

# Resolution of disputes with financial service providers within the justice system

Submission to Senate Legal and Constitutional Affairs Reference Committee Inquiry

Australian Financial Complaints Authority

4 March 2019

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# 1 Executive Summary

## Overview

The Australian Financial Complaints Authority (AFCA) welcomes the opportunity to make a submission<sup>1</sup> to the Senate Inquiry into the resolution of disputes with financial service providers within the justice system.

AFCA is a new body that started on 1 November 2018 and now does the work previously undertaken by the Financial Ombudsman Service (FOS), the Credit and Investments Ombudsman (CIO) and the Superannuation Complaints Tribunal (SCT). The change to a single scheme implements the recommendations to Government made by the 2017 Ramsay Review.<sup>2</sup>

As a new organisation AFCA has a fresh remit, new rules, operating procedures and a strategy that places fairness at the heart of everything it does.

AFCA handles complaints that consumers and small businesses may have with their financial firm. Consumers and small businesses can come to AFCA with matters relating to banking and finance, general insurance, life insurance, investments and advice and superannuation. AFCA's remit for the first time allows superannuation complaints to be handled by an ombudsman scheme. It also has a broader definition of small business, which means more small businesses now have access to EDR.

For consumers and small businesses, AFCA provides a simple and free alternative to going to court. Compared with its predecessors, AFCA has significantly higher limits on the claims it can consider and the compensation it can award.<sup>3</sup>

AFCA strongly welcomes the recommendations of the Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry and believes that these reforms are critical to ensuring that consumers and small businesses are treated fairly. The case studies examined by the Royal Commission highlighted conduct that is deeply concerning and understandably has had a major impact on trust in financial services.

We acknowledge that trust in the financial services industry has been badly damaged by the conduct of a number of financial firms. AFCA's role as an ombudsman is to provide fair and equitable outcomes that provide redress where consumers have not been treated fairly.

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<sup>1</sup> This submission has been prepared by the Office of the CEO and Chief Ombudsman and does not necessarily represent the views of individual AFCA directors.

<sup>2</sup> [Review of the financial system external dispute resolution and complaints framework, 3 April 2017 \(Ramsay Review\)](#)

<sup>3</sup> AFCA has a claim limit of \$1 million and compensation cap of \$500,000 for consumer complaints. For small business credit facility complaints, a small business can lodge a complaint where the credit facility is of an amount up to \$5 million and will be able to receive compensation of up to \$1 million, and \$2 million for primary producers.

Before we can start talking about restoring trust in financial services, it is essential that people have a place to go to be heard, where their matter can be independently assessed and where appropriate, redress provided. We believe in most cases that place is AFCA. The costs, risks, power imbalance and stress of litigation means that taking legal action in court is often not an option for most consumers and small business owners.

### The Terms of Reference of this Inquiry

External dispute resolution (EDR) and internal dispute resolution (IDR) obligations form a key part of the broader consumer protection framework and access to justice for consumers and small businesses. It has benefits the court system doesn't have.

AFCA as a "one stop shop" was set up after substantial review undertaken by the Ramsay Review to deliver a more effective route to justice.

In just over 120 days of operation, AFCA has proactively made an impact in our delivery of this vision. It has finalised almost 20,000 disputes and more than \$54 million was awarded or obtained through AFCA by consumers and small businesses.<sup>4</sup>

The Committee's Terms of Reference asks whether AFCA has the powers and resources it needs, and whether its thresholds are appropriate. AFCA has only been in place for four months and we believe that it needs to be given some time to operate before we have a strong evidence base to support changes to its powers and thresholds.

Built into the legislation that established AFCA<sup>5</sup> is an independent review to be established by the Minister, after AFCA has been operating for 18 months. We will have a much clearer view of whether our thresholds and resources are adequate to respond to the future needs of consumers and small businesses at that time.

We note that recent Government announcements about AFCA's expanded jurisdiction, will result in more complaints being lodged and a greater demand for AFCA's services. AFCA supports measures that will increase access to justice for consumers and small businesses and we are preparing for this new work now. The AFCA Board can source additional funding from industry to respond to, or otherwise take other appropriate action, to address increased demand.<sup>6</sup>

AFCA will also work with Government, ASIC, consumers and industry to ensure it has the necessary resources and remit to deal with complaints now and in the future.

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<sup>4</sup> This includes matters previously received by FOS and AFCA, and resolved by AFCA since 1 November 2018. Compensation amounts for matters previously lodged with the Credit and Investments Ombudsman are not readily available.

<sup>5</sup> *Treasury Laws Amendment (Putting Consumers First—Establishment of the Australian Financial Complaints Authority) Act 2018*.

<sup>6</sup> AFCA Constitution: <https://www.afca.org.au/public/download.jsp?id=7177>

## Our first four months

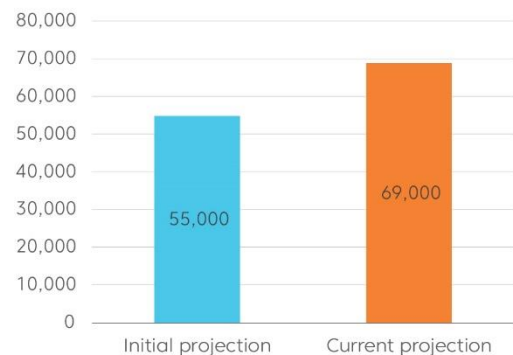
**23,681 complaints received**

**42% increase in volume of complaints compared with predecessor schemes**

**18,390 complaints finalised**  
(11,522 AFCA complaints,  
6,868 FOS and CIO complaints)

**More than \$54 million was awarded or obtained through AFCA by consumers and small businesses**

Projected complaints for 2018-19



The above volumes provide clear evidence of the need for AFCA. As an ombudsman scheme, AFCA has the flexibility to adapt and innovate in response to changes in the external environment.

