



Law Council
OF AUSTRALIA

Resolution of disputes with financial services providers within the justice system

Senate Legal and Constitutional Affairs Reference Committee

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Telephone +61 2 6246 3788 • *Fax* +61 2 6248 0639
Email mail@lawcouncil.asn.au
GPO Box 1989, Canberra ACT 2601, DX 5719 Canberra
19 Torrens St Braddon ACT 2612
Law Council of Australia Limited ABN 85 005 260 622
www.lawcouncil.asn.au

Table of Contents

About the Law Council of Australia.....	3
Acknowledgement	4
Executive Summary.....	5
Background to the Inquiry	6
The need for legal advice and representation	6
The ability to attain legal advice and representation	7
The accessibility of the legal assistance sector	9
Funding to improve access to legal assistance	9
The role of alternative dispute resolution processes.....	11
The accessibility and appropriateness of AFCA	11
The role of AFCA and independent lawyers.....	13

About the Law Council of Australia

The Law Council of Australia exists to represent the legal profession at the national level, to speak on behalf of its Constituent Bodies on national issues, and to promote the administration of justice, access to justice and general improvement of the law.

The Law Council advises governments, courts and federal agencies on ways in which the law and the justice system can be improved for the benefit of the community. The Law Council also represents the Australian legal profession overseas, and maintains close relationships with legal professional bodies throughout the world.

The Law Council was established in 1933, and represents 16 Australian State and Territory law societies and bar associations and the Law Firms Australia, which are known collectively as the Council's Constituent Bodies. The Law Council's Constituent Bodies are:

- Australian Capital Territory Bar Association
- Australian Capital Territory Law Society
- Bar Association of Queensland Inc
- Law Institute of Victoria
- Law Society of New South Wales
- Law Society of South Australia
- Law Society of Tasmania
- Law Society Northern Territory
- Law Society of Western Australia
- New South Wales Bar Association
- Northern Territory Bar Association
- Queensland Law Society
- South Australian Bar Association
- Tasmanian Bar
- Law Firms Australia
- The Victorian Bar Inc
- Western Australian Bar Association

Through this representation, the Law Council effectively acts on behalf of more than 60,000 lawyers across Australia.

The Law Council is governed by a board of 23 Directors – one from each of the constituent bodies and six elected Executive members. The Directors meet quarterly to set objectives, policy and priorities for the Law Council. Between the meetings of Directors, policies and governance responsibility for the Law Council is exercised by the elected Executive members, led by the President who normally serves a 12 month term. The Council's six Executive members are nominated and elected by the board of Directors.

Members of the 2019 Executive as at 1 January 2019 are:

- Mr Arthur Moses SC, President
- Mr Konrad de Kerloy, President-elect
- Ms Pauline Wright, Treasurer
- Mr Tass Liveris, Executive Member
- Dr Jacoba Brasch QC, Executive Member
- Mr Tony Rossi, Executive Member

The Secretariat serves the Law Council nationally and is based in Canberra.

Acknowledgement

In the preparation of this submission, the Law Council is grateful for the assistance of:

- the Law Institute of Victoria and the Law Society of South Australia;
- the Competition and Consumer Committee of the Law Council's Business Law Section;
- the Alternative Dispute Resolution Committee of the Law Council's Federal Litigation and Dispute Resolution Section;
- the Financial Services Committee of the Law Council's Business Law Section; and
- the Law Council's Access to Justice Committee.

