

## *PROTECTION OF FINANCIAL CONSUMERS IN AUSTRALIA*

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### I FINANCIAL CONSUMERS IN AUSTRALIA

#### *(a) Legal Meaning of Financial Consumer*

Financial consumers are defined by s 12BC of the *ASIC Act*<sup>1</sup> as consumers of services worth less than AUD 40,000.00,<sup>2</sup> or if worth more, then 'of a kind ordinarily acquired for personal, domestic or household use or consumption';<sup>3</sup> or if the services are for use or consumption in connection with a small business,<sup>4</sup> and cost more than AUD 40,000.00, ordinarily acquired for business use or consumption.<sup>5</sup>

#### *(b) Economic Situation of Financial Consumers*

Australia's population is approximately 24 million,<sup>6</sup> with a median age of 37.4 years.<sup>7</sup> The average net worth for all Australian households in 2013–14 was \$809,900.<sup>8</sup> In

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<sup>1</sup> *Australian Securities and Investments Commission Act (Cth)*, No. 51 of 2001, (Australia).

<sup>2</sup> S 12BC (1)(a).

<sup>3</sup> S 12BC (1)(b).

<sup>4</sup> Defined in s 12BC (2) as employing less than 100 people if it engages in manufacturing, or otherwise less than 20 people.

<sup>5</sup> S 12BC (1)(c).

<sup>6</sup> Australian Bureau of Statistics, "March Key Figures", in *3101.0 - Australian Demographic Statistics, Mar 2016*, published by Australian Bureau of Statistics, 22 September, 2016, accessed: 5 December, 2016; Anonymous, "Population of Australia 2016", in *Australia2016 Population*, published by Australia2016 Population, 2016, accessed: 5 December, 2016.

real terms, average equivalised disposable household income was AUD 998 per week in 2013–14.<sup>9</sup> Over 70 per cent of households had debt of some level in 2013–14.<sup>10</sup> Twenty-six per cent of such households were servicing a total debt that was three or more times their annualised disposable income.<sup>11</sup> Of 8.8 million households in 2014,<sup>12</sup> almost 36 per cent had a mortgage over their primary residence.<sup>13</sup>



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<sup>7</sup> Australian Bureau of Statistics, “Summary”, in *3235.0 - Population by Age and Sex, Regions of Australia, 2015*, published by Australian Bureau of Statistics, 18 August, 2016, accessed: 5 December, 2016.

<sup>8</sup> Australian Bureau of Statistics, “Key Findings”, in *6523.0 - Household Income and Wealth, Australia, 2013-14*, published by Australian Bureau of Statistics, 4 September, 2015, accessed: 5 December, 2016.

<sup>9</sup> Ibid.

<sup>10</sup> Ibid.

<sup>11</sup> Ibid.

<sup>12</sup> Roger Wilkins, *The Household, Income and Labour Dynamics in Australia Survey: Selected Findings from Waves 1 to 14, The 11th Annual Statistical Report of the HILDA Survey*, in ‘The Household, Income and Labour Dynamics in Australia (HILDA) Survey’, The University of Melbourne, 2016, p 26.

<sup>13</sup> Ibid, p 59.

<sup>14</sup> Trading Economics, “1959-2016”, in *Australia Household Saving Ratio*, published by Trading Economics, 2016, accessed: 8 December, 2016.



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As at October 2016 the total value of bank deposits held by Australian households was AUD 815,708 million.<sup>17</sup> Almost 14 million working-age Australians had some form of life insurance as at late 2013,<sup>18</sup> and 24 per cent had some form of credit card debt.<sup>19</sup> Superannuation assets totalled AUD 2.1 trillion as at the end of the June 2016 quarter,<sup>20</sup> and over 14.8 million Australians had a super fund account.<sup>21</sup>

<sup>15</sup> Trading Economics, “1976-2016 “, in *Australia Consumer Credit*, published by Trading Economics, 2016, accessed: 8 December, 2016.

<sup>16</sup> Trading Economics, “1977-2016”, in *Australia Households Debt To Gdp*, published by Trading Economics, 2016, accessed: 8 December, 2016.

<sup>17</sup> Australian Prudential Regulation Authority, *Monthly banking statistics*, in ‘Statistics’, Australian Prudential Regulation Authority, October, 2016, p 16.

<sup>18</sup> Australian Securities and Investments Commission, *Submission by the Australian Securities and Investments Commission*, Australian Securities and Investments Commission, October, 2016, p 4.

<sup>19</sup> Reserve Bank of Australia, “Household Debt – Distribution – E7”, in *Statistical Tables*, published by Reserve Bank of Australia, 2001-2017, accessed: 10 January, 2017.

<sup>20</sup> Australian Prudential Regulation Authority, *Quarterly Superannuation Performance*, in ‘Statistics’, Australian Prudential Regulation Authority, June, 2016, p 5.

Total employment in the Financial and Insurance Services sector numbered 444,400 in February 2016.<sup>22</sup> Australia's largest bank, Commonwealth Bank, had total assets in 2016 of AUD 933,078 million, and total liabilities of AUD 872,322 million. Its net asset position was AUD 60,756 million.<sup>23</sup> The bank's Common Equity Tier 1 Basel III capital buffer was 14.4 per cent on an international comparable basis, and 10.6 per cent using the APRA definition.<sup>24</sup>

According to the IMF, across the entire Australian banking sector, regulatory tier 1 capital to risk-weighted assets averages out at 12 per cent, which places Australian banks 69<sup>th</sup> in the world.<sup>25</sup> In terms of tier 1 and 2 capital to risk-weighted assets, the same report places Australia 70<sup>th</sup> in the world.<sup>26</sup>

There are a total of 94 insurers authorised to write new or reinsurance in Australia,<sup>27</sup> of which 29 are life insurers,<sup>28</sup> and 18 are not-for-profit/mutual health insurers.<sup>29</sup>

In terms of financial literacy, Australia ranks first in the Asia-Pacific region, and ninth in the world.<sup>30</sup>

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<sup>21</sup> Australian Taxation Office, "Super accounts data overview", in *Research and statistics*, published by Australian Taxation Office, 15 August, 2016, accessed: 11 January, 2017.

<sup>22</sup> Penny Vandenbroek, *Employment by industry statistics: a quick guide*, in 'Parliamentary Library Quick Guide', Research Paper Series, 2015–16, Parliament of Australia, 14 April, 2016, p 3.

<sup>23</sup> Commonwealth Bank, *Annual Report*, in 'Annual Reports', Commonwealth Bank, 2016, p 77.

<sup>24</sup> *Ibid*, p 11.

<sup>25</sup> International Monetary Fund, "Financial Soundness Indicators (FSIs): At a Glance", in *Access to Macroeconomic & Financial Data*, published by International Monetary Fund, 12 July, 2016, accessed: 9 December, 2016.

<sup>26</sup> *Ibid*.

<sup>27</sup> Australian Prudential Regulation Authority, "Insurers Authorised to Conduct New or Renewal Insurance Business in Australia", in *General Insurance*, series edited by Australian Prudential Regulation Authority, published by Australian Prudential Regulation Authority, accessed: 8 December, 2016.

<sup>28</sup> Australian Prudential Regulation Authority, "Registered Life Insurance Companies", in *Life Insurance & Friendly Societies*, series edited by Australian Prudential Regulation Authority, published by Australian Prudential Regulation Authority, accessed: 8 December, 2016.

<sup>29</sup> Members Own Health Funds, "Members Own Health Funds", in *Home*, published by Members Own Health Funds, 2016, accessed: 8 December, 2016.

Australians enjoy access to a comprehensive social welfare system, the primary purpose of which is to provide individuals with a ‘minimum adequate standard of living’.<sup>31</sup> The principle forms of social welfare include income support payments and payments to families, including age and other pensions, the ‘Newstart Allowance’, and the Family Tax Benefit and supplementary payments schemes.<sup>32</sup>

Income support payments are made to those identified as unable to support themselves, with their need for support measured by means-testing of income and assets.<sup>33</sup> According to the most recent figures available, as at 2013, approximately 5.1 million Australians received some form of social security.<sup>34</sup> During 2015/2016 the Australian government spent AUD 154 billion on social security.<sup>35</sup>

According to the Financial Ombudsman Service, of those seeking assistance in relation to financial consumer protection, 50 per cent were male, 32 per cent female and 18 per cent joint applicants.<sup>36</sup> Forty-seven percent were between the ages of 40-59, and 22 per cent were between the ages of 30-39.<sup>37</sup>

Research conducted under the National Financial Literacy Strategy found that only 25 per cent of Australians reported having a long-term financial plan in place

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<sup>30</sup> Leora Klapper, Annamaria Lusardi & Peter van Oudheusden, *Insights From The Standard & Poor’s Ratings Services Global Financial Literacy Survey*, in ‘Financial Literacy Around the World’, Global Financial Literacy Excellence Center (GFLEC), 18 November, 2015, pp 7; 23-25.

<sup>31</sup> The Treasury, *Part Two: Detailed analysis*, in ‘Australia’s future tax system, Report to the Treasurer’, Vol. 2 of 2, Commonwealth Government of Australia, December, 2009, p 485.

