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Committee Secretary
Senate Legal and Constitutional Affairs References Committee
PO Box 6100
Parliament House
Canberra ACT 2600

Dear Committee Secretary

Senate Inquiry: Resolution of disputes with financial service providers within the justice system

Consumer Action Law Centre (**Consumer Action**) welcomes the opportunity to provide comment on the Senate Legal and Constitutional Affairs References Committee Inquiry into resolution of disputes with financial service providers within the justice system (**Inquiry**).

Consumer Action has supported and represented thousands of consumers in disputes with financial services providers (**FSPs**) over many years. This includes extensive experience with state and federal courts, civil tribunals and external dispute resolution (**EDR**) schemes including the Australian Financial Complaints Authority (**AFCA**), the Financial Ombudsman Service (**FOS**) and Credit and Investments Ombudsman (**CIO**).

The court system is rarely an accessible forum for consumers to resolve disputes with FSPs, particularly for consumers experiencing vulnerability and disadvantage. The process is slow, legalistic, complex and expensive. Courts expose families to serious costs risks, and present significant barriers to accessing justice. The resources required to run a case via the court process, as opposed to AFCA, are significant and the process is daunting and entirely inaccessible for participants without access to legal advice and representation. While we recommend improvements to the accessibility of courts and tribunals, the reality is that for most people—particularly those without access to free legal advice and representation—courts will never be as accessible as AFCA.

The policy and legislative settings for EDR in financial services has undergone important changes following the *Review of the Financial System External Dispute Resolution and Complaints Framework* (**Ramsay Review**), passage of the *Treasury Laws Amendment (Putting Consumers First—Establishment of the Australian Financial Complaints Authority) Act 2018* (**AFCA Act**), and commencement of AFCA in November 2018. It is too soon to fully and fairly evaluate the impact of these recent changes. Our primary position is that AFCA should be given time to work before major changes are made to policy settings.

This submission makes 22 recommendations to improve justice outcomes for Australians in their disputes with FSPs.

A summary of recommendations is available at **Appendix A.**

About Consumer Action

Consumer Action Law Centre is an independent, not-for profit consumer organisation based in Melbourne. We work to advance fairness in consumer markets, particularly for disadvantaged and vulnerable consumers, through financial counselling, legal advice and representation, and policy work and campaigns. Delivering assistance services to Victorian consumers, we have a national reach through our deep expertise in consumer law and policy and direct knowledge of the consumer experience of modern markets.

TOR A: Whether the way in which banks and other financial service providers have used the legal system to resolve disputes with consumers and small businesses has reflected fairness and proportionality, including:

i. **whether banks and other financial service providers have used the legal system to pressure customers into accepting settlements that did not reflect their legal rights,**
ii. **whether banks and other financial service providers have pursued legal claims against customers despite being aware of misconduct by their own officers or employees that may mitigate those claims, and**
iii. **whether banks generally have behaved in a way that meets community standards when dealing with consumers trying to exercise their legal rights.**

In our casework experience, most disputes between financial service providers, particularly the big four banks, and consumers are initially dealt with via providers' internal dispute resolution (**IDR**) or hardship teams. This process can be difficult for consumers, particularly those experiencing vulnerability and disadvantage.

In December 2018, the Australian Securities and Investments Commission (**ASIC**) released a comprehensive report into the consumer journey through the IDR process of financial service providers. The report found that approximately 3.2 million Australian adults considered making a complaint for a financial service provider in the preceding 12 months, with 1.5 million proceeding to make a complaint. Of those complainants, 81% experienced at least one obstacle during their IDR journey. A significant proportion of complainants never received a conclusion to their complaint, with 18% withdrawing from the process before reaching a conclusion. The main reason given was not receiving a conclusion after chasing up the firm. Of the 82% of complainants who reached a conclusion, 55% indicated they were satisfied with the outcome. However, only 39% indicated that they were satisfied by the process.[1] This indicates that improvements are needed to banks' approaches to IDR, to ensure fair and appropriate outcomes can be achieved at an early stage.

If a dispute is not resolved to a person's satisfaction during the IDR process, in our experience many consumers either abandon their complaint or proceed to external dispute resolution services, such as AFCA. We have provided further information below about the importance of EDR services such as AFCA in ensuring there is fair, affordable and appropriate resolution processes to resolve disputes with financial services providers.

[1] ASIC, *Report 603: The consumer journey through the Internal Dispute Resolution process of financial service providers*, December 2018, available at: https://download.asic.gov.au/media/4959291/rep603-published-10-december-2018.pdf.

Some people do not engage with the IDR, hardship or EDR processes. People who are struggling with problem debt who do not engage are most at risk of having homes repossessed by banks through the legal system, or having debts sold to external debt collectors which sometimes use the legal system as part of debt recovery. This is where most issues with the use of the legal system to resolve disputes with consumers arise in our casework.

> **Recommendation 1:** Financial services providers significantly improve their internal dispute resolution processes, having regard to ASIC's upcoming review of RG165.

Use of debt collectors and bankruptcy

Banks regularly sell unsecured consumer debts to external debt collectors. While there are notice requirements when debts are assigned,[2] it is not uncommon for consumers only to become aware their debt has been sold when they are contacted by the debt collector. Correspondence received from debt collectors can also be confusing for consumers as it might not be clear to them who they are now indebted to. As noted by the Independent Review of the Banking Code of Practice, 'customers are unlikely to distinguish between the signatory bank and the debt buyer'.[3] This is not only confusing for consumers, but also creates reputation risks for the bank involved.

Concerningly, some debt buyers are quick to institute legal action and use the bankruptcy process as a debt collection tool. This legal action can be used to pressure consumers into unaffordable repayment plans or repaying debts that might not be legally owed. This approach has not reflected fairness and proportionality in many cases, particularly where a consumer faces losing their home over a relatively small unsecured debt. Under the current thresholds in the Bankruptcy Act, a creditor or debt buyer can commence bankruptcy proceedings against a person for a debt of only $5,000.[4] This means a person can lose their home over a $5000 credit card debt. Further, once bankrupt it is practically impossible to take legal action against the lender for misconduct relating to the lending, such as breaches of the responsible lending laws.

The Banking Code of Practice (**the Code**) imposes very few requirements on signatories in relation to the sale of debts to debt buyers. The Code simply requires signatories to choose a debt buyer that has agreed to comply with the ACCC and ASIC Debt Collection Guideline (**the Guideline**).[5] The Code also prohibits that sale of debts during an assessment of hardship, or while a customer is complying with a hardship variation. The independent review of the Banking Code of Practice recommended that banks be required to monitor

[2] For example, see s. 134 of the *Property Law Act 1958* (Vic).
[3] Phil Khoury, *Independent Review: Code of Banking Practice*, 31 January 2017, p 99, available at: http://cobpreview.crkhoury.com.au/wp-content/uploads/sites/2/2017/02/Report-of-the-Independent-Review-of-the-Code-of-Banking-Practice-2017.pdf.
[4] *Bankruptcy Act 1966* (Cth) s 44(1).
[5] Australian Banking Association, *Banking Code of Practice*, effective 1 July 2019, Chapter 43, available at: https://www.ausbanking.org.au/images/uploads/Banking_Code_of_Practice_2019_web.pdf.

compliance by their debt assignees with legislation, the Code and the Guideline[6] but the Australian Banking Association explicitly rejected this recommendation. We consider this a significant missed opportunity and recommend this obligation be imposed by regulation.