Executive Summary

1. The Law Council welcomes the opportunity to provide a submission to the Senate Legal and Constitutional Affairs Reference Committee's (**the Committee**) inquiry into the resolution of financial disputes with financial services providers within the justice system (**the Inquiry**).
2. As a result of the timeframes provided in which to make submissions to the Inquiry, the Law Council has not had an opportunity to consider all aspects of the Terms of Reference. This submission is therefore limited to the following matters arising from the scope of the Inquiry:
 - the need for legal advice and representation;
 - the ability to attain legal advice and representation;
 - the accessibility of the legal assistance sector;
 - funding to improve access to legal assistance; and
 - the accessibility and appropriateness of the Australian Financial Complaints Authority (**AFCA**); and
 - the role of alternative dispute resolution processes.
3. The Final Report of the Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry was tabled in Parliament (**Royal Commission**) found that there is an 'asymmetry of knowledge and power between consumers and financial service entities'.¹ While the Final Report of the Royal Commission recommended the simplification of financial services laws, it acknowledged that 'financial service law will always involve a measure of complexity'.²
4. The combination of the likelihood of a significant power imbalance together with complexity places great importance on the need for accessible dispute resolution, and highlights the role of the legal profession in supporting consumers through this process.
5. While noting the role of AFCA, the Law Council highlights the critical role of alternative dispute resolution processes and the legal assistance sector in assisting in disputes with financial services providers.
6. The Law Council also notes the role of the private legal profession, and in particular the ongoing role of the courts in establishing precedent that may be relied upon and by all parties as authority for what will be permissible conduct.
7. This submission provides support for the role of AFCA, and calls for it to be adequately resourced to undertake whatever measures it considers necessary to ensure that it can effectively, efficiently and fairly deal with a potentially larger volume of complaints.
8. Given that AFCA has been operating for less than six months, the Law Council considers that some time is required to assess its effectiveness and efficiency in dealing with consumer disputes with financial institutions.
9. Further, the Law Council considers that there is an urgent and ongoing unmet need for legal assistance services across the criminal, family and civil law spectrum. It recommends that Commonwealth, state and territory governments should invest

¹ *Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry* (Final Report, February 2019) vol 1 490.

² *Ibid* 491.

significant additional resources in the legal assistance sector to address critical civil and criminal legal assistance service gaps - this should include, at a minimum, \$390 million per annum.³ Commonwealth, state and territory government funding for legal assistance service services should be determined by way of a transparent and evidence-based funding model that provides adequate, predictable, sustainable and long-term funding.⁴

Background to the Inquiry

10. On 4 February 2019, the Final Report of the Royal Commission was tabled in Parliament. The Royal Commission made 76 findings and recommendations across the banking, financial advice, superannuation and insurance sectors.
11. While the Royal Commission did not make a recommendation relating to the appropriate source or level of funding for legal assistance and financial counselling services, it noted that the desirability of predictable and stable funding for the legal assistance and financial counselling services is clear and how this may best be delivered is worthy of careful consideration.⁵
12. On 13 February 2019, Senator the Hon Louise Pratt and Senator the Hon Tim Storer referred to the Committee for inquiry and report the issue of the ability of consumers and small businesses to exercise their legal rights through the justice system and whether there are fair, affordable and appropriate resolution processes to resolve disputes with large financial service providers.

The need for legal advice and representation

13. The Final Report of the Royal Commission found that there is an 'asymmetry of knowledge and power between consumers and financial service entities'.⁶ While the Final Report of the Royal Commission recommended the simplification of financial services laws, it acknowledged that 'financial service law will always involve a measure of complexity'.⁷
14. Financial disputes, particularly those arising out of inappropriate financial advice, are often complex due to the volume of materials under review and the length of time the subject financial services have been provided. The matters which arise can often be difficult for individual consumers to articulate or to progress without legal assistance. There are also a range of more complex financial services that require legal assistance in the event of a complaint or a dispute, for example, insurance, financial advice or even investments.⁸
15. The matters relating to financial services law that frequently require legal support include where:
 - legal debt recovery action has been initiated;
 - contracts are unusual or complex;

³ Advice from PriceWaterhouse Coopers to the Law Council of Australia, January 2018, cited in Law Council of Australia, Submission to the Treasury, *2018-19 Pre-Budget Submission* (31 January 2018); Law Council of Australia, *The Justice Project: Final Report – Legal Services* (August 2018) 11 recommendation 2.1.

⁴ Law Council of Australia, *The Justice Project: Final Report – Legal Services* (August 2018) 11 recommendation 2.2.