## Scope of this submission

In this submission we provide information about AFCA, its history and development; its role as an important mechanism for consumers and small businesses to obtain access to justice for complaints they have about their financial services. We address the questions raised in the Committee's Terms of Reference and provide our insights from our complaint resolution experience and welcome the opportunity to comment on this important topic.

## 2 Introduction

AFCA's new remit was recommended by the Ramsey Review and we have only been operating with this for four months. It has provided for much higher claim and compensation limits than the predecessor schemes, a new superannuation jurisdiction and a broader small business definition.

### Ramsay Review, the role of ombudsmen schemes and access to justice

The Ramsay Review found there was a consensus among stakeholders that EDR schemes are an effective dispute resolution mechanism which promotes access to justice and decreases the burden on the judicial system.<sup>7</sup>

Several other inquiries into the work of EDR schemes in the financial services industry also supported their important role in the access to justice arrangements in Australia.<sup>8</sup> In a letter to the then Prime Minister, consumer organisations emphasised the important role of EDR and noted that:

*EDR in financial services has provided access to justice for hundreds of thousands of consumers that would have been unable to resolve disputes if they had to rely on existing courts and tribunals.*<sup>9</sup>

The Ramsay Review found that ombudsman schemes can promote access to justice through their ability to adapt and innovate in response to changes in the external environment. This is particularly relevant in the financial services sector, which has seen rapid changes in the types of products being sold; how they are sold and delivered and the types of consumers buying them.

### Royal Commission

Commissioner Hayne made two recommendations directly related to AFCA. First, that a compensation scheme of last resort be introduced and second, that financial firms be required to co-operate with AFCA, including by way of providing information to us during our work. We warmly welcome both recommendations and will work with Government and other stakeholders to see these implemented.

The Commissioner made no recommendation for any changes to AFCA's operations, although of course AFCA is still very new. Our goal is to enhance the way complaint resolution services are delivered.

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<sup>7</sup> Joint Consumer Group, submission to the EDR Review Issues Paper, page 39.

<sup>8</sup> [Final Report](#) on the Productivity Commission's *Inquiry into Access to Justice Arrangements*, December 2014, Final Report of the [Financial System Inquiry](#), November 2014, p193-194, Senate Economics References Committee [Inquiry into Forestry Managed Investment Schemes](#), p41 of Submission 34 (by ASIC), September 2014 and [Final Report](#) on the Ramsay Review: *Review of the financial system external dispute resolution and complaints framework*, April 2017.

<sup>9</sup> Letter to the Prime Minister from the Consumer Action Law Centre, the Financial Rights Legal Centre and Financial Counselling Australia, 24 August 2016.

## What is different about AFCA

Given the large reach of AFCA, we have focused on raising awareness of AFCA to consumers, small businesses, financial firms and other stakeholders.

We have been engaging actively with the community both directly and through key support groups such as financial counsellors, legal aid, community legal centres and financial rights advocates, to identify opportunities to develop and enhance our processes and service.

From day one, we have also been working pro-actively with financial firms to resolve complaints earlier, faster and with less impost on the consumer and small business. Ultimately, most complaints can and should be resolved by financial firms themselves directly with consumers. But we recognise this often doesn't happen and that financial firms own IDR processes very often need improvement.<sup>10</sup>

We continue to develop and educate our members on what appropriate and fair IDR and EDR outcomes look like. The quality of IDR arrangements of financial firms is of fundamental importance in providing access to justice for consumers and small businesses. We educate financial firms about their responsibilities and obligations for compliance with AFCA determinations.

We also work with consumers and small businesses to reduce financial complaints through innovative solutions, education and communication.

As a new organisation, AFCA is building a workforce that understands the diverse needs of the community, is customer focused and helpful.

## Our priorities

We are focused on delivering fair, independent and effective solutions for financial complaints. Some of our initiatives are as follows.

We are reviewing our end to end complaint handling processes to make sure they are effective, easy to use and fair. We are working to ensure that people who may need extra help because of language, health issues, cultural backgrounds and vulnerabilities are properly supported.

We are assessing how we can better articulate our approach to fairness and reviewing our approaches to ensure they always lead to fair and consistent outcomes for all. We are aiming to influence behaviour change in the financial services industry through the development of a new and robust framework which articulates our approach to fairness.

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<sup>10</sup> ASIC's Report 603 – [The consumer journey through the Internal Dispute Resolution process of financial service providers](#)

We have recently appointed a dedicated Lead Ombudsman for small business complaints with significant experience in dealing with small businesses. This will ensure that we can better understand the unique issues faced by small businesses and their financial complaints. We are piloting a small business project to investigate in detail the challenges small businesses face when they are trying to resolve their problems, the best way to engage with them and their financial firms, and the most effective tools to resolve complaints.