We also support prohibiting the sale of debts owed by customers who are solely reliant on Centrelink income, and increasing the threshold at which a creditor or debt buyer can commence bankruptcy proceedings to ensure people don't face losing their homes over small unsecured debts.

> **Recommendation 2:** Require financial services providers to monitor compliance by their debt assignees with relevant legislation and regulatory requirements.
>
> **Recommendation 3:** Prohibit the sale of debts owed by customers who are solely reliant on Centrelink income, or have current or pending hardship arrangements.
>
> **Recommendation 4:** Increase the bankruptcy threshold for a creditor's petition to, at a minimum, $30,000 to ensure people don't face bankruptcy and losing their homes over small unsecured debts.

Irresponsible lending and hardship applications

In relation to whether banks and other financial service providers have pursued legal claims against customers despite being aware of misconduct by their own officers or employees that may mitigate those claims, we see this most commonly in relation to hardship applications and irresponsible lending.

In the cases of both Robert Regan and Nalini Thiruvangadam during the first round of hearings at the Banking Royal Commission, hardship applications were made very soon after the initial approval of the relevant loans. This should have been a red flag to lenders that contraventions of responsible lending laws might have occurred, as the loans were arguably unaffordable from the outset. Instead, both Mr Regan and Ms Thiruvangadam were offered unsatisfactory hardship arrangements and potential misconduct of employees and third parties was not investigated. This is not an uncommon scenario.

Where hardship applications are made soon after loan approval, this should be considered a de facto indicator that contraventions of responsible lending laws or other consumer protection laws have occurred. As such, in determining the fair and appropriate response, the lender should investigate whether misconduct by their own employees or related third parties (such as brokers) has occurred and provide an appropriate remedy, for example, a debt waiver.

Further, where misconduct by a particular employee, branch or related third party is detected, the lender should review customer files that might also have been affected and compensate appropriately.

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[6] Phil Khoury, Independent Review: Code of Banking Practice, 31 January 2017, p 99, available at: http://cobpreview.crkhoury.com.au/wp-content/uploads/sites/2/2017/02/Report-of-the-Independent-Review-of-the-Code-of-Banking-Practice-2017.pdf.

Recommendation 5: Early hardship applications be considered de facto indicators that contraventions of responsible lending laws may have occurred, and misconduct be investigated by the lender in determining an appropriate remedy, such as a debt waiver.

Recommendation 6: Where misconduct is detected, the lender should review other customer files that might also have been affected and compensate those customers appropriately.

Conduct falling below community standards

Further to the conduct outlined above, all of which we consider falls below community standards, we note our submissions to the Banking Royal Commission in relation to customer service and complaints handling.[7] People's experiences with financial service providers' customer service and complaints handling are often in circumstances when they are trying to exercise their legal rights. Unfortunately, our experience is that the quality of customer service and complaint handling is variable among the industry and, in some cases, very poor.

Common problems in banking IDR include delays in providing documents, not providing documents, standardised correspondence, not recognising dissatisfaction as a complaint, not accepting authorities for representatives to act and failure to effectively inform people about the relevant EDR body. Banks can also take entrenched positions, irrespective of evidence provided, and not undertake detailed investigations or consider whether issues raised are systemic.

We consider one of the key drivers of this behaviour is misaligned incentives in the finance industry. Staff have not been rewarded for resolving disputes to a customer's satisfaction, providing appropriate compensation or highlighting systemic issues and misconduct. Rather, they have been rewarded for sales and closing complaints. These incentives must change in order for consumer outcomes to improve.

Model litigant policy

Despite designing a system to keep matters out of court, sometimes court action will be an inevitability. This can occur where the consumer either does not take the required steps to make a complaint to AFCA because they are unaware of this option or lack the capacity to do so. It can also occur where AFCA considers a matter to be outside its jurisdiction.

Where matters are before a court, we consider that banks should be required to conduct proceedings as a model litigant.[8] Model litigant obligations are traditionally placed on government instrumentalities, and are integral to the rule of law, as there is an imbalance of power when someone is in dispute with a government. One of the key observations identified in the Final Report of the Banking Royal Commission was the asymmetry of power and information between financial institutions and their customers. We consider that

[7] Consumer Action Law Centre, Initial Submission to Banking Royal Commission: Part 1, paragraph 3.28, available at: https://policy.consumeraction.org.au/wp-content/uploads/sites/13/2018/01/180122-Consumer-Action-Sub-to-Royal-Commission-Part-1-FINAL-redacted-180323-UN.pdf.

[8] See 'Model Litigant Rules', *Rule of Law Institute of Australia*, available at: https://www.ruleoflaw.org.au/priorities/model-litigant-rules/

model litigant obligations would go someway in addressing this, and should require the following of financial institutions:

- acting honestly, consistently and fairly in the handling of claims and litigation;
- paying or resolving legitimate claims without litigation;
- not taking advantage of a claimant who lacks resources;
- not relying on a merely technical defence against a claim.

We note that model litigant obligations also require the consideration of alternative dispute resolution options, such as AFCA.

> **Recommendation 7:** That financial firms that are in legal disputes with their customers be obliged to act as model litigants.

TOR B: The accessibility and appropriateness of the court system as a forum to resolve these disputes fairly, including:

i. **the ability of people in conflict with a large financial institution to attain affordable, quality legal advice and representation,**
ii. **the cost of legal representation and court fees,**
iii. **costs risks of unsuccessful litigation, and**
iv. **the experience of participants in a court process who appear unrepresented;**

The court system is rarely the most suitable forum to resolve financial services disputes fairly, particularly for consumers experiencing vulnerability and disadvantage. The process is slow, legalistic, complex and expensive. Courts expose consumers to serious costs risks, and present significant barriers to accessing justice. The resources required to run a case via the court process, as opposed to EDR, are significant and the process is daunting and entirely inaccessible for participants without access to legal advice and representation.

As set out below and in submissions to the Ramsay Review,[9] we consider that EDR forums such as AFCA provide far more accessible and appropriate dispute resolution services to consumers than the court system. EDR is better equipped to support unrepresented consumers as processes are less formal. Importantly, as part of its decision-making criteria, AFCA can look beyond the black letter law—which can operate harshly on consumers—to consider what is fair and reasonable in all the circumstances and good industry practice. EDR also avoids the significant costs risks associated with courts and tribunals and provides consumers with the option of pursuing their claim in a court or tribunal if they are unsatisfied with their outcome in EDR. Making a complaint to AFCA also immediately halts repossession action and brings financial services providers to the table to mediate, which can ultimately mean the difference between someone losing or keeping their family home.

[9] For more information about the barriers to accessing justice via courts and tribunals, see: in particular, the Joint Consumer Submission to the *Ramsay Review: Issues Paper*, p 3, 4, 68-70, available at: https://consumeraction.org.au/edr-review/; see also Consumer Action, Submission to the Victorian Access to Justice Review, 29 February 2016, available at: https://consumeraction.org.au/access-to-justice-review/ ; Cameronralph Navigator, *Review of Tenants' and Consumers' Experience of the Victorian and Administrative Tribunal: Residential Tenancies List and Civil Claims List*, July 2016, available at: http://consumeraction.org.au/review-tenants-consumers-experience-victorian-civil-administrative-tribunal/.

