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Dear Ms McCarthy

Oversight of the Australian Financial Complaints Authority: Update to RG139

Thank you for the opportunity to comment on:

- ASIC Consultation Paper 298: Oversight of the Australian Financial Complaints Authority: Update to RG139 (**Consultation Paper**); and
- ASIC Draft Regulatory Guide 139: Oversight of the Australian Financial Complaints Authority (**Draft Updated RG139**).

This joint submission has been prepared by Consumer Action Law Centre. The following organisations have contributed to and endorsed this submission:

- Financial Rights Legal Centre
- Financial Counselling Australia
- Consumer Credit Legal Service (WA) Inc
- Consumer Credit Law Centre SA

Information about the contributors is available at **Appendix A**.

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1. Executive summary

In Australia, everyone should be able to easily access a free, fair, fast and effective service to resolve complaints against financial firms. The establishment of the Australian Financial Complaints Authority (**AFCA**) is an important opportunity to review the scope of ASIC's oversight of external dispute resolution (**EDR**) in financial services.

Generally, we support ASIC's approach to the three issues directly raised in the Consultation Paper: referring matters to relevant authorities, the role of the Independent Assessor, and EDR disclosure obligations.

We note that much of the detailed guidance in the existing RG139 has been amended, re-written, or re-structured in Draft Updated RG139. While this has improved clarity and reduced duplication in some areas, in others the removal of detailed guidance is less helpful. During a critical transition for external dispute resolution framework—including the extension of EDR to superannuation for the first time—it is important to retain detailed regulatory guidance that has worked well. This will ensure that AFCA incorporates and builds on the successful features of the existing EDR framework. This submission outlines areas where, in our view, guidance removed from Draft Updated RG139 should be retained in the final update.

In establishing AFCA, critical differences between the existing schemes—the Financial Ombudsman Service (**FOS**), Credit and Investments Ombudsman (**CIO**) and Superannuation Complaints Tribunal (**SCT**)—will need to be reconciled. This includes differences in the Terms of Reference/Rules, Operating Guidance, and approach documents/position statements.

While this is ultimately a matter for consultation by AFCA, we strongly recommend that ASIC signal in RG139 an expectation that AFCA adopt best practice, pro-consumer features from across the schemes. Otherwise, there will be consumers left in a *worse* position as a result of this reform.

Some of the best practice features (not consistently implemented across schemes) that should be adopted include:

- accepting complaints about a stay of execution of a default judgment;
- holding enforcement action, including repossession of a car, while a complaint is open;
- accepting hardship complaints about unregulated credit; and
- accepting complaints about linked credit.

To ensure effective and efficient consultation with resource-constrained consumer groups, forthcoming consultations by the authorised AFCA scheme on these issues must clearly identify the relevant differences in approach by the existing EDR schemes, and its proposed approach with reasons.

We recommend that RG139 require AFCA to publicly report systemic issues, including the name of the trader. The introduction of public reporting of systemic issues will enhance transparency and improve the conduct of our financial services sector. It is clear from the early evidence to the Financial Services Royal Commission that, in many cases, it's only when a systemic issue becomes public that there will be sufficient pressure for financial firms to act.

Finally, we note that nothing has been done to implement the Government's commitment to require so-called "debt management" firms to join AFCA,[1] despite progressing legislation on compulsory credit reporting that will expand the market for problematic credit repair firms, and discourage people in financial difficulty from requesting hardship variations.[2] 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.

2. Summary of Recommendations

1. RG139 should provide detailed examples of what is considered a 'serious' contravention of a law.
2. Retain the existing guidance on systemic issues at RG139.131-138.
3. AFCA should publicly report systemic issues, including naming the trader.
4. ASIC should make publicly available a comprehensive list of all substantive changes made to RG139.
5. RG139 should require that a suitably qualified national consumer body nominate, or appoint, directors with consumer representative experience to the Board of AFCA.
6. Amend RG139 to signal that AFCA should adopt the best practice, pro-consumer, features each of the existing schemes.
7. Retain the existing wording of 'frivolous or vexatious' in exclusions from jurisdiction.
8. Retain the existing guidance on scheme communication in RG139.61.
9. Retain the existing guidance on resources available to the scheme in RG139.101.
10. Retain the existing guidance on scheme members' power of veto in RG139.102-4.
11. AFCA should ensure substantive, as well as procedural, fairness.
12. AFCA should properly investigate all apparent claims, rather than taking a narrow approach to the definition of the dispute.
13. Amend Draft Updated RG139.120 to meet the Government's stated intention that AFCA should generally draw an adverse inference where a financial firm fails to comply with an information request, except in exceptional and unusual circumstances.
14. Clarify that time limits for hardship and credit disputes in Draft Updated RG139.153 apply unless exceptional circumstances apply, or the firm and AFCA agree to AFCA having jurisdiction.
15. Retain the existing guidance on available remedies in RG139.225.
16. Retain the existing guidance on interest on awards in RG139.194.
17. AFCA should monitor compliance with IDR timeframes.