<sup>32</sup> The Treasury, *Architecture of Australia’s tax and transfer system*, Commonwealth Government of Australia, August, 2008, p xiii.

<sup>33</sup> Professor Rosalind Croucher (President and Commissioner in Charge), Justice Berna Collier (part-time Commissioner) & The Hon Susan Ryan AO, Age Discrimination Commissioner (part-time Commissioner), *Grey Areas—Age Barriers to Work in Commonwealth Laws (DP 78)*, in ‘Publications’, no. 78, Vol. Chapter 5, ‘Social Security’, Australian Law Reform Commission, 2 October, 2012, p 114.

<sup>34</sup> Department of Social Services, *Income support customers: a statistical overview 2013*, in ‘Statistical Paper Series’, Statistical Paper No. 12, Department of Social Services, January, 2015, p 2.

<sup>35</sup> Don Arthur, *What counts as welfare spending?*, in ‘Parliamentary Library Research Paper’, Research Paper Series, 2015–16, Parliament of Australia, 21 December, 2015, p 3.

<sup>36</sup> Financial Ombudsman Service, *Financial System Inquiry - Financial Ombudsman Service Submission*, in ‘Submissions’, Financial Ombudsman Service, April, 2014, p 25.

<sup>37</sup> *Ibid*, p 25.

(15-20 years).<sup>38</sup> Eighty-eight per cent of those surveyed had at least one insurance policy,<sup>39</sup> and 78 per cent indicated that they have a retirement policy (superannuation fund).<sup>40</sup> Around 10 per cent of Australians surveyed maintain a self-managed superannuation fund.<sup>41</sup> Of those surveyed, 40 per cent did not understand the risk/return trade-off principle,<sup>42</sup> and 34 per cent were unaware of the diversification principle.<sup>43</sup>

## II FINANCIAL CONSUMER PROTECTION SYSTEM (SOFTWARE)

The framework for the protection of financial consumers can be categorised into two main areas. First, there are general protections afforded to consumers of financial products<sup>44</sup> and financial services,<sup>45</sup> and secondly, there are industry specific regimes covering matters such as licensing, conduct and disclosure.<sup>46</sup>

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<sup>38</sup> Australian Securities and Investments Commission, *Australian Financial Attitudes and Behaviour Tracker: Wave 4: September 2015 – February 2016*, in ‘National Financial Literacy Strategy’, ASIC report 481, Australian Securities and Investments Commission, December, 2016, p 24.

<sup>39</sup> *Ibid*, p 26.

<sup>40</sup> *Ibid*, p 27.

<sup>41</sup> *Ibid*, p 29.

<sup>42</sup> *Ibid*, p 34.

<sup>43</sup> *Ibid*, p 35.

<sup>44</sup> Defined by s 12BAA, *Australian Securities and Investments Commission Act (Cth)*, No. 51 of 2001, and Chapter 7, *Corporations Act (Cth)*, No. 50 of 2001, (Australia). Generally these are defined to include making a financial investment; managing a financial risk, or; making payments, other than in cash, to acquire a facility.

<sup>45</sup> Defined by s 12BAB, *Australian Securities and Investments Commission Act (Cth)*, No. 51 of 2001, and Chapter 7, *Corporations Act (Cth)*, No. 50 of 2001. Generally these are defined to include: providing financial product advice; dealing in a financial product; making a market for a financial product; operating a registered scheme; providing a custodial or depository service; operating a financial market or clearing and settlement facility; providing a service that is otherwise supplied in relation to a financial product; engaging in conduct of a kind prescribed in regulations, or; providing a traditional trustee company service.

<sup>46</sup> Financial System Inquiry, *Financial System Inquiry Interim Report*, Commonwealth Government of Australia, July, 2014, p 3-51.

The first category, consumer regulation, is contained across an array of Statutes.<sup>47</sup> From the perspective of generic financial consumer legislative protection – that is to say protections that are not contained in legislation that covers specific products, like insurance - the most important provisions are contained in the *Australian Securities and Investments Commission Act 2001 (ASIC Act)*.<sup>48</sup> This Act covers all financial products and services, including credit. The provisions of the ASIC Act mirror the relevant provisions of the *Australian Consumer Law*,<sup>49</sup> and empower ASIC to administer these provisions.

The second category, industry-specific consumer regulation, includes licensing, conduct and disclosure regimes, as contained in the *Corporations Act 2001*,<sup>50</sup> and the *National Consumer Credit Protection Act 2009*<sup>51</sup> - the most notable of which address responsible lending, hardship and unjust transactions.

It is not within the scope of this chapter to address every aspect of these protections. Analysis will be confined to the most salient elements overall of consumer protection.

*(a) Generic Consumer Regulation Provisions*

The general protections for consumers of financial products and services are contained in the *ASIC Act*,<sup>52</sup> and include: unconscionable conduct;<sup>53</sup> misleading or

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<sup>47</sup> *Banking Act (Cth)*, No. 6 of 1959, (Australia); *Corporations Act (Cth)*, No. 50 of 2001; *Financial System Legislation Amendment (Financial Claims Scheme and Other Measures) Act (Cth)*, No. 105 of 2008, (Australia); *Insurance Contracts Act (Cth)*, No. 80 of 1984 as amended, (Australia); *Life Insurance Act (Cth)*, No. 4 of 1995 as amended, (Australia); *National Consumer Credit Protection Act (Cth)*, No. 134 of 2009, (Australia); *Retirement Savings Accounts Act (Cth)*, No. 61 of 1997 as amended, (Australia); *Superannuation (Resolution of Complaints) Act (Cth)*, No. 80 of 1993 as amended, (Australia); *Superannuation Industry (Supervision) Act (Cth)*, No. 78 of 1993 as amended, (Australia).

<sup>48</sup> *Australian Securities and Investments Commission Act (Cth)*, No. 51 of 2001.

<sup>49</sup> *Competition And Consumer Act (Cth)*, Schedule 2, *The Australian Consumer Law*, No. 51 of 2010, (Australia).

<sup>50</sup> *Corporations Act (Cth)*, No. 50 of 2001.

<sup>51</sup> *National Consumer Credit Protection Act (Cth)*, No. 134 of 2009.

<sup>52</sup> *Australian Securities and Investments Commission Act (Cth)*, No. 51 of 2001.

deceptive conduct;<sup>54</sup> unfair contract terms;<sup>55</sup> bait advertising;<sup>56</sup> referral selling;<sup>57</sup> harassment or coercion;<sup>58</sup> pyramid schemes;<sup>59</sup> and offering gifts and prizes.<sup>60</sup> An analysis of the first three categories follows below.

(i) *Unconscionable conduct*

A person must not, in relation to financial services, engage in unconscionable conduct.<sup>61</sup> ‘Unconscionability’ has a particular meaning in Australian law which, within the context of financial services, is informed by its meaning as developed in the context of consumer law generally, and one that has been developed over many years. Unconscionability has, therefore, a technical legal meaning, but broadly refers to the exploitation of a ‘special disadvantage’.<sup>62</sup>

(ii) *Misleading or deceptive conduct*

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<sup>53</sup> SS 12CA-12CC, *ibid.* Section 12CA captures judicial decisions that relate to unconscionable conduct, such as that handed down in *Commercial Bank of Australia Ltd v Amadio*, HCA, 1983, (151, CLR (12 May, 1983), 447. Section 12CC captures concepts such as undue influence (s12CC 1(d)).

<sup>54</sup> S 12DA, *Australian Securities and Investments Commission Act (Cth)*, No. 51 of 2001. For an outline of how misleading or deceptive conduct is interpreted in the context of insurance, see further: Stanley Drummond, “Misleading or deceptive conduct in insurance”, *Insurance Law Journal*, Vol. 14, no. 1 (2002).

<sup>55</sup> SS 12BF-12BM, *Australian Securities and Investments Commission Act (Cth)*, No. 51 of 2001.

<sup>56</sup> S 12DG, *ibid.*

<sup>57</sup> S 12DH, *ibid.*

<sup>58</sup> S 12DI, *ibid.*

<sup>59</sup> S 12DK, *ibid.*

<sup>60</sup> S 12DE, *ibid.*

<sup>61</sup> SS 12CA-12CC, *ibid.*

<sup>62</sup> *Louth v Diprose*, HCA, 1992, (175, CLR (2 December, 1992), 621 at 637 per Deane J; *Blomley v Ryan*, HCA, 1956, (99, CLR (28 March, 1956), 362 at 385; *Commercial Bank of Australia Ltd v Amadio*, *op cit.* See further: Stanley Drummond, “Unconscionable Conduct in Insurance”, *Insurance Law Journal*, Vol. 14, no. 2 (2003), p 105-6; Pelma Rajapakse & Jodi Gardner, “The Unconscionable Conduct and Consumer Protection in Subprime Lending in Australia”, *Banking & Finance Law Review*, Vol. 29, no. 3 (2014), p 485.



