and external dispute resolution, http://asic.gov.au/regulatory-resources/find-a-document/regulatory-guides/rg-165-licensing-internal-and-external-dispute-resolution/ (both accessed 28 September 2017).

1.20 The Credit and Investments Ombudsman is a much smaller body, although it has more members. Of its 22,973 members in 2015–16, around 97 per cent were sole traders, partnerships or small businesses. They included lenders (big and small, including mortgage lenders and credit card providers), finance brokers, mutual banks and credit unions, credit reporting schemes and financial planners. It has about 60 employees and received 4760 disputes in 2015–16. Of its $8 million revenue, 71 per cent came from membership fees and 26 per cent came from complaints fees.

1.21 The Superannuation Complaints Tribunal is funded from a Budget allocation which is then recovered through a financial sector levy by the Australian Prudential Regulation Authority. The levy is set by the Minister and is not linked to the number of disputes. It is also subject to constraints such as the efficiency dividend. The number of staff has been around 45 but fell to 32 in 2015–16. In 2015–16, the SCT received 2368 complaints. These disputes tend on average to be more complex than those received by the other two bodies, and generally take longer to resolve.

1.22 FOS and CIO have a monetary limit of $500,000 and compensation cap of $309,000 for individuals and small businesses, with a small business cap of $2 million on credit facilities. SCT has no limits.

1.23 There is an important distinction in the way the two models operate. Ombudsman schemes are set up to mediate between a powerful and a weak entity. The SCT stands in the place of the trustee and attempts to make the right decision. This means, broadly, that the Ombudsman has a concern with fairness while the SCT has a concern with legality.

International comparisons

1.24 The Interim Report of the Ramsay Review examined several overseas countries' ways of dealing with disputes. No one model seems to predominate.[12]

1.25 According to the Interim Report, the UK has a single statutory ombudsman body to deal with all kinds of cases. There is an independent assessor who can review process, but not the merits or decisions of individual cases. The decisions are subject to judicial review. However, the UK also has a Pensions Ombudsman, and there appears to be some overlap between the two bodies.[13]

1.26 Singapore has a single scheme. Its cap is S$100,000 (A$95,000), which suggests a limited jurisdiction in superannuation matters.

1.27 New Zealand has four different schemes. They compete for members, and have a good deal of overlap. They began as specialised bodies, but the specialisation appears to be breaking down.

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12 The Treasury, *Review of the financial system external dispute resolution and complaints framework: Interim Report*, 6 December 2016, https://static.treasury.gov.au/uploads/sites/1/2017/06/R2016-002_EDR_interim.pdf (accessed 11 October 2017).

13 Pensions Ombudsman, https://www.pensions-ombudsman.org.uk/; Financial Ombudsman Service, http://www.financial-ombudsman.org.uk/publications/technical_notes/pension-complaints-our-jurisdiction.html (both accessed 11 October 2017).

1.28 Canada has several different schemes. Two are operated by national industry bodies. At least one is operated by the provincial government of Québec. The two major schemes appear to have a fairly clear but not mandated division of labour: one deals with banking and the other with general insurance.

Findings of the Ramsay Review

1.29 The Ramsay Review concluded that there were overlaps and gaps among the various disputes bodies, and some confusion among consumers as to where to direct their complaints. The different operating styles of the bodies made it difficult to ensure the same outcome for similar complaints. Some disputes could involve several financial service providers, and they could be members of different schemes. The existence of several schemes imposed extra costs on industry and on the regulator. There were some gaps in coverage: debt management schemes were not required to be members; and there was some overlap: both credit licensees and credit representatives were required to be members when membership by a credit licensee provided the necessary coverage.[14]

1.30 Not surprisingly, the SCT's performance has been poor:

> Although SCT has a highly professional staff and Chairperson, it is unable to resolve disputes quickly, in contrast to FOS and CIO. In 2015–16, for disputes that reached determination, it took an average of 796 days [that is, over two years] for a dispute to be resolved.
>
> The problems facing SCT can be attributed to chronic underfunding and a lack of flexibility in its funding—there is no link between SCT funding and the level of complaints it receives—as well as outdated governance arrangements and limited flexibility to determine its dispute resolution process. There is a lack of focus on achieving system-wide improvements and the existing accountability mechanisms are passive and indirect.[15]