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[1] Review of the financial system external dispute resolution and complaints framework (**Ramsay Review**), Recommendation 10; 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.

[2] Financial Rights Legal Centre and Consumer Action Law Centre, *Joint Media Release – Penalised for poverty – consumer groups say Morrison announcement will make the poor pay more*, 2 November 2017, available at: http://financialrights.org.au/joint-media-release-penalised-for-poverty-consumer-groups-say-morrison-announcement-will-make-the-poor-pay-more/.

3. Referring matters to appropriate authorities

B1Q1. Do you agree with our proposed timeframe for AFCA to report serious contraventions or systemic issues? If not, why not?

3.1 We agree with the proposed timeframe.

B2Q1. Do you agree with our broad approach to AFCA reporting? If not, why not?

3.2 We agree that a broad and inclusive approach to reporting should be maintained. To assist AFCA, however, we recommend that ASIC provide detailed examples of what is considered a 'serious' contravention of a law. It is important that reporting under section 1052E is not constrained to high value or high-volume disputes. This reporting should also consider the impact depending on the vulnerability of the particular consumer or class of consumers.

3.3 We strongly support the naming of the firm, including licensee, representative or employee, in the particulars of the contravention in a report under section 1052E. We agree that this will improve transparency and effectiveness of reporting regime.

RECOMMENDATION 1: RG139 should provide detailed examples of what is considered a 'serious' contravention of a law.

Retain detailed guidance on systemic issues

3.4 Similarly, ASIC should give more guidance around systemic issues reporting in practice. A robust systemic issues function is critical to improve industry conduct over time and compensating all affected consumers. Existing guidance on systemic issues that has been removed from Draft Updated RG139 should be retained, such as the sections on:

a) Identification of reportable issues (RG139.131-4);

b) Reporting of systemic issues involving a single member (RG139.135-6); and

c) Reporting of systemic issues involving multiple members (RG139.137-8).

3.5 While section 1052E(4) refers to the 'reporting of systemic issues arising from the consideration of complaints', this should not limit the ambit of systemic issues function. We support the FOS pilot for consideration of systemic issues raised by consumer advocates that are not linked to an individual complaint. This practice should be adopted by AFCA.

RECOMMENDATION 2: Retain the existing guidance on systemic issues at RG139.131-138.

AFCA should publicly report systemic issues and name traders

3.6 We support the naming of traders in systemic issues reporting by AFCA to ASIC in DRG139.56. However, RG139 should go further and require AFCA to publicly report systemic issues, including the name of the trader. The introduction of public reporting of systemic issues will enhance transparency and improve the conduct of our financial services sector.

3.7 A failure to deal with systemic issues, or delays in dealing with systemic issues, has been a feature of the public hearings of the Financial Services Royal Commission on consumer lending.[3] These hearings revealed numerous systemic issues that have caused devastating harm to the victims of misconduct. From Mr Robert Regan's evidence about his reliance on charities for food,[4] to Ms Nalini Thiruvangadam's evidence about missing rent and utility bill payments to pay her car loan repayments, the heavy personal toll attributable to systemic irresponsible lending was clear.[5] A consistent theme throughout the hearings was a lack of transparency by firms with consumers, ASIC, and even the Royal Commission. The evidence established a serious reluctance on the part of banks to move away from practices that cause consumer harm for fear of losing market share or profits. It is clear from these hearings that only when an issue is public will there be sufficient pressure for firms to act. In light of these disclosures, public reporting of systemic issues is warranted and needed.

3.8 We note that FOS already reports the number of complaints made against each member and the results of those complaints in its comparative tables—a practice that AFCA should adopt. Consistent with this practice, AFCA could list whether those members had engaged in serious or systemic misconduct and the outcome.

3.9 Consumers should be given the opportunity to know if particular firms have engaged in systemic or serious misconduct when they are choosing between providers. The public reporting of a comprehensive response to resolve a systemic issue would be good public relations for the member in some circumstances. Knowing that systemic issues identified by AFCA will be reported gives an added incentive to financial firms to resolve systemic issues as quickly as possible, and prior to identification by AFCA.

3.10 We are aware of concerns that requiring AFCA to name firms that have engaged in systemic or serious misconduct may inhibit cooperation from the relevant firm in responding to the issue. We reject this concern and consider that publicity will encourage firms to fix issues and remediate customers appropriately.