Our processes allow us to tailor what is required for an individual. Trust in financial firms can sometimes be rebuilt through sincere apologies, acknowledgment of what has been and actions to repair the relationship. We offer this through interest based resolution tools, such as conciliations and ombudsman conferences. For this reason, we also place greater emphasis on the use of these informal resolution methods to facilitate agreement between the parties if possible.

We know from our experience that negotiated outcomes result in greater complainant satisfaction than formal decisions do. We provide tailored processes to rebuild a person's trust and therefore sense of fairness and access to justice. However, we continue to issue formal decisions, if a fair agreement cannot be reached between the parties.

A key aspect of our engagement with all stakeholders is to provide information that is both transparent and informative and that ultimately leads to positive change in the financial services industry, resulting in fairer outcomes for consumers and small businesses. We are therefore assessing how we will use our complaint data to identify trends and issues in the industry, to inform both industry improvements and the work of regulators.

We are establishing a new and different relationship with regulators through our early identification and reporting of systemic issues, discussed further below.

## **Our work is more than individual complaint resolution**

### **Systemic issues and serious contraventions**

Under ASIC's Regulatory Guide 267, AFCA is required to report systemic issues and serious contraventions to ASIC as soon as practicable, but no later than 15 days after it considers that there is a systemic issue.<sup>11</sup>

A systemic issue is one that has implications beyond the immediate actions and rights of the parties to the complaint.<sup>12</sup>

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<sup>11</sup> ASIC Regulatory Guide 267, RG 267.65, 267.69, 267.70 & RG 267.38.

<sup>12</sup> Under the AFCA Rules, a systemic issue is defined as an issue that is likely to have an effect on consumers or small businesses, in addition to any complainant. According to ASIC's RG 267, a serious contravention will be serious, and therefore reportable by AFCA to the regulators if: a) there are sufficient facts or information to found an objectively reasonable belief that it is serious; or (b) AFCA in good faith forms the view that a serious contravention of the law may have occurred. A reasonable belief will be formed if a reasonable person would expect AFCA to report the matter to a regulator.



Our systemic issues work has a broader effect, in that it may impact customers of a financial firm who may not even know there has been an issue.

Identifying, investigating and resolving systemic issues gives AFCA the chance to work with financial firms to fix issues, including providing remediation to consumers and small businesses. The impact of our systemic issues work raises industry standards and improves practices.

AFCA has started 39 investigations into possible systemic issues since it started on 1 November 2018. AFCA has in progress eight investigations into possible serious contraventions. The most common issue being misleading conduct by financial firms. None of these have been confirmed as serious contraventions, as they are still under investigation.

AFCA has continued with investigations into possible systemic issues that were commenced by its predecessor schemes. 56 possible systemic issues were identified by the predecessor schemes and since confirmed by AFCA as systemic.

One systemic issue affected 2.3 million customers and related to the cancellation of insurance policies. An outcome of our investigation was that the financial firm was required to update all affected renewal notices to ensure they provided the time at which the policy would expire, ensuring that consumers had a clear understanding of when their policy would lapse. Another, involved a financial firm offering inappropriate repayment arrangements, putting an estimated 815 consumers at risk of hardship. The consumers are currently being remediated.

Other systemic issues were about responsible lending, errors in credit listings, complaints handling procedures, terms and conditions, approach to terms of settlement, conduct of employees, and financial difficulty policies.

## Code compliance

Industry codes play an important role in enhancing the relationship of trust between consumers and financial firms. They are a form of regulation by which participants set standards on how to comply with the law. AFCA supports the role of codes and will take them into account in its consideration of complaints.

As well as its role in complaint resolution and systemic issues, AFCA has a Code team that provides secretariat services and support to five Code compliance committees.<sup>13</sup> Each Committee publishes its own annual reports including details of code breaches, investigations and the results of its targeted monitoring activities.<sup>14</sup>

Code compliance committees undertake annual compliance reporting programs for each code. Code subscribers self-report code breaches that they have identified through internal compliance monitoring activities. Committees are also empowered to

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<sup>13</sup> Codes of Practice: <https://www.afca.org.au/about-afca/codes-of-practice/>

<sup>14</sup> Code compliance publications: <https://www.afca.org.au/about-afca/rules-and-guidelines/code-compliance/>

investigate individual allegations of noncompliance with a code. Committees may become aware of these matters through referrals from AFCA's complaint resolution work.

## A. Use of the legal system to resolve disputes

### **Committee's Terms of Reference**

- 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

As an independent EDR scheme, we exist as a free and independent alternative to the courts. We also deal with complaints where a financial firm may have started debt recovery litigation against its customer and the litigation is in the early stages. When a complaint is lodged with AFCA all legal and other recovery action must be stopped.<sup>15</sup> These complaints involve dealing with customers experiencing financial difficulty, and are often resolved by negotiation.

Whilst it may be within a financial firm's legal rights to take enforcement action under their credit contracts if a customer is in default, we strongly encourage financial firms to work together with their customers experiencing financial difficulty to try to resolve issues before they escalate. It is in everyone's interest to resolve differences before court proceedings take place as these may have more far reaching consequences for consumers and small businesses.

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<sup>15</sup> AFCA Rules, A.7 Restrictions on Financial Firms during a complaint.