There is a general prohibition against conduct that is misleading or deceptive or likely to mislead or deceive.<sup>63</sup> There are also specific prohibitions relating to particular representations, for example, a person cannot make a false or misleading statement that the financial services are of a particular standard or price.<sup>64</sup> False or misleading testimonials in relation to financial services are also prohibited.<sup>65</sup>

*(iii) Unfair contract terms*

Terms of consumer contracts for financial services and financial products which are unfair are void.<sup>66</sup> Some common examples where this protection is invoked are contracts for banking services, loan or credit card contracts.<sup>67</sup> This protection does not, however, extend to insurance contracts, which are regulated under other legislation.<sup>68</sup>

Three common situations giving rise to unfair terms include: a significant imbalance between the parties;<sup>69</sup> the term is not necessary to protect the legitimate interests of the party advantaged by the term<sup>70</sup> or, thirdly; the term causes detriment.<sup>71</sup>

*(b) Industry Specific Regulations*

*(i) Responsible lending*

The principle consumer protections in this area are contained in Schedule 1, *The National Credit Code*.<sup>72</sup> All credit providers must be licensed,<sup>73</sup> are required to lend

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<sup>63</sup> S 12DA, *Australian Securities and Investments Commission Act (Cth)*, No. 51 of 2001.

<sup>64</sup> S 12 DB, *ibid*.

<sup>65</sup> S 12 DB, *ibid*.

<sup>66</sup> S 12BF, *ibid*.

<sup>67</sup> Stephen Corones & Philip Clarke, *Australian Consumer Law, Commentary and Materials*, 4th ed., 2011, p 619.

<sup>68</sup> S 15(1), *Insurance Contracts Act (Cth)*, No. 80 of 1984 as amended.

<sup>69</sup> S 12BG(1)(a), *Australian Securities and Investments Commission Act (Cth)*, No. 51 of 2001.

<sup>70</sup> S 12BG(1)(b), *ibid*.

<sup>71</sup> S 12BG(1)(c). An inexhaustive list of examples of unfair terms is contained in s 12BH(1), *ibid*.

<sup>72</sup> *National Consumer Credit Protection Act (Cth)*, No. 134 of 2009.

<sup>73</sup> "Chapter 2—Licensing of persons who engage in credit activities", *ibid*.

responsibly,<sup>74</sup> and must be a member of an external, approved, dispute resolution scheme,<sup>75</sup> the aim of which is to ensure access to justice for consumers. Briefly, by way of overview, the provisions apply to natural persons<sup>76</sup> obtaining credit for personal, domestic or household purposes, which includes a mortgage to buy a house,<sup>77</sup> provided a charge is levied for the service.<sup>78</sup> Also covered are instalment sale agreements<sup>79</sup> and pay-day loans (unless they attract interest and charges below a threshold, in which case they are exempt from the Act).<sup>80</sup>

Credit licensees must conduct reasonable inquiries about the consumer's financial situation.<sup>81</sup> Second, they must conduct reasonable inquiries into the consumer's requirements and objectives in using that credit product.<sup>82</sup> Third, credit licensees must take reasonable steps to verify the consumer's financial situation.<sup>83</sup> In that respect, licensees should ask for documents such as payslips, employment documents, tax returns, bank statements, and the like.<sup>84</sup> Fourth, the credit licensee must make an assessment as to whether the credit contract is 'not unsuitable'.<sup>85</sup> There are prohibitions on suggesting or assisting credit under an unsuitable credit contract,<sup>86</sup> or on entering into, or increasing credit, under an unsuitable credit contracts.<sup>87</sup>

(ii) *Hardship and unjust transactions*

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<sup>74</sup> "Chapter 3—Responsible lending conduct", *ibid.*

<sup>75</sup> S 47 (i), *ibid.*

<sup>76</sup> S 5, *ibid.*

<sup>77</sup> Schedule 1, s 5, *ibid.*

<sup>78</sup> Schedule 1, s 5(1)(c), *ibid.*

<sup>79</sup> Schedule 1, s 11, *ibid.*

<sup>80</sup> Schedule 1, s 6, *ibid.*

<sup>81</sup> SS 117(1)(b) & 130(1)(b), *ibid.*

<sup>82</sup> SS 117(1)(a) & 130(1)(a), *ibid.*

<sup>83</sup> SS 117(1)(c) & 130(1)(c), *ibid.*

<sup>84</sup> Australian Securities and Investments Commission, "*Credit licensing: Responsible lending conduct*", Regulatory Guide 209, published by Australian Securities and Investments Commission, November, 2014, p 21/22.

<sup>85</sup> SS 115; 116; 128; 129, *National Consumer Credit Protection Act (Cth)*, No. 134 of 2009.

<sup>86</sup> S 123, *ibid.*

<sup>87</sup> S 133, *ibid.*

The *National Credit Code* (NCC)<sup>88</sup> contains rules relating to hardship and unjust transactions.<sup>89</sup> The NCC applies to debtors, credit providers, and credit contracts.<sup>90</sup> A debtor includes a prospective debtor.<sup>91</sup>

If a debtor considers they are unable to meet their obligations under a credit contract, they may give a ‘hardship notice’ to the creditor.<sup>92</sup> The creditor may then vary the terms of the contract to help the debtor.<sup>93</sup> The creditor may refuse to vary the terms if there is no reasonable cause, or where the creditor reasonably believes the debtor would not be able to meet their obligations under the contract even if it were changed.<sup>94</sup> Where a debtor is in default, the credit provider must give a default notice and allow 30 days for the debtor to remedy the default.<sup>95</sup>

A debtor may apply to the court to reopen a transaction if it was unjust.<sup>96</sup> ‘Unjust’ means conduct which is unconscionable, harsh or oppressive,<sup>97</sup> and is therefor wider than unconscionable conduct. In making such a determination, a Court must have regard to the public interest,<sup>98</sup> and may use an extensive array of factors. These include the consequences of compliance; the relative bargaining power of the parties; whether the contract’s terms were negotiated and could be altered; whether there are terms that are unreasonably difficult to comply with, or are not reasonably necessary; whether the debtor was adequately represented in negotiations; the accessibility of the contract document; whether the debtor received independent advice; the extent to which the contract was explained, and the extent to which the debtor understood the contract; whether the debtor was subjected to unfair influence, pressure or tactics; whether the credit provider took steps to ensure the debtor understood the transaction; whether the credit provider knew or could reasonably

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<sup>88</sup> Schedule 1, *ibid.*

<sup>89</sup> Schedule 1, Part 4, Division 3, *ibid.*

<sup>90</sup> Legal Services Commission of South Australia, “What credit contracts are regulated by the NCC?”, *Law Handbook*, (20 June, 2013), (accessed: 14 December, 2016), published electronically.

<sup>91</sup> S 204, Schedule 1, *National Consumer Credit Protection Act (Cth)*, No. 134 of 2009.

<sup>92</sup> S 72(1), Schedule 1, *ibid.*

<sup>93</sup> S 73(1), Schedule 1, *ibid.*

<sup>94</sup> S 72(3), Schedule 1, *ibid.*

<sup>95</sup> S 88, Schedule 1, *ibid.*

<sup>96</sup> S 76, Schedule 1, *ibid.*

<sup>97</sup> S 204, Schedule 1, *ibid.*

<sup>98</sup> S 76(2), Schedule 1, *ibid.*

have known that the debtor would be unable to repay, or would face substantial hardship in repaying; whether the terms or the conduct of the credit provider are justified, in light of the risk to the credit provider, of the transaction; in the case of a mortgage, whether there are terms of the contract rendered void by the NCC; whether comparable contracts have comparable terms or rates of interest; any other factor a Court deems relevant;<sup>99</sup> unforeseen circumstances giving rise to an unjust outcome;<sup>100</sup> and the conduct of the parties.<sup>101</sup>

Along with the catch-all provision of ‘any other factor’, it is clear therefore that the NCC provides an extensive list of factors that a Court may rely upon to give relief to consumers.

*(iii) Small amount credit contracts*

A Small Amount Credit Contract (SACC or pay-day loan) is a credit contract of AUD 2,000 or less, with a term between 16 days and one year, that is unsecured, has only a single advance of monies, and where the credit provider is not an authorised deposit-taking institution (ADI – usually an ADI is a bank).<sup>102</sup> An SACC is prohibited where a consumer receives at least 50 per cent of their gross income as social security payments.<sup>103</sup> Additionally, an SACC is prohibited if the repayments would exceed 20 per cent of the consumer’s gross income in an income cycle.<sup>104</sup>

There are additional responsible lending obligations which apply to an SACC. For example, a credit provider must obtain an applicant’s bank account statements for the preceding 90 days, when verifying their financial position.<sup>105</sup> Moreover, there is a presumption that an SACC is unsuitable where a consumer is either already in default

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<sup>99</sup> S 76(2)(a)-(p), Schedule 1, *ibid.*

<sup>100</sup> S 76(4), Schedule 1, *ibid.*

<sup>101</sup> S 76(5), Schedule 1, *ibid.*

<sup>102</sup> S 5(1), *ibid.*

<sup>103</sup> S 133CC, *ibid.*; s 28S(2), *National Consumer Credit Protection Regulations (Cth)*, Select Legislative Instrument No. 44 of 2010 as amended, (enacted: 13 June, 2014), (Australia).