The court system is unlikely to be able to handle the volume of complaints made to EDR schemes. It is estimated that AFCA will receive 69,000 complaints in its first year, which is a 20% increase on its forecast based on predecessor scheme volumes.[10] Without access to EDR, consumers would face huge delays and, in many cases, give up altogether on meritorious complaints.

We strongly support the jurisdiction of AFCA to consider disputes even where a firm has pursued debt recovery legal proceedings.[11] We consider that consumers should also be able to complain to AFCA about certain steps in any enforcement process post-judgment, and also encourage consideration of gaps in accessing AFCA in this area.

> **Recommendation 8:** As part of regular reviews of AFCA, consideration should be given to the effectiveness of AFCA's debt recovery legal proceedings jurisdiction as well as its ability to consider complaints about enforcement action or other matters where legal proceedings have been commenced.

Public interest litigation including class actions

In many circumstances, including class actions, courts can form an important part of the consumer redress framework. However, class actions can operate to exclude some parties from access to justice, for example, consumers might be required to register as a member of a class or their dispute might not be captured by the scope of a class action. Class actions are therefore only part of the answer.[12]

A barrier to commencing public interest litigation, particularly in the context of cases which relate to private rights, is the risk of adverse costs orders. In Consumer Action's experience, the prospect of adverse cost orders can act as a deterrent for our clients in pursuing legal action. This risk arises for our clients if they challenge a trader in lower courts and are successful, but the trader then appeals to a superior court. If the trader wins the appeal, a costs order may be made against the consumer which they are unable to pay. The risk is particularly present where the claim relates to an area of law that is unclear and, if the claimant is successful, will have implications for the viability of the relevant trader's business model.

This risk is heightened when the consumer owns or has an interest in the family home (or other significant assets), which could be called on to satisfy a costs award if the litigation is unsuccessful. This means that litigation about home lending will often involve significant costs risk where the consumer is still in possession of the home.

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[10] https://finsia.com/insights/news/news-article/2019/02/18/afca-sees-complaints-soar-after-royal-commission.
[11] AFCA Rules, A.7.1(b) and A.7.2(d).
[12] For more information on class actions, see Consumer Action submissions to: the Victorian Law Reform Commission inquiry into Litigation Funding and Group Proceedings, 6 October 2017, available at https://policy.consumeraction.org.au/2017/10/06/litigation-funding-and-group-proceedings-consultation-paper/; and to the Australian Law Reform Commission inquiry into Class Actions and Third-Party Litigation Funders, 17 August 2018, available at: https://policy.consumeraction.org.au/2018/08/20/class-actions-and-third-party-litigation-funders-alrc-inquiry/.

Efforts to deal with these risks, such as small claims procedures which are designed to facilitate more accessible dispute resolution, have had limited success. For example, the *National Consumer Credit Protection Act 2009* (Cth) (**NCCP Act**) provides for a presumption against adverse cost orders for small claims proceedings, hardship and postponement matters.[13] However, compensation orders are limited to offences or contraventions of the NCCP Act, and should a plaintiff seek to include related claims (for example, breaches of general consumer protections in the *Australian Securities and Investments Act 2001* (Cth)), then the protections of the small claims jurisdiction are not available. This limits the usefulness of this forum. We recommend that consumers be provided with better rights to gain a protective costs order, or order that costs won't be awarded. We note that this has been recently legislated in relation to small business and competition matters.[14]

> **Recommendation 9:** Consumers be provided with better rights to gain a protective costs order, or order that costs won't be awarded.

TOR C: The accessibility and appropriateness of the Australian Financial Complaints Authority as an alternative forum for resolving disputes including:

i. **whether the eligibility criteria and compensation thresholds for AFCA warrant change,**
ii. **whether AFCA has the powers and resources it needs,**
iii. **whether AFCA faces proper accountability measures, and**
iv. **whether enhancement to their test case procedures, or other expansions to AFCA's role in law reform, is warranted**

One of the more significant advances in consumer protection in the past 20 years has been the establishment of mandatory external dispute resolution schemes in many industry sectors. EDR in the financial system has provided access to justice for hundreds of thousands of consumers who would have been unable to resolve disputes if they had to rely on existing courts and tribunals, which are expensive, slow, and largely inaccessible without legal representation. That is why for most consumers, AFCA is the primary—not the alternative—forum for resolving disputes with FSPs.

Consumer advocates continue to support the thorough and considered findings of the recent Ramsay Review.

The policy and legislative settings for EDR in financial services has undergone important changes following the Ramsay Review, passage of the *Treasury Laws Amendment (Putting Consumers First—Establishment of the Australian Financial Complaints Authority) Act 2018* (**AFCA Act**), and commencement of AFCA in November 2018. As these changes occurred only recently, it is too soon to fully and fairly evaluate the impact of the change in these policy settings. Our primary position is that AFCA should be given time to work before further changes are made to policy settings.

Below we set out our views on outstanding and transitional issues.

Accessibility and appropriateness of AFCA

[13] NCCP Act s 199.
[14] Treasury Laws Amendment (2018 Measures No. 5) Bill 2018.

By comparison to courts and tribunals, AFCA is a far more accessible and often more appropriate forum to resolve consumer disputes with FSPs. The benefits of EDR schemes include:

- AFCA is free to consumers, unlike courts and tribunal which typically involve application fees and where the parties split the costs of court-ordered mediation;
- reduced practical barriers to making a complaint, by allowing consumers to make a complaint by phone or online, and through the use of simple forms in plain language;
- faster dispute resolution compared to legalistic tribunals, which would be overwhelmed by the volume of complaints that AFCA has received since commencement;
- greater flexibility in resolving disputes, including decision-making criteria that include a consideration of what is fair and reasonable in all the circumstances and good industry practice, not just the black letter law;
- funding that responds to demand and does not depend on appropriation bills once this issue is no longer 'flavour of the month';
- an ability to respond to systemic issues, resolve the cause of consumer problems and facilitate consumer redress;
- the ability for advocates other than legal practitioners to assist consumers, such as financial counsellors and support workers;
- the use of telephone conciliation and email/telephone correspondence avoids the need for time off work to attend court hearings, and is more accessible for people living regionally;
- AFCA decision-makers can *investigate* the consumer's claim, unlike adversarial litigation, and the process and format for providing evidence is much simpler.

To give one practical example, an AFCA complaint does not require the detail and formality of an affidavit, which is usually required to substantiate claims in court action. It is very time consuming, expensive and difficult to prepare an affidavit setting out conversations and a lengthy history of, for example, a loan account. The consumer often cannot recall the details while the lender has access to phone recordings and file notes to prepare its own affidavit evidence. By comparison, a consumer at AFCA can set out the detail of their complaint in a phone call or email and ask AFCA to investigate.