⁵ *Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry* (Final Report, February 2019) vol 1 489.

⁶ *Ibid* 490.

⁷ *Ibid* 491.

⁸ *Ibid*.

- there are multiple parties (e.g. co-borrowers, guarantors);
 - particular business models or contractual arrangements give rise to potential unconscionable conduct; and
 - legal avoidance strategies are adopted.⁹
16. Legal assistance for these problems is often required for low value products, such as payday loans and consumer leases, as well as higher value disputes relating to home loans and financial advice.
17. Some submissions to the Royal Commission identified areas where the present coverage of such services could be expanded, such as in the provision of consumer advocacy and representation for superannuation consumers. Further areas identified were 'small business assistance and community-led specialist education for Aboriginal and Torres Strait Islander communities regarding funeral insurance and other financial products'.¹⁰
18. Evidence provided to the Royal Commission highlighted the importance of accessible legal assistance and financial counselling services when resolving disputes with entities through alternative dispute resolution (**ADR**) processes, such as direct negotiation, farm debt mediation and through the Financial Ombudsman Service (**FOS**). This is despite these ADR processes being designed with the intention of not requiring that claimants have legal representation.¹¹

The ability to attain legal advice and representation

19. The imbalance between claimants and financial service entities is particularly pronounced in the expert legal representation engaged by financial institutions throughout the course of a dispute, compared with that typically engaged by individuals and small businesses.¹²
20. A disparity in resources between parties may be addressed through the availability of legal assistance sector funding, however there is currently very little public legal assistance funding dedicated to support civil law matters. In this regard, less than 3 per cent of means-tested legal aid grants for legal representation and dispute resolution nationally were for civil law matters in 2016-17, compared to 65.4 per cent for criminal law matters and 32.3 per cent for family law matters.¹³ The Law Council views with concern the fact that when intensive levels of legal assistance are required for civil law matters and where there is a significant imbalance of resources, it is unlikely that this support will come from a legal aid grant, placing significant pressure on the community legal assistance sector and pro bono legal services.
21. To compound this lack in legal assistance grants for civil laws matters, the Productivity Commission has previously indicated that only 8 per cent of the population is eligible for such grants, compared to around 14 per cent who fall under the poverty line.¹⁴ The Law Council's recent Justice Project highlighted that strict legal aid grant eligibility rules can mean that Australians in rural, regional and remote (**RRR**) areas, such as those in the

⁹ National Association of Community Legal Centres and Financial Counselling Australia, *Submission to the Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry* (26 October 2018) 6 <http://www.naclc.org.au/resources/20181026%20NACLCLC%20and%20FCA%20Banking%20RC%20Submission_2.pdf>.

¹⁰ *Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry* (Final Report, February 2019) vol 1 488-9.

¹¹ *Ibid* 490.

¹² *Ibid*.

¹³ National Legal Aid, *Legal Aid Commission Services 2015 to 2017 – Attachment A*.

¹⁴ Productivity Commission, *Access to Justice Arrangements*, Inquiry Report No 72 (2014) 739 ('*Access to Justice Arrangements*').

farming industry, as well as older Australians, may be 'asset rich, financially poor', and thus cannot access legal aid despite not being able to afford a lawyer.¹⁵

22. The Justice Project heard that a significant number of older people fail to meet the legal aid means test for ongoing advice and representation due to owning assets such as a house.¹⁶ National Legal Aid submitted that while some legal aid services are free and not means tested, such as legal information, discrete legal tasks and community legal education, other services, including grants of legal aid for dispute resolution and representation, are means tested. It stated that the availability of means tested services 'are necessarily curtailed by limited funding'.¹⁷ As a result, many older persons on low incomes cannot access legal assistance. National Legal Aid has previously explained:

*The means test is not particularly well crafted to accommodate a range of the problems and issues that face older Australians. A high proportion of older Australians have comparatively low incomes but are reasonably well off in terms of assets. That tends to mean that they will fail our means test, even though their actual disposable income is not particularly significant.*¹⁸