<sup>104</sup> S 28S(3), *National Consumer Credit Protection Regulations (Cth)*, Select Legislative Instrument No. 44 of 2010 as amended.

<sup>105</sup> SS 117(1A); 130(1A), *National Consumer Credit Protection Act (Cth)*, No. 134 of 2009.

under another SACC, or has had 2 or more SACCs in the previous 90 days.<sup>106</sup> The credit provider must also prominently display warnings to potential debtors on their premises,<sup>107</sup> their website<sup>108</sup> or during telephone contact.<sup>109</sup> In these warnings consumers must be reminded that they can request payment plans from utility providers; a toll-free number for financial counselling, and; the availability of social welfare loans.

(iv) *Short term credit contracts*

A Short Term Credit Contract (STCC) means a credit contract of AUD 2,000 or less, with a term of 15 days or less, has only a single advance of monies, and where the credit provider is not an ADI.<sup>110</sup> Credit providers who hold an Australian Credit Licence (with the exception of an ADI) are prohibited from offering STCCs, and if they contravene this prohibition, or fail to adhere to the requirements for the granting of an SACC, they may be liable for both civil and criminal consequences.<sup>111</sup> Similarly, credit assistance in relation to an STCC is prohibited.<sup>112</sup>

(v) *Analysis*

Despite the protections outlined above, the results have been mixed. Persistent problems remain in the short-term and small amount credit industry, despite the increased regulatory burden.

Evidence put forward to the Treasury's Review of the small amount credit contract laws by the Financial Rights Legal Centre indicates that the SACC regime has failed to protect consumers, and is inadequate to the task of preventing financial

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<sup>106</sup> The so-called "presumption of unsuitability", contained in ss 118(3A); 123(3A); 131(3A) and 133(3A), *ibid*.

<sup>107</sup> S 28XXA, *National Consumer Credit Protection Regulations (Cth)*, Select Legislative Instrument No. 44 of 2010 as amended.

<sup>108</sup> S 28XXB, *ibid*.

<sup>109</sup> S 28XXD, *ibid*.

<sup>110</sup> S 5(1), *National Consumer Credit Protection Act (Cth)*, No. 134 of 2009.

<sup>111</sup> S 133CA(1) and Chapter 6, *ibid*.

<sup>112</sup> S 124A(1), *ibid*.

damage to the most vulnerable consumers.<sup>113</sup> Despite the 2013 amendments, harmful repeat borrowing has increased, and is spreading to other demographics, thereby undermining efforts at financial literacy.<sup>114</sup> The same submission asserts that the payday lending industry has a culture of avoiding its legal obligations, relies upon repeat borrowing, and has a systemic culture of non-compliance with responsible lending laws.<sup>115</sup> Despite concerted attempts to reign in this industry, there has been a twenty-fold increase in the demand for short-term credit over the last decade.<sup>116</sup> According to the Financial Rights Legal Centre:

*We have no confidence that the industry will ever comply with the law in any meaningful way ... the only effective way to protect consumers is to ban the industry.*<sup>117</sup>

Having said that, the same submission does point to improvements effected under the current regime, particularly as compared to the pre-2013 position. These include limits on the amounts recoverable under an SACC, reductions in direct re-financing, and effective caps on costs.<sup>118</sup> However, evidence suggests the results of these reforms have been patchy. Payday lending to financially distressed households has suffered a modest decrease of approximately 5 per cent,<sup>119</sup> but in respect of financially stressed households – that is to say households that are in less serious financial predicaments than those of financially distressed households – small amount

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<sup>113</sup> Financial Rights Legal Centre, *Review of the small amount credit contract laws, September 2015*, in ‘Submission by the Financial Rights Legal Centre’, Financial Rights Legal Centre, October, 2015, p 3.

<sup>114</sup> *Ibid*, p 3.

<sup>115</sup> *Ibid*, p 4/6. See also: Australian Securities and Investments Commission, “*Payday lenders and the new small amount lending provisions*”, Report 426, published by Australian Securities and Investments Commission, March, 2015, § 11, p 6.

<sup>116</sup> Marcus Banks, Ashton De Silva & Roslyn Russell, *Trends in the Australian small loan market*, in ‘Commissioned Paper Series’, Australian Centre for Financial Studies and School of Economics, Finance and Marketing, RMIT University, October, 2015, p 5; Jasmine Ali & Marcus Banks, “Into the Mainstream: The Australian Payday Loans Industry on the Move”, *JASSA, The Finsia Journal of Applied Finance*, no. 3 (2014), p 36.

<sup>117</sup> Financial Rights Legal Centre, *op cit*, October, 2015, p 4.

<sup>118</sup> *Ibid*, p 5.

<sup>119</sup> From 395,297 households in 2010 to 376,206 in 2015. Martin North & Gill North, *The Stressed Finance Landscape Data Analysis*, in ‘Digital Finance Analytics, Reports’, Digital Finance Analytics and the Centre for Commercial Law and Regulatory Studies, Monash University, October, 2015, p 15.

and short term credit has exploded.<sup>120</sup> Moreover, several of the most prominent national payday lenders in Australia charge the maximum interest permissible – at times in excess of 240 per cent per annum - indicating that price competition in this market has failed.<sup>121</sup> As argued further by the Financial Rights Legal Centre:

*Worse, we have a more or less effective system of responsible lending for most of the population and a completely ineffective one for those most in need of protection.*<sup>122</sup>

Evidence from the United States and Canada points strongly to the need for inviolable interest rate caps on small and short term loans, prohibitions on multiple loans from one lender, and bans on rollover loans.<sup>123</sup>

### III FINANCIAL CONSUMER PROTECTION INSTITUTIONS (HARDWARE)

#### *(c) Financial Supervision Organizations*

In Australia, there are three corporate regulators: the Australian Competition and Consumer Commission (ACCC), the Australian Securities and Investments Commission (ASIC), and the Australian Prudential Regulation Authority (APRA).

While the ACCC has wide general consumer protection powers, including competition law,<sup>124</sup> ASIC, the national regulator of corporations, was vested with the power to protect financial consumers,<sup>125</sup> as of 1 July 1998.<sup>126</sup> ASIC may delegate its power to the ACCC<sup>127</sup> and vice versa,<sup>128</sup> although such instances are rare. APRA, as

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<sup>120</sup> From 20,805 households in 2010 to 266,881 in 2015. Ibid, p 15.

<sup>121</sup> Financial Rights Legal Centre, op cit, October, 2015, p 11.

<sup>122</sup> Ibid, p 13.

<sup>123</sup> Ibid, p 12.

<sup>124</sup> Established under s 6A, Part II, 'The Australian Competition and Consumer Commission', *Competition And Consumer Act (Cth)*, No. 51 of 2010 as amended, (Australia), and responsible for the enforcement of, *inter alia*, Part IV, 'Restrictive Trade Practices', *ibid*.

<sup>125</sup> Part 2, 'Australian Securities and Investments Commission and Consumer Protection in Relation to Financial Services', Division 2, Subdivision A to H, s 12AB to s 12HD, *Australian Securities and Investments Commission Act (Cth)*, No. 51 of 2001.

<sup>126</sup> Australian Securities and Investments Commission, *Annual Report 1998/99*, Australian Securities and Investments Commission, 18 October, 1999, pp 2/3/30/60.

<sup>127</sup> S 102(2)(e), *Australian Securities and Investments Commission Act (Cth)*, No. 51 of 2001.

<sup>128</sup> S 26, *Competition And Consumer Act (Cth)*, No. 51 of 2010 as amended.

the national regulator of prudential institutions, is responsible for the soundness of the financial system, and its powers extend to authorised deposit takers (banks), insurance companies, and superannuation funds.<sup>129</sup>

The financial products over which ASIC has jurisdiction to enforce consumer protection include: deposit-taking activities;<sup>130</sup> general insurance<sup>131</sup> (except health insurance<sup>132</sup>); life-insurance;<sup>133</sup> superannuation;<sup>134</sup> retirement savings accounts;<sup>135</sup> managed investment schemes;<sup>136</sup> securities;<sup>137</sup> derivatives;<sup>138</sup> debenture stock or bond issued by a government;<sup>139</sup> foreign exchange contracts;<sup>140</sup> and credit.<sup>141</sup> These powers,

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<sup>129</sup> S 8, *Australian Prudential Regulation Authority Act (Cth)*, No. 50 of 1998, (Australia). See also: Financial System Inquiry, *Financial System Inquiry Final Report*, Commonwealth Government of Australia, November, 2014, p 241.

<sup>130</sup> SS 12A(3); 12BAA(7)(h); *Australian Securities and Investments Commission Act (Cth)*, No. 51 of 2001; Stephen Corones & Philip Clarke, op cit, p 624.

<sup>131</sup> S 12A(1); s 12BAA(7)(d), *Australian Securities and Investments Commission Act (Cth)*, No. 51 of 2001; SS 11A & 11B; *National Consumer Credit Protection Regulations (Cth)*, Select Legislative Instrument No. 44 of 2010 as amended; Stephen Corones & Philip Clarke, op cit, p 624.

