Finance Industry Delegation

RESPONSE TO THE CONSULTATION PAPER

ON THE ESTABLISHMENT OF THE

AUSTRALIAN FINANCIAL COMPLAINTS AUTHORITY

November 2017

To: Head of Secretariat
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INTRODUCTION

The 187 credit provider and lessor companies that support the Finance Industry Delegation (the Delegation) note that the opportunity to respond to the November 2017 Consultation Paper, "*Establishment of the Australian Financial Complaints Authority*", appears to be the last chance industry representative entities, such as the Finance Industry Delegation, will have to present recommendations in the hope of avoiding a repeat of the disgrace that currently masquerades as the Australian external disputes resolution regime.

Section 1051(4)(b) of the enabling Bill demands that the operation of the Australian Financial Complaints Authority (AFCA) must be "*in a way that is fair, efficient, timely and independent*".

Later content in the enabling Bill contradicts any opportunity for AFCA to ever be independent (see discussion later in this response).

However, if the consultation process does not ignore the content of this and other industry representative organisation responses, there is just a chance that - for the first time - Australia will get an external dispute regime that satisfies 3 of the 4 lofty goals included in Section 1051(4)(b).

In the Minister's press release of 3 November 2017, Minister O'Dwyer claims that "*AFCA is a landmark reform that will overhaul how financial disputes are dealt with in Australia*". With the exception of the issues of creating a monopoly and involving superannuation, this claim cannot be justified under the current Enabling Bill. The only way the Minister's claim can now be achieved is to ensure that the criteria included in the Minister's Authorisation lives up to the Minister's promise.

The Finance Industry Delegation (the Delegation) accepts that the Government has indicated or settled its policy in regard to the new Australian Financial Complaints Authority (AFCA) regime and that the Treasury Laws Amendment (Putting Consumers First - Establishment of the Australian Financial Complaints Authority) Bill 2017 (the enabling Bill), at the time of submitting this response, has had its second reading speech in the Senate, with debate adjourned.

This response is therefore focused on the "*Purpose of Current Consultation*" discussed in the Consultation Paper November 2017. With this in mind, the Delegation has written this response to the Consultation Paper, with the fourth paragraph on page 2 of the Consultation Paper very firmly in mind. That being, "*The Transition Team will use feedback from the Consultation Paper to inform its advice to the Minister on those matters that should be addressed in material submitted to the Minister. This may include advice as to the conditions that should be imposed on Authorisation*".

We consider that the Minister has considerable opportunity to ensure greater clarity and utility for the new regime, plus go some way to justifying the "*landmark reform*" claim with Ministerial initiative concerning the conditions that should be imposed on Authorisation. This initiative should reflect an endorsement of the Westminster system's concept of Ministerial responsibility and constitute a necessary and appropriate supplement to the regime as presently detailed. The initiative would also complement the power, and provide a platform to exercise the power, to vary or cancel an Authorisation at any time, a Ministerial power specifically included in the enabling Act [Section 1050(4)].

The Delegation considers such an approach is compatible with, if not directly mandated by, the Minister's powers prescribed in Section 1050(5)(b) - "*The Minister may... specify... conditions relating to the Authorisation*".

In adopting this approach, the Delegation has determined that it is imperative to consider not only the questions presented in the Consultation Paper, but also the introductory or commencement text to the Consultation Paper as a whole and some of the introductory text associated with the various questions.

It is recognised that some of the suggested initiatives could constitute amendments to the enabling Act, but these are presented with confidence that they could all be recognised during the Authorisation process by way of inclusion as Authorisation criteria.

SECTION 1

This section considers the introductory pages to the Consultation Paper.

Reform of the External Dispute Resolution framework - page 1

A note on the Ramsay Review

The Ramsay Review process was designed to ignore the opportunity for a Federal Tribunal along the lines of the very successful state consumer tribunals, thereby contradicting the findings of the House of Representatives Standing Committee on Economics, which was in favour of a Federal Tribunal. The Ramsay Review has delivered the opportunity for the Government to present the establishment of the Australian Financial Complaints Authority as yet another reason why a Royal Commission into the Australian banking system can be avoided.

The Finance Industry Delegation accepts the realities of that Government policy decision and provides a response to this current consultation paper, which the Delegation acknowledges is about the implementation of the about to be established AFCA.

No endorsement for a monopoly

In providing this response, the Finance Industry Delegation would like to make it clear that it does not endorse the establishment of a monopoly organisation that appears designed to simply duplicate all the worst features of the current external dispute resolution farce.

This current consumer-advocate dominated, anti-business, ASIC satellite approach, where the "members" pay for everything while not having any participation in the selection of Board representation, and where they are not provided with fully disclosed financials - appears to be the model that is now being adopted for the AFCA.

This response asserts that, with appropriate criteria included in the Minister's Authorisation, issued by notifiable instrument under Section 1050(1) of the enabling Bill, the Minister can significantly ameliorate what could be the worst features that could be adopted, largely from the existing flawed regime, under such a monopolistic structure.

"New" model just duplicates the old model rejected by the Government

The current model essentially gives a private company, run by a club of consumer advocates and their consumer advocate-dominated board appointees, an opportunity to impose extra parliamentary rules and sanctions on "members" under delegated powers they have merely presumed - because they have never actually been given them by the Constitution, or by the Commonwealth Parliament.

This current and possibly soon to be duplicated model provides that "members" have no right of appeal (unlike the complaining consumer), and are forced to join under the licensing conditions imposed by Section 47(1)(i) of the National Consumer Credit Protection Act 2009. Licensees pay "membership" fees and pay the case fees they have no involvement in assessing. They "belong" to an entity where they have no opportunity to nominate candidates for, or elect members of, the Board and no right to demand a full set of annual financial statements.

All of these anti-business features, as revealed by the Consultation Paper and the enabling Bill, are proposed to be adopted by the "new" model

To rub salt into the proposed "members" wounds caused by the above, as the Treasury Fact Sheet on the AFCA, "*the Government's response to consultation*", indicates - the interim period will now see "members" paying two lots of EDR "membership" fees - one for the existing EDR scheme and one for the new scheme.

Neither model provides any recognition of traditional "membership" rights.

This response is submitted with much concern as to whether or not free enterprise, particularly small and medium business, can ultimately survive under the ever increasing constraints of Australian Government initiatives.

This concern makes the content of the Minister's Authorisation, under Section 1050(1) of the enabling Bill, all the more important, as it will determine the limits of behaviour for the AFCA. Without appropriate limits, the AFCA will be virtually autonomous.

Important "new" features - are not new at all

The dot points included towards the end of page 1 of the Consultation Paper, with the exception of "*higher monetary limits*" (if recognised/adopted by the future boards and/or ASIC) are nothing new.

Concerning dot point 2 - ensuring accountability - there is nothing new in the legislation that would promote greater accountability for users.

This is very significant, given that the current regime offers no accountability at all to "members" except the opportunity to turn up at the AGM for a sham question and answer session, in front of alleged industry representative Board members who are handpicked by the existing Board when there is a vacancy - without any opportunity for election. Even promised "member" consultation committees or panels never eventuate.

To assert that the position of "*independent assessor*" as a new initiative is nonsense.

This position - under another name - is available now, without any encouraged opportunity for "members" to contact the auditor to express concerns, or any mechanism that demands a report acknowledging any "member" representation, or that the auditor did anything about that "members" representation.

On behalf of a number of members, the writers and a colleague made a determined effort to have contact with the then named COSL (now CIO) efficiency, effectiveness, accountability and governance auditor, when COSL engaged the Navigator company for that role.

Our contacts were not welcomed and it is fair to say that the Navigator company had no interest in including what the "members" had to present, as part of their audit procedure.

The general result is that the current system, apparently replicated in the new proposed regime, offers an opportunity for a Board whitewash.

The opportunity for a true independent assessment will never eventuate unless the assessor and any other auditor is appointed by the Minister, reports to the Minister, who then reports to the Parliament when tabling the assessors report. This report then must be available for Public Accounts, or other Parliamentary Committee, consideration and Senate Estimates Committee cross-examination of the Minister and the "*independent assessor*".

Such an opportunity should be provided in the Minister's detailed criteria in the Minister's Authorisation.

Concerning dot point 3 - there is no guarantee that the AFCA will have suitable "*powers to support its dispute resolution functions in its terms of reference...*", because they do not appear to have been drafted yet and the Minister has not indicated any intended detail concerning the treatment of "members" "*Operational requirements*", critical for the future.

These are listed on page 5 of the Consultation Paper and include:

(a) dispute resolution "*in a way that is fair*";

(b) dispute resolution that is "*efficient*";

(c) dispute resolution that is "*timely*";

(d) dispute resolution that is "*independent*"; and

(e) what constitutes "*appropriate expertise is available*".

If the AFCA proceeds as a near carbon copy of the current regime, none of these "*Operational requirements*" will be achieved.

If the Minister's Authorisation does not define these concepts and Authorisation is based on the AFCA offering no more than a repetition of these words in its written materials and Terms of Reference, or Rules, then no change from the existing amoral mess will have been achieved.

In the absence of appropriate definition, to imply that they will be better than the existing regime's powers is nonsense.

From a "members" perspective, the existing regime's powers are draconian.

From a consumer advocate's and a complainant's perspective, they are a gift.

From a consumer advocate's perspective it seems impossible to dream of any additional power over the "members", in regard to the "*dispute resolution functions*", that could be relevant and available beyond those already available under the current regime. Again, the content of the Minister's Authorisation will be critical.

This response focuses on and includes recommendations for that content - the very task to which stakeholders have been invited to respond.

Purpose of current consultation - Page 2, Consultation Paper

The Finance Industry Delegation is very concerned with regard to the content of the first 2 paragraphs under this subheading in the Consultation Paper, at page 2.

Challenges for ministerial responsibility

The Finance Industry Delegation would like to be reassured that the Minister is not avoiding any responsibility for the AFCA's Terms of Reference, governance and funding arrangements.

The AFCA is to be imposed on the finance sector by law, which is the responsibility of the Minister, but the AFCA board could be given extra-parliamentary power to do whatever it likes, aided and abetted by ASIC.

As the Consultation Paper states in the final sentence in paragraph 2, on page 2, "*...fundamental principles and key features of the AFCA scheme will need to be grounded in the terms of reference if they are not in legislation*".