A critical feature of AFCA, in distinction to courts and tribunals, is that its determinations are binding on (and rarely appealable by) the FSP but not binding on the consumer. This levels the inherent power and resourcing imbalance between FSPs and consumers, as consumers do not have to fear endless costly appeals by well-resourced banks, avoiding the costs risks described above. If the consumer is unhappy with the outcome at AFCA, they do not have to accept AFCA's view and can try their matter fresh in court from the start. Although this right is rarely exercised in practice due to courts' accessibility barriers, it is an important feature to retain, as it gives people trust in the AFCA process and provides a mechanism by which consumers and their advocates can take public interest matters to court.

There is always room for improvement, so we encourage AFCA to engage in continuous improvement of its accessibility and to remedy any barriers to access. Consumer groups are monitoring AFCA decisions and consumer feedback, and will continue to provide feedback to AFCA and, where necessary, ASIC, on accessibility or quality issues.

Eligibility criteria

Our views on the appropriate terms of reference for AFCA are set out in a joint submission on AFCA's draft rules.[15]

There are significant gaps in membership of AFCA, which reduces access to justice for customers of these firms. The main hook by which firms join AFCA is a licensing condition. This means unlicensed firms cannot be made to join AFCA, creating loopholes and inconsistencies. Even where firms do join voluntarily, they can choose to leave AFCA at any time.

The following types of firm provide services of a financial nature but are not required to provide their customers access to AFCA:

- Debt management firms;
- Registered Debt Agreement Administrators;
- 'Buy now, pay later' providers;
- FinTechs and emerging industries;
- Small business lenders.

Some products fall outside—or are structured to fall outside—AFCA's jurisdiction. We have particular concerns about exemptions for point of sale lending in car yards and retail outlets, and "dealer-issued warranties", a form of junk add-on insurance sold in car yards, both of which fall outside the remit of AFCA (and ASIC licensing regimes).[16]

There have been a number of reviews recommending that the above firms and services be brought within AFCA's remit, including the recent Senate Inquiry into credit and financial services targeted at Australians at risk of financial hardship[17] and this Committee's report on the 2018 debt agreement reforms.[18] We note, for example, the Government's commitment in 2017 to require debt management firms to join AFCA.[19] Until the Government implements a seamless regulatory framework for debt management firms, credit repairers will increasingly undermine the efficacy of AFCA and continue to rip off people who are confused and concerned about their creditworthiness.

We recommend urgent legislative reform to require the above firms to maintain membership of AFCA.

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[15] Joint consumer submission to AFCA, *Australian Financial Complaints Authority (AFCA) Draft Rules*, 2 July 2018, available at: https://policy.consumeraction.org.au/2018/07/03/draft-afca-rules/.

[16] For more information, see Consumer Action submission to ACCC new car retailing industry market study, 14 November 2016, available at: https://www.accc.gov.au/system/files/Consumer%2520Action%2520Law%2520Centre.pdf

[17] The Senate, Economics References Committee, *Credit and hardship: report of the Senate inquiry into credit and financial products targeted at Australians at risk of financial hardship*, February 2019, Recommendations 4, 8, 9, 10, available at: https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Economics/Creditfinancialservices/Report.

[18] The Senate, Legal and Constitutional Affairs Committee, *Report: Bankruptcy Amendment (Enterprise Incentives) Bill 2017, Bankruptcy Amendment (Debt Agreement Reform) Bill 2018 [Provisions]*, 16 April 2018, [4.14], available at: https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Legal_and_Constitutional_Affairs/DebtAgreementReform/Report.

[19] Ramsay Review, Final Report, 9 May 2018, Recommendation 10, available at: https://treasury.gov.au/publication/edr-review-final-report/; The Hon Scott Morrison MP, Media release, Building an accountable and competitive banking system – Attachment B: Government Response to the Ramsay Review (9 May 2017) (**Government Response**), available at https://cdn.tspace.gov.au/uploads/sites/72/2017/05/MR044b.pdf.

Recommendation 10: Require the following firms to maintain membership of the Australian Financial Complaints authority: debt management firms; registered Debt Agreement Administrators; 'buy now pay later' providers; FinTechs and emerging players; and small business lenders.

Recommendation 11: Remove point-of-sale lending exemptions from the *National Consumer Credit Protection Act 2009* (Cth).

Recommendation 12: Reform the sale of 'dealer-issued' warranties.

Exclusions – Family Court property matters

AFCA's rules also exclude complaints that have already been dealt with by a court or dispute resolution established by legislation.[20] This practice disadvantages consumers who have a claim against a financial firm but who have settled a family law property matter.

In family law matters, it is not uncommon for one party to have liability for debts for which they received no benefit. This is particularly the case where family violence and economic abuse are involved (such as coercion to obtain credit, to be a joint borrower, or fraud which causes detriment to the other partner).

In some of these cases the financial service has acted illegally, or unfairly, (for example due to maladministration in lending, inappropriately signing one party as a co-borrower or guarantor, or failing to recognise undue pressure from another party) and the consumer has a dispute which would be within AFCA's jurisdiction.

However, AFCA refuses to consider such a dispute against a lender if the couple have settled their property dispute, on the basis that it is outside jurisdiction because the dispute has been determined by a court (even if the lender was not involved in the family court matter).

The result is that those involved in family law property disputes are disadvantaged if they have legal rights against the lender.

In such cases the consumer could join the lender in the family law property proceedings. This means that the property dispute would involve a dispute between the separating couple, as well as a dispute between one party and a financial institution. Such a matter would be complex. The Family Court would need to determine issues relating to credit legislation and finance industry codes of conduct, and the legal costs would make this unaffordable for most consumers. We are not aware of any cases where this has occurred.

Another option for these consumers is lodging a dispute with AFCA and seeking an adjournment of the property dispute, but this could delay family law proceedings which is undesirable.

[20] AFCA Rules, C1.2(d)

Given that the financial service is not involved in the property settlement, we believe that AFCA should be prepared to handle such a dispute regarding the conduct of the financial service. AFCA's refusal to do so results in an unfair outcome for some consumers, particularly those who have experienced financial abuse.

Case study 1
A wife signed a joint loan with her husband for over $200,000 because she was told that it would pay off a debt to her father-in-law and remove his name from the title of the family home. When she left her abusive marriage, she found that the husband's father was still on title, which (along with the $200,000+ loan) significantly reduced the property pool. When she lodged a dispute in AFCA, based on evidence that the lender should have been aware that she was being misled and/or coerced, AFCA refused to deal with the matter because a family law property dispute has been settled.

Case Study 2
Mr X and Mrs X were joint owners of the family home. When they separated, they decided to sell the house. Mr X completed a bank form, authorising proceeds from the sale of the house to be transferred to an account in his name alone. He forged Mrs X's signature on the form.

The funds (approximately $200,000) were transferred to Mr X. Mr X withdrew the funds, and declared he had spent most of the funds and had total assets remaining of only $30,000.

A private lawyer is handling the property matter for Mrs X, but a community lawyer is assisting her with some family violence matters. The community lawyer has advised Mrs X not to enter into a property settlement, because if she does AFCA is likely to refuse to hear a dispute about the bank's role in transferring the funds based on a forgery. The community lawyer has sought advice from pro-bono counsel. The matter is continuing.

Recommendation 13: AFCA should be able to consider disputes against a financial firm post a Family Court property order or settlement

Compensation thresholds

The increased limits at AFCA are an improvement by comparison to its predecessor schemes but should be further raised to expand access to justice in consumer claims.