## B. Accessibility and appropriateness of the court system

### Committee's Terms of Reference

- 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;

One of the most significant challenges encountered by consumers and small businesses who have financial complaints is the power imbalance they face, particularly when dealing with very large financial institutions. Individuals can feel that they are in a “*David and Goliath*” struggle against a body that has all the records and legal resources at its disposal.

The Productivity Commission Inquiry Report into Access to Justice Arrangements<sup>16</sup> outlined the many challenges faced by Australians gaining effective access to the justice system including the cost of accessing justice services and securing legal representation. Whilst improvements will have occurred in the five years since the report, the issues raised in the above question were identified previously. These include the adversarial nature of court processes; and the observation that some parties, including many self-represented litigants, do not understand the processes involved in undertaking legal action and appearing in a court or tribunal.

In contrast, AFCA is a free service available to consumers. AFCA is funded by industry, through a mixture of levies and fees for complaints handled. The more complaints a financial firm receives the more it pays in fees to use our service. The longer each complaint remains unresolved and the further along it goes in our process the greater the cost to the financial firm. There are no fees for lodging a complaint at AFCA and no adverse costs outcomes if a complainant is not successful in their complaint.

AFCA's processes are inquisitorial and include the gathering of information and the identification and articulation of issues. This involves our assessment of the issues for the parties and checking of these issues with the parties to confirm that our identification and articulation is correct. We may recognise an issue at law that a party

<sup>16</sup> [Access to Justice Arrangements, Productivity Commission Inquiry Report No 72, 5 September 2014](#)

did not raise and as an inquisitorial process it is within our remit to pursue that claim if appropriate. This approach assists consumers and small businesses and makes it easier for them to access and engage with the process as we take a more active role in defining the issues for investigation.

In contrast, in an adversarial court process, this task is left to the parties and they are often required to get legal advice to assist in this. The position of financial firms is slightly different as they generally have access to records and internal or external legal advice. Further, larger financial firms may be more familiar with EDR processes than individual consumers and small businesses.

As noted in the Productivity Commission's Report, the traditional court system, which relies on lawyers, the rules of evidence and specific processes and procedures can be complex and intimidating for consumers and small businesses. In this regard, a benefit of ombudsman schemes is that they provide a relatively simple process, led by the ombudsman, negating the need for formal legal representation and going some way towards balancing the power difference between the parties. Furthermore, ombudsman services are not restricted to resolving legal issues; rather, they have broader scope to consider a range of factors, including what is a fair outcome in the circumstances of each particular case.

Under the AFCA Rules, we can make decisions on complaints based on our opinion of what is fair in all the circumstances – having regard to legal principles, applicable industry codes or guidance as to practice, good industry practice and previous relevant decisions of AFCA or a predecessor scheme (although AFCA is not bound by these).

AFCA's processes are designed to facilitate an early resolution of complaints using informal resolution methods including negotiation and conciliation. If the matter cannot be resolved then a preliminary view may be issued, followed by a decision of an ombudsman. There are no adverse costs consequences to complainants if they are not successful in their complaint. Our processes are designed however to give an early indication of approach and likelihood of success. Most complainants are self-represented and generally do not require legal representation to successfully navigate through the process. As the Productivity Commission set out in its report:

*Alternative dispute resolution (ADR) encompasses a broad range of facilitatory, advisory and determinative processes whereby parties can resolve disputes with the assistance of an impartial practitioner. These techniques are increasingly being recognised as a way for people to resolve disputes without recourse to traditional trial processes. ADR offers a number of advantages, including cost and time savings and confidentiality of outcomes, provided both sides are willing to constructively engage in the process. In cases that already involve courts and tribunals, ADR can be used to narrow the issues in dispute and so minimise hearing times and avoid significant costs.<sup>17</sup>*

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<sup>17</sup> Access to Justice Arrangements, Productivity Commission Inquiry Report No 72, 5 September 2014

## C. Accessibility and appropriateness of AFCA

### Committee's Terms of Reference

- c) the accessibility and appropriateness of the Australian Financial Complaints Authority (AFCA) 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;

As a key principle of EDR,<sup>18</sup> AFCA should be accessible to all consumers and small businesses. These principles are also included in AFCA's authorisation as an EDR scheme.<sup>19</sup> Such access is easier for those in our community who are financially literate, can use online resources and have knowledge and resources to proactively seek EDR. We are committed to making AFCA services available to all consumers, particularly those who may be vulnerable and disadvantaged.

AFCA addresses the issue of accessibility in two ways: firstly ensuring broadly that consumers and small businesses are aware of our existence. Secondly, once they have found us, making our process easy to use. This is especially important when dealing with vulnerable consumers.

### Increasing public awareness of AFCA

We attend a range of community and consumer events across the country to raise awareness of AFCA with people who might need help with a financial complaint and who may not be aware there is an ombudsman scheme in financial services.

Our outreach program includes working with financial counsellors, community legal centres and financial rights centres, as well as interfacing with vulnerable and disadvantaged groups including culturally and linguistically diverse communities,

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<sup>18</sup> ASIC Regulatory Guide 267 sets our guidance relating to the general consideration for an EDR schemes, which are principles of accessibility; independence; fairness; efficiency and effectiveness and accountability. These principles have been applied to the oversight of ASIC-approved industry-based EDR schemes for many years, and will continue to apply to AFCA.