1.31 The Ramsay Report applauds the independence, flexibility and responsiveness of the ombudsman model. It valued the unlimited monetary jurisdiction, the broad jurisdiction to review trustee decisions, and statutory provisions such as the ability to join third parties to a dispute and to require the production of information of the SCT model.[16]

1.32 The report recommends the establishment of a single ombudsman-style body to hear complaints, with special features of the superannuation jurisdiction to be retained in legislation. The body would be a company limited by guarantee, overseen by ASIC, and operating under terms of reference devised by a Board and agreed by ASIC.

1.33 The body would have the following features, set out on p. 11 of the report.

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14 Ramsay Report, pp. 8–9.

15 Ramsay Report, p. 9.

16 Ramsay Report, p. 10.

Governance, funding and membership

1.34 The new body will be set up as follows:

- It will be governed by a board with an independent chair and equal numbers of directors with industry and consumer backgrounds.
- It will be funded by industry through a transparent process.
- It will require compulsory membership through a licensing condition (or equivalent requirement) for financial firms (including superannuation funds).

Key features

1.35 The single EDR body would have the following key features:

- Accessibility: it would be free to consumers when they lodge a complaint.
- Accountability: it would be subject to strengthened accountability mechanisms, including regular independent reviews (with the reports and the body's responses to recommendations reported publicly) and would have an 'independent assessor' to review how disputes are handled (but not to review the outcome of individual disputes).
- Enforceability: firms would be required to comply with its determinations as a condition of membership and it would report firms that fail to comply to the appropriate regulator. The body would have the power to expel firms that fail to comply.
- Improving industry practice: it would monitor, address and report systemic issues to the appropriate regulator.
- Expertise: it would use panels to resolve disputes in specific circumstances, such as complex disputes, and would provide clear guidance and transparency to users on when a panel would be used.
- Community engagement: it would engage in outreach activities to raise awareness amongst consumers (in particular vulnerable consumers) and financial firms.

Other recommendations

1.36 The report recommended higher monetary limits (with no limits for superannuation); funding on the basis of need; and full operational autonomy.[17]

1.37 It also recommended closer supervision and reporting by ASIC of IDR processes, and simpler methods to deal with the identified gaps and overlaps.[18]

17 Ramsay Report p. 12.

18 Ramsay Report p. 12.

Transition arrangements

1.38 The Government announced the creation of the new scheme in the 2017–18 Budget. The scheme is to operate from 1 July 2018. The Superannuation Complaints Tribunal is to be wound down and will no longer operate from 1 July 2020.[19]

1.39 On 26 July 2017, the Government announced the creation of a transition team, headed by Dr Malcolm Edey, the former Assistant Governor (Financial System) of the Reserve Bank of Australia. The transition team is to advise the Government on AFCA's terms of reference, governance and funding arrangements. It will also make recommendations on the authorisation process for AFCA and the transitional arrangements required to settle the cases currently before the three existing schemes.[20]

19 Commonwealth of Australia, *Budget Measures: Budget Paper No. 2 2017–18*, 'A More Accountable and Competitive Banking System—improving external dispute resolution', p. 162.

20 The Hon Kelly O'Dwyer, Minister for Revenue and Financial Services, 'Overhauling the dispute resolution framework', Media Release, 26 July 2017, http://kmo.ministers.treasury.gov.au/media-release/071-2017/ (accessed 4 October 2017).

Chapter 2

Provisions of the bill

2.1 The bill works at a high level. Much of the operational detail of the measure will be contained in the terms of reference (TOR) for the AFCA scheme, which have yet to be worked out. This is intended to allow for flexibility so that operational improvements can be made promptly.[1]

2.2 The Senate Committee on the Scrutiny of Bills has not, at time of writing, commented on the bill.

Schedule 1—External dispute regulation

2.3 Part 1 of Schedule 1 of the bill inserts into the *Corporations Act 2001* a new Part 7.10A, External dispute resolution. It follows existing Part 7.10—Market misconduct and other prohibited conduct relating to financial products and financial services.