This raises the issue - what are the guidelines or specifications for the "*fundamental principles*" included in the enabling Bill, or recognised under the enabling Bill? There is no content provided under such a heading.

They are the very broad statements included in Section 1051, with Section 1052 prescribing that they are mandatory and, unless contradicted, we have to presume are the "*fundamental principles*":

1. "Membership" open to all who have to be members of an EDR scheme.
2. "Members" to pay for everything.
3. There must be independent reviews of the scheme's operations.
4. The scheme must be a Not-for-Profit company limited by guarantee.
5. Industry representation on the board must equal consumer advocate representation.
6. There must be an independent chair.
7. Consumers must have easy access to the scheme.
8. Resolution of complains must be "*fair, efficient, timely and independent*".
9. Appropriate expertise must be available
10. "*Reasonable steps are taken to ensure compliance by members of the scheme with... determinations*".
11. Determinations are binding on members, but not binding on complainants.

We note that determinations being binding on "members" has not been followed for superannuation determinations. Subdivision E of the Act allows appeals to the Federal Court by either party.

The Finance Industry Delegation would appreciate clarification as to why superannuation determinations are being offered this different and advantageous treatment?

Section 1051A then prescribes 6 "*General considerations*" which overlap with the above list:

(a) accessibility;

(b) independence;

(c) fairness;

(d) efficiency; and

(e) effectiveness.

The Finance Industry Delegation is concerned that the AFCA Interim Board and its successors will be all powerful, with extra-parliamentary powers to write what will effectively be the details of the legislation and regulation that will then govern the board of the AFCA in its dealings with the "members".

The Delegation is concerned that this is in contradiction to the Authorisation of an external dispute resolution scheme power with which the Minister is provided under Section 1050(1). This is with the Bill, under Section 1050(2), demanding that the Minister consider the "*general considerations*" listed in Section 1051A, before authorising a scheme.

The Delegation's concern is enhanced, with the Delegation hoping that Sections 1050 and 1051A provide "*the gateway*" for the consideration of this response's content.

But it appears to go nowhere, because the Treasury Laws Amendment (Putting Consumers First - Establishment of the Australian Financial Complaints Authority) Bill 2017 establishes a monopoly that the Minister cannot reject.

In other words, there could be opportunity for the AFCA Board to develop the all important detail concerning the Terms of Reference (and the rules that follow) and, whether this is done before or after any Ministerial consideration, if Minister O'Dwyer is not happy with their additions to the "*general considerations*" and/or interpretation of those "*general considerations*", she will not have any opportunity to totally reject the AFCA.

It would appear that an amendment to the enabling Bill could be useful to resolve this issue and to ensure the feedback the stakeholders are providing, in response to the November 2017 Consultation Paper, have any utility.

In the absence of this commitment, the criteria for Authorisation adopted by the Minister will be critical.

<u>Minister could leave power vacuum</u>

The above concerns could be enhanced if the Minster was to take little or no action in regard to Section 1050(5)(b), because the section provides for the Minister to determine conditions "*relating to the Authorisation*".

While it is noted that the Minister cannot avoid appointing the AFCA, due to the AFCA enabling Act, the Minister can at least specify the conditions of the Authorisation. We note that this is recognised in paragraph 4, on page 2 of the Consultation Paper.

While the Delegation understands why - it may be important to remember that this has not happened to date and, as a result, this provides two fundamental concerns:

1. The Minister has proceeded to advertise for membership (appointed by the Minister) of the AFCA Interim Board, without those indicating interest knowing what their "*terms of reference*" or "*Authorisation*" will ultimately be; and
2. stakeholders have been left to respond to the current Consultation Paper without being fully and clearly informed as to what is, or may be, included, at least by topic heading, in the Authorisation. Stakeholders can only assume that the subheadings and text in the Consultation Paper have some relevance to the criteria for Authorisation.

Paragraphs 3 and 4 on, page 2 of the Consultation Paper, indicate that the Minister will consider documents provided by AFCA - "*specifically terms of reference, company constitution and funding model - to demonstrate their capability to satisfy operator, organisational, operational and compliance requirements to which the Minister must have regard in making the Authorisation decision*".

We note that the detail concerning these, provided in the Act, does not make any mention of the rules under which complaints against "members" will be assessed. As could be expected, the Delegation's supporters are concerned about this apparent omission.

Under this approach, "members" will not have any opportunity to provide input in regard to specific rules, and the rules have been predetermined as outside the Minister's sphere of influence. This could only be rectified by an assertive approach to the formulation of the Minister's Authorisation and/or amendment to the enabling Bill.

Unfortunately these two paragraphs in the Consultation Paper also make it clear that any information from the responses to the Consultation Paper, which the unidentified Transition Team consider as being "*matters that should be addressed in material submitted to the Minister*", may not end up being advice "*as to the conditions that should be imposed on Authorisation*". From the start, the "members" who will be paying for everything face a mechanism of exclusion.

In addition, as indicated earlier, stakeholders are not being given any opportunity to comment on what may be included in the Authorisation that is just a copy of the existing regime (see comment in paragraph 1, under the subheading "*Structure of the Consultation Paper*" below).

Should the Minister fail to specify a comprehensive set of conditions of Authorisation and/or decline to attempt definition of the very broadly listed "*general considerations*" in the enabling Bill, the Interim Board and its successors could fill the power vacuum in a manner that could be unsatisfactory to both the Minister and/or the "members".

However, any Ministerial declaration made now will come too late for the stakeholders responding to the current Consultation Paper.

We needed the Authorisation criteria topic headings to be clearly identified and revealed in the Consultation Paper, with opportunity to suggest more if deemed appropriate.

The Delegation requests a stakeholder opportunity to consider a draft of the Minister's proposed Authorisation - after Dr Edey, the AFCA Transition Team and the Minister have carefully considered the various responses to the November 2017 Consultation Paper - in circumstances where the detail not provided in the legislation will be critical.

Effective controller of the AFCA - ASIC

Any concerns as to lack of Ministerial responsibility delivered under the enabling Bill, and with the issues raised by a number of the questions in the Consultation Paper, must be viewed in the light as to what the enabling Bill provides by way of non-Ministerial control over the AFCA.

1. Section 1052A provides ASIC with the opportunity to issue legislative instruments *"...relating to... compliance with mandatory requirements for the AFCA scheme under section 1051... and 1052A*".
2. Section 1052B provides for ASIC to give "*a written direction*" as to the value of claims that may be made under the scheme and as to increasing the limits, which must be complied with.
3. Section 1052C provides that, where ASIC considers the AFCA has not "*done all things reasonably practicable*" to ensure compliance with the mandatory requirements - organisational, operator, operational and compliance (with any condition of Authorisation, ASIC legislative instruments, ASIC written directions, ASIC specific directions, or the need for AFCA to report to ASIC) under Section 1051 - then ASIC may impose a penalty under Section 1311(1) of the Corporations Act and seek a court order for enforcement of ASIC's wishes.
4. Section 1051(5)(b) and 1052D demand that no material change to the AFCA can be made without ASIC approval and must be made if ASIC directs.

The Delegation notes that there is no definition of a "*material change*" in the enabling Bill.

Given the above, it is the Delegation's view that ASIC, not the Minister, will be responsible for all relevant oversight of the AFCA. ASIC will thereby subsume all traditional Ministerial responsibility. However, there is one particular element - ASIC will have to acknowledge the content of the Minister's Authorisation.

Unfortunately for the AFCA "members", the ASIC powers outlined above are enhanced with the prescribed reporting and referral to ASIC requirements in Section 1052E:

(a) AFCA must report to ASIC if it "*becomes aware, in connection with a complaint under the AFCA scheme, that... a serious convention of any law may have occurred...*"; and

(b) "*If... the parties to a complaint made under the AFCA scheme agree to a settlement of the complaint, and ...AFCA thinks that the settlement may require investigation*"...; and

(c) "*If AFCA considers that there is a systemic issue arising from the consideration of complaints under the AFCA scheme*".

Under the current model, this referral is only applicable where a "member" is considered to be involved with a possible systemic issue and where the member is considered to have engaged in "*serious misconduct*" (ASIC Regulatory Guide 139.117).

Under both models, where a "member" refuses to obey an EDR scheme order, this is referred to ASIC. A continuation of this current inequitable policy demands that the Minister's Authorisation impose the requirement for the AFCA to have adequate internal appeal opportunities prior to any referral.

We note that, unlike the provisions for superannuation in Subdivision F of the Act, there is no opportunity for secrecy with regard to information documents being provided by credit providers and lessors to the AFCA, during the complaints assessment process.

For supporters of the Finance Industry Delegation, the opportunity superannuation disputants will have for secrecy is going the other way. Section 243C of the Bill proposes to give ASIC power to publish information collected about internal disputes resolution schemes for the first time, and the current Taskforce conducting the ASIC Enforcement Review is clearly advocating that credit providers and lessors should provide reports to ASIC concerning their IDR matters.

The above regime, plus the case costs associated with a complaint, may ensure that the AFCA never gets any complaints from complainants that have first gone to their credit provider or lessor. This is because those complainants will get all that they ask for under "hardship" from the Australian Credit Licensees, who will be forced to make sure that no EDR complaint is created.

No matter how dishonest, nebulous, vexatious or unjustified the complaint, automatic blackmail of the licensees will be the order of the day.

The consumer advocates will have an enhanced weapon to support dishonest consumers and the opportunity to inflict financial pain on the lenders and lessors, regardless of truth and any sense of fairness or justice.

Given ASIC's pre-eminence, all of the above means that the AFCA will breach Section 1051A(b) - it will breach the second "*general consideration*" for an external dispute resolution scheme - it will not be independent as the Act demands.

The Delegation asks the AFCA Transition Team and the Minister to give the closest consideration as to how the Minister's Authorisation, if not amendments to the enabling Bill, can address these concerns.

<u>Board edicts replace ministerial power - no regulations</u>

The Delegation notes that there will be no Minister-responsible Regulation that allows opportunity for disallowance by the Parliament under the enabling Bill.

Once the Minister has given Authorisation to AFCA, the board could effectively have both legislative and regulatory powers over the finance industry, to determine what the highly subjective language in the Act actually will mean for "members" and the Minister will have no apparent responsibility or control.