<sup>19</sup> The AFCA Act set out the general considerations for an EDR scheme. This includes accessibility, independence, fairness, accountability, efficiency and effectiveness.

those experiencing family violence, elder abuse or socio-economic disadvantage and Aboriginal and Torres Strait Islander communities.

Additionally, AFCA has created a consumer advisory panel made up of financial counsellors, legal aid and community legal center lawyers, and those involved in supporting other vulnerable and disadvantaged groups. We are also in the process of setting up our internal accessibility working groups to further enhance and support access to our services.

We also make regular media appearances across a broad array of consumer and specialist media to inform the public of our service, as well as undertaking appropriate awareness raising advertising across a range of platforms.

In the last four months, AFCA has attended 30 consumer, small business and community-related events. In the same period, we have attended 13 industry events or conferences, and hosted nine industry forums for financial firms. We have also had several individual meetings with financial firms to inform them of the AFCA implementation and the obligations and expectations we have of them.

### **Ensuring accessibility during the complaint handling process**

Being accessible also requires us to make the service easy to use for people who want to make a complaint, including those who have special needs. Our processes aim for a minimum of formality, with regular phone contact with complainants and financial firms and appropriate flexibility to consider individual circumstances that arise.

We provide translation services for those who need it; adapt our processes for individuals with disabilities and mental health issues. Where someone indicates to us that they would like additional assistance, AFCA contacts them to ensure we understand their needs and then organise the support required. We discuss with them how they would prefer to communicate with us and any other assistance we can provide. Through our website we provide information in a clear manner explaining about our service, what can be expected through our process; information about our approaches to certain types of complaints.

### **Eligibility criteria and compensation thresholds**

The Ramsay review spent a considerable amount of time investigating and determining what the appropriate limits should be for AFCA. The Government subsequently agreed with the recommendations in relation to the thresholds and they are the current AFCA thresholds.

Since 1 November 2018, AFCA has excluded only four complaints because their claim amount exceeded \$1 million. Further, AFCA proactively asks financial firms to consent to AFCA considering a complaint, when the claim amount or time limits are outside AFCA's jurisdiction.

Given the time that AFCA has been operating for, data on eligibility criteria and compensation thresholds is limited. It is therefore difficult to assess whether the current thresholds warrant change at this time. We note the independent review of AFCA's operations after 18 months presents an opportunity to review current thresholds.

### **Powers and resources**

AFCA's powers and jurisdiction is outlined in the AFCA Act, Constitution and Rules. Financial firms who become members of AFCA are contractually bound to comply with the AFCA Rules and Constitution. A key element of this is that they are required to comply with any direction or determination we issue in a complaint. If financial firms fail to comply with a direction or determination, AFCA can expel a financial firm, which would result in the financial firm breaching its licensing conditions.

Insights about whether AFCA has the powers and resources it needs to operate are limited given how long AFCA has been around for. Once AFCA has been operating for at least 18 months we will have a clearer view of whether our resources are adequate to respond to future needs.

### **How we are accountable**

AFCA provides a service that is accountable in many ways, including:

- reporting to the regulator, ASIC
- publishing and providing access to our decisions
- reporting on our performance in our Annual Reviews and other regular reports we publish
- conducting industry and consumer forums and sharing information about our operations and performance
- having a robust complaint resolution process that allows a decision maker to review an assessment previously issued by a case worker and reach a different view
- publishing approaches and guidance on how we deal with complaints
- having available a complaints and feedback process for users of our service who wish to complain about our standard of service. This includes an Independent Assessor<sup>20</sup> who independently reviews complaints about our standard of service, and

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<sup>20</sup> Pursuant to AFCA's Rules, it is a mandatory requirement that AFCA have an independent assessor to assess AFCA's handling of complaints, with a focus on reviewing AFCA's service provided to consumers and small businesses who have had their complaint dealt with by AFCA. If the independent assessor determines that a complaint was not handled satisfactorily, the independent assessor may recommend that AFCA take certain actions. Please see our website for further information <https://www.afca.org.au/about-afca/accountability/independent-assessor/>

- being subject to independent reviews.<sup>21</sup> AFCA will publish all independent review reports and the actions taken to address any independent review findings and recommendations.

### AFCA Board and governance

AFCA is governed by a Board with an independent Chair, and equal numbers of directors with consumer and industry backgrounds. With a largely new Board,<sup>22</sup> CEO and Chief Ombudsman, they bring new perspectives to EDR.

The AFCA Board develops and oversees AFCA's strategic direction and ensures the EDR scheme complies with its obligations under law. It provides ongoing strategic input and guidance to the Chief Ombudsman and CEO and the AFCA Senior Leadership Group.

The Board is also responsible for overseeing the Rules that AFCA follows when investigating complaints. The Board regularly commissions independent reviews and audits of the operations and procedures of AFCA.

The AFCA Board holds itself to high standards of corporate governance when running AFCA. AFCA has taken the ASX Corporate Governance Principles and Recommendations, issued by the ASX Corporate Governance Council, as being a baseline for good standards of corporate governance in Australia.

### ASIC oversight

ASIC is responsible for overseeing the effective operation of the dispute resolution system, which includes providing oversight of AFCA. ASIC has a range of powers available to it, including the power to issue regulatory requirements which form part of AFCA's compliance requirements, issue directions to AFCA and approve material changes to the AFCA scheme.