RECOMMENDATION 3: AFCA should publicly report systemic issues, including naming the trader.

Referring matters to other authorities

3.11 We note that ASIC is consulting with the Australian Prudential Regulation Authority, the Commissioner of Taxation and the authorised AFCA scheme about practical implementation of the new reporting requirements in the Act during the transition period. There are, however, other relevant authorities that should be informed of serious contraventions or systemic issues identified by AFCA, depending on the issue. For example:

a) a complaint to AFCA about a credit provider's listing on a credit report may reveal a significant contravention of the law or systemic issue in relation to the privacy or credit reporting laws, which should be reported to the Office of the Australian Information Commissioner;

[3] Consumer Action Law Centre, Submission to Royal Commission into Misconduct in the Banking, Superannuation and Finance Sector, *Submission on Round 1 Hearings – Consumer Lending*, 3 April 2018, available at: https://policy.consumeraction.org.au/2018/04/03/summary-rc-submission-lending/.
[4] Witness Statement of Robert Regan, Exhibit #1.82, WIT.0001.0006.0007.
[5] Witness Statement of Nalini Thiruvangadam, Exhibit #1.138, WIT.0001.0012.0011.

b) a complaint against an AFCA member who is also a debt agreement administrator may reveal a serious contravention of the law, relevant to its ongoing registration by the Australian Financial Security Authority.

We encourage the AFCA and ASIC to develop appropriate reporting arrangements with other relevant regulators.

4. Role of the Independent Assessor

B3Q1. Do you agree with our proposed guidance on the primary role of the independent assessor? If not, why not?

4.1 We agree with the primary role of the Independent Assessor. We suggest that the Independent Assessor utilise the EDR Benchmarks as a framework for conducting their review.

4.2 The utility of the Independent Assessor's role and its findings will depend on accurate and meaningful data collection. Consumer advocates are particularly interested in a review of data in respect of:

a) assisting vulnerable consumers and access to the scheme for vulnerable consumers;

b) timing in resolving complaints, particularly during the initial transition period; and

c) systemic issues decision-making.

4.3 We note that the Independent Assessor recently established by FOS only accepts complaints in writing, which may create language and literacy barriers to access.[6] We recommend that the Independent Assessor accept complaints from consumers in writing or verbally, over the telephone. It would be a perverse outcome if a person was unable to make a complaint about inaccessible communications from AFCA because the Independent Assessor's own processes were inaccessible.

B4Q1. Do you agree with our proposed guidance on what is outside the role of the independent assessor? If not, why not?

4.4 We agree with ASIC's approach. The Independent Assessor should not be an internal appeal mechanism or re-open the merits of the dispute. In practice, however, the line between service issues and the merits or outcome of a dispute may become blurred, so more detailed guidance may be needed. This may arise where the complaints-handling or decision-making process does not accord with principles of procedural fairness. For example, if AFCA fails to inform a consumer of their right to proceed from an unfavourable recommendation to a determination, and they abandon a meritorious complaint or accept an inferior settlement, the outcome will be affected by the service issue.

Case study 1 – Case closed after offer rejected

We have assisted clients where FOS has closed their case prematurely. In one case, FOS closed the case because our client did not accept the offer, which she did not in fact understand. With our help, the applicant asked FOS to re-open the case and ultimately the matter resolved.

Source: Consumer Action Law Centre

[6] FOS, 'Independent Assessor', accessed 4 April 2018 at: https://www.fos.org.au/about-us/independent-assessor/.

Case study 2 – Consumer unaware of right to proceed to determination

Glen (name changed) lodged a dispute against his insurer at FOS. FOS closed the dispute after the recommendation was issued. Glen was unaware that he had the option to request that the matter go to determination, where a different outcome could result. In our view, FOS applied the incorrect legal principle in the recommendation. We wrote to FOS on his behalf and requested that they reopen the case. Glen was not aware he could do this.

Source: Consumer Action Law Centre

B5Q1. Do you agree with our proposed requirements for the independent assessor? If not, why not?

4.5 We agree with the proposed requirements.

5. EDR disclosure obligations

B6Q1: Is this is a sufficient timeframe for financial firms to update all of their legal disclosures (as set out in paragraph 35) and other consumer communications?

5.1 Yes, the proposed timeframe is sufficient.

5.2 Information provided to consumers should be user-friendly and user-tested. This information could include estimations of any delays in the EDR process, particularly during the transition period. The information could also flag with consumers that a delay might have an impact on impending limitation of action time limits, and that they should seek legal advice.

B6Q2: Should we provide transitional relief from external dispute resolution disclosure obligations in the lead up to AFCA commencement?