2.4 The new Part 7.10A provides that the Minister may authorise an external dispute resolution scheme—and only one such scheme. This is done by means of a notifiable instrument. This is not a legislative instrument or regulation, and cannot be disallowed by Parliament. It can be varied or overturned by another notifiable instrument made by the Minister. In principle the Minister could make the choice of a scheme to authorise by calling tenders or otherwise comparing several candidates, but there are no criteria for making a choice among competing organisations.

Division 1 of Part 7.10A—Authorisation of an external dispute resolution scheme

Mandatory requirements

2.5 The new section 1051 details four groups of mandatory requirements for the EDR scheme. To a great extent they reflect the findings of the Ramsay Review. They are in general terms and will be operationalised in the terms of reference for AFCA.

Organisational requirements

2.6 The organisational requirements are:

- Membership of the scheme is open to entities that are required to be members of the scheme, either by law or by conditions on their licence. In general, members of AFCA will be financial and credit service providers who are required as a condition of their licence to belong to an EDR scheme.
- The scheme is funded by the members, but how—whether by membership dues or user charges—is not specified.
- The scheme has an independent assessor.

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1 Explanatory Memorandum, p. 10.

- The scheme is free to users.

Operator requirements

2.7 The operator requirements for the new scheme are:

- There are independent reviews of the scheme's operations and procedures. (The frequency is not specified.)
- The operator is a not-for-profit company limited by guarantee.
- The number of directors with experience in carrying on the kinds of businesses operated by members of the scheme (that is, financial and credit services) must equal the number of directors with experience in representing consumers. This presumably does not preclude having other directors who have, for example, expertise in technical financial matters, although this possibility is not mentioned in the Explanatory Memorandum. The number of directors is not specified.
- The Minister may appoint an independent Chair and may appoint a minority of directors (including the Chairs).

Operational requirements

2.8 The operational requirements are:

- The scheme is accessible, complaints are resolved in a way that is fair, efficient, timely and independent, and appropriate expertise is available.
- Reasonable steps are taken to ensure compliance with determinations, which are binding on members of the scheme but not on complainants.
- For superannuation complaints there are no limits on the value of claims or of remedies.

Compliance requirements

2.9 Compliance requirements include that the approval of ASIC is required for material changes to the scheme. This is spelt out further in new section 1052D.

General considerations

2.10 The new section 1051A sets out general considerations for the EDR scheme: accessibility, independence, fairness, accountability, efficiency and effectiveness.

Division 2—Regulating the AFCA scheme

2.11 New section 1052A allows ASIC to issue regulatory requirements relating to compliance with the mandatory requirements, and to any of the general considerations. If there are financial limits in the AFCA scheme, ASIC can direct that they be increased for future complaints.

2.12 More generally, section 1052D deals with approval of changes by ASIC.

2.13 Section 1052E provides that if AFCA becomes aware of a contravention of a law, or of the rules of a superannuation fund or an approved deposit fund, or of the terms and conditions of life insurance and similar policies, it must notify APRA,

ASIC and/or the Commissioner of Taxation. There is a parallel provision for notifying the minister in the case of a Defence Force scheme.

2.14 AFCA may also refer a settlement between parties for investigation. If a systemic issue becomes apparent, it may also refer it.

Division 3—Additional provisions relating to superannuation complaints

2.15 While the operation of AFCA will be based on contractual obligations between AFCA and its members, the bill retains statutory provisions for dealing with superannuation. According to the Explanatory Memorandum, this is because some superannuation complaints cannot be resolved between the parties. For example, third parties may have an interest in a death benefit.[2]

2.16 The provisions are similar, but not identical, to current arrangements. For example, the bill provides that a person can make a complaint about a death benefit if she has 'an interest in the payment of a death benefit'. The current wording is 'an interest in a death benefit'. This and other minor changes are dealt with below in the section on Views on the bill.