AFCA is also required to report to ASIC, on a quarterly basis, information about the volume and nature of complaints received, including consumer demographics, volume of complaints received that AFCA could not consider, the scheme caseload and time taken to resolve complaints as well as the profile of complaints and financial firms' cooperation in the dispute resolution process. This provides ASIC with regular updates on scheme performance to enable it to fulfil its responsibility for overseeing the effective operation of the dispute resolution system.

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<sup>21</sup> The *Treasury Laws Amendment (Putting Consumers First—Establishment of the Australian Financial Complaints Authority) Act 2018* (Cth) (the AFCA Act) requires the Minister to bring about an independent review of AFCA as soon as practicable, 18 months from commencement of operations. This independent review is scheduled to be conducted in May 2020.

<sup>22</sup> The AFCA Board has 11 directors, 6 were previously directors with the Financial Ombudsman Service. The remaining Directors and the Independent Chair were newly appointed by the Minister for Revenue and Financial Services.



## Test case procedures

Financial firms are generally not permitted to take legal proceedings including debt recovery against a complainant once a complaint has been lodged.<sup>23</sup> However a financial firm may begin legal proceedings if AFCA agrees to allow the financial firm to treat the complaint as a test case and the financial firm meets certain requirements.<sup>24</sup> These include undertakings to institute proceedings in any superior court or tribunal which has the ability to make a binding decision of the issue or point of law in respect of the complaint, and paying the complainants legal fees.

AFCA has received one request to treat a complaint as a test case. This request is currently being considered. The request for a test case is extremely rare. In the eight years of operation of AFCA's predecessor, FOS, only two requests were received to treat a complaint as a test case. One of those requests was withdrawn by the financial firm. The other request was granted. Our experience is that a test case takes a long time to be determined through the courts.

Given the infrequent use of the test case procedures in AFCA's predecessor schemes, it is not apparent that there is any current need to extend or revise the existing procedure. However, if that changes, there is an opportunity to review this in the independent review of AFCA's operations which will occur after 18 months of operating.

## D. Accessibility of community legal centre advice

### Committee's Terms of Reference

- d) the accessibility of community legal centre advice relating to financial matters

As noted in our submission to the Senate Inquiry into 'Credit and financial services targeted at Australians at risk of financial hardship'<sup>25</sup>, vulnerable and disadvantaged people often have difficulties seeking assistance with their complaints or even access an EDR scheme.

Free community legal centres and financial counselling services play a very important role in the financial sector. These services connect vulnerable and disadvantaged members of the community to EDR schemes such as AFCA and other support mechanisms. They also raise the standard of financial competency through help with budgeting, dealing with credit issues and other practical financial matters.

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<sup>23</sup> AFCA Rules A.7.1

<sup>24</sup> AFCA Rules A.7.2 (b)

<sup>25</sup> AFCA [submission](#) to the Inquiry by the Senate Economics References Committee, Credit and financial services targeted at Australians at risk of financial hardship, November 2018.

There are some excellent dedicated financial and credit legal centres in Australia that provide critical support to consumers and campaign for law and policy reform. We refer clients to them daily but know that they are under-resourced and their coverage is in places non-existent. We believe that measures to provide multi-year sustainable funding for these services is critical.

The National Debt Helpline provides a lifeline to thousands of people each year. Financial worries are a key component of many relationship breakdowns, suicide and both physical and mental health issues.<sup>26</sup>

If these services are not available free, many vulnerable and disadvantaged people may not be able to make complaints to financial firms or escalate complaints to EDR – and may turn to paid debt management firms.

Community legal centres and financial counselling services form a crucial part of the infrastructure of our financial sector. They provide benefits by, for example:

- helping consumers to resolve financial problems and complaints – alleviating issues that can cause real hardship
- promoting financial capability
- reducing the risk that vulnerable and disadvantaged consumers will be targeted by predatory businesses

Given the important role that community legal centres and financial counselling services play in the financial sector generally, and in EDR, we support measures to ensure these services are funded adequately now and in future.

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<sup>26</sup> See examples: <https://ndarc.med.unsw.edu.au/blog/mental-disorders-debt-there-link>; <https://www.wesleymission.org.au/assets/Migrated-Files/Document/Our-words/The-Wesley-Report/The-Wesley-Report-14-May-2015.pdf>; [https://www.goodshep.org.au/media/1288/mental\\_illness\\_debt\\_information\\_for\\_financial\\_counsellors\\_sep\\_2010.pdf](https://www.goodshep.org.au/media/1288/mental_illness_debt_information_for_financial_counsellors_sep_2010.pdf)

## Appendix 1 – About AFCA

The *Treasury Laws Amendment (Putting Consumers First—Establishment of the Australian Financial Complaints Authority) Act 2018* (Cth) authorises AFCA and outlines how our jurisdiction and powers are determined. AFCA was authorised on 23 April 2018.

*The Corporations Act 2001* (Cth) gives ASIC powers to oversee AFCA. ASIC is required to approve material changes to the AFCA scheme under the Corporations Act, 2001. ASIC approved AFCA's Rules on 6 September 2018.

Our [Rules](#) set out what complaints we can consider, the procedures we can use to resolve complaints, remedies we can provide and related matters, including our reporting obligations. We also publish [Operational Guidelines and Transitional Superannuation Guidelines](#), which set out how we interpret and apply our rules.