5.3 No, the proposed timeframe is sufficient. It is appropriate for financial firms to update the disclosures and communication quickly to minimise consumer confusion during the transition.

6. Other feedback on Update to RG139

General comments

6.1 We note that much of the detail of RG139 has been amended, re-written, or re-structured. While this has improved clarity and reduced duplication in some areas, in others the removal of detailed guidance is less helpful. During a critical transition for external dispute resolution framework—including the extension of EDR to superannuation for the first time—it is important to retain detailed regulatory guidance that has worked well to ensure AFCA incorporates and builds on the successful features of the existing EDR framework. Outlined below are areas where, in our view, guidance removed from Draft Updated RG139 should be retained.

6.2 Unfortunately, many of the changes in Draft Updated RG139 were not flagged or explained in Consultation Paper 298. This has resulted in a time-consuming manual comparison of the existing and Draft Updated RG139 by resource-constrained consumer groups. In future, it would be helpful if consultation papers on regulatory guides under review stated, for each section, whether that section has been removed, moved, re-worded or superseded with references and a brief explanation. As

demonstrated by the long list of recommendations that follow, many of the changes drafted by ASIC to RG139 are not simply superficial changes but substantive issues that will have a serious impact upon the future of AFCA oversight. We note that there may be other un-highlighted changes that we have not picked up on given time and resource constraints. We believe it may be helpful for ASIC to make publicly available a comprehensive list of every substantive change made in to RG 139 in order that stakeholders can provide the appropriate feedback.

RECOMMENDATION 4: ASIC should make publicly available a comprehensive list of all substantive changes made to RG 139.

The AFCA Board

6.3 The process for nominating and appointing directors with consumer experience to AFCA's board is crucial. RG139 should require that the nomination, or appointment, of such directors to the Board of AFCA by a suitably qualified national consumer body, such as Consumers' Federation of Australia (**CFA**)[7] or CHOICE. This would ensure the appointment of appropriate and skilled directors with *genuine* consumer expertise, in addition to governance skills and other appropriate qualifications. At the very least, the process for appointing such directors should involve consultation with individuals and organisations (including key consumer organisations) as is appropriate to give proper consideration to the person's expertise in consumer affairs and capacity and willingness to consult with consumer organisations.[8]

RECOMMENDATION 5: RG139 should require that a suitably qualified national consumer body nominate, or appoint, directors with consumer representative experience to the Board of AFCA.

Accessibility

<u>Complaints AFCA can and cannot deal with</u>

6.4 There are differences between the FOS Terms of Reference and the CIO Rules that will need to be reconciled in AFCA's terms of reference. If AFCA is to implement the Government's commitment to improving dispute resolution in financial services, then its terms of reference must incorporate all of the pro-consumer features of the FOS Terms of Reference and CIO Rules[9] that have resulted from years of continuous improvement and consumer advocacy. That is, AFCA should adopt best practice from across the schemes—even if particular features were not yet implemented by other schemes. Otherwise, there will be consumers left in a worse position as a result of this reform.

6.5 We consider the following to be essential features of AFCA's terms of reference and operational guidance, as appropriate.

a) *Hardship disputes* – The ability to hear disputes and vary contracts on grounds of hardship has been transformational.[10] In addition to hardship on regulated credit, AFCA should adopt the CIO hardship

[7] For more information on CFA's approach to nominating consumer representatives, see: Consumers' Federation of Australia, *Policy Statement - Policy on Consumer Representation*, available at: http://consumersfederation.org.au/representing-consumers/cfa-representatives-policy/.
[8] This is currently a requirement of the Financial Ombudsman Service Limited Constitution at [4.11], available at: https://www.fos.org.au/custom/files/docs/fos_constitution.pdf.
[9] CIO, *Credit and Investments Ombudsman Rules* (10th edition) (**CIO Rules**).
[10] FOR ToR 18.1(f); CIO Rule 9.6.

jurisdiction on unregulated credit, which will be particularly beneficial for struggling small business complainants who are not covered by the *National Consumer Credit Protection Act 2009* (Cth).[11]

b) *Accepting complaints after legal proceedings issued* – This has enabled many people to avoid stressful, risky and expensive litigation, particularly where the family home is at risk. This also removes any incentive for creditors to commence legal proceedings precipitously to oust the jurisdiction of EDR and reduces pressure on the court system by allowing some matters to be diverted to EDR.[12]

c) *Post-judgment jurisdiction* – AFCA should adopt, at a minimum, the CIO's approach to this important, limited jurisdiction to consider complaints following a court judgment.[13] AFCA should also be able to accept a complaint after a court judgment has been set aside. For an example of the impact this can have on consumers, please refer to Anna's story in the Joint Consumer Submission to the Ramsay EDR Review Interim Report.[14]

d) *Holding enforcement action while the dispute is on foot* – This is essential for EDR to provide fair and effective dispute resolution.[15] We recommend that AFCA adopt the CIO's approach to this issue, which does not permit the sale of the asset that is the subject of the dispute, such as a car. By comparison, FOS ToR 13.1(b) allows the FSP to freeze, preserve or sell the asset that is the subject of the dispute.