The Delegation requests that the AFCA Transition Team and the Minister give the closest of attention to ensuring that every opportunity is taken to include appropriate criteria content in the Minister's Authorisation, to address the fact that the Minister will have no regulation powers if the enabling Bill is passed without amendment.

<u>Contractual myth</u>

The Minister's Explanatory Memorandum, at paragraph 1.25, presents a major myth that undermines the claim that the credit and leasing companies that the Delegation represents are "members" of the AFCA.

Minus statutory powers for superannuation, "*...the operational aspects of the AFCA scheme will be based on private law (contractual) obligations between AFCA and the financial firms who are members of the AFCA scheme (as set out in the ToR)*".

There is nothing traditionally contractual about being forced by law to be a "member" of an entity:

1. for which you have to pay all the costs;
2. which imposes Terms of Reference or Rules upon you that you have no part in formulating; and
3. whose rules you have no opportunity to vote for, or change; and
4. with management by a Ministerial-selected and then self-selecting Board; and
5. for which you have no opportunity to nominate and/or vote for industry representation.

That is why the detail of the Terms of Reference or Rules - and every stipulated element of AFCA operation - must be a Ministerial responsibility, detailed in the Authorisation criteria, with some form of review by the Parliament being possible.

That means the notifiable instrument that authorises the AFCA, issued by the Minister (Section 1050), must be comprehensive with the detail suggested in the answer to Question 1 in the Consultation Paper below, to import some Ministerial responsibility into the process.

The Delegation recognises that the use of the notifiable instrument form of delegated powers avoids Parliamentary scrutiny that is at least possible with Regulations.

The Delegation observes that the use of the notifiable instrument not only shields the Minister, but very effectively shields both the AFCA and ASIC from Parliamentary scrutiny and Ministerial intervention.

Without this the likely consumer advocate-dominated AFCA Board will impose Terms of Reference or Rules regime that could be as anti "member", unconscionable and overwhelmingly in favour of the consumer, as is the case with the current FOS Terms of References and CIO Rules.

Without such Ministerial responsibility, it is expected that the Ramsey Review's concern for reform will be ignored by the AFCA.

Interim board paves the way for consumer advocate day to day and policy control

Significantly, the opportunity for membership of the Interim Board has already been advertised by the Minister, with criteria that excludes anyone who has had any involvement in the credit industry sectors, while including every opportunity for consumer advocates to dominate.

This situation appears to have occurred despite the provision indicating that the Minister wants a different approach in Section 1051(3)(d) of the enabling Bill -

"*The operator requirements are that:…*

(d) the operator's constitution provides that the number of directors of the operator who have experience in carrying on the kinds of businesses operated by members of the scheme must equal the number of directors who have experience in representing consumers" (the writers' emphasis).

Unless the Minister reviews her approach to the appointment of the Interim Board, as indicated by the advertisement placed by Treasury, the appointment of the Interim Board will contradict the legislation and provide an opportunity for an effective continuation of this contradiction, as has been the case most years with the existing FOS and CIO boards.

As indicated above, this Interim Board will then self select, to become the first Board. No Board elections are stipulated or promised. To emphasise - there is no opportunity for "members" - who will pay for everything - to have any right to vote for their "*industry representative*" on the interim or any future Boards.

It is hoped that the Minister will give serious attention to this issue.

AFCA's autocratic powers confirmed

It gets worse.

The second paragraph in this section of the Consultation Paper includes this warning to the finance industry sectors, including the credit providers and lessors who support the Finance Industry Delegation:

"*The operational details - the "how to" of the scheme - should be included in operational guidelines and other AFCA guidance material that can be easily amended as required to provide a flexible and efficient response to changing requirements*".

That is double speak for retrospective regulation of "members" and autocratic changes in the AFCA rules, if a "member" demonstrates any presumed advantage to "members" with the existing Terms of Reference or Rules at the time.

The history of the CIO Boards' changes to their Rules bears testament to this concern.

The issue occurs before the change in the rules, but the complaint is lodged after the change in the rules - so the changed rules apply. A "member" demonstrates an advantage not foreseen by the CEO/Ombudsman under the current rules and, without any debate or consultation with "members" as to the appropriateness of that advantage, within months the Rules are changed to prohibit that advantage, with immediate commencement.

Again, the Finance Industry Delegation seeks AFCA Transition Team and Ministerial attention to this, when drafting the criteria for Authorisation.

The finance Industry Delegation notes that the Consultation Paper content indicates it is only a part consultation effort.

Structure of the Consultation Paper - Page 2

Structural concerns

The first paragraph under the subheading "*Structure of the Consultation Paper*" reveals:

1. that "arrangements" from the existing regime will be copied and pasted without any opportunity for stakeholders to comment. This demonstrates a lack of understanding as to how deficient many "arrangements" under the current regime are, and this omission introduces a real concern as to the integrity of this review process;

2. the fact that the government has endorsed the Ramsey Review recommendations does not preclude the need for assessment of the content of the intended application of those recommendations. This includes the opportunity to compare the rationale offered in the Ramsey Review report and the words used by Ramsey and his colleagues - with what is actually intended;

3. that understanding a Government's "policy intention" may be or may not be assisted by considering its implementation of the enabling Bill. If a Minister is committed to the role and supports genuine reviews, stakeholders should have the opportunity to consider likely implementation of authorised features, as against the policy statement and the contents of the enabling Bill.

   The opportunity earlier in the year gave stakeholders a chance to compare the latter two, but no opportunity to consider the third element - what might be included, or should be included, in the Authorisation; and

4. where the Government's policy has not been included in the enabling Bill, there is the issue as to why, which is not explained in the Consultation Paper. How will this omission be rectified by the content of the Authorisation?

No further consultation

The Finance Industry Delegation is concerned that the process of implementation from here appears to be that the Minister's Authorisation criteria or terms will be:

(a) developed without any further consultation - which means stakeholders have had the opportunity to comment on the draft legislation and know what the enabling Bill demands of the AFCA, but have not had any opportunity to comment on a draft Authorisation, nor know what the Minister demands of the AFCA until after it is listed on the Parliamentary Register. Once listed on the Parliamentary Register it is law;

(b) presented to AFCA's handpicked Interim Board by the Minister who appointed the Interim board; and

(c) enshrined as law by the Registration process and the fact that the notifiable instrument in Section 1050(1) of the enabling Bill has been issued by the Minister.

No Parliamentary review

This issue demands an understanding of the following:

1. Section 1050(1) of the enabling Bill provides: "*The Minister may, by notifiable instrument, authorise an external dispute resolution scheme if the Minister is satisfied that the mandatory requirements under section 1051 will be met*".
2. The Delegation notes that this approval is absolutely at the Minister's discretion.
3. Significantly, the Legislation Act 2003 (Cth) provides that a notifiable instrument only has to be listed on the Legislation Register to become law, unless specific provision is included in the Act listing the notifiable instrument, that provides appeal or amendment opportunities. The Delegation notes that no such provision is included in the enabling Bill.

That means the Minister's notifiable instrument in the enabling Bill is not like a regulation. There is no Parliamentary control, no disallowance opportunity, no amendment opportunity, no discussion opportunity.

That is why the Finance Industry Delegation is so concerned to see that the review process, and the Minister, give necessary attention to the recommendations for inclusion in the Minister's Authorisation criteria - discussed in this response.

Unless such content and any similar content in other responses is responsibly addressed, we will get no more than exactly what we have now for an EDR regime, only it will be a monopoly beholden only to ASIC, under its delegated powers that are not subject to effective review by the Parliament.

Broad specifications must be defined

As discussed elsewhere in this response, Section 1051 very broadly outlines some of the organisational, operator, operational and compliance "*mandatory requirements*".

The problem for the Delegation is that at least 6 of the 22 or so requirements, collected by way of this section and the other sections to which it refers, are very broadly specified.

These are the requirements that the Delegation seeks to have the Minister very clearly define in the Authorisation criteria. It is hoped that the response to the questions in this response assists with this specification.

Inherent functional inconsistency

The functional divisions inherent between paragraph one and paragraph 2 are noted.

On the one hand, Dr Edey will "*advise the Minister... on key elements relating to the Minister's Authorisation of AFCA, including AFCA's terms of reference, governance and funding arrangements*".

On the other hand, "*The Transition Team will not develop AFCA's terms of reference, funding or governance arrangements - these are matters that are the responsibility of the AFCA board subject to the legislation and any conditions imposed as part of the Authorisation process*".

***Recommendation**:*

That the good work of Dr Edey and his colleagues be made available to the Interim AFCA Board, in accordance with the Minister's preferences, in order that they might be better informed to shape the terms of reference, governance and funding arrangements that will be presented to the Minister under the Authorisation process.

Conditions imposed as part of the Authorisation process critical

As the Delegation reads these provisions, that means the Minister's Authorisation criteria will be critical. It will be the detail in the Minister's Authorisation that will shape, or leave free for the AFCA Interim Board to shape, the all important terms of reference. As indicated above, without any effective industry representation on the Interim Board and, thereafter, on successive Boards, due to the terms included in Treasury's advertisement seeking

expressions of interest for membership and the self-appointment that will follow, the industry sectors are highly dependent on the detail in the Minister's Authorisation.

Paragraph 2 goes on to explain that the terms of reference will not include anything to do with the "how to" (the operational guidelines or rules) of the scheme's operation. Again, Dr Edey will not be involved in the development of these rules.

On a Delegation reading of this inclusion, the Rules will be left entirely to the Interim Board in circumstances where, like the AFCA constitution, there is no opportunity for presentation to the "members" for debate first, and there is no opportunity for any vote outside the Interim Board. We are puzzled as to how this possibility is consistent with the Government's constant presentations that it is pro-small and medium business, and seeks to genuinely consult with business stakeholders.

The Delegation notes that such an abandonment of Ministerial responsibility would contradict the comment included at the bottom of page 14 in the Consultation Paper -

"*AFCA's terms of reference will play a crucial part in governing its operations and the framework of its accountability. Not only will the terms of reference be a public statement of key features of the AFCA scheme and the fundamental principles that will govern how AFCA carries out its functions...*".

This recognition and the fact that AFCA is the creation of the Parliament, demand the Ministerial involvement the Delegation seeks. The enabling Bill, soon to be an Act, is a public statement that AFCA is a creature of the Turnbull Government. The AFCA's performance control mechanisms must also be a creature of the Turnbull Government.