Under transitional arrangements that have been put in place with ASIC's approval, AFCA is currently resolving complaints made under the FOS and CIO schemes and will continue to do so until these are resolved. These complaints will be handled in accordance with the FOS Terms of Reference or CIO Rules, as applicable and in force when the relevant complaint was lodged.

AFCA is impartial, independent and free for consumers. If a complaint does not resolve between the parties, we will decide an appropriate outcome, including awarding compensation for losses suffered, where appropriate.

Examples of the outcomes that AFCA can provide:

- the payment of a sum of money
- the forgiveness or variation of a debt
- the release of security for debt
- the repayment, waiver or variation of a fee or other amount paid to, or owing to, the financial firm or to its representative or agent including the variation in the applicable interest rate on a loan
- the reinstatement, variation, rectification or setting aside of a contract
- the meeting of a claim under an insurance policy by, for example, repairing, reinstating or replacing items of property
- in relation to a default judgment, not enforcing the default judgment
- an apology.

## AFCA decision making criteria

Under the AFCA Rules, we can make decisions on complaints based on our opinion of what is fair in all the circumstances – having regard to legal principles, applicable industry codes or guidance as to practice, good industry practice and previous relevant decisions of AFCA or a predecessor scheme (although AFCA is not bound by these).

## AFCA staff

As at the end of February 2019, AFCA had a total of 559 staff in Melbourne and Sydney. AFCA staff have the experience to deal with all financial complaints, superannuation and small business. This includes 19 Ombudsmen, 12 Adjudicators and 45 Panel Members, among others.

## AFCA funding

AFCA is funded by membership levies, user charges and complaint fees received from member financial firms.

Australian financial firms that must be members of AFCA by law are required to pay a membership levy and other complaint-related charges to contribute to our operating costs. If we receive a complaint against a firm, the firm is required to pay an individual complaint fee. Our services are free of charge to consumers and small businesses who make a complaint.

For financial firm members who have complaints, their user charge is based on the number and complexity of the complaints closed for each firm over the 12 months prior to the calculation of the charge.

This approach rewards members who:

- increase their internal complaint resolution rates, and
- reduce the need for their customers to use AFCA.

## Appendix 2- AFCA facts and figures

**23,681 complaints received**

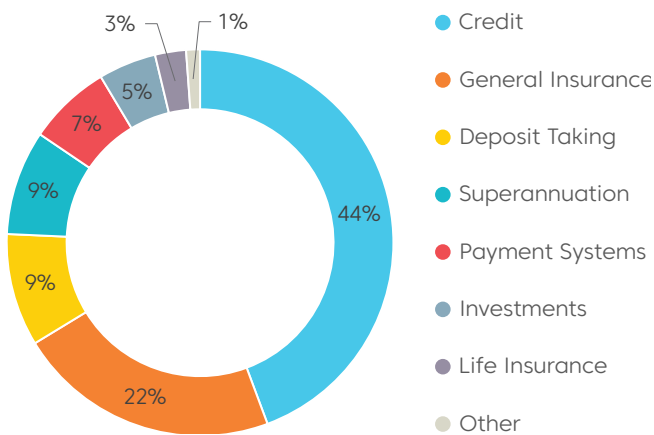
**42% increase in volume of complaints compared with predecessor schemes**

**18,390 complaints finalised**

(11,522 AFCA complaints, 6,868 FOS and CIO complaints)

**\$54.3 million in compensation<sup>1</sup>**

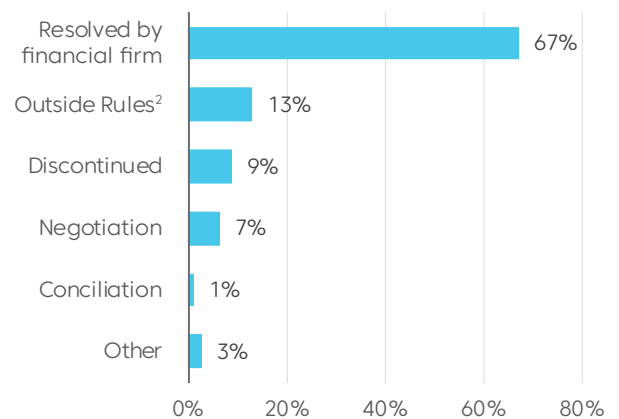
### Complaints received by product type



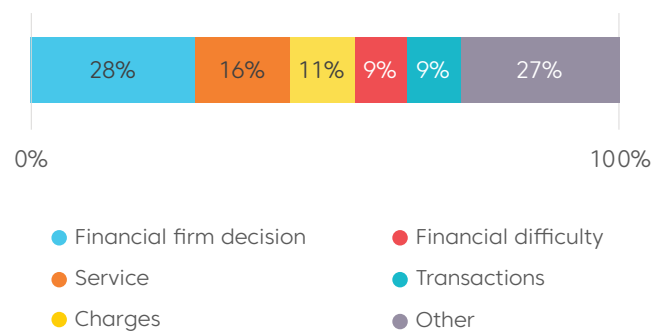
### Top 5 product types

Product	Total
Credit cards	3,395
Home loans	1,899
Personal loans	1,685
Motor vehicle – comprehensive	1,182
Personal transaction accounts	841

### Complaints finalised by outcome



### Complaints received by issue type



<sup>1</sup> This includes matters previously received by AFCA's predecessor, Financial Ombudsman Service, and resolved by AFCA since 1 November 2018.