e) *Implementing systemic issues investigations* – AFCA should adopt the CIO's requirement to implement findings of systemic issues investigations, and the capacity to receive systemic issues referrals that are not linked to a complaint.

f) *The existing remedies*, including the capacity to vary or waive a debt.[16]

g) *Beneficial time limits* – Where the scheme can consider a complaint outside the applicable time limit in exceptional circumstances, or where the FSP and EDR scheme agree.[17]

h) *Third party rights in insurance* – Including third party beneficiaries, and third-party claimants in low value motor vehicle accident disputes involving insurers.

i) *Ability to obtain specialist advice* – This can greatly assist the quality, fairness and consistency of decision-making by, for example, engaging a handwriting expert to determine whether a signature was forged.[18]

j) *Test case provisions* – These permit novel or contentious areas of law to be referred to a court.[19]

k) *Voluntary membership* – This has been a very useful feature, especially for emerging industries, such as FinTechs and some debt management firms, who want to provide access to free and credible dispute resolution for their customers. EDR can be of benefit to a company, allowing it to identify and address systemic issues, thereby improving customer satisfaction.

6.6 This list is not exhaustive, but it identifies some of the most important access issues for consumers. These features have gone some way to redress the enormous imbalance of power between consumer complainants and their industry respondents.

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[11] CIO Rule 18.1.
[12] FOS ToR 13.1; CIO Rule 17.
[13] CIO, *Position Statement 3: Stay on Execution Default Judgment Orders* (30 June 2011).
[14] Joint consumer submission to Ramsay Review Interim Report, 3 February 2017, page 14, available at: http://consumeraction.org.au/edr-review-interim-report/.
[15] FOS ToR 13.1; CIO Rule 17.
[16] FOS ToR 9; CIO Rule 9.
[17] FOS ToR 6.2; CIO Rule 6.4
[18] FOS ToR 17.3; CIO Rule 19.1(g).
[19] FOR ToR 10.

6.7 There are some other differences between the FOS Terms of Reference and the CIO Rules that AFCA should reconcile. For example:

a) The CIO does not exclude complaints about financial service providers who are linked credit providers[20] – AFCA should have jurisdiction to consider linked credit, particularly given the ongoing concerns about caryard finance;

b) The CIO approach to confidentiality is too restrictive (see CIO Rules 33 and 33.8) – we prefer the FOS approach;

c) The CIO can convene a hearing of the issues under Rule 22.2 where a question-and-answer format would assist in resolving the complaint – AFCA should retain this feature; and

d) The CIO has the ability to suspend or expel a member for failing to comply with its Rules.[21] This power was useful in a two-scheme environment. In moving to one scheme, it is more appropriate for such breach to trigger regulatory action, such as the cancellation of a licence by ASIC in serious cases. This issue should also be considered in the context of a compensation scheme of last resort.[22]

RECOMMENDATION 6: Amend RG139 to signal that AFCA should adopt the best practice, pro-consumer features each of the existing schemes.

Exclusions from jurisdiction

6.8 The existing RG139.178(d) allows complaints that are 'frivolous or vexatious' to be excluded from EDR schemes. Draft Updated RG139.76 expands this list to complaints that are 'frivolous, vexatious, misconceived or lacking in substance'. We do not support the expansion of this exclusion to 'misconceived or lacking in substance,' at least for non-super complaints. It is important that AFCA errs on the side of inclusion, not exclusion. A consumer may have a genuine complaint but may not have documents or information held by the financial firm to substantiate their complaint at an early stage or may not fully articulate their meritorious claim in 'legal speak'.