It is important that the ombudsman scheme's jurisdiction is, as far as possible, uniform and consistent across claims, compensation, and types of disputes. A uniform threshold would reduce the substantial confusion faced by consumers, industry, and their respective advisors about the various sub-limits for different claims.[21] It would improve consistency of outcomes and simplify jurisdictional disputes for the scheme. As such, we recommend removing the distinction between claim limits and compensation caps, and increasing both to $2 million for consumer and small business disputes.

[21] For a summary of the existing monetary jurisdiction, see AFCA Complaint Resolution Scheme Rules, page 35, available at: https://www.afca.org.au/about-afca/rules-and-guidelines/rules/.

The existing sub-limits for consequential financial and non-financial loss are far too low. The Banking Royal Commission revealed the stress, anxiety, and hardship caused by irresponsible loans. Despite these impacts, AFCA can only award $5000 compensation.

Increasing these limits will incentivise all FSPs to act appropriately in the first place, and resolve customers complaints in a timely manner, which should reduce the number of AFCA complaints over time.

We recommend the following increases to AFCA compensation thresholds:

Limit/Cap	Recommendation
Claim limit (general)	$2 million
Compensation cap (general)	$2 million
Consequential financial loss	Remove existing sub-limit of $5,000 for 'indirect financial loss'. Empower AFCA to award fair and reasonable compensation within the general compensation cap
Consequential non-financial loss	Remove existing sub-limit of $5,000 for non-financial loss. Empower scheme to award fair and reasonable compensation within the general compensation cap
Life insurance claims	No cap (alternatively, include within general compensation cap)
General insurance broking	Remove existing sub-limit of $250,000 and include within general compensation cap

While we consider that the caps should be increased, ultimately, AFCA's monetary jurisdiction should be a matter for its Board, with oversight by ASIC. We note that ASIC has a new power to direct AFCA to increase limits on the value of claims or the value of remedies, after giving AFCA one month's notice.[22]

Recommendation 14: AFCA compensation thresholds should be increased in accordance with the above table.

Powers

One area of concern is the provision of documents by FSPs to complainants.

We support the recommendation 4.11 of the Financial Services Royal Commission Final Report that section 912A of the Corporations Act be amended to require that AFSL holders take reasonable steps to cooperate with AFCA in its resolution of particular disputes, including, in particular, by making available to AFCA all relevant documents and records relating to issues in dispute. We note the bill intended to be introduced by the Australian Labor Party to give effect this recommendation.[23]

Recommendation 15: There should be enhanced obligations on financial firms to cooperate with AFCA and make available relevant documents and records relating to a dispute.

[22] Corporations Act 2001 s 1052B.
[23] Corporations Amendment (Banking Royal Commission Recommendations Implementation—Strengthening AFCA Processes) Bill 2019

Resources

AFCA has a greatly expanded jurisdiction by comparison to its predecessor EDR schemes, FOS and CIO. This includes an expanded small business jurisdiction and for the first time, superannuation jurisdiction, as well as increased claims thresholds.

It is vital that the small business and superannuation complaints units are self-funding, and that consumer disputes are not cross-subsidising these new areas. This model was proposed by FOS when it consulted on expanding its own small business jurisdiction in 2016, prior to the Ramsay Review.[24]

The transitional funding to establish AFCA was minimal. We support additional funding to AFCA, should it need it, particularly given the higher-than-expected volume of complaints it has received since 1 November 2018 to ensure that it can provide high-quality and timely decisions.

We note that since commencement of the AFCA Act in 2018, ASIC has a new power to give directions to AFCA to ensure sufficient financing.[25]

> **Recommendation 16:** AFCA should be sufficiently resourced to deal with higher-than-expected volume of complaints

Accountability

The AFCA Act included enhanced accountability measures for AFCA by comparison to its predecessor schemes and courts and tribunals.

- The EDR Benchmarks of accessibility, independence, fairness, accountability, efficiency, and effectiveness are now enshrined in legislation as general considerations under section 1051A of the Corporations Act.
- The general considerations are relevant to the Minister's authorisation of the AFCA scheme.[26]
- ASIC may issue regulatory requirements relating to, among other things, the general consideration of accountability[27] and issue written directions to AFCA if it has not done all things reasonably necessary to comply with that requirement.[28]
- If AFCA wants to make material changes to the scheme, including to the general consideration of accountability, it must apply to ASIC.[29]

As these changes commenced only recently, it is too soon to fully and fairly evaluate their impact.

Other tried and tested accountability measures from predecessor EDR schemes will continue to apply at AFCA, including:

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[24] Financial Ombudsman Service, *Expansion of FOS's Small Business Jurisdiction: Consultation Paper*, August 2016, available at: https://www.fos.org.au/custom/files/docs/fos-small-business-consultation-paper.pdf.
[25] Corporations Act 2001 (Cth) (**Corporations Act**) s 1052BA.
[26] Corporations Act s 1050(2)(a).
[27] Corporations Act s 1052A.
[28] Corporations Act s 1052C.
[29] Corporations Act s 1052D.

- strong consumer liaison functions, with consumer advocates, community legal centres, financial counsellors and legal aid commissions providing ongoing feedback and complaints on emerging issues and areas where AFCA can be improved; and
- periodic independent reviews.

We also support the public reporting of complaints, determinations, and systemic issues. We consider that public accountability for traders improves the overall competitiveness of the marketplace by encouraging traders to improve their practices and empowers consumers to make informed decisions about where to buy goods and services. Further, it provides incentive for regulators to take enforcement action against problematic players in the market where there are clearly systemic issues.

While we welcome the Parliament's focus on outcomes for victims of misconduct by FSPs in the justice system, ultimately, we support a governance model for AFCA that is largely independent of government control, with ASIC providing the primary oversight.

> **Recommendation 17:** AFCA should public report complaints, determinations and systemic issues, including the names of financial firms.

Transitional issues

The transition to AFCA has been incredibly fast and, in some respects, difficult given the external environment. In the uncertainty between the Government's commitment to implement the Ramsay Review recommendation of establishing one EDR scheme in the financial system and the passage of the AFCA Act, many experienced staff left the predecessor schemes.

AFCA was also given a very short timeframe for establishment—just 6 months from Ministerial authorisation of the scheme on 1 May 2018 to being required to accept complaints on 1 November 2018.[30] By comparison, the establishment of the Financial Ombudsman Service took over 18 months.

We continue to monitor transitional issues as AFCA develops, including the quality of decision-making, particularly with new staff. There can be a trade-off between the quality and timeliness of decision-making in EDR schemes. While timeliness is important, we don't want this to be at the expense of quality and the fair resolution of disputes.

One area of concern is decision-making during the earlier stages of case management and in assessing whether a dispute is within AFCA's jurisdiction. We consider that determinations made by a lead ombudsman or expert panel are generally of very high quality. However, only a very small number of disputes reach an ombudsman or expert panel. It is important that early case management is staffed by experienced and skilled case managers that can identify all relevant issues, whether or not those issues were raised directly in the consumer's application.

[30] The Hon Kelly O'Dwyer MP, Media release, *Putting Consumers First: Australian Financial Complaints Authority Takes Shape*, 1 May 2018, available at: http://kmo.ministers.treasury.gov.au/media-release/044-2018/.