23. National Legal Aid submitted to the Justice Project that in such circumstances, justice 'is no more than theoretically available to this group of people'.¹⁹ It was of the view that:

*... this is a major access to justice issue as some people either have to self-represent, which is usually experienced as very stressful, or give up on their case potentially compromising safety and/or longer term health and well-being, as well as their rights and entitlements.*²⁰

24. Justice Project stakeholders similarly emphasised that many RRR residents experience financial barriers in accessing legal assistance, and the 'asset rich, cash poor' phenomenon was noted. It was also noted during Justice Project consultations that many RRR farmers and small businesses do not meet the legal aid means test for this reason.²¹ In its submission to the Justice Project, Community Legal Centres NSW considered that:

Because many RRR Australians can be identified as 'asset rich, financially poor' individuals, they are often unqualified to accept pro bono legal assistance from initiatives due to the value of the property they might own, even if they do not have the finances to pay for private legal assistance'.²²

¹⁵ Law Council of Australia, *The Justice Project: Final Report – Legal Services* (August 2018) 14.

¹⁶ House of Representatives Standing Committee on Legal and Constitutional Affairs, *Older People and the Law* (September 2007) 171. See also Council on the Ageing, Submission No 114 to the Law Council of Australia, *The Justice Project* (6 October 2017).

¹⁷ National Legal Aid, Submission No 128 to Law Council of Australia, *The Justice Project* (25 October 2017).

¹⁸ Norman Reaburn, quoted in House of Representatives Standing Committee on Legal and Constitutional Affairs, *Older People and the Law* (September 2007) 170.

¹⁹ Law Council of Australia, *The Justice Project: Final Report – Older Persons* (August 2018) 28, citing National Legal Aid, Submission No 128 to the Law Council of Australia, *The Justice Project* (25 October 2017).

²⁰ *Ibid.*

²¹ Law Council of Australia, *The Justice Project: Final Report – Rural, Regional and Remote (RRR) Australians* (August 2018) 16, citing Legal Aid Queensland at The Justice Project consultation on 29 August 2017 in Townsville. See also Community Legal Centres NSW, Submission No 106 to the Law Council of Australia, *The Justice Project* (9 October 2017).

²² Community Legal Centres NSW, Submission No 106 to the Law Council of Australia, *The Justice Project* (9 October 2017).

The accessibility of the legal assistance sector

25. As noted above, the difficulty in obtaining legal aid grants for civil law matters places a burden on the broader community legal sector. In particular, chronically under-funded and under-resourced community legal centres (**CLCs**) are left to address the void of legal assistance services for civil law matters.
26. In 2017-18, CLCs helped over 200,000 people across Australia.²³ However, CLCs are under severe strain. The Final Report of the Royal Commission found that 'the legal assistance sector and financial counselling services frequently struggle to meet demand, which is increasing'.²⁴ CLCs reported turning away 169,513 people in 2015-16,²⁵ and an Australian Council of Social Services Survey of CLCs in 2014 found that 72 per cent of CLCs reported being unable to meet demand.²⁶
27. Furthermore, it was highlighted throughout the Justice Project that legal assistance services delivered by CLCs in RRR areas across Australia are scarce and over-stretched.²⁷ The Royal Commission noted that 'frequent reference was made to the difficulty that farmers have in obtaining access to banking services and to appropriate support.'²⁸
28. Credit and debt issues are among the top five legal problems dealt with by CLCs.²⁹ It is estimated that around 240,000 financially disadvantaged people per annum experience these kinds of issues and therefore need access to free legal information and advice.³⁰

Funding to improve access to legal assistance

29. The need for stable and established funding for the legal assistance sector was most recently highlighted in the Final Report of the Royal Commission, where it was found that:
- ... the desirability of predictable and stable funding for the legal assistance sector and financial counselling services is clear and how this may best be delivered is worthy of careful consideration. Such consideration should look at all options that may be available to supplement existing funding.³¹
30. The Justice Project highlighted that unsustainable pressures, and uncertainty regarding funding sources, in many cases, was contributing to staff burnout and turnover within

²³ National Association of Community Legal Centres and Financial Counselling Australia, *Submission to the Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry* (26 October 2018) 11.