6.9 We note that there are a number of exclusions from jurisdiction in the current framework that are causing barriers to access to justice. Please refer to our detailed comments in previous submissions[23] on gaps in the current framework, which include:

a) Debt management firms – we note that nothing has been done to implement the Government's commitment to require these firms to join EDR,[24] despite progressing legislation on compulsory credit

[20] CIO Rule 10.1(e)(B).
[21] CIO Rule 27.1.
[22] A joint consumer submission to the Ramsay Review Supplementary Issues Paper on a compensation scheme of last resort is available here: http://policy.consumeraction.org.au/2017/07/05/edr-review-supplementary-issues-paper/.
[23] Joint consumer submission to The Treasury, *Establishment of the Australian Financial Complaints Authority*, 29 November 2017, p9-14, available at: https://policy.consumeraction.org.au/2017/11/29/joint-submission-establishment-of-the-australian-financial-complaints-authority/; Joint consumer submission to Ramsay Review, *EDR Review – Interim Report*, 3 February 2017, p18-24, available at: https://consumeraction.org.au/wp-content/uploads/2017/02/Joint-Consumer-Submission-EDR-Review-Interim-Report.pdf.
[24] Ramsay Review, *Final Report*, April 2017, Recommendation 10; 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.

reporting that will expand the market for problematic credit repair firms that undermine the efficacy of EDR schemes;[25]

b) Debt Agreement Administrators, who perform a highly problematic financial advisory role on debt options. A recent report by the Senate Legal and Constitutional Affairs Legislation Committee found merit in requiring administrators to join AFCA;[26] and

c) Dealer-issued warranties.

RECOMMENDATION 7: Retain the existing wording of 'frivolous or vexatious' in exclusions from jurisdiction.

Scheme communication

6.10 The guidance on scheme communication has been re-written in Draft Updated RG139, with specific examples removed or converted into general guidance. For example, RG139.61 currently states that it may be appropriate to provide communications in 'different languages, in Braille or large font, and in audio format, depending on the demographics and special needs of complainants.' This detailed guidance is useful for AFCA and should be retained in the updated RG139.

RECOMMENDATION 8: Retain the existing guidance on scheme communication in RG139.61.

Scheme promotion

6.11 It is essential that AFCA engage in effective outreach and promotion to reach and assist people experiencing vulnerability. Some of the most disadvantaged members of our community are subject to targeted and predatory provision of financial and credit services.

6.12 We agree with Draft Updated RG139.80 that demographic data about complainants should inform AFCA's promotional and outreach activities. However, this should not be the only source of information. There may be other sources of data and information that assist AFCA in tailoring effective promotion and outreach to people experiencing vulnerability or disadvantage. This includes ASIC's reports and investigations, consumer liaison functions, and independent reviews.

Improving accessibility

6.13 The existing schemes, particularly FOS and CIO, are to be commended on their efforts to continuously improve the accessibility of their service. We make the following recommendations to further improve accessibility at AFCA:

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[25] Above n 2; for more information on the impact of comprehensive credit reporting on hardship, see Joint consumer submission to PwC, *Review of Privacy (Credit Reporting) Code 2014 V1.2, September 2017*, p9-14, available at: http://financialrights.org.au/wp-content/uploads/2017/10/Joint-Consumer-Submission-to-CR-Code-Review-2017.pdf.

[26] The Senate, Legal and Constitutional Affairs Legislation Committee, *Report – Bankruptcy Amendment (Enterprise Incentives) Bill 2017; Bankruptcy Amendment (Debt Agreement Reform) Bills 2018 [Provisions]*, March 2018, p41, available at: https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Legal_and_Constitutional_Affairs/DebtAgreementReform/Report.

a) AFCA should establish and improve outreach programs to underrepresented communities, like the Electricity and Water Ombudsman NSW.[27] This should include culturally and linguistically diverse, indigenous, Deaf, and newly arrived communities.

b) AFCA should engage with health and community workers. In our experience, disputes involving vulnerable clients are often activated by a family member or community worker with an established relationship with the consumer. People in situations of extreme vulnerability are more likely to remain engaged with their dispute if supported by a worker.

c) AFCA could pilot a face-to-face option for the most disadvantaged and vulnerable consumers.

d) AFCA should improve access to interpreters, including Auslan interpreters where relevant. For example, the first page of the online CIO complaint form asks if the person requires an interpreter. If the answer is yes, the person is then expected to complete the rest of the form without accessing an interpreter. Interpreting services should be available at the point that the consumer indicates their need for an interpreter.

e) AFCA should play a greater role in obtaining documents and information from the FSP than the current scheme, particularly where the consumer faces technological or other barriers to providing documents. This will remove some of the pressure from vulnerable clients who may not understand or hold the documentation that is needed, and go some way to redressing the large power imbalance between consumers and financial firms.

6.14 Special consideration should be given to accessibility during the transition period to ensure no person, and no dispute, is left behind. There will need to be extensive community education about the new scheme, including appropriate advertising, communication with key agencies assisting consumers in financial distress and outreach to particularly vulnerable communities, such as remote Aboriginal communities.