2.17 For superannuation, time limits for complaints are set out in the bill. AFCA will be able to join third parties to complaints. AFCA will have power to compel attendance at conciliation conferences and to produce documents. Appeal to the Federal Court will be available on questions of law, because determinations on superannuation may have wider ramifications, and because superannuation is compulsory.[3] Confidentiality provisions are set out in the bill. These provisions are not made in the bill for other complaints to be handled by AFCA.

Other amendments relating to EDRs

2.18 Part 2 of Schedule 1 of the bill excludes decisions of AFCA on superannuation matters from the *Administrative Decisions (Judicial Review) Act 1977*. Determinations relating to superannuation will be binding on both financial service providers and consumers. As mentioned above, there will be appeal on questions of law to the Federal Court.

2.19 There is no need to exempt other decisions of AFCA. The *Administrative Decisions (Judicial Review) Act 1977* does not apply to other decisions of AFCA because they will not be made under an act.[4]

2.20 Part 3 of Schedule 1 of the bill makes amendments to several other acts to require financial and credit service providers to be members of AFCA. Parts 4 and 5 make amendments to close off membership of existing schemes.

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2 Explanatory Memorandum, p. 11.

3 Explanatory Memorandum, p. 13.

4 Explanatory Memorandum, p. 44.

Schedule 2—Internal dispute resolution

2.21 Financial and credit service firms and superannuation funds and approved deposit funds are currently required to have an internal dispute resolution scheme. Schedule 2 provides that firms will be required to report their IDR activities to ASIC (with the content and form of the reporting to be decided by ASIC). It also allows ASIC to publish data relating to IDR activities. This will allow comparison between firms of their performance on IDR.[5]

Starting date

2.22 The Government has foreshadowed a starting date of 1 July 2018. There does not seem to be anything in the legislation (including the commencement dates for the legislation) to require this.

5 Explanatory Memorandum, pp. 50–51.

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.

Chapter 4

Committee view and recommendations

The bill in the context of policy for the financial sector

4.1 The committee notes that the measure in the bill is the product of consultation and review. It further notes that the function of the Australian Financial Complaints Authority will be to ensure that consumers and small businesses have access to free, fast and binding dispute resolution. While this is important for the functioning of the financial sector, it is a discrete and limited part of it.

4.2 A primary concern raised in evidence was the amount of detail which is yet to be determined and which is not spelt out in the current bill, for example, the terms of reference, governance structures or funding arrangements. The second reading speech by the Assistant Minister to the Prime Minister, Senator the Hon James McGrath notes that these are intentionally left to the transition team, the body operating the new scheme and ASIC to establish and review. It is stated that this will create a flexible environment that is not overly legalistic.

4.3 Additionally, other benefits of the framework include the possible lifting of monetary limits related to the value of the claims that can be considered or increasing the remedy financial limits on claims and settlements, though neither of these are articulated in the bill.

A single body to hear complaints

4.4 The committee notes that many financial complaints, including superannuation complaints, involve more than one financial service. It considers accessibility to consumers to be a very high priority, and this will be best provided by a single body. For the same reason of accessibility to consumers it believes that an ombudsman is the appropriate model for dealing with all of these complaints.

4.5 The committee notes the concerns that some parties have expressed as to the juxtaposition of superannuation complaints and other financial complaints. The committee draws attention to the separate provisions for superannuation, which recognise that it is in some respects different from other financial transactions.

Concerns about the content of the bill

4.6 The committee draws attention to the points raised in chapter 3 of this report. It suggests that the transition team should be alert to all of these, and particularly to whether they can satisfactorily be dealt with in the terms of reference for AFCA.

4.7 This is an important measure and is innovative in its approach. The committee is of the view that the new arrangements should be reviewed after a year and again after five years.