To that end we note some description of the "*Matters to be taken into account*" by the Minister in considering whether or not to authorise a scheme, beginning at 1.52 in the Explanatory Memorandum. Inclusion of these in the Authorisation would go some way to satisfying the Delegation's concerns that the Authorisation be very descriptive of the criteria.

***Recommendation**:*

That the Minister prescribe in detail the expected content of the terms of reference and that the terms must include the expected rules indicating how the AFCA will carry out its functions with reference, but not limited, to the content commencing at paragraph 1.52 in the Explanatory Memorandum concerning the enabling Bill.

This recognising the Westminster system or concept of Ministerial responsibility, traditionally embraced by the Australian Parliament's democratic system.

<u>Promised flexibility disturbing</u>

In addition, the text in the Consultation Paper indicates that these rules should be developed and included in such a way that they "*can be easily amended as required to provide a flexible and efficient response to changing requirements*".

The Delegation is concerned that, under the currently proposed regime, this will be interpreted as "*amended without notice or discussion*" with "members", just to satisfy the whim of the consumer advocate-dominated Board or complaints/case officers to ensure maximum suppression and adversity for "members". This is the current CIO model.

The Delegation notes that these concerns are not recognised at 1.21 in the Explanatory Memorandum. Concerning Terms of Reference - this paragraph identified that the Terms of Reference set out how the AFCA is to operate and that "*this will allow the scheme to be flexible where operational improvements can be implemented more quickly than would otherwise be the case if a legislated change was required, which is the key benefit of an ombudsman model*".

There is no provision for the Minister to be informed of this change. This is a change which could reflect a fundamentally different approach to that included or implied in, or signalled to the Minister, by way of the materials AFCA provided during the Authorisation process. By use of this opportunity, AFCA could completely contradict the original Authorisation.

***Recommendation**:*

That the Minister's Authorisation include a condition that requires the AFCA to report to the Minister at least 21 days in advance of any introduction/commencement of changed operation rules that contribute to the method of, and the rationale for, dispute resolution processes and content.

What is overlooked is that the concept was to involve a contractual relationship between the AFCA and the "member". Operational improvements, without any pre-consideration or voting mechanism available to the "members", could become the excuse to fundamentally change the contract. This is prohibited for the "members" to impose on consumers, but indicated with approval for the AFCA to impose on "members" - who have not opportunity to participate in the governance of the AFCA and the decision to implement the change.

We ask the Minister to provide an Authorisation criteria to control such easy amendment and flexibility, so that such features do not become an open door for the introduction of Terms of Reference and Rules oppressive to, and/or of arbitrary adverse impact on, the "members", who are trying to pay their taxes and keep employees employed.

Changes to the Terms of Reference and rules, without advanced warning or opportunity for "member" liaison and consultation with the industry representatives on the Boards, are a feature of the current regime.

***Recommendation**:*

That the Minister include in the Minister's Authorisation a requirement that any proposed change to the AFCA terms of reference or rules, be communicated to all "members" at least 21 days before the next AFCA Board meeting, to enable "members" to make responses to the so called industry representative (and other) Board members for consideration at the Board meeting - before the board considers endorsement of the proposed change.

SECTION 2

TERMS OF REFERENCE

Question for Discussion 1

Are there any other principles that should be included in the guiding principles for AFCA's establishment?

Comments: Question 1

This question must be considered in the light of the Ramsay Review finding quoted in the Minster's Explanatory Memorandum: "*The Review Panel found that the current framework is a product of history rather than design and that reform is needed*".

Without very serious consideration of the content of the industry sectors' response to this and the other questions following, with the exception of involving superannuation under the same EDR scheme, the current enabling Bill will deliver almost no reform and create a major increase in ASIC power.

In the opinion of the Finance Industry Delegation, without amendment to the enabling legislation, the only option for achieving real reform promised by the Government is by way of the criteria included in the Minister's Authorisation.

To that point we acknowledge the Government's policy priority, signalled at 1.8 in the Explanatory Memorandum associated with the enabling Bill - "*On 20 April 2016, the government announced a package of measures to enhance the operation of ASIC and to improve outcomes for consumers in the financial system*".

The following recommendations reflect that substantial need for reform, with essential additions to dot point 2 - "*Incorporation of better practice principles for dispute resolution*". They reflect the practical lessons learnt by Delegation supporters in their dealings with the current EDR regime over the last 6 years.

Answer to Question 1

The Delegation proposes that the Minister's Authorisation criteria include the requirement for the inclusion of the following provisions, as guiding principles to be recognised in the AFCA's Terms of Reference or rules:

1. That "members" and consumer complainants be treated with equal objectivity.
2. That, at all times, the presumption of honesty not be automatically provided to consumers and that the honesty of both parties be equally tested robustly.
3. That challenges from "members" of vexatious complaints be investigated, before the complaint is escalated to a more expensive level of AFCA determination.
4. That prior dispute resolution conducted by state consumer tribunals be recognised as concluding a matter.
5. That the opportunity for the case manager to interview the parties, rather than relying entirely on written responses, be adopted.
6. That the reasons provided by the consumer for lodging a dispute be considered for relevance, before automatically escalating the matter to a more expensive level of determination.
7. That there be a clear and comprehensive internal appeal mechanism. This including:
   (a) the opportunity to appear personally before an appeal or examination panel, or the ombudsman if an aggrieved party; and
   (b) that the AFCA case officer's written response, when concluding a resolution against the "member", where the "member" has disputed the complaint and provided responses, demonstrate unbiased consideration of those responses and full explanation for their non-acceptance, so that the "members" and panel or ombudsman (if relevant) is fully informed during the appeal process.

Postscript to Question 1

Unfortunately, there was no question relating to the issue of "compliance", as described in the first paragraph on page 7 of the Consultation Paper.

The Delegation takes this opportunity to present the following comments as being timely for this stage of the review process.

1. That any attempt to adopt the Ramsay Review recommendation 9, concerning implementation of an outreach program, extend the outreach to not only raise community awareness, as described in the Consultation Paper, but also raise AFCA case managers' awareness of business realities. The existing isolation from any contact with the "member's" actual environment should not be adopted or cultivated.

   ***Recommendation**:*
   That AFCA case managers participate in the required outreach program in a manner that includes not only contact with the general community to increase community awareness, but also contact with "members", in order that the case workers acquire an appropriate understanding of the industry environment, standards and practices.

2. That "*relevant expertise*" advocated by the Ramsey Review in recommendation 9; noted in the Consultation Paper under Terms of Reference (ToR), with "*operational requirements*" recognising "*appropriate expertise*"; and with Section 1051(4)(c) in the enabling Act also demanding "*appropriate expertise*" - be interpreted to include expertise in both consumer and "member" matters.

   ***Recommendation**:*
   That the AFCA recruit management and case manager staff with a history of expertise in both consumer protection and/or finance industry sector circumstances.

3. That, given the impotence of "members" under the currently proposed regime in regard to negotiating their "contractual" conditions with AFCA, or real participation in the selection and membership of the Board, that the AGMs must include a prescribed performance forum. This where "members" can present their AFCA performance grievances, the independent assessor must attend to comment, and a member of the Board must respond on behalf of the Board. These grievances to be minuted.

   ***Recommendation**:*
   That the AFCA, at its AGM, must provide for a performance forum where "members" can present their grievances with AFCA, with the independent assessor able to ask questions and a Board member required to respond on behalf of the Board. This with all proceedings minuted as part of the AGM.

4. Given that the enabling Act does not prescribe any opportunity for the AFCA or its "members" to report to the Minister after the Authorisation process has been completed, this despite the Minister having the legislated power to seek amendment or cancellation of an Authorisation at any time [Section 1050(4)], there is the current possibility of the Minister being "kept in the dark".

   In the absence of any amendment to the enabling legislation, it appears very important for the Minister to be kept informed by way of being provided with copies of any relevant reports.

   ***Recommendation**:*
   That the Minister be provided with a copy of the AFCA AGM Minutes at the same time as they are distributed to the Board, distributed to "members", or posted on the AFCA website, whichever comes first - but this must not be later than 2 months after the AGM has been held.

5. The Delegation notes that Section 1051(2)(c) of the enabling Bill provides for what is referred to as an "*independent assessor*". We note that this concept is the topic for a number of questions later in the Consultation Paper.

Unfortunately, the descriptions of the role may lead to some confusion when the regime is introduced.

(a) Section 1051(3)(a) provides that "*The operator requirements are that... (a)... the operator of the scheme commissions the conducting of independent reviews of the scheme's operations and procedures...*". It is not clear as to whether or not the independent assessor would be the person to undertake these reviews.

(b) The relevant Explanatory Memorandum defines that person's role at 1.16, as "*to focus on reviewing the handing of complaints*".

(c) The Consultation Paper, under the subheading "*Issue 5*", on page 13, describes this person's function as "*This function will not be to review the merits of an AFCA decision, but to review complaints about service issues to AFCA's dispute handling. Where the independent assessor determines that a dispute or a series of disputes, was not handled satisfactorily, the assessor may recommend that the EDR body take certain actions, including making an apology, providing compensation to the affected user and/or recommending a change to a scheme process or procedure*".

(d) The Minister's media release on 23 November 2017 stated, "*AFCA will have an independent assessor to investigate complaints regarding the way in which a dispute was handled, to ensure procedural fairness*".

The above descriptions are inconsistent and the Delegation is unsure as to whether or not the reference to "*scheme process or procedure*" in the Consultation Paper actually refers to "*the scheme's operations and procedures*" in Section 1051(3)(a). The definition in the media release is potentially more limited.

Recommendations:

1. That the Minister's Authorisation clarify the definition of "independent assessor" to ensure certainty in regard to their role.
2. That the definition include the opportunity for the assessor to examine efficiency, effectiveness, accountability and compliance.
3. In the alternative and if it is the Minister's intention that AFCA have an independent auditor, as well as the independent assessor, then that auditor must be provided with the role of examining efficiency, effectiveness, accountability and compliance.

6. The Delegation was unable to discover, either in the enabling Bill, Explanatory Memorandum, or November 2017 Consultation Paper - any provision for the mandated assessor to communicate with the Minister or Board.

Recommendation*:*

That the independent assessor must present his/her reports to the Board and that reports must be published, with Board response, and provided to all "members" and the Minister. This publication to be undertaken by email, posting on the AFCA website and hard copy presented to the Minister within two months of the independent assessor reporting to the Board.