²⁴ *Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry* (Final Report, February 2019) vol 1 488-9.

²⁵ National Association of Community Legal Centres, *National Census of Community Legal Centres: 2016 National Report* (2016) 10; Law Council of Australia, *The Justice Project: Final Report – People Experiencing Economic Disadvantage* (August 2018) 25.

²⁶ Australian Council of Social Service, *Australian Community Sector Survey 2014* (2014) 2, 17, 20.

²⁷ Law Council of Australia, *The Justice Project: Final Report – Rural, Regional and Remote (RRR) Australians* (August 2018) 33.

²⁸ *Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry* (Final Report, February 2019) vol 1 237.

²⁹ National Association of Community Legal Centres and Financial Counselling Australia, *Submission to the Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry* (26 October 2018) 11.

³⁰ *Ibid* 6. Of the 1.2 million individuals with credit debt legal problems, 20 per cent, or 240,000 are likely to be in the lowest income quintile, and all these people are likely to need at least some legal information to help them resolve the issue: Christine Coumarelos et al, 'Legal Australia-Wide Survey: Legal Need in Australia Access to Justice and Legal Needs' (2012) 7 *Law and Justice Foundation*, 60. See also G Renouf and P Porteous, *Consumer Credit Legal Services in Australia*, (Unpublished Report to ASIC, Document 18 on ASIC FOI Disclosure Log 2011-2017, 2011) <<https://asic.gov.au/about-asic/freedom-of-information-foi/foidisclosure-log/freedom-of-information-asic-disclosure-log-archive-2011-2017>> .

³¹ *Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry* (Final Report, February 2019) vol 1 493.

the legal assistance sector, which in turn undermined access to justice within the community. This was most apparent amongst legal staff, particularly those in the most remote, challenging communities, but also in urban locations.³²

31. In providing input to the Justice Project, the Consumer Action Law Centre described the frustration and inefficiency caused by cobbling together uncertain, short-term funding from multiple sources, and reporting across several funding frameworks.³³
32. The Justice Project highlighted an urgent and ongoing unmet need for legal assistance services across the criminal, family and civil law spectrum. It recommended that Commonwealth, state and territory governments should invest significant additional resources in the legal assistance sector to address critical civil and criminal legal assistance service gaps - this should include, at a minimum, \$390 million per annum.³⁴ The Justice Project also recommended that Commonwealth, state and territory government funding for legal assistance service services should be determined by way of a transparent and evidence-based funding model that provides adequate, predictable, sustainable and long-term funding.³⁵
33. In relation to funding for civil law legal assistance services, in 2014 the Productivity Commission recognised the net public benefits to the community of legal expenditure and the 'false economy' of not doing so, given that the costs of unresolved problems were often shifted to other areas of government spending such as health care, housing and child protection.³⁶ It recommended that the Commonwealth, state and territory governments should provide additional funding of around \$200 million per annum for civil legal assistance services to:
 - better align the means test used by legal aid commissions (**LACs**) with that of other measures of disadvantage (around \$57 million per annum) – given its finding that LACs' resources are so tight, that existing 'means tests are too mean',³⁷
 - maintain existing frontline services that have a demonstrated benefit to the community (\$11.4 million per annum);³⁸ and
 - allow legal assistance providers to offer a greater number of services in areas of law that have not previously attracted government funding (around \$124 million per annum).³⁹
34. The Law Council supports the Financial Counselling Australia (**FCA**) and the National Association of Community Legal Centres' (**NACLC**) proposals in its submission to the Royal Commission for additional resourcing to create a properly funded network of community financial counselling and community legal services.⁴⁰ This needs to be complemented by adequately funded state and territory civil law Legal Aid services.

³² Law Council of Australia, *The Justice Project: Final Report – Legal Services* (August 2018) 97.