Given that the vast majority of consumers are unrepresented, and thus unlikely to identify all relevant legal claims, it is important that the new scheme takes the time to properly investigate all apparent claims during case management, rather than taking a narrow approach based on the consumer's application.

Indeed, one of the great advantages of AFCA over the adversarial approach of a tribunal or court is AFCA's ability to *investigate* a person's complaint. It is essential that AFCA investigate all apparent claims on the information available, whether or not specifically identified in the complaint. This will ensure fair outcomes and assist in the identification of systemic issues.

The assessment of whether decision-making is fair and high-quality must go beyond satisfaction surveys. While surveys are useful in identifying trends, consideration must also be given to feedback from vulnerable and unrepresented consumers, and periodic external quality assessment, including file audits.

File review processes are expensive but valuable from time to time. File audits can serve to challenge internal wisdom and bring a new perspective for the benefit of decision-making in future disputes. We recommend that a random selection of disputes be periodically externally quality-assessed. The quality assessment should encompass whether the outcome was fair and legally correct, as well as the appropriateness of the conduct of the dispute resolution process. If some public transparency is given to the external assessment process, this can also build stakeholder confidence and enhance the credibility of the dispute resolution scheme.

We understand that AFCA has initiated some internal reviews into these issues, including a review into decision-making and review into fairness, and we strongly support this work.

Recommendation 18: AFCA should review decision-making models to ensure that decision-making is effective and fair at all stages of a dispute.

Recommendation 19: AFCA should properly investigate all apparent claims, rather than taking a narrow approach to the definition of the dispute.

Recommendation 20: The AFCA Board should consider commissioning a periodic external quality-assessment of a random selection of disputes, encompassing whether the outcome was fair and legally correct, as well as the appropriateness of the conduct of the dispute resolution process.

Test case provisions

Occasionally, there are unsettled and untested aspects of our credit and financial services law that can pose problems for the resolution of disputes.

We consider that it is primarily the role of the regulator to run test cases to settle the law in these situations. We also note ASIC's new approach to enforcement, with a 'why not litigate?' enforcement stance and new Office of Enforcement.[31]

[31] ASIC, ASIC update on implementation of Royal Commission recommendations, 19 February 2019, page 3, available at: https://download.asic.gov.au/media/5011933/asic-update-on-implementation-of-royal-commission-recommendations.pdf.

However, there is value in a mechanism for consumers to be supported to bring test cases, acknowledging the resource constraints of the regulator and that a consumer may take a different view of the unsettled law to the regulator and thus may wish to argue the case differently.

Consumer advocates support the test case provisions at AFCA. However, FSPs have been unwilling to use these provisions, likely because the FSP has to foot the consumer's legal bill under the AFCA Rules. It is important that the consumer's legal costs are paid, otherwise the mechanism will be entirely inaccessible to consumers.

To address this practical barrier, we recommend the establishment of a fund for consumer legal costs for test cases. One model for this fund is the Victorian Law Reform Commission's recommended Justice Fund, which would provide: financial assistance to parties with meritorious civil claims; indemnity in respect of any adverse costs order; and indemnity in respect of any order for security for costs.[32] This fund would be of benefit to AFCA, complainants and FSPs.

> **Recommendation 21:** Establish a Justice Fund for consumer legal costs and costs risks in AFCA test cases.

TOR D: The accessibility of community legal centre advice relating to financial matters

Consumer Action considers that the resolution of disputes with financial service providers can be aided by an effective and integrated community legal sector, working closely with financial counsellors and other community service providers. Community lawyers not only assist individuals resolve to disputes, but play an important role in leading systemic change, preventing disputes from arising.

This submission suggests the following:

- a model for community lawyers and financial counselling service delivery, which responds to financial sector disputes; and
- an injection of funding to the financial counselling & community legal sectors to meet the resourcing required by such a model.

Model for community legal service delivery

An effective model for community legal and financial counselling service delivery, which responds to disputes in the finance sector, would:

- build on the strengths and plug the gaps of current financial services legal assistance and financial counselling services;
- respond to the needs of consumers, particularly those vulnerable and disadvantaged consumers who have the greatest need for assistance and/or the greatest difficulty accessing services;
- maximise coordination between all service delivery agencies, including through specific support for coordination so that there isn't duplication, that there are clear entry points and pathways for consumers, and consumers are connected to the service they need;

[32] VLRC, *Civil Justice Review: Report 14*, 28 May 2008, available at: https://www.lawreform.vic.gov.au/projects/civil-justice/civil-justice-review-report.

- build in flexibility as to the mix of services to allow the system to respond to changing circumstances;
- include capacity for improvement through research and evaluation and contribute to systemic change.

The model involves both community lawyers and financial counsellors, recognising that people often have intertwined legal and debt issues and the existence of legal rights with respect to financial difficulty.[33] Furthermore, people don't necessarily identify their financial services legal issue as a 'legal problem', and many people need both legal and non-legal assistance in relation to that model.

The model also recognises that people's needs for assistance can vary. Some people are able to self-advocate with very limited information and/or advice. Others, particularly those experiencing disadvantage or vulnerability, require more intensive assistance. As such, the proposed model would be made up of:

A. First contact services – initial triage, advice and referral
B. Advice and self-help services
C. Casework and representation services – both financial counselling and legal assistance
D. Specialist services to extend generalist lawyers and financial counsellors – specialist worker advice and training
E. Research, evaluation, policy analysis – capacity to contribute to systemic change

A. First contact services

The design of first contact services should recognise that disputes may arise from a debt or other legal issue, and that people contact services differently—some will use phone services, and some will contact centres in their local community. The services would include:

- the National Debt Helpline, being the first point-of-call for people experiencing financial difficulty including website and webchat;
- triage legal advice service operated by state-based specialist community legal centres (**CLCs**)[34]—many legal disputes won't originate as a debt issue, but will present as a legal issue;
- state-based legal helplines, for example, the services operated by Victoria Legal Aid[35] or NSW's Law Access;[36] and
- community-based services: many people do not contact phone services, but will rather contact their local community legal centre or financial counselling service.

B. Advice and self-help services

Many people's disputes will be able to be resolved through limited advice and/or self-help services. This might include provision of sample letters, dispute toolkits etc. This service level is beyond initial triage and advice, however, and recognises that many people will require repeat services, for example, where they initially make a complaint that is rebuffed, they can return to the service to get greater assistance. These services will be delivered by:

- the National Debt Helpline: many callers return for additional advice; and

[33] Section 72, National Credit Code, Schedule to *National Consumer Credit Protection Act 2010* (Cth).
[34] There are existing specialist CLCs only in 4 jurisdictions, and some are not well resourced.
[35] See https://www.legalaid.vic.gov.au/get-legal-services-and-advice/free-legal-advice/get-help-over-phone.
[36] See http://www.lawaccess.nsw.gov.au/.

- legal advice services operated by state-based specialist CLCs—these services can produce a range of self-help toolkits and provide ongoing advice to assist people resolve disputes through, for example, AFCA.

This aspect of the model recognises that not everyone needs a 'lawyer or advocate on the record', and they can resolve their own complaint with access to assistance when they need it.