<sup>132</sup> S 12BAA(7)(d)(i) & (ii); s 12(8)(b) & (ba), *Australian Securities and Investments Commission Act (Cth)*, No. 51 of 2001; Stephen Corones & Philip Clarke, op cit, p 624.

<sup>133</sup> S 12A(1); s 12BAA(7)(e), *Australian Securities and Investments Commission Act (Cth)*, No. 51 of 2001; s 7(1)(b), (2) & (3), *Life Insurance Act (Cth)*, No. 4 of 1995 as amended; Stephen Corones & Philip Clarke, op cit, p 624.

<sup>134</sup> S 12A(1); s 12BAA(7)(f), *Australian Securities and Investments Commission Act (Cth)*, No. 51 of 2001; s 6, *Superannuation Industry (Supervision) Act (Cth)*, No. 78 of 1993 as amended; ss 64 & 64A, *Superannuation (Resolution of Complaints) Act (Cth)*, No. 80 of 1993 as amended; Stephen Corones & Philip Clarke, op cit, p 624.

<sup>135</sup> S 12A(1); s 12BAA(7)(g), *Australian Securities and Investments Commission Act (Cth)*, No. 51 of 2001; s 3, *Retirement Savings Accounts Act (Cth)*, No. 61 of 1997 as amended; Stephen Corones & Philip Clarke, op cit, p 624.

<sup>136</sup> S 12BAA(7)(b), *Australian Securities and Investments Commission Act (Cth)*, No. 51 of 2001; Stephen Corones & Philip Clarke, op cit, p 624.

<sup>137</sup> S 764A(1)(a), *Corporations Act (Cth)*, No. 50 of 2001; s 12BAA(7)(a), *Australian Securities and Investments Commission Act (Cth)*, No. 51 of 2001; Stephen Corones & Philip Clarke, op cit, p 624.

<sup>138</sup> S 901A, *Corporations Act (Cth)*, No. 50 of 2001; s 12BAA(7)(c), *Australian Securities and Investments Commission Act (Cth)*, No. 51 of 2001; Stephen Corones & Philip Clarke, op cit, p 624.

<sup>139</sup> S 764A(1)(j), *Corporations Act (Cth)*, No. 50 of 2001; s 12BAA(7)(i), *Australian Securities and Investments Commission Act (Cth)*, No. 51 of 2001; Stephen Corones & Philip Clarke, op cit, p 624.

<sup>140</sup> S 12BAA(7)(j), *Australian Securities and Investments Commission Act (Cth)*, No. 51 of 2001; Stephen Corones & Philip Clarke, op cit, p 624.



however, are *ex post*, and do not extend to ASIC taking proactive steps against product issuers unless and until a breach of the law has occurred. It has been argued that this is a serious flaw in ASIC's powers, and should be remedied.<sup>142</sup>

Currently, ASIC's consumer protection powers in respect of financial products include information disclosure; prohibitions against misleading or deceptive conduct and unconscionable conduct, and other unfair practices; licensing of financial advisors and product issuers; conduct requirements for financial services providers; and the approval of alternative dispute resolution schemes and industry codes.<sup>143</sup>

*(d) Deposit Insurance Corporation*

In 2008 the Australian Government created the Financial Claims Scheme.<sup>144</sup> This scheme covers account holders in banks, building societies and credit unions, and policy-holders with general insurers.<sup>145</sup> The scheme may only be activated by the Australian Government if one of the covered institutions becomes insolvent.<sup>146</sup> Once activated, it is administered by the Australian Prudential Regulation Authority.<sup>147</sup>

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<sup>141</sup> S 12BAA(7)(k), *Australian Securities and Investments Commission Act (Cth)*, No. 51 of 2001; Stephen Corones & Philip Clarke, *op cit*, p 624.

<sup>142</sup> See: Financial System Inquiry, *op cit*, November, 2014, p 206ff.

<sup>143</sup> Stephen Corones & Philip Clarke, *op cit*, p 625.

<sup>144</sup> *Financial System Legislation Amendment (Financial Claims Scheme and Other Measures) Act (Cth)*, No. 105 of 2008; Australian Prudential Regulation Authority, "About the Financial Claims Scheme", in *Home*, series edited by Australian Prudential Regulation Authority, published by Australian Prudential Regulation Authority, accessed: 8 January, 2017; Australian Prudential Regulation Authority, "Financial Claims Scheme for banks, building societies and credit unions", in *Cross Industry*, series edited by Australian Prudential Regulation Authority, published by Australian Prudential Regulation Authority, accessed: 9 January, 2017.

<sup>145</sup> S 16AD read with s 5(1), *Banking Act (Cth)*, No. 6 of 1959; Australian Prudential Regulation Authority, "About the Financial Claims Scheme", *op cit*; Australian Prudential Regulation Authority, "Financial Claims Scheme for banks, building societies and credit unions", *op cit*.

<sup>146</sup> SS 14F & 16AB, *Banking Act (Cth)*, No. 6 of 1959; Australian Prudential Regulation Authority, "About the Financial Claims Scheme", *op cit*; Australian Prudential Regulation Authority, "Financial Claims Scheme for banks, building societies and credit unions", *op cit*.

<sup>147</sup> S 16AC, *Banking Act (Cth)*, No. 6 of 1959; Australian Prudential Regulation Authority, "About the Financial Claims Scheme", *op cit*; Australian Prudential Regulation Authority, "Financial Claims Scheme for banks, building societies and credit unions", *op cit*.

Under this scheme individual account holders' funds are guaranteed up to AUD\$ 250,000.<sup>148</sup> This guarantee does not extend to foreign banks, and is limited per account holder, not per account.<sup>149</sup> An account holder with multiple accounts at one failed bank will, therefore be protected up to \$250,000 in total, not \$250,000 for each separate account.<sup>150</sup> This limitation extends to accounts held at banks that operate under different trading names, but are all part of the same holding company.<sup>151</sup> Put differently, if a consumer has multiple accounts at one bank, or multiple accounts at different banks all of which are part of the same group, and together those accounts are worth more than \$250,000, the consumer will only be able to receive a maximum of \$250,000, in total. APRA undertakes to compensate consumers within seven calendar days.<sup>152</sup>

In addition, Australia is one of the few countries<sup>153</sup> where depositors enjoy preference as against any other claimants, in the event that an Australian bank is wound-up.<sup>154</sup> Evidence to date suggests that at current levels of capitalisation, all Australian banks would be able to repay all preferred – that is to say domestic - depositors, without becoming insolvent.<sup>155</sup>

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<sup>148</sup> Australian Prudential Regulation Authority, "About the Financial Claims Scheme", op cit; Australian Prudential Regulation Authority, "Financial Claims Scheme", in *Cross Industry*, series edited by Australian Prudential Regulation Authority, published by Australian Prudential Regulation Authority, accessed: 9 January, 2017; Australian Prudential Regulation Authority, "Financial Claims Scheme for banks, building societies and credit unions", op cit.

<sup>149</sup> Australian Prudential Regulation Authority, "Financial Claims Scheme", op cit; Australian Prudential Regulation Authority, "Financial Claims Scheme for banks, building societies and credit unions", op cit.

<sup>150</sup> Australian Prudential Regulation Authority, "Financial Claims Scheme for banks, building societies and credit unions", op cit.

<sup>151</sup> Ibid.

<sup>152</sup> Australian Prudential Regulation Authority, "About the Financial Claims Scheme", op cit; Australian Prudential Regulation Authority, "Financial Claims Scheme for banks, building societies and credit unions", op cit.

<sup>153</sup> Grant Turner, *Depositor Protection in Australia*, in 'Bulletin', Reserve Bank of Australia, December Quarter, 2011, p 54.

<sup>154</sup> S 13A, *Banking Act (Cth)*, No. 6 of 1959.

<sup>155</sup> Kevin Davis, *Depositor Preference, Bail-in, and Deposit Insurance Pricing and Design*, Department of Finance, University of Melbourne, and Australian Centre of Financial Studies and Monash University, 14 September, 2015, p 11.

*(e) Dispute Settlement Organization*

Currently the financial system's dispute resolution framework consists of government, which sets the framework and appoints members to the Board of the Superannuation Complaints Tribunal (SCT) and funds the SCT; ASIC, which approves and oversees industry ombud schemes and staffs the SCT; internal dispute resolution schemes (IDR), which are required to be established by providers of financial products and services to consumers;<sup>156</sup> external dispute resolution (EDR) bodies<sup>157</sup> to be available free to consumers when disputes lodged with IDR fail to be resolved, and finally; the courts.<sup>158</sup>

*(vi) Internal dispute resolution*

As a first option to resolving a complaint, consumers may have recourse to internal dispute resolution (IDR) facilities. These are designed to make dispute resolution quick and easy.<sup>159</sup> As indicated, such arrangements are required by law.<sup>160</sup> Firms have

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<sup>156</sup> S 912A, *Corporations Act (Cth)*, No. 50 of 2001, and s 47, *National Consumer Credit Protection Act (Cth)*, No. 134 of 2009, and regulated by: Australian Securities and Investments Commission, "Licensing: Internal and external dispute resolution", Regulatory Guide 165, published by Australian Securities and Investments Commission, July, 2015 and Australian Securities and Investments Commission, "Approval and oversight of external dispute resolution schemes", Regulatory Guide 139, published by Australian Securities and Investments Commission, June, 2013. See also: Australian Securities and Investments Commission, op cit, October, 2016, p 8.