<sup>2</sup> Three reasons accounted for 50% of all complaints outside the AFCA Rules – financial service was not provided, complaint already dealt with by a court, tribunal or other scheme and complaint related to a financial firm's practice or policy.

## Number of complaints received by main product issues

The following tables show all complaints received by the top 5 issue types.



**Credit 10,406 (44%)**

Issue	Total
Credit reporting	1,502
Responsible lending	931
Misleading product or service information	927
Incorrect fees or costs	609
Unauthorised transactions	587



**General Insurance 5,152 (22%)**

Issue	Total
Delay in claim handling	910
Claim amount	832
Denial of claim – exclusion or condition	815
Denial of claim	695
Service quality	258



**Deposit taking 2,221 (9%)**

Issue	Total
Unauthorised transactions	571
Service quality	180
Mistaken internet payment	139
Incorrect fees or costs	108
Failure to follow instructions or agreement	82



**Superannuation 2,066 (9%)**

Issue	Total
Incorrect fees or costs	301
Delay in claim handling	200
Account administration error	152
Denial of claim	138
Death benefit distribution	128



**Payment systems 1,637 (7%)**

Issue	Total
Unauthorised transactions	275
Denial of claim	257
Mistaken internet payment	179
Service quality	100
Incorrect fees or costs	68



**Investments 1,137 (5%)**

Issue	Total
Failure to follow instructions or agreement	259
Inappropriate advice	133
Incorrect fees or costs	87
Failure to act in client's best interests	86
Service quality	64



**Life insurance 608 (3%)**

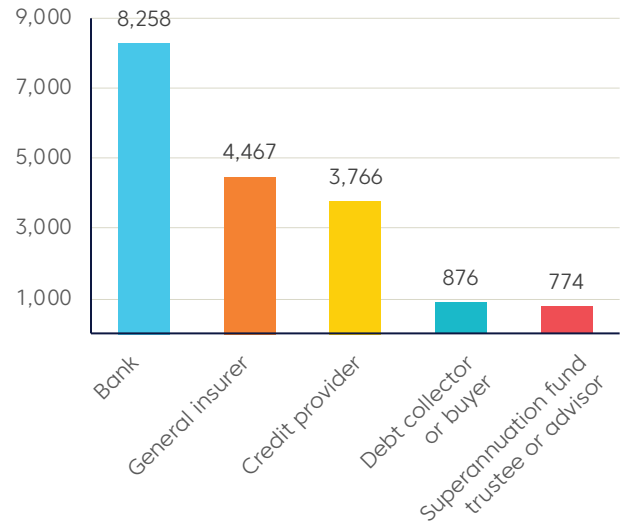
Issue	Total
Denial of claim	87
Incorrect premiums	56
Delay in claim handling	48
Claim amount	43
Cancellation of policy	38

## Members

We have 37,520 members<sup>1</sup>

90% of licensee members do not have a complaint lodged against them

## Complaints received by financial firm type

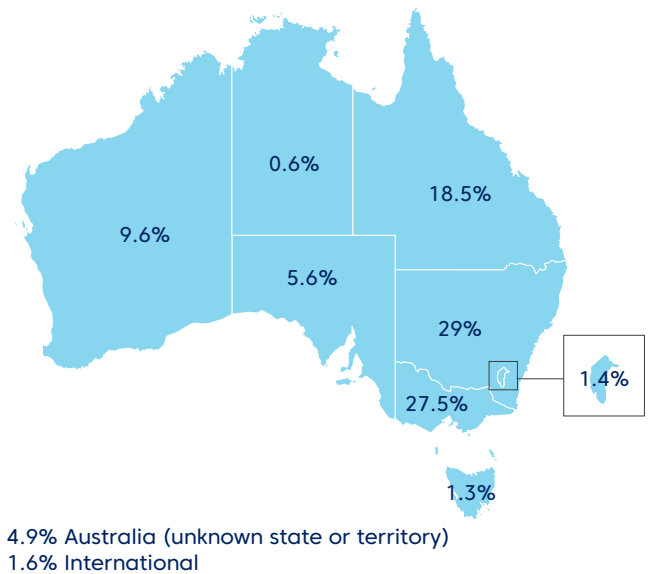


## Who lodged complaints

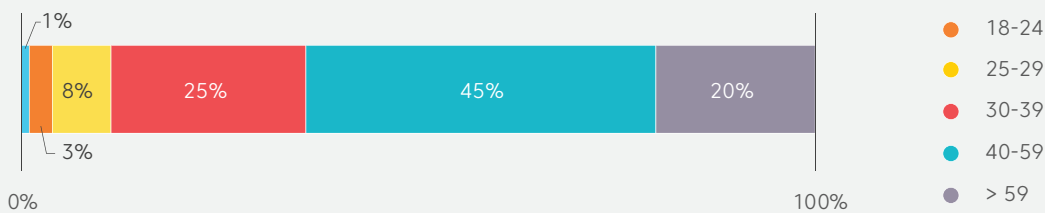
### Lodgement methods

Method	Total
Web	18,877
Email	3,144
Letter	1,149
Phone	488
In person	4
Fax	3
Other	16

### Geographic distribution of complainants



### Complaints by age of complainant



<sup>1</sup> 10,447 are licensee members.