7. In the Delegation's opinion, with the independent assessor having to consider the handling of disputes, the independent assessor's consideration must include considering the internal governance of the AFCA. This will involve consideration of those matters that are assumed to enhance decision making including, but not limited to:

(a) staff skills and knowledge about relevant industry sectors;

(b) the existence and quality of detailed operational guidelines;

(c) the application or respect for those detailed operational guidelines;

(d) the existence, appropriateness and reference to internal quality assurance mechanisms; and

(e) resolved case reports.

Such a consideration offering the opportunity for the independent assessor to reach a view on the success of AFCA balancing the challenges of achieving fairness, while having flexibility to adapt.

> ***Recommendation**:*
>
> That the description of the role of the independent assessor, included in the Minister's Authorisation, clarify that role and indicate the range of consideration to be undertaken in regard to AFCA handling disputes.

The importance of the various reports discussed above cannot be overlooked. Respect for the proper functioning of the AFCA board, the Minister's Ministerial responsibility and the role of the Parliament that will create the AFCA and the new EDR regime, demand appropriate distribution of these reports.

With the requirement to present reports being prescribed in such a limited way in the enabling Bill, the Minister's Authorisation will have to create the necessary distribution regime. With more consideration of this matter in Questions 12 to 18, the Delegation provides the following by way of introductory suggestions.

In the Delegation's opinion, the reports mentioned above should be presented directly to the Minister. The Minister would then be responsible for tabling them in the Parliament, recognising that the AFCA is a creature created by the Parliament. This suggested distribution regime includes:

1. the Minister would table the minutes of the AFCA AGM in the Parliament; and
2. the Minister would table the independent assessor's report and any other audit report in the Parliament, together with the Board's response.

This process appears a necessary one to adopt, given that the Minister maintains the power to vary or revoke an Authorisation of an external dispute resolution scheme, once given [Section 1050(4) enabling Bill]. The assessor's reports may be critical as a necessary trigger for action, under this provision in the enabling Act, particularly because this may well be the only certain way the Minister will be reliably informed of a statutory breach of one or more of the mandatory requirements included in the enabling Bill.

> ***Recommendation**:*
>
> That a report distribution regime be included in the Authorisation criteria that facilitates the delivery of AFCA, independent assessor and any other audit reports to the AFCA Board, the Minister and the Parliament.

The Delegation asserts that, without this recommended report distribution regime, the Minister cannot claim that AFCA will be "*transparent and accountable to both industry and consumers*", as the Minister stated in her press release on 23 November 2017. To limit AFCA's reporting requirements to simply report to the Minister "*annually on any decisions to vary fees*" and then leave accountability only to "*ASIC's directions power* (not a public announcement)*, AFCA's board structure* (under the currently proposed regime, with no real and mandated contact with industry)*, and the requirement for AFCA to establish an independent assessor* (without any prescribed reporting requirements)" will not provide any guarantee of accountability.

In the press release of the 23 November 2017, the Minister continued "*Constructive stakeholder engagement will underpin the smooth commencement of this landmark reform*". The Minister's concern for constructive stakeholder engagement must go beyond the commencement and the foundation for such engagement must always lie with the concept of appropriate and comprehensive reporting to the stakeholders.

<u>Fundamental concerns</u>

Please note that the practical impact of the above recommendations are not just a micro management issue - they are fundamental to ensuring that the new AFCA regime does not commence with and continue all the unconscionable principles very adverse to the "members", adopted by the current regime. They are also fundamental to recognising the necessary assumed new role of the Minister and the Parliament.

The Authorisation criteria must include the adopted principles associated with the new regime, to avoid the AFCA conducting itself without any reference to the Minister and/or as an extension of the Consumer Action Law Centre, as is attempted by the current EDR schemes.

This comment comes with one caveat - at least the FOS Ombudsman associated with complaints relevant for Delegation supporters is fair, and prepared to meet with the parties to discuss the "appeal" before making his determination. Unfortunately, this Ombudsman is an isolated case, as so many of the case mangers and officers assigned responsibility for "systemic issues" at both FOS and CIO act as agents of the Consumer Action Law Centre and/or inappropriately assume the duties of an ASIC officer.

Issue 1 : Monetary Limits

Questions 2 & 3

These questions are not relevant for Delegation supporters.

Question for Discussion 4

Are there any anticipated effects on firms that will be disproportionate to any increase in specific increased monetary limits?

Answer to Question 4

The Delegation notes the promise of the Government to undertake further consultation concerning "*specific limits*", mentioned in paragraph 2 on page 8.

This consultation must also explore the following factual circumstances facing the SACC, MACC, AOCC and leasing industry sectors:

1. It is already difficult to obtain professional indemnity insurance for non-ADI credit providers and lessors; and
2. the conditions relating to excess and claims generally offered are a farce.

There is extremely little chance of claims ever occurring (less than 5 claims have ever been attempted, with 4 being dropped after the initial lodgement). No claim has yet been successfully made against an insurance company involving these sectors.

It is to be hoped that this consultation will actually include talking to the insurance companies and brokers, to discover whether or not they have any interest in providing cover and if any of the cover offered has any real purpose.

With such consultation it might be useful to clarify ASIC's long standing misunderstanding as to how insurance cover works - whether those insurance companies will actually cover their lending company or lessor company client for a breach of the Credit Act - as the ASIC Regulatory Guide expects.

The Delegation also foreshadows a concern that, unless the "*specific limits*" reflect a realistic assessment of the small business, small amount of potential compensation- nature of credit providers and lessors who support the Delegation, the Delegation supporters may be forced to pay inflated insurance premiums for insurance cover they will never need - as is the case at present.

Issue 2 : Enhanced Decision Making

The Ramsay Review may have come to the conclusion that the current decision making test for disputes - "*fairness in all the circumstances*", "*was appropriate and should continue*". However, the Ramsey Review did not take any notice of any complaint as to how this test has been implemented under the current regime.

The presentation of the FOS Terms of Reference and the CIO Rules, in the Consultation Paper, on their face, cannot be presumed as indicating what has been happening in practice.

That is why the Delegation is advocating a meaningful independent assessor process, rather than the current audit sham, considered elsewhere in this response.

Given the proposed structure that effectively excludes "members", unless the Delegation's recommendation for performance forums at AGMs is adopted as a criteria for Ministerial

Authorisation, any general adoption of the inclusions listed must be viewed with suspicion. This could merely be a smokescreen, just as some of the Terms of Reference and Rules are under the current regime.

Question for Discussion 5

What measures may assist in ensuring AFCA's decision making processes promote consistency, while:

- *deciding each case on its merits based on the facts and circumstances of the complaint; and*
- *maintaining the objective of achieving fairness and flexibility to adapt to changed circumstances?*

Answer to Question 5

The Delegation considers that it would be a substantial change if the AFCA was to attempt to consider maintaining the confidence of "members".

As the courts have proved, the concept of precedent assists with supporting consistency. Precedent requires the publication of individual resolutions, which enhances transparency and allows the essential meaningful comparisons to be made - while exposing the inadequate case manager.

Obviously, published precedent provides guidelines for "members" concerning what the AFCA will consider to be acceptable business behaviour.

As good administrators have consistently demonstrated, having "*detailed operational guidelines*" that are published for "member" awareness, also assists with maintaining consistency. Publication provides an opportunity for analysis of their content and application by the independent assessor and the Minister.

Confidence in internal quality assurance mechanisms having a positive effect, and making a positive difference to the quality of decision making, must depend on the opportunity for the external independent assessor to audit the existence and impact of these mechanisms.

"*Ensuring that staff at all levels are skilled, knowledgeable about relevant industry sectors and receive appropriate training*", as a means of enhancing decision making, can only be of value if this criteria is exposed to independent assessor review and recommendation. The dominance of consumer advocate sentiment in the proposed structure cannot provide any confidence that senior management, or the Board, will be objectively capable of encouragement and assessment of enhanced decision making that offers fairer or more reasonable treatment to "members", than has been the case under the existing EDR regime. The proposed structure must be improved, with enhanced decision making included as a criteria for Authorisation.

Question for Discussion 6

Are there any other principles that may assist in ensuring AFCA provides fair, efficient, timely and independent decisions?

Answer to Question 6

The further principles to recognise are:

(a) Engagement.

That a case manager must address both parties' arguments and provide some response, rather than ignoring those arguments that are inconvenient.

(b) Internal review of decision making.

Unless there is an genuine appeal mechanism within AFCA, then the current regime's ethos of supporting an inadequate case manager's decision will continue.

(c) Legislation.

That the case manager respect that the first duty of the lender/lessor is to obey the law and that no concept of "*fairness*" or "*hardship*" can justify a resolution against the

lender when they have obeyed the law. AFCA must never be allowed to take on an unsanctioned extra parliamentary role - as have the current EDR schemes.

This has allowed CIO to ignore what the Parliaments actually passed as legislation (both state and federal as relevant at the time).

Question for Discussion 7

To what extent should these principles be reflected in the Terms of Reference, while allowing for operational flexibility?

Answer to Question 7

All principles should be codified and included in the Terms of Reference or Rules of the AFCA.

Issue 3 - Use of Panels

Question for Discussion 8

How should AFCA balance the advantages of using panels in certain circumstances against efficiency and service implications including cost and timeliness of its decision making?

Answer to Question 8

It should be a matter for the "member" to determine the relevance of a panel to achieve a decision.

The panels being available when a pending decision reflects one of the elements identified in the dot points on page 11 - complexity, amount of consumer loss, systemic issues, and the novelty of the circumstances.

The AFCA should never be permitted to create a position of "*Systemic Issues Manager*", or similarly purposed under another title. This creates a bias and a conflict of interest, with the opportunity for an officer to declare a systemic issue in order to create a continuing employment opportunity.

Essentially, to create a "*Systemic Issues Manager*" is to create another ASIC officer position, as has occurred under the current regime. It is ASIC's role to focus on identifying systemic issues - not an EDR scheme set up to facilitate resolution of disputes.

Question for Discussion 9

Are there other factors that should be taken into account when considering whether a panel should be used?

Answer to Question 9

(a) The existence of robust internal appeal mechanisms.

(b) Publication of the decision.

(c) The opportunity for the parties to bring an expert to the panel deliberations.

Question for Discussion 10

How best can AFCA provide clear guidance about to users about when a panel should be used?