C. Casework and representation services

Where disputes are more complex, or the consumer is unable to self-advocate, a casework or representation file might be opened. Where the matter relates to financial difficulty or responsible lending, a financial counsellor would be well placed to run the file. Where the matter relates to more complex legal arguments or dispute, it might be best run by a lawyer.

These services would be delivered by:

- specialist CLCs, who would have a particular focus on strategic litigation, e.g. testing aspects of the law;
- generalist CLCs, a network of lawyers focusing on consumer disputes located at existing CLCs, allowing face-to-face delivery particularly in regional areas where the specialist CLC may not be located; and
- community-based financial counsellors.

Some financial counsellors could be co-located at community legal centres, enabling joint casework and representation services that would respond to the full remit of a client's concern—i.e. immediate dispute, and broader hardship concerns.

D. Specialist support services

These services would be delivered by specialist community legal centres, and be dedicated specifically to support other aspects of the service delivery system with their specialist knowledge. This would include:

- training services – providing training on specialist aspects of the law and practice for generalist lawyers and financial counsellors;
- advice services – specialist legal advice services targeted at other community workers (including financial counsellors and community lawyers) about their clients' disputes (sometimes called 'worker advice' or 'secondary consultations').

These specialist support services would build the capacity of the service system to respond, but also facilitate appropriate referral practices, i.e. when the matter is complex, it can be transferred to the specialist centre.

Secondary consultations (worker advice) – what is it?

It is empirically established that unresolved legal problems result in poorer health and social outcomes. Recent research[37] has found that the use of secondary consultations, where a lawyer gives advice in a timely and approachable way to non-legal professionals ('trusted intermediaries') who are likely to have contact with the most vulnerable and disadvantaged clients, then this is an effective way of reaching clients who would otherwise not gain help or advice.

Legal secondary consultations build capacity and confidence in professionals to both identify legal rights so they either support a client or, where appropriate, refer clients who would otherwise not get help because of a range of inhibitors. Legal secondary consultations enable people to identify their rights and action them where otherwise they would be overlooked.

Specialist legal centres partnering with generalist community legal centres, an example

In 2017-18, Consumer Action partnered with two regional community legal centres to better reach vulnerable and disadvantaged people living in remote, rural and regional areas. This partnership involved:

- delivery of training by Consumer Action specialist lawyers to generalist community lawyers at these centres;
- a program of shadowing and secondments between staff at the agencies;
- outreach and community legal education; and
- secondary consultations and supported casework.

These partnership projects resulted in a substantial amount of consumer law, credit/debt law and insurance law being undertaken by the regional centres. The large increase in service delivery came on the back of increased knowledge, skills and confidence around identifying and supporting clients' consumer law issues at the regional community legal centres, particularly from the shadowing, secondments and secondary consultations. Furthermore, referral partnerships were improved as a result of the in situ training and relationship building.

Key drivers for the success of the projects included:[38]

- a highly responsive specialist legal centre both through its worker advice line (easy to access support when it was required) and when designing training;
- a flexible approach to case management, e.g. 'ongoing assistance files' instead of supervisions. This style of assistance is neither one-off general advice nor ongoing casework, but involves the availability to support from a specialist lawyer when it is needed.

[37] Curran, L, 'Lawyer Secondary Consultations: improving access to justice and human rights: reaching clients otherwise excluded through professional support in a multi-disciplinary practice', *Journal of Social Inclusion,* vol 8, No 1 (20017) available at: https://josi.journals.griffith.edu.au/index.php/inclusion/article/view/817

[38] Federation of Community Legal Centres, *Collaboration works: FCLC Generalist-Specialist Project*, Final Report, August 2018

E. Research, evaluation & policy analysis

The system should also built on the principle of continuous improvement, including in terms of its own service delivery but also in the capacity of the consumer experience to feedback into systemic change and improvement in the delivery of financial services.

Evaluation and research would ensure that the client voice is fed back into the design of services. This would include assessing client satisfaction with triage services, but also monitoring client outcomes from advice and representation services. This capacity should be built inside the specialist centres as well as relevant peak bodies.

Specialist centres should also have the capacity to lead systemic change through, for example:

- identifying the need for law reform and advocating for needed reform;
- identifying the need for changes to industry practice and advocating for that change;
- identifying systemic issues, including systemic breaches of the law and drawing them to the attention of the regulator;
- participating in government and regulatory processes;
- monitoring the performance of dispute resolution systems and regulators, and advocating change.

Casework resulting in systemic change

In 2014, Consumer Action identified a recurring them in our casework arising from the sale of poor-value add-on insurance including through car yards. This theme arose as a result of attempting to assist people make claims that were declined, and identifying clients who did not know that they had purchased this form of insurance. We published two policy reports in 2015 that examined these issues,[39] and raised the issue with industry, regulators and government.

In 2016, Consumer Action launched DemandARefund.com, a tool which enabled people who had been mis-sold insurance and warranties to claim a refund from the insurer or financier. The tool has been widely used. As at the end of 2018, over $1.6 million in refunds had be demanded using DemandARefund.com.

These activities resulted in ASIC investigating the sale of this sort of insurance, and it released two reports in February 2017 examining the sector.[40] During 2017 and 2018, ASIC took action which resulted in a number of insurers agreeing to pay more than $100m in remediation. ASIC also proposed a deferred sales model for the sale of add-on insurance in car yards, to address the risk

[39] Consumer Action, *Donating Your Money to a Warranty Company*, August 2015, available at: https://consumeraction.org.au/wp-content/uploads/2015/08/DonatingYourMoneyToAWarrantyCompany.pdf; *Junk Merchants: How Australians are being sold rubbish warranties and what we can do about it*, December 2015, available at: http://consumeraction.org.au/Junk%20Merchants%20-%20Consumer%20Action%20Law%20Centre%20December%202015.pdf

[40] ASIC, *Report 470: buying add-on insurance in car yards, why it can be hard to say no,* available at: https://asic.gov.au/regulatory-resources/find-a-document/reports/rep-470-buying-add-on-insurance-in-car-yards-why-it-can-be-hard-to-say-no/; *Report 417: The sale of life insurance through car dealers: taking consumers for a ride*, available at: https://asic.gov.au/regulatory-resources/find-a-document/reports/rep-471-the-sale-of-life-insurance-through-car-dealers-taking-consumers-for-a-ride/.

of high pressure selling.[41] This deferred sales model has been recommended by the Banking Royal Commission to be applied across all types of add-on insurance and in all distribution channels.[42]

Resourcing community legal service delivery

To deliver effectively on the model above, greater resourcing for community lawyers and financial counsellors is required. We endorse the proposal for an industry levy in the joint submission by Financial Counselling Australia and the National Association of Community Legal Centres to the Banking Royal Commission (**FCA-NACLC Submission**).[43] An industry levy recognises that banks, financial service providers, utilities, telecommunications companies all benefit from access to financial counselling and legal assistance. These services can contribute to the early resolution of debt and legal problems, meaning people are less likely to need to take their dispute to AFCA or courts.

The FCA-NACLC Submission calls for funding of $157 million per annum, through an increase to the Major Bank Levy or ASIC Industry levy, to create a properly funded network of community financial counselling and community legal services. This is composed of $1 million for the National Debt Helpline, $130 million for 1,000 financial counsellors, and $26 million for an additional 200 community financial service lawyers located across Australia.