³³ Ibid.

³⁴ Advice from PriceWaterhouse Coopers to the Law Council of Australia, January 2018, cited in Law Council of Australia, *Submission to the Treasury, 2018-19 Pre-Budget Submission* (31 January 2018); Law Council of Australia, *The Justice Project: Final Report – Legal Services* (August 2018) 11 recommendation 2.1.

³⁵ Law Council of Australia, *The Justice Project: Final Report – Legal Services* (August 2018) 11 recommendation 2.2.

³⁶ Productivity Commission, *Access to Justice Arrangements*, 30-31, citing Murray Gleeson, 'State of Judicature' (Speech delivered at the Australian Legal Convention, Canberra, 10 October 1999).

³⁷ Productivity Commission, *Access to Justice Arrangements*, 1023.

³⁸ Ibid 1026.

³⁹ Due to sensitivities around the methodology employed, the Productivity Commission recommended a total funding increase of around \$200 million per annum: Ibid 1025.

⁴⁰ National Association of Community Legal Centres and Financial Counselling Australia, *Submission to the Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry* (26 October 2018).

Legal Aid's national reach enables it to assist some of the most vulnerable people and communities in Australia.

35. The FCA and NACLC estimate that their proposal for a sufficiently and appropriately resourced expanded network would triple the number of people per year – from 360,000 to 800,000 – who are able to access information, self-help resources, phone financial counselling services, face-to-face financial counsellors and legal advice.⁴¹
36. While the Australian Government has allocated an extra \$51.5 million to boost resources for the prosecution of criminal misconduct by banks,⁴² it has not yet committed to additional funding to assist the individuals, farmers or small businesses impacted by the misconduct.

The role of alternative dispute resolution processes

37. The Law Council emphasises that ADR processes such as mediation, conciliation, arbitration and others, such as expert determination decision-making and hybrid processes introduced into specialist courts and tribunals, can assist in the management of power imbalances between parties, cost and delay. Parties' perceptions of justice, fairness and outcomes is often perceived through their experiences and engagement in dispute resolution processes. Access to dispute resolution processes for parties in financial distress is often difficult and can be a barrier to entry in relation to any redress scheme.
38. A great deal can be learned from the historical development of industry ombudsman schemes and dispute resolution models in the financial and business sector, such as the mediation and expert evaluation schemes developed by the Small Business Commissioners in New South Wales and Victoria, the Farm Debt Mediation Schemes and also historical ombudsman schemes such as the Mortgage and Industry Ombudsman Scheme, which had a national reach.
39. The Law Council considers that any scoping or analysis of appropriate dispute resolution schemes requires an assessment of Online Dispute Resolution (**ODR**) schemes. Developments in ODR platforms for small debt claims are being implemented beyond their initial introduction in the arena of internet business transactions such as those implemented by eBay,⁴³ Alibaba and Amazon.com. ODR redress schemes have been introduced in industry schemes and in local or small claims courts and tribunals. ODR development is likely to move rapidly and some time is required to assess the effectiveness and efficiency of these schemes. The Law Council would be pleased to provide further information in respect to the design of ADR processes which may be implemented in the financial services sector, if required.

The accessibility and appropriateness of AFCA

40. AFCA was established to take the place of the Financial Ombudsman Service, the Credit and Investments Ombudsman, and the Superannuation Complaints Tribunal (**SCT**).⁴⁴ The Law Council has previously expressed general support for the

⁴¹ See Ibid 15, for a table detailing the funding proposal and modelling of people helped.

⁴² The Hon Christian Porter MP, '\$51.1 Million Boost to Pursue Criminal Prosecutions for Financial Misconduct' (Media Release, 16 November 2018) <<https://www.attorneygeneral.gov.au/Media/Pages/51-5-Million-Boost-to-pursue-Criminal-Prosecutions-for-Financial-Misconduct-16-November-2018.aspx>>.

⁴³ eBay, *Resolution Centre* <<https://resolutioncentre.ebay.com.au/>>.