Independence

Resources available to the scheme – Assisting consumers to draft and lodge complaints

6.15 RG139.101 currently requires that a scheme's resourcing include provision to assist consumers to draft and lodge their complaints. This guidance, which has been removed in Draft Updated RG139, should be retained. This long-standing feature of EDR is crucial to accessibility and should be retained by AFCA.

Scheme members' power of veto

6.16 RG139.102 currently requires that a scheme must not give its members a right of veto over changes to the Constitution and Terms of Reference. This requirement, which has been removed in Draft Updated RG139, should be retained. While it is no longer EDR practice to give scheme members a veto, it is important to signal to industry members—including financial firms new to mandatory EDR—that paying membership fees does not entitle the firms to a veto.

RECOMMENDATION 9: Retain the existing guidance on resources available to the scheme in RG139.101.
RECOMMENDATION 10: Retain the existing guidance on scheme members' power of veto in RG139.102-4.

[27] See http://www.ewon.com.au/index.cfm/publications/newsletters/ewonews-issue-31/community-outreach.

Fairness

Substantive fairness

6.17 AFCA must have an obligation to deliver substantive fairness, particularly in decision-making and overseeing any agreed dispute outcome. DRG139.109 seems to limit the fairness requirement to 'procedural fairness' (formerly 'natural justice' in RG139). As we can see from the evidence and public debate around the ongoing Financial Services Royal Commission, our community demands outcomes that are not just legally correct but that are fair. The implementation of AFCA is an importantly and timely opportunity to improve the substantive fairness of EDR outcomes for consumers.

Investigation and decision-making

6.18 A current area of concern is decision-making during the earlier stages of case management. 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.

6.19 AFCA should take an inquisitorial rather than adversarial approach when ascertaining the grounds of a dispute or complaint. Not all complainants, particularly those who have not sought legal advice, are able to articulate in 'legal speak' their grounds of dispute properly and this may result in perceived and/or actual unfairness to unrepresented consumers. By contrast, financial firms have an inherent advantage—they know what records are held, have access to internal or external legal advice, and will be a 'repeat player', aware of the EDR process and how to best defend the claim. Case managers should therefore be more pro-active when evaluating claims to determine the actual dispute rather than the consumer's perceived dispute. This approach will ensure that AFCA's decision-making is fair, accessible and efficient and consistent.

RECOMMENDATION 11: AFCA should ensure substantive, as well as procedural, fairness.
RECOMMENDATION 12: AFCA should properly investigate all apparent claims, rather than taking a narrow approach to the definition of the dispute.

Information sharing

6.20 FOS and CIO currently have the power to request information and documents from parties and, if not provided, make an adverse inference. However, this power has proven inadequate as, in practice, the schemes tend not to make adverse inferences. Even when the schemes do request documents, financial services providers do not always provide the relevant information or documents. This is problematic where documents held by a financial service provider are needed to prove its unlawful conduct. If the new scheme cannot compel the financial service provider to provide all relevant documents, then it may not have sufficient information to make appropriate findings of fact and come to a fair and just determination.

6.21 In the digital age, competent and well-managed financial firms should be able to provide all relevant documents quickly in digital format. As such, this requirement should not unduly delay the proper resolution of a dispute nor impose a significant time or cost burden on the financial firm.

6.22 We note that during the second reading debate on the legislation establishing AFCA, the Government stated that:

> The Minister for Revenue and Financial Services will require that AFCA's terms of reference will provide that an adverse inference should generally be drawn from a financial services provider's failure to provide information that is material to the resolution of a dispute, except in exceptional and unusual circumstances.[28]

RECOMMENDATION 13: Amend Draft Updated RG139.120 to meet the Government's stated intention that AFCA should generally draw an adverse inference where a financial firm fails to comply with an information request, except in exceptional and unusual circumstances.

Written reasons

6.23 RG139.115 envisages some circumstances where a complaint may be resolved without written reasons. Draft Updated RG139.114 requires AFCA to provide written reasons for any decision made about the merits of a complaint, including jurisdictional complaints. We strongly support this updated requirement.

Efficiency and Effectiveness

Time limits for standard complaints

6.24 We support the redrafting of the guidance on time limits for clarity in Draft Updated RG139. However, we recommend that Draft Updated RG139.152 be replicated in the sub-section 'Time limits for hardship and some credit disputes'. This would clarify that the time limits for hardship and credit disputes in Draft Updated RG139.153 apply 'unless exceptional circumstances apply of the firm and AFCA agree to AFCA having jurisdiction.'

Available remedies

6.25 The existing guidance on available remedies in RG139.225 provides that:

> In determining loss or damage, the scheme should have regard not only to relevant legal principles but also the concept of fairness and relevant industry best practice.