<sup>157</sup> The Financial Ombudsman Service (FOS), Credit and Investments Ombudsman (CIO), and Superannuation Complaints Tribunal (SCT).

<sup>158</sup> Ian Ramsay, Julie Abramson & Alan Kirkland, *Review of the financial system external dispute resolution and complaints framework, Interim Report*, in 'EDR Review', The Treasury, Commonwealth Government, 6 December, 2016, p 39.

<sup>159</sup> Ian Ramsay, Julie Abramson & Alan Kirkland, *Review of the financial system external dispute resolution framework, Issues Paper*, in 'Consultation on the financial system external dispute resolution framework', The Treasury, Commonwealth Government, 9 September, 2016, § 14, p 4.

<sup>160</sup> Australian Securities and Investments Commission, "Licensing: Internal and external dispute resolution", Regulatory Guide 165, op cit.

45 days to resolve a complaint before external dispute arrangements are triggered.<sup>161</sup> Superannuation funds have 90 days.<sup>162</sup>

(vii) *External dispute resolution*

If IDR processes fail to resolve a consumer's complaint, the next step is external dispute resolution (EDR). These processes are designed to be quicker and easier than court processes, and at much lower cost.<sup>163</sup>

In Australia, EDR takes the form of independent Ombuds, membership of which is a legal requirement.<sup>164</sup> These are the Financial Ombudsman Service (FOS), the Credit and Investments Ombudsman (CIO), and the Superannuation Complaints Tribunal (SCT), all of which are industry funded, but must maintain independence from the entities that provide that funding.<sup>165</sup> Establishment must be approved by ASIC,<sup>166</sup> which maintains limited oversight of their operations.<sup>167</sup> They are free to access by consumers, and while banks and insurers are bound by the decisions of these ombuds, consumers are not.<sup>168</sup>

FOS is responsible for complaints in relation to financial and credit products and services. That includes complaints against banks; insurers (including life and general insurers); credit providers; credit unions; financial advisers and planners; brokers; debt collection agencies; and other businesses that provide financial products and services.<sup>169</sup>

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<sup>161</sup> RG 165.88(b), *ibid*.

<sup>162</sup> S 101(b), *Superannuation Industry (Supervision) Act (Cth)*, No. 78 of 1993 as amended.

<sup>163</sup> Ian Ramsay, Julie Abramson & Alan Kirkland, *op cit*, 9 September, 2016, § 19, p 6.

<sup>164</sup> S 912AA, *Corporations Act (Cth)*, No. 50 of 2001.

<sup>165</sup> Australian Securities and Investments Commission, "*Approval and oversight of external dispute resolution schemes*", Regulatory Guide 139, *op cit*, RG 139.88ff, p 22ff.

<sup>166</sup> S 912A(2)(b)(ii), *Corporations Act (Cth)*, No. 50 of 2001 and s 47, *National Consumer Credit Protection Act (Cth)*, No. 134 of 2009, and regulated by: Australian Securities and Investments Commission, "*Approval and oversight of external dispute resolution schemes*", Regulatory Guide 139, *op cit*.

<sup>167</sup> Ian Ramsay, Julie Abramson & Alan Kirkland, *op cit*, 6 December, 2016, § 3.24, p 48.

<sup>168</sup> *Ibid*, p 43/44.

<sup>169</sup> Ian Ramsay, Julie Abramson & Alan Kirkland, *op cit*, 9 September, 2016, § 31, p 8.

The CIO deals with complaints concerning lenders (residential and commercial mortgage providers, personal loan and credit card providers, small amount lenders and pawn brokers); mutual banks, credit unions and building societies; finance brokers; securitisers; debt purchasers and collectors; timeshare providers; financial planners; accountants; and credit reporting schemes.<sup>170</sup>

Since the establishment of FOS in 2008, there has been a dramatic increase in the number of disputes, attributable to the global financial crisis, the expansion of the FOS's jurisdiction, and the impact of natural disasters suffered in Australia.<sup>171</sup>

The SCT is a statutory tribunal, governed by Statute,<sup>172</sup> and not by ASIC. It is responsible for resolving complaints concerning the conduct of trustees, insurers, retirement savings account (RSA) providers, superannuation providers (excluding self-managed superannuation funds), approved deposit funds, life policy funds, annuity policies and RSAs.<sup>173</sup>

*(viii) Courts*

If all other avenues of dispute resolution fail, the option of last resort for financial consumers is litigation. In Australia, however, this option is costly to the point of being prohibitive for most consumers.<sup>174</sup> Litigation is also typically complex, time-consuming<sup>175</sup> and stressful, and there are no guarantees as to the outcome. However, the court's powers in terms of remedies are wide.

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<sup>170</sup> Ibid, § 35, p 9.

<sup>171</sup> Financial Ombudsman Service, op cit, April, 2014, p 9.

<sup>172</sup> S 6, *Superannuation (Resolution of Complaints) Act (Cth)*, No. 80 of 1993 as amended.

<sup>173</sup> Ian Ramsay, Julie Abramson & Alan Kirkland, op cit, 9 September, 2016, § 64, p 14.

<sup>174</sup> Louis Schetzer, Joanna Mullins & Roberto Buonamano, *Access to Justice & Legal Needs, A project to identify legal needs, pathways and barriers for disadvantaged people in NSW*, in 'Background Paper', Law & Justice Foundation of New South Wales, August, 2002, p 10. See further: Community Law Australia, *Unaffordable and out of reach: the problem of access to the Australian legal system*, National Association of Community Legal Centres, July, 2012.

<sup>175</sup> Mr Justice Joe Harman, "From Alternate to Primary Dispute Resolution: The pivotal role of mediation in (and in avoiding) litigation", *Paper presented at the National Mediation Conference*, Melbourne, 2014, p 1.

(ix) *Analysis*

The current arrangements, particularly in respect of EDR, have been found to be confusing<sup>176</sup> and unnecessarily complex.<sup>177</sup> There is evidence that outcomes tend to differ between various EDR schemes.<sup>178</sup> There are also significant gaps in the current schema, including out-dated monetary limits, lack of EDR for consumers of debt management firms' services, and a lack of a compensation scheme as a last resort.<sup>179</sup> Delays in respect of actions brought before the SCT are 'unacceptable.'<sup>180</sup> Its handling of complaints is inhibited by Statute, and transparency and accountability are lacking.<sup>181</sup> As the Interim Report of the EDR Review found:

*The existence of multiple schemes that have overlapping jurisdictions contributes to consumer confusion and makes it more challenging to achieve and be seen to achieve comparable outcomes for consumers with similar complaints.*<sup>182</sup>

IDR schemes lack adequate reporting,<sup>183</sup> suffer from inconsistent time-frames,<sup>184</sup> and some schemes are inaccessible to consumers.<sup>185</sup>

As a result, one recommendation is that:

*There should be a single industry ombudsman scheme for financial, credit and investment disputes (other than superannuation disputes) to replace FOS and CIO.*<sup>186</sup>

*SCT should transition into an industry ombudsman scheme for superannuation disputes.*<sup>187</sup>

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<sup>176</sup> Law Council of Australia, *Review of the Financial System External Dispute Resolution Framework*, Law Council of Australia, 7 October, 2016, § 62, p 14.

<sup>177</sup> Ian Ramsay, Julie Abramson & Alan Kirkland, op cit, 6 December, 2016, p 96.

<sup>178</sup> Ibid, § 5.11, p 97.

<sup>179</sup> Ibid, § 5.45, p 103/4.

<sup>180</sup> Ibid, § 5.104, p 120.

<sup>181</sup> Ibid, § 5.117, p 122.

<sup>182</sup> Ibid, § 5.19, p 98.

<sup>183</sup> Ibid, p 137.

<sup>184</sup> Ibid, p 138.

<sup>185</sup> Ibid, p 139.

<sup>186</sup> Ibid, § 6.8, p 144.

<sup>187</sup> Ibid, § 6.22, p 149.

The same Inquiry recommends an assessor to review Schemes' complaints handling,<sup>188</sup> while enhancing ASIC's powers to compel remedial action where Schemes fail to do so.<sup>189</sup> Finally the Inquiry recommends the establishment of a compensation scheme of last resort, to provide compensation where firms are incapable of doing so.<sup>190</sup>

#### IV SPECIAL FCP SYSTEMS

*(f) For the elderly group*

The Australian Law Reform Commission was recently called upon to investigate the protection of older Australians against abuse, including in respect of their rights as financial consumers.<sup>191</sup> The Report identifies elder abuse as one of the most common types of abuse that older Australians suffer.<sup>192</sup> In particular this involves asset theft, and abuse of powers of attorney.<sup>193</sup>

The principal recommendations in respect of the protection of older Australian as financial consumers involve addressing enduring powers of attorney, and banking services. In respect of the former, the Commission's main recommendations were as follows:

- the establishment of a national online registration scheme for enduring documents;
- the provision of significant safeguards in a national legal framework for enduring documents; and

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<sup>188</sup> Ibid, § 6.58, p 159.

