FSC FINANCIAL SERVICES COUNCIL

29 September 2017

Committee Secretary

Senate Economics Legislation Committee

PO Box 6100

Parliament House

Canberra ACT 2600

By email only:

economics.sen@aph.gov.au.

Attention: Mr. Alan Raine

Dear Mr. Raine

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

The Financial Services Council (**FSC**) has over 100 members representing Australia's retail and wholesale funds management businesses, superannuation funds, life insurers, financial advisory networks and licensed trustee companies. The industry is responsible for investing more than $2.7 trillion on behalf of 13 million Australians. The pool of funds under management is larger than Australia's GDP and the capitalisation of the Australian Securities Exchange. It is the fourth largest pool of managed funds in the world. The FSC promotes best practice for the financial services industry by setting mandatory Standards for its members and providing Guidance Notes to assist in operational efficiency.

Thank you for the opportunity to provide a submission on this topic. Our comments follow.

Inquiry into *the Treasury Laws Amendment (Putting Consumers First—Establishment of the Australian Financial Complaints Authority) Bill 2017* (Bill): FSC Submission 29 September 2017

General comments

1. We refer to our earlier submission of 14 June 2017 in relation to the Treasury *Consultation Paper: Improving dispute resolution in the financial system* and the Exposure Draft *Treasury Laws Amendment (External Dispute Resolution) Bill* and *Regulations* 2017 and Exposure Draft Explanatory Material (**June submission**). A copy of the June submission is **attached** for your reference. To the extent to which they remain relevant under the Bill, we confirm the observations made in the June submission.
2. In particular, we confirm that, as a matter of general principle, the FSC supports the concept of more effective and fairer external dispute resolution (**EDR**) processes. However, we are concerned to ensure that the proposals fulfil the Minister's intention, particularly in the superannuation context. We question whether the higher monetary limits (as detailed in the Treasury Fact Sheet, The Australian Financial Complaints Authority (AFCA) – the Government's response to consultation (**Fact Sheet**)) than those which currently exist for complaints dealt with by the Financial Ombudsman Service (**FOS**) and the Credit & Investments Ombudsman (**CIO**) can be justified. We also express reservation as to what is termed in the Bill's Explanatory Memorandum "strengthened regulatory oversight", that is the powers conferred upon ASIC in relation to AFCA. We would like to see these issues given appropriate consideration and are subject to detailed consultation prior to the finalisation of the AFCA regime.

Specific Comments

3. Thank you for considering our June submission and adopting certain recommendations we made.
4. Regarding those parts of our June submission which have not been incorporated into the Bill, we make the following further submissions.

a. Monetary Limits

We consider the monetary limits should be set out in the Bill or its Regulations. It seems an unusual position to provide ASIC with the power to increase certain monetary limits without making provision for the quantum of those limits themselves. By not setting out the initial limits in the Bill, this may allow AFCA to set and increase the monetary limits itself, without recourse to the Minister, ASIC or industry. We doubt this was the Minister's intention.

Further, the FSC does not support ASIC having the power to increase permanently AFCA's monetary limits. ASIC should be able to make recommendations to AFCA, but not give it mandatory directions. It is not appropriate that a regulator should have a coercive power in respect of an independent, statutory body. The role of ASIC in this context should be facilitative, not compulsive. Otherwise, there is a risk that the independence of AFCA will be compromised.

If, as set out in the Fact Sheet, the Minister intends to raise the monetary limit of non-superannuation complaints to $1million, we consider industry consultation is necessary.

b. Natural Justice

We note that the Explanatory Memorandum provides that AFCA must handle complaints according to the principles of natural justice. This is consistent with our June submission. We still seek, however, that parties to a complaint always receive written reasons of a decision, all decisions are made available to the public (in identified or

de-identified form), and AFCA bases every decision upon prior decisions (whether of itself, FOS, CIO or the Superannuation Complaints Tribunal (**SCT**), as appropriate). The Fact Sheet provides that the Government will require AFCA to undertake these last two matters, however they are not referred to in the Bill or the Explanatory Memorandum.

We question the obligation in the Explanatory Memorandum that AFCA must handle complaints in accordance with "industry best practice". Is this a reference to the complaints handling industry?

c. Rights of Appeal

Under the Bill, a financial firm only has a right to appeal a superannuation complaint on a matter of law. In our view, if monetary limits and the amount of monetary compensation are to be increased significantly, the Government should consult further as to whether the topic of rights of appeal on questions of law should be revisited in non-superannuation complaints. This is so particularly as AFCA will not be bound to follow the rules of evidence. We appreciate that the AFCA regime is intended to provide an alternative dispute mechanism; however, the significant increases mooted in respect of jurisdiction and compensation tend to move the regime out of an EDR process for most businesses.

d. Funding

The Bill and Explanatory Memorandum provide that contributions of financial firms will finance AFCA, with its board determining the detail of that funding.

We consider that the funding model should be designed to incentivise good behaviour, and discourage bad behaviour.

That is, it should not incentivise AFCA to register complaints that are not within its jurisdiction, or to unnecessarily accelerate the complaints process. Financial firms with numerous unsuccessful complaints should pay higher fees, and consumers should not be encouraged to lodge frivolous complaints.

The funding model needs to strike a balance between adequate funding and expense for the industry (especially given many of these costs are ultimately borne by consumers). Additionally, our members seek that they be provided reasonable notice of their contribution to funding AFCA.

e. AFCA's right to withdraw complaints

We consider that AFCA ought to be given similar powers to the SCT to withdraw a complaint if it considers that it is lacking in substance or is misconceived. This is particularly important given it is intended that complainants will not pay to lodge a complaint. Our members have indicated that currently a significant proportion of SCT complaints are withdrawn by the SCT for these reasons. It is in the interests of financial firms, the Government and consumers to ensure that the AFCA is not spending its valuable time and resources on considering such complaints.

f. Reporting

It would be useful for industry to understand whether its reporting obligations will change. If reporting requirements increase, we would expect that there will be further consultation, particularly as systems changes are likely to be required. We would expect that reporting to

AFCA be made consistent, where possible, with reporting to ASIC and APRA.

Regarding the Internal Dispute Resolution reporting requirements in the Bill, we would expect ASIC to consult on the development of the instrument mandating such reporting.

The industry should be given sufficient time to implement the new reporting requirements. At a minimum, we suggest 12 months.

g. Transitional Provisions

The Explanatory Memorandum provides that, in certain circumstances, a financial firm may be required to be a member of two external dispute resolution services for up to 12 months. In that instance, our members would expect that they are not obliged to pay two different sets of fees when in fact they would only be receiving one service.

Further, the Bill provides that the SCT cannot receive new complaints once AFCA begins receiving disputes. To avoid confusion on the part of consumers and financial firms, this rule ought to be extended to FOS and CIO. We expect that it be made clear which disputes the SCT, FOS and the CIO can hear, and which disputes the AFCA will hear during the transition period.

Other Comments

5. We note the terms "Financial Firms" and "Members" are used interchangeably in the Bill and the Explanatory Memorandum, and that "Members" is not defined.

6. Contrary to the Fact Sheet, AFCA's reporting obligations to the Minister or another body do not appear to be contained in Division 2 of the Bill.

7. There appear to be typographical errors in the amendment of section 47(1)(b) of the *Retirement Savings Accounts Act 1997* and section 101(1)(b) of the *Superannuation Industry (Supervision) Act 1993*.

Should you have any questions in relation to the contents of this submission, we would welcome the opportunity to discuss it with you.

Yours Sincerely

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Senior Policy Manager