Recommendation 1

4.8 The committee recommends that the bill be passed.

Senator Jane Hume

Chair

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

Appendix 1
Submissions and additional documents received

Submissions

1. ASDAA
2. ASIC
3. Australian Collectors & Debt Buyers Association
4. SCOA Australia
5. Mortgage & Finance Association of Australia (MFAA)
6. Australian Institute of Superannuation Trustees
7. Financial Ombudsman Service Australia
8. Financial Planning Association of Australia
9. Joint Submission: 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
10. Westpac
11. Credit Corp Group Limited
12. Finance Sector Union of Australia
13. Australian Bankers' Association (ABA)
14. Superannuation Complaints Tribunal
15. Credit and Investments Ombudsman Limited
16. Law Council of Australia
17. Australian Lawyers Alliance
18. National Insurance Brokers Association of Australia
19. Insurance Council of Australia
20. Financial Services Council
    a. Attachment 1
21. Association of Superannuation Funds of Australia Limited (ASFA)
22. Commercial Asset Finance Brokers Association of Australia
23. Association of Financial Advisers
24. Council for Small Business Australia
25. Community & Public Sector Union
26. ASBFEO
27. Mr Ivano Lino
28. Mr Michael Horne

29. ACTU
30. ANZ
31. SMSF Association

Answers to Questions on Notice

1. Credit and Investments Ombudsman: Answers to questions taken on notice from a public hearing on 9 October 2017 (received 9 October 2017)
2. Council of Small Business of Australia: Answers to questions taken on notice from a public hearing on 9 October 2017 (received 12 October 2017)
3. ASIC: Answers to questions taken on notice from a public hearing on 9 October 2017 (received 12 October 2017)
4. Financial Ombudsman Service Australia: Answers to questions taken on notice from a public hearing on 9 October 2017 (received 12 October 2017)
5. The Treasury: Answers to questions taken on notice from a public hearing on 9 October 2017 (received 12 October 2017)

Additional Information

1. Additional information provided by Credit Corp Group Limited on 14 October 2017.

Additional Hearing Information

2. Hansard correction received from Consumer Action Law Centre regarding a public hearing held in Canberra on 9 October 2017.

Appendix 2
Public hearings and witnesses

9 October 2017, Canberra ACT

Members in attendance: Senators Bushby, Hume, Ketter, Paterson

BEREGI, Mr Thomas, Chief Executive Officer, Credit Corp Group Ltd

BROWN, Ms Diane, Head, Financial System Division, Treasury

DAVIS, Ms Helen, Chairperson, Superannuation Complaints Tribunal

DIKSTEIN, Ms Judith, Workplace Delegate (Superannuation Complaints Tribunal), Community and Public Sector Union

DOWDELL, Ms Michelle, Principal Adviser, Retirement Income Policy Division, Treasury

EVANS, Mr Rupert, Deputy National President, Community and Public Sector Union

FIELD, Mr Philip, Chief Ombudsman, Banking and Finance, Financial Ombudsman Service Australia

KIRK, Mr Greg, Senior Executive Leader, Strategy Group, Australian Securities and Investment Commission

McCARTHY, Ms Clare, Senior Policy Adviser, Behavioural Research and Policy Unit, Australian Securities and Investment Commission

PAI, Ms Neena, Acting Principal Adviser, Financial System Division, Treasury

PEACHEY, Ms Jenny, Executive General Manager, Strategic Review, Financial Ombudsman Service Australia

PRICE, Mr Graeme, Organiser, Community and Public Sector Union

SCOTT, Ms Anne, Principle Advisor, Australian Small Business and Family Enterprise Ombudsman

STRACHAN, Mr James, Advocacy Manager, Australian Small Business and Family Enterprise Ombudsman

STRONG, Mr Peter, Chief Executive Officer, Council for Small Business Australia

TREGILLIS, Mr Shane, Chief Ombudsman, Financial Ombudsman Service Australia

VENGA, Mr Raj, Chief Executive Officer and Ombudsman, Credit and Investment Ombudsman

10 October 2017, Sydney NSW

Members in attendance: Senators Bushby, Hume, Ketter, Williams

BRODY, Mr Gerard, Chief Executive Officer, Consumer Action Law Centre

COX, Ms Karen, Coordinator, Financial Rights Legal Centre

GUTHRIE, Ms Fiona, Chief Executive Officer, Financial Counselling Australia