⁴⁴ Australian Government, *Review of the Financial System External Dispute Resolution and Complaints Framework* (Final Report, 3 April 2017) 14, Recommendation 1.

establishment of AFCA. The Law Council provided detailed comment on AFCA in submissions to:

- Treasury regarding its Consultation Paper on Improving Dispute Resolution in the Financial System;⁴⁵
- the Senate Standing Committee on Economics regarding the Treasury Laws Amendment (Putting Consumers First – Establishment of the Australian Financial Complaints Authority) Bill 2017;⁴⁶ and
- Treasury regarding its Consultation Paper on the Establishment on the Australian Financial Complaints Authority (November 2017).⁴⁷

41. The Law Council supports AFCA as the primary means of resolving most financial services disputes, particularly low value claims. The Law Council has previously noted that the SCT had been underfunded for some time, which resulted in the inefficient determination of complaints.⁴⁸ The Law Council stated that AFCA is likely to result in improved outcomes for consumers by reducing the time associated with resolving superannuation complaints.⁴⁹

42. AFCA commenced operating in November 2018. Within its first month of operating, AFCA reported that it received 13,000 phone enquiries and 6,522 complaints from consumers and small businesses.⁵⁰ This averages approximately as 310 complaints per day – a 47 per cent increase in complaints received when compared to the three predecessor schemes.⁵¹

43. Given that AFCA has been operating for less than six months, some time is required to assess its effectiveness and efficiency in dealing with consumer disputes with financial institutions. The Law Council notes that the Final Report of the Royal Commission recommended a review of the quality of financial advice in three years' time.⁵² The Law Council submits that a review of AFCA be could be undertaken in association with that review.

44. On 4 February 2019, the Australian Government announced the expansion of AFCA's remit to review eligible financial disputes dating back to 1 January 2008.⁵³ These legacy

⁴⁵ Law Council of Australia, Submission to the Treasury, *Consultation Paper on Improving Dispute Resolution in the Financial System* (14 June 2017) <www.lawcouncil.asn.au/resources/submissions/improving-dispute-resolution-in-the-financial-system>.

⁴⁶ Law Council of Australia, Submission to Senate Standing Committee on Economics, *Treasury Laws Amendment (Putting Consumers First Establishment of the Australian Financial Complaints Authority) Bill 2017 (Cth)* (29 September 2017) <www.lawcouncil.asn.au/resources/submissions/treasury-laws-amendment-putting-consumers-first-establishment-of-the-australian-financial-complaints-authority-bill-2017>.

⁴⁷ Law Council of Australia, Submission to the Treasury, *Australian Financial Complaints Authority* (24 November 2017), <www.lawcouncil.asn.au/resources/submissions/australian-financial-complaints-authority>.

⁴⁸ Law Council of Australia, Submission to the Treasury, *Consultation Paper on Improving Dispute Resolution in the Financial System* (14 June 2017) Part B, 13 [41].

⁴⁹ Ibid.

⁵⁰ Australian Financial Complaints Authority, 'Financial Complaints Soar in the First Month of AFCA Operations' (Media Release, 4 February 2019) <<https://www.afca.org.au/news/media-releases/financial-complaints-soar-in-first-month-of-afca-operations/>>.

⁵¹ Ibid.

⁵² In three years' time, there should be a review by Government in consultation with ASIC of the effectiveness of measures that have been implemented by the Government, regulators and financial services entities to improve the quality of financial advice: *Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry* (Final Report, February 2019) vol 1, 178 rec 2.3.

⁵³ The Hon Josh Frydenberg MP and the Hon Scott Morrison MP, 'Restoring Trust in Australia's Financial System' (Media Release, 4 February 2019) <<http://jaf.ministers.treasury.gov.au/media-release/007-2019/>>.

disputes were excluded by the predecessor schemes.⁵⁴ AFCA will consider eligible legacy complaints for a period of 12 months between 1 July 2019 and 30 June 2020.⁵⁵

45. Currently there are three aspects to the funding model of AFCA: an annual membership levy, a user-charge and a complaints fee.⁵⁶ In anticipation of a significant spike in the number of complaints that AFCA is likely to receive between 1 July 2019 and 30 June 2020, it is essential that AFCA is adequately resourced to undertake whatever measures it considers necessary to ensure that, come 1 July 2019, it can effectively, efficiently and fairly deal with a potentially larger volume of complaints.