<sup>189</sup> Ibid, § 6.64, p 160.

<sup>190</sup> Ibid, § 7.17, p 168.

<sup>191</sup> Professor Rosalind Croucher (President), The Hon Justice John Middleton, Federal Court of Australia (part-time Commissioner), & The Hon Justice Nye Perram, Federal Court of Australia (part-time Commissioner), *Elder Abuse - Discussion Paper 83*, in 'Publications', (DP 83), Australian Law Reform Commission, December, 2016, p 3.

<sup>192</sup> Ibid, § 1.19, p 18.

<sup>193</sup> Ibid.

- the replacement of current forms of enduring documentation with a single ‘representatives agreement.’<sup>194</sup>

In respect of the latter, the Commission’s main recommendations were:

- The *Code of Banking Practice* should provide that banks will take reasonable steps to prevent the financial abuse of older customers.<sup>195</sup>
- The *Code of Banking Practice* should increase the witnessing requirements for arrangements that allow people to authorise third parties to access their bank accounts.<sup>196</sup>

*(g) For the poor group*

Australia does not enjoy protections specifically targeted at protecting the poor. However it does regulate small amount and short term credit (typically payday lenders), which most often are used by, and targeted at, the poor.<sup>197</sup>

Analysis of these types of products and the regulations that restrict them is provided *supra*, at pp 12 and at 13.

*(h) For the young group*

As with protections aimed at the poor, Australia does not provide protection tailored to the young. However, one study makes a compelling argument that a close connection exists between higher levels of financial literacy amongst the young, and their ability to protect themselves as financial consumers.

*Financial literacy is increasingly recognised as an essential part of consumer protection, complementing traditional consumer protection mechanisms such as disclosure.*<sup>198</sup>

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<sup>194</sup> Ibid, § 5.3, p 86.

<sup>195</sup> Ibid, Proposal 7.1, p 129.

<sup>196</sup> Ibid, Proposal 7.2, p 134.

<sup>197</sup> Chris Field, “Pay day lending: an exploitative market practice”, *Alternative Law Journal*, Vol. 27, no. 1 (February, 2002), p 36ff, and p 413.

<sup>198</sup> Paul Ali, Malcolm Anderson, Cosima McRae & Ian Ramsay, “The financial literacy of young Australians: An empirical study and implications for consumer protection and ASIC’s National Financial Literacy Strategy”, *Company and Securities Law Journal*, Vol. 32, no. 5 (2014), p 334.



Further:

*Effective consumer protection frameworks and institutional structures are necessary but not sufficient conditions for effective protection of the interests of the consumer of financial services. Only informed and educated users of financial services can be fully empowered by the opportunities the modern financial system provides.*<sup>199</sup>

The study finds disparities in the overall level of financial literacy amongst the young related to demographics, such as location (urban or rural), parental income and education levels and the like, and argues in favour of national policies aimed at improving financial literacy amongst the young.<sup>200</sup>

## V CONCLUSION

### *(i) Regulatory failure*

Australia's consumer protection agency, ASIC, has performed poorly.<sup>201</sup> There have been numerous and extensive scandals in Australia over the past nine years.<sup>202</sup> These

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<sup>199</sup> Nataliya Mylenko, Adetola Adenuga, Roziah Baba, Elizabeth Davidson, Ros Grady, Johanna Jaeger & Valentina Saltane, *Global Survey on Consumer Protection and Financial Literacy: Results Brief - Regulatory Practices in 114 Economies*, in 'Publications', The World Bank, 2013, p 22.

<sup>200</sup> Paul Ali, Malcolm Anderson, Cosima McRae & Ian Ramsay, *Company and Securities Law Journal*, op cit, p 352.

<sup>201</sup> Adele Ferguson, "Royal commission: not a populist whinge for burned bank customers", 'Comment', *The Sydney Morning Herald*, 13 August, 2016; Gail Pearson, "Failure in corporate governance: financial planning and greed", Chap. 8, in *Handbook on Corporate Governance in Financial Institutions*, edited by Christine A. Mallin, in 'Business', 27 May, 2016, p 185/190/197/198; Ruth Williams, "'Tough cop' ASIC too timid on enforcement: Allan Fels", 'News & Views/Banking', *The Sydney Morning Herald*, 15 April, 2016.

<sup>202</sup> See: Gail Pearson, op cit, p 203, fn 6; Adele Ferguson, "Hearing into ASIC's failure to investigate CBA's Financial Wisdom", 'Business Day', *The Sydney Morning Herald*, 3 June, 2014; Adele Ferguson & Deb Masters, "Banking Bad", in Four Corners, *Audiovisual Material*, Documentary, 5 May, 2014; Adele Ferguson & Ben Butler, "Commonwealth Bank facing royal commission call after Senate financial planning inquiry", 'Banking and Finance', *The Sydney Morning Herald*, Business Day ed., 26 June, 2014; Adele Ferguson, "A banking royal commission couldn't make the sector's reputation any worse", 'Business/Banking & Finance/Financial Services/Opinion', *The Australian Financial Review*, AFR Weekend ed., 11 April, 2016 at 08:46 am. See also: Denise Brailey, *Australia's 'Banking Cartel Scandal' - The Rise of White-Collar Crime*, in 'Senate Economics

have included serious and persistent instances of fraud<sup>203</sup> and malpractice in the financial advice industry,<sup>204</sup> (which is substantially owned by Australia's four major banks); allegations of bench-mark rate rigging,<sup>205</sup> which in turn affects the price of finance paid by consumers; consumer abuse in the life insurance industry;<sup>206</sup> and charging fees to bank clients, for services that were never provided, in amounts that are eye-watering.<sup>207</sup> The severity of these scandals cannot be underestimated. They

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Standing Committee, 2016 Inquiry into 'Penalties for White-Collar Crime', Submission 23, Banking and Finance Consumers Support Association (Inc.), 29 March, 2016.

<sup>203</sup> Senate Economics References Committee, *The Performance of The Australian Securities and Investments Commission*, in 'Executive summary', Parliament of Australia, 26 June, 2014, Executive Summary, p xviii.

<sup>204</sup> Gail Pearson, op cit, p 185.

<sup>205</sup> André Dao, Andrew Godwin & Ian Ramsay, "From enforcement to prevention: international cooperation and financial benchmark reform", *Law and Financial Markets Review*, Vol. 10, no. 2 (1 June, 2016), p 90; Australian Securities and Investments Commission, "16-060MR ASIC commences civil penalty proceedings against ANZ for BBSW conduct", published by Australian Securities and Investments Commission, Sydney, NSW, Friday, 4 March, 2016; Australian Securities and Investments Commission, *Annual Report 2015-2016*, Australian Securities and Investments Commission, 14 October, 2016, p 73; Pat McConnell, "ASIC finally pulls the BBSW trigger on ANZ", 'Business & Economy', *The Conversation*, 4 March, 2016 5.52 pm AEST; Pat McConnell, "Market manipulation – ASIC better get it right, first time", 'Business & Economy', *The Conversation*, 9 February, 2016 1.54 pm AEDT; Chris Wright, "Regulation: Banking's dark side reaches Australia", *Euromoney*, 6 April, 2016; Mario Christodoulou, "ASIC: \$20 trillion worth of financial products may be affected by BBSW rigging", in *News*, series edited by Australian Broadcasting Corporation, published by Australian Broadcasting Corporation, 29 July 2016, 3:16 pm, accessed: 16 October, 2016; Andrew Schmulow, "Why rigging of the bank bill swap rate hurts everyone", 'Business & Economy', *The Conversation*, 9 March, 2016 2.29 pm AEDT.

<sup>206</sup> Pat McConnell, "CommInsure case shows it's time to target reckless misconduct in banking", *ibid*, 8 March, 2016 9.38 am AEDT; David Jacobson, "Life insurance claims handling inquiry", *Bright Law*, (4 April, 2016), (accessed: 16 May, 2016), published electronically; Darren Snyder, "Senate to investigate life industry", 'News/Insurance, Regulatory', *Financial Standard*, Tuesday, 8 March, 2016 12:21 pm; Anna Henderson & Dan Conifer, "Commonwealth Bank boss Ian Narev says no-one sacked over CommInsure scandals", in *Breaking News*, series edited by Australian Broadcasting Corporation, published by Australian Broadcasting Corporation, 4 October, 2016, 11:17 pm, accessed: 30 January, 2017.