Answer to Question 10

(a) Information on the panel should be made available on the AFCA website, with invitations to view presented to all "members".

(b) Also to be made available with AGM notices and in "member" induction materials.

Issue 4 - Independent Reviews

Question for Discussion 11

Apart from the review of the impact of the higher compensation cap, are there other aspects of AFCA's operations that should be subject to independent review within the first three years of its commencement?

Answer to Question 11

The AFCA should be subject to a bi-annual efficiency, effectiveness, accountability and compliance audit. This to be undertaken every two years by the independent assessor, or an efficiency, effectiveness, accountability and compliance auditor.

The FOS independent model provides a useful start. However, the independent assessor's appointment (whether to undertake this role, or the more limited role) should be characterised by:

1. appointment by the Minister; or
2. in the alternative, appointment by the AFCA Board, with the opportunity for Ministerial disallowance;
3. reporting to the Board and the "members":
4. availability to discuss the reports with both the Board and the "members"; and
5. reports also being presented to the Minister, who shall table these with the Parliament - as the AFCA will be the creation of the Parliament.

Issue 5 - Independent Assessor

Question for Discussion 12

How and where should the charter of the independent assessor be defined? Who should be able to make a complaint to the independent assessor?

Answer to Question 12

(a) The charter should be defined by AFCA, with reference to existing auditing bodies' standards and subject to ministerial approval. The charter to include detailed reference to efficiency, effectiveness, accountability and compliance.

(b) The charter should be presented annually as an addendum/appendix to the AFCA annual report.

(c) All members and all complainant consumers should have a right to complain to the independent assessor.

Question for Discussion 13

What safeguards should be put in place to ensure the assessor remains 'independent' (for example, should there be restrictions on early termination of the independent assessor)?

Answer to Question 13

(a) Appointment by the Minister, as the AFCA is the creation of the Parliament.

(b) Bi-annual appointments, with no renewal for 2 years thereafter.

(c) Reporting to the Board and members.

Question for Discussion 14

Should the independent assessor have guaranteed direct access to the AFCA Board?

Answer to Question 14

(a) Yes, as the assessor may require during the assessment period and to address the Board with regard to his/her annual report.

(b) Also access to the Minister, if a major non-compliance issue arises during the assessment period.

(c) Also access to the Minister to present and explain the assessor's annual report.

(d) As the AFCA is a creation of the Parliament and the assessor's annual report should be tabled in the Parliament, the assessor should be available for attendance as a witness for relevant Parliamentary Committee hearings.

Question for Discussion 15

What other reporting arrangements should be in place (for example, if there is serious misconduct or a systemic issue)?

Answer to Question 15

As indicated in response to Question 14, the assessor should have access to the Minister when such discoveries are made.

Question for Discussion 16

Should the independent assessor publish their findings in each case on an anonymised basis?

Answer to Question 16

Yes, with such publication available to members, the Minister and tabled in the Parliament.

Question for Discussion 17

What should happen if AFCA disagrees with the independent assessor's decision?

Answer to Question 17

(a) The disagreement should be presented to the Minister in separate reports from both the Board and the assessor.

(b) These reports to be made available to "members", with the assessor and Board having an opportunity to call a Special General Meeting, with attendance available for all who are entitled to attend an AGM.

Question for Discussion 18

When should a review of the functions and operation of the independent assessor be undertaken?

Answer to Question 18

At the same time as the third year after commencement review of AFCA, as provided in the Enabling Bill. If the Delegation's recommendation for a 2 year term, not immediately renewable, is adopted, this will allow a review after 2 different assessors have been involved.

Issue 6 - Exclusions from AFCA's Jurisdiction

Question for Discussion 19

Do existing exclusions from FOS and CIO jurisdictions present any unreasonable barriers to accessing the schemes?

Answer to Question 19

No.

Question for Discussion 20

Is there more that could be done so that complaints lacking substance are excluded from being dealt with by AFCA?

Answer to Question 20

That there be an initial screening process, where the member can attempt to establish that the complainant consumer's claim is vexatious, frivolous, a repeat of a complaint already dealt with by AFCA, or an attempt by a "credit repair company" to blackmail the "member" into illegally removing an adverse credit listing by creating AFCA costs.

Question for Discussion 21

What, if any, further practices should be adopted to ensure the correct balance between accessibility to the scheme and ensuring that complaints not appropriate for consideration by an EDR scheme are excluded?

Answer to Question 21

(a) That the initial screening process address these issues, if brought to the attention of the AFCA by either party.

(b) That the assessing AFCA screening officer have the opportunity for personal contact with both parties, to ask clarifying questions to supplement written responses.

Issue 7 - Other Issues to be Addressed in the Terms of Reference

Question for Discussion 22

What requirements relating to accessibility should be included in AFCA's terms of reference?

Answer to Question 22

Addressing the content of the FOS and CIO documents, included on page 9 of the Consultation Paper, provides an interesting insight into the process for traditionally abbreviated content to provide an opportunity - in the external dispute resolution's actual operation - to fundamentally ignore what its "members" would regard as being a reasonable recognition and application of the meaning of an apparently relevant Terms of Reference or Rules.

Concerning the FOS Terms of Reference

Note the terminology introducing 8.2 - "*FOS will do what in its opinion is fair in all the circumstances...*". In the writers' experience, that has facilitated a ruthless anti-"member" approach on the part of some FOS case managers and "systemic issues" officers.

The writers would claim that this introduction has been redefined in these managers and officers' minds as, "*If I don't like it because our role is to protect the consumer at all cost possible to the credit provider, we will declare it as inappropriate...*".

The list of 4 criteria to be considered mean nothing in the face of FOS case manager determination -

(a) "*legal principles*" are listed first, but are the first to be ignored by FOS case managers.

That includes the acceptance of clear and precise terminology in legislation where there is no ambiguity, and where the High Court and every Supreme Court has consistently ruled that the ordinary meaning of the words have to apply.

Currently, if the legal principles don't suit the case manager's position, they are ignored and the case manager refuses to engage with the propositions presented.

(b) "*applicable industry codes*".

None of the lenders associated with the Delegation report this criteria having been applied and none have been asked for, or presented with, the relevant code.

(c) "*good industry practice*"

This rationale is used without any indication as to how the criteria has been formulated under the current regime. The criteria has been created and applied by people who never attend industry organisation meetings, or discuss industry practice, with anyone associated with the lenders or lessors who support the Delegation.

Concerning 8.3

(a) None of the Delegation supporters or professional adviser contacts report this option ever being exercised.

(b) Obtaining expert advice from a legal or industry expert - has never happened with Delegation supporters or their associated advisers.

The statements look credible, but are not applied at the FOS case manager level.

Concerning the CIO Rules

This EDR scheme is even worse. Allegedly, there is no non-conflicted and impartial Ombudsman to whom to appeal.

It is the view of one of the writers that this Ombudsman simply rubber stamps the decisions of his staff. He has to manage the conflict of interest of being both the Ombudsman (responsible for final decision making) and the CEO (responsible for making money to fund the organisation) and this is consistently carried out in a manner adverse to the CIO "members".

Concerning 12.1, it is the writers' experience that CIO is incapable of observing procedural fairness.

(a) "*Rights provided by law*" - despite the CEO stating at the 2016 AGM that CIO observes the laws of the Parliament, that has not been found to be true in practice when dealing with the organisation.

(b) "*applicable codes of practice*" - despite numerous supporters of the Delegation being CIO members - none have ever experienced CIO case managers considering codes of practice.

(c) "*good practice in the sector*" - like FOS, the case managers have never been seen at industry organisation conferences, or appear to have had any contact with "members" to learn what such practice might be. This is compounded by the CEO regularly attending consumer advocate conferences.

(d) "*good practice in the... industry*" - as with point (c) above.

(e) "*fairness in all the circumstances*" - this never comes even close to being applied as a criteria to the advantage of the "member".

(f) "*consult with... industry*" - this simply does not happen.

A promised "member" consultative group, such as the one CIO has had for the consumer advocates for years, has never materialised. At the 2016 CIO AGM, the CEO gave a commitment to "look into" forming a "member's" consultative group. When asked for a report on progress at the 2017 CIO AGM, the CEO admitted that nothing had been done. His explanation was that he had numerous meetings with "members" during any one year, that "member" representative organisations tended to have varying views, but the consumer advocates spoke with one voice. It is interesting to note that none of the Delegation's supporters, nor any of the members of the other representative organisations report having had any meetings with the CEO at any time, in any year.

Further, the Board selected "*industry representative*" has no outside contact with the industry sectors represented by the Delegation, that would assist with such consultation.

(g) "*seek advice*" - this has never been known to happen for any supporter of the Delegation involved in a dispute with CIO.

(h) (Any) code of practice - no such reference has ever been known to occur for a dispute involving Delegation supporters.

Question for Discussion 23

Having regard to the current FOS terms of reference and CIO rules, what principles and topics are of sufficient ongoing significance that they should be addressed in the AFCA terms of reference?

Answer to Question 23

Notwithstanding the issues of Intellectual Property and Copyright, there is no way FOS Terms of Reference or CIO Rules should be cut and pasted, erroneously assuming that they mean anything in EDR practice, or have been applied consistently in any meaningful and objective way since 2010-11.

As the Delegation's answer to Question 22 indicates, there should be limited confidence in the relevance of the FOS Terms of Reference or the CIO Rules.

If the Minister is serious about implementing "*landmark reform*", the Delegation regards it as essential for Dr Edey to meet with relevant stakeholders and formulate a unique Terms of Reference that truly reflects the Minister's announcement and the specific intent behind the creation of the AFCA.

Question for Discussion 24

Are there any matters not currently included in the FOS terms of reference/CIO rules that warrant inclusion in AFCA's terms of reference?

Answer to Question 24

(a) Clarification that any "complaint" that emerges from a "credit repair" company must be screened for what they invariably are - a brutal attempt at blackmail, to illegally force the lender to remove an adverse credit listing for the company's client. If the listing was justified, removing it is a breach of the law (and the credit reporting body's contract with the lender).

(b) Recognition that the AFCA does not have extra parliamentary powers entitling it to ignore the relevant Commonwealth credit legislation and/or credit regulation, when it suits the case manager and ombudsman to do so.