The role of AFCA and independent lawyers

46. Industry-supported ADR schemes play a vital role in assisting consumers to resolve complaints or disputes in a forum that is generally faster and cheaper than the formal legal system. However, the role of the private legal profession remains critical and complementary to the successful operation of AFCA.
47. There is an important role for the courts in establishing precedent for others, and processes such as class actions remain important in obtaining consumer redress in instances of widespread misconduct.
48. In an earlier submission to the Treasury on improving dispute resolution in the financial sector, the Australian Consumer Law Committee of the Law Council's Legal Practice Section (**Australian Consumer Law Committee**) noted the continued importance of the private legal profession, and urged that AFCA have a process whereby AFCA can direct an applicant to obtain independent legal advice.⁵⁷
49. The Australian Consumer Law Committee recommended that the Government consider including a process by which AFCA can direct an applicant to obtain independent legal advice.⁵⁸ The Australian Consumer Law Committee submitted that, in the experience of its members, in financial services disputes concerning complex advice or complex products or complex loss calculations, the costs of obtaining legal advice and independent expert accounting advice where required (for example, to accurately quantify losses) can be significant.⁵⁹
50. The Australian Consumer Law Committee has recommended that AFCA should be constituted such that a matter triaging processes be in place to identify matters of sufficient complexity that warrant the complainant having the option of retaining an independent solicitor from a panel of independent law firms (for example, the Commonwealth Bank of Australia's Open Advice Review Program was constituted with a panel of three national law firms). Doing so would assist AFCA and the parties to resolve the matter more fairly and efficiently. In these circumstances, AFCA ought to have the power to compel payment of fixed amount(s) by the respondent to the panel law firm. The fixed amounts would be determined by reference to the AFCA assessor's assessment of the complexity and amount in dispute.

⁵⁴ Australian Financial Complaints Authority, 'AFCA's Statement on the Royal Commission's Final Report' (Media Release, 4 February 2019) <<https://www.afca.org.au/news/media-releases/financial-complaints-soar-in-first-month-of-afca-operations/>>.

⁵⁵ Australian Financial Complaints Authority, 'AFCA to Accept Legacy Financial Complaints from 1 July 2019' (Media Release, 20 February 2019) <<https://www.afca.org.au/news/media-releases/afca-to-accept-legacy-financial-complaints-from-1-july-2019/>>.

⁵⁶ Australian Financial Markets Association, 'User Pays Funding Model Set for Australian Financial Complaints Authority' (Member News, September 2018).

⁵⁷ Law Council of Australia, Submission to Treasury, *Consultation Paper on Improving Dispute Resolution in the Financial System* (14 June 2017) Part B, 16 [57].

⁵⁸ *Ibid.*

⁵⁹ *Ibid.*

51. In addition, the Australian Consumer Law Committee has highlighted the need for the Australian Securities and Investments Commission (**ASIC**) to be adequately resourced and to have the necessary powers to obtain consumer redress, as well as penalties. Consumer redress obtained in this way could also relieve the pressure on public legal assistance services and reduce the burden on individuals to pursue individual disputes.
52. On this point, the Law Council submitted to the Treasury, in relation to 2019-20 Federal Budget, that the current level of funding ASIC should be increased. This will enable it to more effectively carry out its respective investigative, regulatory and supervisory functions, as the case may be, and to assist ASIC to build its capacity to implement recommendations adopted by the Government from the Final Report from the Royal Commission.⁶⁰

⁶⁰ Law Council of Australia, Submission to the Treasury, *2019-20 Pre-Budget Submission* (12 February 2019) 31.