The FCA-NACLC Submission estimates that this expanded network will triple the number of people—increasing from around 250,000 to 800,000 people a year—who are able to access information, self-help resources, phone financial counselling services, face-to-face financial counsellors, legal advice, or other legal support to help them resolve disputes, structure their debts, and negotiate with financial services.

This resourcing required is based on the following:

- Community lawyers: The LAW (Legal Australia-wide) survey conducted by the Law and Justice Foundation in NSW found that 6.4 percent of people surveyed had experienced a credit and debt problem in the last 12 months.[44] This amounts to 1.2m people (percentage of adult population). Of this group, it is estimated around 20 percent would be in the lowest quintile, which means that they are financially disadvantaged. This would amount to 240,000 people—the amount of people that can be reached by 200 additional community lawyers through information, advice and representation.[45]

[41] ASIC, *Consultation paper 294: The sale of add-on warranties through car yard intermediaries*, August 2017, available at: https://download.asic.gov.au/media/4422973/cp294-published-24-august-2017.pdf
[42] Final Report, Royal Commission into Misconduct in the Banking, Superannuation & Finance Industry, recommendation 4.3
[43] Available at: http://www.naclc.org.au/resources/20181026%20NACLC%20and%20FCA%20Banking%20RC%20Submission_2.pdf.
[44] Law & Justice Foundation of NSW, *Legal Australia-Wide Survey: Legal need in Australia*, 2012, available at: http://www.lawfoundation.net.au/ljf/app/6DDF12F188975AC9CA257A91000608 9D.html
[45] Ibid.

- Financial counsellors: In October 2018, Financial Counselling Australia conducted an unmet needs survey.[46] This showed that for every five people who seek financial counselling, three are assisted and two are turned away. This means that, overall, around 128,000 people are being turned away each year (extrapolating from the survey which showed that 3,000 people were turned away each week). To turn no-one away, and address this unmet need, there is a need to double the number of financial counsellors.[47]

For more information on the benefits to individuals, communities and the broader financial services industry, and funding models, please refer to the FCA-NACLC Submission.

The types of disputes that community lawyers can assist with

Community lawyers assist with a range of legal disputes in the finance sector, but focus primarily on consumer credit and insurance disputes. With additional resourcing, there is an opportunity to expand this remit to respond to legal issues affecting other people experiencing disadvantage or vulnerability. These might include:

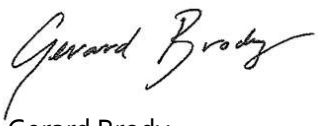
- Financial planning disputes, particularly where poor financial advice has resulted in the loss of assets such that people are required to resort to government assistance;
- Small business lending disputes, particularly where lending results in recourse on residential property resulting in loss of a family home; and
- Superannuation disputes, for example, disputes around access to group insurance offered by superannuation funds.

Greater resourcing will allow a community legal sector to respond to the legal need in a planned and coherent way, and not be siloed by different types of legal dispute.

> **Recommendation 22:** That there be a substantial injection into the resourcing of financial counselling and community legal services to assist with disputes in the finance sector, and for this to be paid for through an industry levy.

Please contact us on 03 9670 5088 or at cat@conusumeraction.org.au if you would like to discuss this submission further.

Yours Sincerely,
CONSUMER ACTION LAW CENTRE



Gerard Brody
Chief Executive Officer

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[46] Financial Counselling Australia, *The Unmet need for financial counselling,* December 2018, available at: https://www.financialcounsellingaustralia.org.au/FCA/media/CorporateMedia/Unmet-Need-for-Financial-Counselling-2018.pdf.
[47] See above n 41.

APPENDIX A: SUMMARY OF RECOMMENDATIONS

Recommendation 1: Financial services providers significantly improve their internal dispute resolution processes, having regard to ASIC's upcoming review of RG165.

Recommendation 2: Require financial services providers to monitor compliance by their debt assignees with relevant legislation and regulatory requirements.

Recommendation 3: Prohibit the sale of debts owed by customers who are solely reliant on Centrelink income, or have current or pending hardship arrangements.

Recommendation 4: Increase the bankruptcy threshold for a creditor's petition to, at a minimum, $30,000 to ensure people don't face bankruptcy and losing their homes over small unsecured debts.

Recommendation 5: Early hardship applications be considered de facto indicators that contraventions of responsible lending laws may have occurred, and misconduct be investigated by the lender in determining an appropriate remedy, such as a debt waiver.

Recommendation 6: Where misconduct is detected, the lender should review other customer files that might also have been affected and compensate those customers appropriately.

Recommendation 7: That financial firms that are in legal disputes with their customers be obliged to act as model litigants.

Recommendation 8: As part of regular reviews of AFCA, consideration should be given to the effectiveness of AFCA's debt recovery legal proceedings jurisdiction as well as its ability to consider complaints about enforcement action or other matters where legal proceedings have been commenced.

Recommendation 9: Consumers be provided with better rights to gain a protective costs order, or order that costs won't be awarded.

Recommendation 10: Require the following firms to maintain membership of the Australian Financial Complaints authority: debt management firms; registered Debt Agreement Administrators; 'buy now pay later' providers; FinTechs and emerging players; and small business lenders.

Recommendation 11: Remove point-of-sale lending exemptions from the *National Consumer Credit Protection Act 2009* (Cth).

Recommendation 12: Reform the sale of 'dealer-issued' warranties.

Recommendation 13: AFCA should be able to consider disputes against a financial firm post a Family Court property order or settlement

Recommendation 14: AFCA compensation thresholds should be increased in accordance with the below table.

Limit/Cap	Recommendation
Claim limit (general)	$2 million
Compensation cap (general)	$2 million
Consequential financial loss	Remove existing sub-limit of $5,000 for 'indirect financial loss'. Empower AFCA to award fair and reasonable compensation within the general compensation cap
Consequential non-financial loss	Remove existing sub-limit of $5,000 for non-financial loss. Empower scheme to award fair and reasonable compensation within the general compensation cap
Life insurance claims	No cap (alternatively, include within general compensation cap)
General insurance broking	Remove existing sub-limit of $250,000 and include within general compensation cap

Recommendation 15: There should be enhanced obligations on financial firms to cooperate with AFCA and make available relevant documents and records relating to a dispute.

Recommendation 16: AFCA should be sufficiently resourced to deal with higher-than-expected volume of complaints

Recommendation 17: AFCA should public report complaints, determinations and systemic issues, including the names of financial firms.

Recommendation 18: AFCA should review decision-making models to ensure that decision-making is effective and fair at all stages of a dispute.

Recommendation 19: AFCA should properly investigate all apparent claims, rather than taking a narrow approach to the definition of the dispute.

Recommendation 20: The AFCA Board should consider commissioning a periodic external quality-assessment of a random selection of disputes, encompassing whether the outcome was fair and legally correct, as well as the appropriateness of the conduct of the dispute resolution process.

Recommendation 21: Establish a Justice Fund for consumer legal costs and costs risks in AFCA test cases.

Recommendation 22: That there be a substantial injection into the resourcing of financial counselling and community legal services to assist with disputes in the finance sector, and for this to be paid for through an industry levy.