<sup>207</sup> Georgia Wilkins, "Big banks to refund \$178 million to financial advice customers", 'Business', *The Sydney Morning Herald*, 27 October, 2016; Stephen Letts, "Banks facing \$180 million compensation payments for gouging fees without advice", in *Breaking News*, series edited by Australian

have involved somewhere between hundreds of thousands of consumers,<sup>208</sup> and 1.3 million consumers,<sup>209</sup> and have caused damage to consumers running into hundreds of millions of dollars.<sup>210</sup>

What makes the position worse is that these scandals were not uncovered by ASIC. They were uncovered by the media. It then became apparent in some cases that ASIC had been provided with evidence at least six years prior to the first news reports,<sup>211</sup> yet failed to pursue the wrongdoers, until media attention<sup>212</sup> and the public outcry<sup>213</sup> forced their hand.

*ASIC has limited powers and resources but even so appears to miss or ignore clear and persistent early warning signs of corporate wrongdoing or troubling trends that pose a risk to consumers.*<sup>214</sup>

As a result, ASIC's conduct was examined by Australia's Parliament, and was subjected to extensive and withering criticism.

*...it showed ASIC as a timid, hesitant regulator, too ready and willing to accept uncritically the assurances of a large institution that there were no grounds for ASIC's concerns or intervention. ASIC concedes that its trust in this institution was misplaced.*<sup>215</sup>

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Broadcasting Corporation, published by Australian Broadcasting Corporation, 27 October, 2016, 1:02 pm, accessed: 30 January, 2017; Misa Han, "Big four banks, AMP charged \$178m for no financial advice", 'Business/Banking & Finance', *The Australian Financial Review*, 27 October, 2016 at 11:37 am.

<sup>208</sup> Gail Pearson, op cit, p 202.

<sup>209</sup> Adele Ferguson, "Financial misconduct costs a fortune", 'Business/Comment', *The Sydney Morning Herald*, Business Day ed., 17 September, 2016.

<sup>210</sup> Gail Pearson, op cit, p 202.

<sup>211</sup> For a timeline see: Senate Economics References Committee, op cit, 26 June, 2014, pp 110 and 114.

<sup>212</sup> Gail Pearson, op cit, p 186.

<sup>213</sup> A. Odysseus Patrick, "Flush and Dominant, Australia's Banks Come Under Pressure", 'Dealbook', *New York Times*, New York ed., 14 October, 2016.

<sup>214</sup> Senate Economics References Committee, op cit, 26 June, 2014, Executive Summary, p xvii.

<sup>215</sup> Ibid, Executive Summary, p xviii.

This issue is of relevance for reasons beyond straightforward consumer protection, as ASIC has, in addition, a market conduct remit,<sup>216</sup> and is one of two peaks in the Twin Peaks model of financial regulation.<sup>217</sup>

The subprime disaster in the United States in 2007/2008, which then metastasised into the Global Financial Crisis, was precipitated by rampant market misconduct in the subprime housing industry.<sup>218</sup> Consequently, the market conduct function is also, at least in part, a consumer protection function. ASIC's failures as an effective consumer protector do not bode well for its ability to enforce market conduct and, therefore, that potentially poses a risk to overall financial system stability too.

As the Twin Peaks model is gaining traction internationally,<sup>219</sup> the serious failings that ASIC has evidenced is of great, and should be regarded as being of international, concern.

*(j) Fixing the problem / regulating the regulator*

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<sup>216</sup> Andrew D. Schmulow, "The four methods of financial system regulation: An international comparative survey", *Journal of Banking and Finance Law and Practice*, Vol. 26, no. 3 (November, 2015), p 169.

<sup>217</sup> A.D. Schmulow, *Twin Peaks: A Theoretical Analysis*, in 'The Centre For International Finance and Regulation (CIFR) Research Working Paper Series', no. 064/2015 / Project No. E018, The Centre For International Finance and Regulation (CIFR), 1 July, 2015, p 4.

<sup>218</sup> Ibid, p 18; See further: Frederic S. Mishkin, *Over the Cliff: From the Subprime to the Global Financial Crisis*, in 'NBER Working Paper Series', no. 16609, National Bureau of Economic Research, December, 2010; U.S. Securities and Exchange Commission, *SEC Enforcement Actions. Addressing Misconduct that Led To or Arose From the Financial Crisis*, U.S. Securities and Exchange Commission, 26 May, 2015; Steve Denning, "Lest We Forget: Why We Had A Financial Crisis", *Forbes*, (22 November, 2011), published electronically; Ray Martin, "Bank of America's great mortgage give-away", in *CBS News*, series edited by CBS Money Watch, published by CBS Interactive Inc., 9 May, 2012, 10:32 am, accessed: 26 September, 2015; Rick Rothacker, "The deal that cost Bank of America \$50 billion – and counting", 'News, Business, Banking', *The Charlotte Observer*, 16 August, 2014; L. Randall Wray, "Setting the Record Straight One More Time: BofA's Rebecca Mairone Fined \$1Million; BofA Must Pay \$1.3Billion", *New Economic Perspectives*, (2 August, 2014), (accessed: 26 June, 2015), published electronically; Edward Wyatt, "Promises Made, Then Broken, By Firms in S.E.C. Fraud Cases", 'Business Day', *New York Times*, New York ed., 8 November, 2011.

<sup>219</sup> Andrew D. Schmulow, *Journal of Banking and Finance Law and Practice*, op cit, p 165.

ASIC can and should perform better,<sup>220</sup> and any improvements to ASIC's performance will include improvements to the overall state of consumer protection in Australia. That would be positive for investor/consumer confidence.<sup>221</sup> The importance of the task cannot, therefore, be underestimated.

There are four areas of reform that should be investigated or implemented, with a view to improving the performance of the regulator. These are:

- (1) the establishment of a *Financial Regulator Assessment Board*, in line with the recommendation of the Financial System Inquiry,<sup>222</sup> the purpose of which would be to independently assess the performance of the regulators (ASIC and APRA), on an on-going basis. This could include comparative analysis of world's best practice, ASIC enforcement strategies, ASIC's allocation of resources and the like<sup>223</sup>;
- (2) a user pays system, like that employed by APRA,<sup>224</sup> to ensure that ASIC's funding is not permanently at the mercy of government, and to ensure also that those entities that consume disproportionately large quantities of ASIC's time and money, pay their fair share;
- (3) allow ASIC to retain a percentage of whatever fines and court-imposed penalties they levy on firms found guilty of malpractice. This too would contribute to greater budget certainty for ASIC, while at the same time incentivise the regulator to impose the largest penalties and fines possible. One of the current and persistent criticisms levelled at ASIC is that it imposes penalties that are too small<sup>225</sup> to effect improvements in firm behaviour, or create credible deterrence,<sup>226</sup> and finally;

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<sup>220</sup> Ruth Williams, *op cit*, 2016.

<sup>221</sup> Australian Financial Markets Association, *Submission to the Financial System Inquiry*, Australian Financial Markets Association, 31 March, 2014, p 2.

<sup>222</sup> Financial System Inquiry, *op cit*, November, 2014, p 239.

<sup>223</sup> Pat McConnell, "War on banking's rotten culture must include regulators", 'Business & Economy', *The Conversation*, 4 June, 2015 2.14 pm AEST.

<sup>224</sup> The Treasury & Australian Prudential Regulation Authority, *Financial Industry Levies for 2015-16*, The Treasury & Australian Prudential Regulation Authority, 1 July, 2015, p 2 ff.

<sup>225</sup> Australian Securities and Investments Commission, *Penalties for corporate wrongdoing*, Report Number: 387, Australian Securities and Investments Commission, March, 2014, p 15.

<sup>226</sup> Pat McConnell, "ASIC needs a win in 2017, but it's not likely to come from the banks", 'Business & Economy', *The Conversation*, 15 January, 2017 10.47 am AEDT.

- (4) the establishment of a disgorgement penalties regime, like that in force in the United States, the purpose of which would be to ensure that fines and penalties are not simply seen as an operational cost. Disgorgement damages would ensure that, at a minimum, firms do not profit from their malpractices; thereby further bolstering credible deterrence.

Overall, however, Australia's regime for the protection of financial consumers is sophisticated and advanced, as would be expected of a developed, representative democracy. Its legal system is possessed of a rich commercial jurisprudence, and there exist an array of protections, from legislation to alternative dispute resolution to education initiatives to frequent and independent formal inquiries. This is, no doubt, a contributing factor to the comparatively high levels of asset ownership and personal wealth.<sup>227</sup>

That said, there is also doubtless room for improvement: some of which, as should be expected, involves the ordinary, run-of the mill reforms that will always be necessary to adapt to changing conditions, and keep existing structures up-to date and fit for purpose. But some issues – one in particular –ASIC – represent an out-of the ordinary set of problems, and a critical challenge to the overall goal of the protection of consumers of financial products and services.

For Australia to continue to progress as a developed economy, with a strong foundation in the rule of law, and with the fair and equitable treatment of consumers, that issue should be tackled immediately, and with courage and foresight.

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<sup>227</sup> Anthony Shorrocks, James B. Davies, Rodrigo Lluberas & Antonios Koutsoukis, *Global Wealth Report 2016*, in 'Global Wealth Report', Credit Suisse, November, 2016, p 40.

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