6.26 As far as we can tell, this guidance has been removed from Draft Updated RG139. We strongly recommend that this guidance is retained. As the Ramsay Review found, the decision-making criteria is one of the strengths of the existing EDR frameworks, particularly compared to courts that are bound by black letter law.

Interest on awards

6.27 Currently, RG139.194 requires that 'if interest is awarded, the Terms of Reference *must* require that interest be calculated from the date of the cause of action or matter giving rise to the claim' (emphasis added). This section has been revised in Draft Updated RG139.142-3:

> To provide an outcome that is fair and reasonable in all the circumstances, AFCA *may—in specific cases*—award interest or earnings in addition to the amount awarded by a compensation cap. In calculating any award of interest, AFCA *may* calculate interest from the date of the cause of action or matter giving rise to the claim.

[28] Commonwealth, *Parliamentary Debates*, Senate, 6 December 2017, 9815 (Senator the Hon Mattias Cormann).

6.28 We recommend that the existing guidance be retained, where interest must be backdated. We also consider that interest must be awarded on all claims. If changes to this position are necessary due to the inclusion of super disputes in AFCA, then the requirements in RG139 should be separated for super and non-super disputes.

IDR timeframes

6.29 We appreciate that ASIC will undertake further consultation on IDR timeframes in its anticipated review of Regulatory Guide 165. Considering this, we support the approach in Draft Updated RG139 where timeframes for IDR are not hardwired. However, we recommend that the existing general requirement in RG139.232 that a 'scheme must monitor its members compliance with timeframes relating to IDR' be retained.

RECOMMENDATION 14: Clarify that time limits for hardship and credit disputes in Draft Updated RG139.153 apply unless exceptional circumstances apply, or the firm and AFCA agree to AFCA having jurisdiction.
RECOMMENDATION 15: Retain the existing guidance on available remedies in RG139.225.
RECOMMENDATION 16: Retain the existing guidance on interest on awards in RG139.194.
RECOMMENDATION 17: AFCA should monitor compliance with IDR timeframes.

7. Contact

There may be further issues that should be addressed in RG139 that come to light as the transition to AFCA progresses. In this event, consumer advocates would welcome the opportunity to make further comments to ASIC on RG139 before its release on 1 November 2018.

Please contact Cat Newton, Policy Officer, Consumer Action Law Centre on 03 9670 5088 or at cat@consumeraction.org.au with any questions about this submission.

Yours Sincerely,

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Appendix A – About the Contributors

About Consumer Action Law Centre

Consumer Action is an independent, not-for profit consumer organisation with deep expertise in consumer law and policy and direct knowledge of people's experience of modern markets. We work for a just marketplace, where people have power and business plays fair. We make life easier for people experiencing vulnerability and disadvantage in Australia, through financial counselling, legal advice and representation, and policy work and campaigns. Based in Melbourne, our direct services assist Victorians and our advocacy supports a just market place for all Australians.

About the Financial Rights Legal Centre

The Financial Rights Legal Centre is a community legal centre that specialises in helping consumers understand and enforce their financial rights, especially low income and otherwise marginalised or vulnerable consumers. We provide free and independent financial counselling, legal advice and representation to individuals about a broad range of financial issues. Financial Rights operates the National Debt Helpline, which helps NSW consumers experiencing financial difficulties. We also operate the Insurance Law Service which provides advice nationally to consumers about insurance claims and debts to insurance companies. Financial Rights took close to 25,000 calls for advice or assistance during the 2016/2017 financial year.

About Financial Counselling Australia

FCA is the peak body for financial counsellors. Financial counsellors provide information, support and advocacy for people in financial difficulty. They work in not-for-profit community organisations and their services are free, independent and confidential. FCA is the national voice for the financial counselling profession, providing resources and support for financial counsellors and advocating for people who are financially vulnerable.

About Consumer Credit Legal Service (WA) Inc

Consumer Credit Legal Service (WA) Inc. (CCLSWA) is a not-for-profit charitable organisation which provides legal advice and representation to consumers in WA in the areas of credit, banking and finance, and consumer law. CCLSWA also takes an active role in community legal education, law reform and policy issues affecting consumers. In the 2016/2017 financial year, CCLSWA provided 2677 pieces of legal advice to 1088 new clients.

About Consumer Credit Law Centre SA

The Consumer Credit Law Centre South Australia was established in 2014 to provide free legal advice, legal representation and financial counselling to consumers in South Australia in the areas of credit, banking and finance. The Centre also provides legal education and advocacy in the areas of credit, banking and financial services. The CCLCSA is managed by Uniting Communities who also provide an extensive range of financial counselling and community legal services as well as a large number of services to low income and disadvantaged people including mental health, drug and alcohol and disability services.