(c) Recognition of the 500 years of development of the law of contract, and many hundreds of Australian common law of contract court decisions which have held that - if a contract has appropriate or legislated disclosures and the parties have signed willingly without harassment, etc. - then the signatures of the parties bind them to the terms included above those signatures.

(d) Recognition that -

- the National Credit Code prescribes the mandated content of a credit contract; and
- additional content is the prerogative of the lender; and
- it is the prerogative of the borrower to accept or reject the mandated content and the lender's terms, subject to those other terms not breaching any other specific legislative provision.

Superannuation

The Questions for Discussion relating to the Superannuation industry are not relevant to the supporters of the Delegation.

Part 3 - Governance

Concerning the company

The Delegation notes and reluctantly accepts the continuation of the current regime outlined on page 21 of the Consultation Paper.

However, the issue of the AFCA being a Not-For-Profit company should not preclude the Minister including the publication of a full financial statement each year in the criteria for Authorisation -

(a) For compliance purposes, this should be available to the assessor.

(b) For financial responsibility, accountability and equitable purposes, this should also be available to the "members" who have faced all the cost.

(c) In recognition of the Westminster system, this statement should be available to the Minister and tabled in the Parliament each year.

Neither FOS nor CIO currently provide appropriately detailed financial statements. These should not take advantage of any accounting standards provision that allows a less than comprehensive report.

As a creature established by the Parliament, it would be totally unacceptable if AFCA maintains the tradition of financial secrecy promoted by both FOS and CIO.

Concerning the Board

The text on page 21 of the Consultation Paper raises a number of issues to be considered in this phase of establishing the AFCA:

1. The Interim board is highly likely to fail the test of having equal numbers of "*directors with experience in carrying out the types of businesses operated by the members*". The advertisement inviting interested parties to indicate their interest discouraged such people from accepting the invitation.

It was very cleverly worded to ensure that the Interim Board would be more likely to have a consumer advocate bias and to ensure that this Board could then go on and consolidate the consumer advocate control of AFCA. This would occur with token representation from the industry sector, with such representation having agendas other than to officiate over a properly functioning objective EDR scheme.

2. Limiting directors who have been lenders or lessors is an interesting one. The professional consumer advocate industry can take places on the Board, even though they have never been an affected consumer.

   However, industry experts who have advised or provided services, have a wide ranging understanding of the industry sectors and have regularly represented industry sectors since 2002, including attending all stakeholder meetings during the formulation of the NCCP Act, are excluded.

   Perhaps this is because the majority of this relatively small number are outspoken, not afraid to challenge the professional consumer advocates, Treasury officials and/or relevant Ministers.

3. Given the Minister's power of appointment lasting only 6 months and the need for an interim board that does not result in basically total control by the professional consumer industry, as is the real situation with FOS and CIO, it might be useful for the Minister and/or the Transition Team and/or Dr Edey to actually meet with some industry sector leaders and have a discussion concerning the composition of the Board from the "members" perspective.

4. We are amazed to learn of the claim that there were no suggestions presented, to the Ramsay Committee, to depart from the CIO and FOS practice of the continuing Board members appointing members to fill vacancies. It would appear some early responses concerning EDR have been ignored.

5. In the opinion of the Delegation supporters who have been on Boards, or have otherwise had experience with Board selection and election, the self-appointed board concept is far from satisfactory. It provides opportunities for:

   (a) ignoring the need to create a talented Board to oversee a controversial creation of the Parliament, operating in a complex and demanding environment - and with responsibility to the Parliament as well as consumers and "members";

   (b) a club mentality to develop when analytic, individualistic and enquiring minds, who have real personal contact with the industry sector (or consumers), are required;

   (c) a club mentality to develop that considers "members" to be an underclass to be milked for fees and charges, and expected to easily give in to any outrageous consumer/complainant demand; and

   (d) the development of arrogance, because there is no open competition for a seat on the Board, with the accompanying consideration of aggregate and personal Board performance and suitability for the role.

6. The presumption that there is consultation with relevant industry bodies (we cannot comment in regard to consumer bodies) is very ill founded. Neither FOS, nor CIO's continuing Board members have ever consulted with the five industry bodies that represent non-ADI lenders and lessors.

   As a result, the Board members alleged to represent industry interests are not known by the writers to have participated in any way with any of these five organisations. They have never attended any of their conferences or meetings and have never consulted with them - either before or after being appointed to the Board - despite the 1,100 EDR scheme "members" represented by the five organisations.

7. Concerning numbers on the board of the AFCA - it is recommended that the minister look to 11 directors. This allows industry representation across a greater spectrum of membership business interests, as must be required with the breadth of membership to be included under the AFCA regime.

Issue 10 - Skilled and Experienced Directors, Without Simply Being Representatives of Sectional Interests

The Delegation is very concerned with the identification of the broader membership base in the second paragraph.

Please note that the spectrum of membership business interests demands that there be directors who also have knowledge of the following sub-sectors relevant to Delegation supporters:

- SACC lending;
- MACC lending;
- AOCC lending;
- brokers (credit);
- leasing (non franchise); and
- leasing (franchise).

***Recommendation**:*

That the Minister's criteria for Authorisation recognise the full range of finance industry sub-sectors that will be "members" of the AFCA, when considering the AFCA Board size and composition.

It is possible to locate people with a substantial knowledge of more than one sub-sector. They may not be actually running a lending or leasing business, but are in other positions of extensive contact with two or more of the above industry sub-sectors. As an example, the writers are in constant contact with all five - either as compliance clients and/or supporters of the Finance Industry Delegation. They can also introduce the Minister to a small range of other people with similar multi-category contact and depth of knowledge of the above listed industry sub-sectors.

Certainly the other people referred to above and the writers' contact with industry "members" will be vastly more numerous than the professional consumer advocates' contact with actual consumers that lodge EDR complaints.

However, at present, this business contact experience and expertise is precluded from Board membership by the terms of Section 1051(3)(d) concerning mandated operator requirements -

"*the operators' constitution provides that the number of directors of the operator who have experience in carrying on the kinds of businesses operated by members of the scheme must equal the number of directors who have experience in representing consumers*".

However, as it now stands, the professional consumer advocates are recognised; there is no place available for a consumer; "members" professional advisers and industry representatives are excluded and only "members", or people who have been employed by or have owned the "member" entity in the past, appear to be eligible. These people are not necessarily familiar with current industry conditions.

There is no reason why the AFCA cannot conduct elections for the Board. The Minister's local community club or motoring representative organisations will provide the necessary expert advice on the conduct of Board elections - they generally do it very well.

***Recommendation**:*

If ever there is an opportunity to amend the enabling Bill, that the issues of "membership" Board size and representation and the opportunity for electing the Board be considered.

Board responsibilities

There are two issues arising from this subsection in the Consultation Paper:

1. The AFCA cannot ever be truly independent under the provisions in the enabling Bill -
   (a) The requirements of the legislation Section 1052 to 1052E determine that AFCA is a satellite of ASIC.

(b) The Consultation Paper notes the ASIC directions' regime.

(c) The Consultation Paper notes that material changes to the scheme require ASIC approval.

These opportunities for ASIC to exercise power should not be overlooked when the proposed inquiry into regulatory agencies, including ASIC, is undertaken.

2. AFCA is required to look for systemic issues.

Given that ASIC has such difficulty conducting an investigation and now generally sub-contracts the task to an "auditor"- with the licensee paying - it is unfortunate to see a continuing acknowledgement of this ASIC performance, with AFCA being pledged to undertake another element of ASIC's work - looking for systemic issues.

The Delegation accepts that this is Government policy and is currently enshrined in the enabling Bill at 1052E(1)(a). However, the Explanatory Memorandum and the Consultation Paper both overlook the impact of this expectation on "members" preparedness to let a dispute get anywhere near AFCA.

The Minister should be mindful of the ease with which an allegation of a systemic issue can be made. In accordance with the relevant ASIC Regulatory Guide (RG 209), even just one consumer file is enough. That means:

1. with AFCA programmed like FOS and CIO on this issue, it will probably again be complete with systemic issues managers;
2. the significant reduction in the number of SACC lenders and lessors occurring in 18 months time, due to the commencement of the foreshadowed National Consumer Credit Protection Amendment (Small Amount Credit Contract and Consumer Lease Reforms) Bill - Exposure Draft 2017; and
3. the significant fall in the number of SACC loans (at least 40%), and the closure of many credit providers in this sector, will massively reduce membership fees and the number of complaints from the SACC lending sector, thereby dramatically reducing AFCA income.

The lenders and lessors that survive will avoid the possibility of having just one complaint being declared a systemic issue and will quickly settle during the IDR process, or before. That means no consequent EDR case fees. That means a distortion of the EDR process.

The Board and sectional representation

In the Delegation's opinion, it is hard to avoid coming to the conclusion that the well intentioned person or persons who drafted pages 21 and 22 of the Consultation Paper, have never been a member of a Board.

In particular, it is nonsense to attempt to avoid the representative tag - consumer advocates are on the Board, hopefully to reflect consumer interests. People with business backgrounds, or associated with business backgrounds, are there to reflect business interests. Hopefully, all are there to ensure the good conduct and governance of an objective AFCA.

The last paragraph on page 21 of the Consultation Paper rightly recognises the need for diversity on the Board. Section 1051(3)(d) recognises business and consumer contact experience - that must mean accepting the reality that the Board will represent two broad camps and the different Board members will be considered as aligned with their respective "camp".

Conflicts of interest cannot be avoided - they just have to be managed.

Question for Discussion 28

What measures could be put in place to secure sufficient knowledge of how different parts of the industry operate, while avoiding the representative tag for directors?

Answer to Question 28

Sufficient knowledge of the industry is what counts. As discussed above, the years of alignment with industry, acquiring that knowledge, will determine the unavoidable tag.

Commitment to the common cause, concerning conduct and governance of the AFCA, will ensure any tag will not get in the way of board performance.

Question for Discussion 29

What measures should be put in place to ensure the AFCA Board appropriately balances the considerations of currency of director knowledge of particular industry sectors, conflict of interests, and breadth of competencies required?

Answer to Question 29

(a) To continue to answer this question in association with each assessment is a challenging indirect role for the assessor.

(b) To continue to deal with the direct and indirect impact of the topic in question is a challenging role for any efficiency, effectiveness, accountability and compliance auditor.

(c) Given the mandated Board membership, there are no measures to put in place to overcome this threat. It is a matter up to the Board and its ability to constructively function that cannot be pre-judged, or controlled with attempted impositions on Board conduct.

(d) The only direct measure that the Delegation can identify is for the Minister's Authorisation criteria to include the opportunity for the independent assessment and any efficiency, effectiveness, accountability and compliance audit, to include an assessment of the Board's general conduct and its impact on the governance and performance of AFCA.

(e) Ideally, the minister should be able to retain the right to dismiss a non-functioning Board and this should be presented as part of the opportunities available to the Minister under Sections 1050(4) and (5), concerning cancellation or variation of Authorisation of AFCA.

Question for Discussion 30

What needs to be addressed at a Board/constitution level and what can be addressed through additional governance arrangements established by AFCA such as industry sector advisory panel(s) for transition?

Answer to Question 30

(a) Ensuring genuine and useful industry representation is selected for the Interim Board.

(b) Recognising the critical importance of the content of the Minister's Authorisation and the need to include the recommended content, to be found elsewhere in this response.

(c) Actually establish some industry advisory panels and ensure both the Minister, and later the Board, meet with them.

Issue 11 - Board Responsibilities

Question for Discussion 31

Are there additional functions or responsibilities of the AFCA board that are not reflected in the constitutions of the existing schemes?

Answer to Question 31

(a) The only function AFCA should have is that of an EDR scheme. To allow otherwise is:

- to open the door to conflicts of interest;
- to open the door to loss of essential focus on the core activity; and
- to potentially threaten the legitimacy of the Not-For-Profit company status.

(b) This is consistent with the legislation.

Question for Discussion 32

What benchmarks should AFCA have in relation to matters addressed in the ASX corporate governance principles, including:

- *board renewal;*
- *diversity;*
- *procedures for assessing board performance;*
- *management of conflicts of interest or of duty on the part of directors and executive staff; and*
- *remuneration policy?*

Answer to Question 32

Concerning each matter listed:

(a) Board renewal - maximum 4 year terms, with the opportunity for only half the Board to go at any one time and for a return to the Board at the next cycle.

(b) Diversity - segment the election process and avoid only appointing or promoting members of the consumer advocate industry to represent consumers.

(c) Procedures for assessing board performance:

- The assessor to assess and report to the board and the Minister.
- Encouragement of "members" to attend the AGM and ask questions.
- Present industry representative forums.

(d) Managing conflicts of interest:

- Broad rules of conduct and required declaration of conflict.
- Clear procedures when a conflict of interest does arise.
- Accepting that conflicts of interest can be managed and accommodated with integrity.

(e) Remuneration policy:

- Performance, not number of staff managed.
- Comparative analysis.
- No bonuses based on number of cases, or anything that encourages shortcuts and/or case conduct bias.

Question for Discussion 33

Should the Constitution or governing rules provide that neither the board nor individual directors can direct a decision-maker with regard to the outcomes of a particular dispute or class of disputes?

Answer to Question 33

Yes - the Board sets policy and ensures implementation. However, it should not be overlooked that, under the Enabling Bill, the Minister maintains the ability to vary the AFCA Authorisation at any time.

PART 4 - FUNDING

Background and settled procedures.

The information content on page 25 introduces two issues for consideration:

1. The preferred fee structure must be membership fee according to size of business, plus fee for case resolution.

   This is to ensure that small companies do not subsidise big companies (and vice versa).

This is also to ensure that those businesses that "create" disputes are not significantly subsidised by those who do not.

2. Delegation supporters prefer the FOS model to the CIO model concerning fees, because, in some ways, FOS has proven to be considerably cheaper than CIO.

As indicated above, the Delegation does not support a multi-service AFCA.

Further, the enabling Bill does not make any provision for such non-core activity. The enabling Bill presents as a comprehensive description of the responsibilities of the AFCA and it could be expected that the courts would consider that, if the Parliament had intended the AFCA to engage in non-core activities, then the legislation would have specifically provided for this. This response is not legal advice, but there are numerous precedents to this effect.

If this opportunity was to be considered, it appears that the legislation would have to be amended.

It may be politically unwise for the Minister, with a legal professional background, to contemplate an Authorisation that incorporated non-core activities. In the opinion of one of the writers, it would be very risky legally and politically to allow Parliament to essentially create an entity - and then have no control over avoiding cross-funding of its core responsibility within that entity - sanctioned by Parliament, and its non-core activity, without Parliamentary sanction.

Issue 12 - Funding Matters for Consideration as Part of Authorisation

Question for Discussion 34

In addition to matters identified in paragraphs 1-3 above, what other material should a company seeking authorisation to operate the AFCA scheme provide to demonstrate that it has satisfied the requirements of adequate funding and sufficient funding flexibility?

Answer to Question 34

This question puts the Delegation on notice that the Minister's intention may be to have a corporate shell, being the AFCA, and then attempt to facilitate sub-contracting of its duties - probably to FOS - which is possibly the only entity that can offer legitimate experience and budgeting close to what will be required for AFCA.

The Delegation noted that the only person from any existing EDR scheme that has been appointed to the Minister's Expert Reference Panel, is the Chief Ombudsman of FOS (media release 22.8.17).

FOS involvement would be analogous to a reverse takeover, which would be of concern to the Delegation if it involved the wholesale recruitment of the FOS pro-consumer advocate case management staff.

If this strategy is the case, there is some doubt that this has been presented to the Parliament and to the public, to date.

The Delegation notes that the Explanatory Memorandum includes a number of statements that may not support the subcontracting model:

At 1.20 and at 1.30 it states, "*The operator of the scheme will be known as the AFCA scheme*".

At 1.34 there is the inclusion that recognises that the AFCA has "*statutory powers*".

At 1.14 there is the mention of an earlier Government announcement, that the AFCA *"will be established by industry as a company limited by guarantee*".

The Delegation is concerned that some clarification may be necessary, particularly with Assistant Minister Senator McGrath, in his second reading speech on the enabling Bill, confirming that the Government had abandoned the competitive tendering or selection approach.

In respect to Question 34, it may be useful for the AFCA company to present some economic modelling on the possible impact on AFCA income and operation activity, of far fewer small amount lenders - and almost no lessors - being available 12 months after the royal assent for the Government's SACC and Lease Reform Bill.

Question for Discussion 35

Are there any principles beyond those identified in paragraph 2 above that should underpin AFCA's funding model?

Answer to Question 35

Yes - the model will offer transparency and disclosure to "members", as they pay for everything.

Question for Discussion 36

Should the funding arrangements for superannuation and non-superannuation disputes be separate and distinct, given the very different nature of these disputes?

Answer to Question 36

Yes.

Issue 13 - Interim Funding

Question for Discussion 37

If an interim funding arrangement were put in place, what features should it have and when would it be appropriate to transition to a long-run funding model?

Answer to Question 37

(a) The special feature that might be considered is a series of periodic calls on "members" for funds, rather than one estimated annual levy, so that the amounts can be varied to match the actual expenditure.

(b) The easier transition to the longer term model will be encouraged if the short term template can simply carry over.

Question for Discussion 38

What special considerations might need to be factored into an interim funding model to balance the need for adequate resources (certainty) with the principles (accuracy)?

Answer to Question 38

As briefly discussed elsewhere in this response, the most obvious consideration is to look to a series of membership fee part payments, over the first twelve months, or even two years, in recognition of the uncertainties associated with undertaking an estimate for an annual lump sum payment. The challenge of balancing certainty with accuracy may require the adoption of the current CIO financial model, where 80% of funding is generated from membership fees. Obviously, this makes it easier to fund fixed costs, leaving the reliance on collecting adequate variable costs - reflecting the case load - to case management fees.

Again, as mentioned earlier in this response, if the proposed SACC and Lease Reform Bill proceeds as it is currently drafted, financial planning for AFCA will have to factor in the impact on reduced membership income due to a major reduction in SACC lenders and the near abolition of lessors, as well as substantially reduced case fees.

Issue 14 - Transparency and Accountability

The information content on page 28 contains little that has not been discussed before. However, the Explanatory Memorandum's listing of the potential AFCA's scheme providing "*regular consultation with stakeholders*" is novel in comparison with FOS or CIO, neither of whom have ever attempt such consultation with Delegation supporters or their representative bodies.

It is to be hoped that the Minister will include this criteria on the Minister's Authorisation.

Question for Discussion 39

Who are the key stakeholders AFCA is accountable to? What is the key objective and measure of importance to each stakeholder?

Answer to Question 39

(a) The key stakeholders about whom the Delegation is concerned are the current EDR regime's much overlooked "members".

(b) The key objective of the "member" when dealing with AFCA will be containing costs.

(c) Given the new environment to be created by the Government's currently planned SACC and Lease Reform Bill, with generally much lower gross profit, this key objective will be very critical for those still attempting to lend SACCs, or undertake consumer household product leasing.

(d) Associated with this cost reduction, is the importance of having the Minister's Authorisation recognise Recommendation 9 of the Ramsay Review - the referral of all new complaints back to the lender for IDR consideration first.

Question for Discussion 40

In addition to the accountability measures in the Bill, are there additional measures that should be embedded in AFCA's Constitution and/or terms of reference or reflected in ASIC guidance to ensure accountability to stakeholders?

Answer to Question 40

As indicated previously:

(a) publication of a full set of financial accounts made available to the "members;.

(b) the opportunity for an elected board; and

(c) access to a forum to present grievances and comment, with the assessor, at AGMs.

Question for Discussion 41

Are there other conditions that could be put in place to ensure the scheme is accountable to members in relation to fees?

Answer to Question 41

(a) Consultation on potential fee changes.

(b) Assessor to report to "members" after investigating the proposed fee increase.

(c) Warnings of at least one month's duration concerning any fee increase.

(d) A clear analysis in the annual report of the impact of the fee increase.

(e) The creation of an audit committee, which may include non-Board members.

CONCLUSION

This response attempts to highlight the opportunities for the Minister's Authorisation to deliver the landmark reforms that were promised in Minister O'Dwyer's media release and to which Treasurer Morrison has referred during a recent ABC TV 7.30 Report interview.

The Delegation is of the view that, unless there is comprehensive criteria included in the Minister's Authorisation, the Government's promises will not be fulfilled.

The Finance Industry Delegation appreciates the importance and the opportunity of being able to provide a response to the Consultation Paper.

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Co-ordinators

Finance Industry Delegation