



Promoting Responsible Consumer Lending

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### **Re: the Establishment of the Australian Financial Complaints Authority**

NCPA supports in principle the establishment of the proposed Australian Financial Complaints Authority (AFCA) on the basis it is a transparent and accountable vehicle in resolving disputes in a timely and balanced manner.

#### **Preamble**

The NCPA believes it's imperative that once the AFCA Board is in place that all stakeholders have an opportunity to comment on and contribute to the Terms of Reference to be developed by the inaugural AFCA Board.

The new scheme should not be a replication of the old schemes under the FOS and CIO, but rather the new Terms of Reference must be fair to all parties and respect the rule of law.

It is noted that in setting up the AFCA that the mandate includes consideration of "accessibility, independence, fairness, accountability, efficiency and effectiveness", this is welcomed by the NCPA as it is imperative for the scheme to be truly effective it must be staunchly independent, (fair in accordance with the principles of natural justice) and accountable.

The NCPA noted in its submission to the Review into Dispute Resolution & Complaints Framework - Supplementary Issues Paper (July 2017) a number of key issues that must be addressed if the new AFCA is to have the confidence of members. This can be

assured if the design and establishment of the terms of reference in the new AFCA scheme are instructive of the short-comings and failures of the dispute resolution schemes it is replacing. These include consideration of;

1. Apply a fair and reasonable fee schedule for small amount loan disputes. The costs to a small business under the FOS and CIO are excessive which leads to many disputes not being contested. For example, the average amount of a small amount loan is approximately \$960 over a 12-month period. When you consider the minimum basic cost for a small amount loan provider to challenge a dispute from the Credit Investment Ombudsman is \$985.00 and can rise substantially to as much as \$6575 if the small amount loan provider goes through the process of disputing and defending the complaint. Many small amount loan providers forgive an outstanding debt rather than subject their business to such excessive costs.
2. The number of genuine complaints as opposed to vexatious claims is a serious concern and there is little or no recourse for the small amount loan providers. As a principle, the new scheme to mandate a complainant must complete and provide proof that an IDR process has been undertaken before accessing the AFCA scheme. This will have the effect of reducing vexatious complaints and better and more accurately reflect the issue being pursued. Further, introduce a penalty for unmeritorious complaints as this would have the effect of lowering the number of vexatious complaints. There are numerous examples of evidence to support the NCPA's concerns over current practises in this regard including in the Credit Investment Ombudsman's (CIO) Annual Report 2104/15, 'inappropriate conduct by paid representatives' and the CIO Newsletter, Issue 2, June 2017 page 2 #11 - "smaller firms don't want to be financially blackmailed into settling unmeritorious claims to avoid further complaint fees" as well as the QCAT website ref: fees for Debt disputes.
3. In addition, lawyers and credit repair agents are registering complaints via EDR channels where clients are at fault or have tried IDR or Equifax and their requests have been refused, in order to use the high costs associated with EDR as a deterrent to the FSP, knowing that it costs the FSP more to defend the 'complaint' than to roll over, remove the default or credit inquiry and pay on the \$240 which is invoiced to the FSP for the EDR scheme reception function. As a solution, the NCPA recommends credit repair agents and lawyers must be forced to refer the matter to the FSP's IDR in the first instance and where resolution is not achieved, and if the credit repair agent or lawyer elects to pursue the matter via EDR, the credit repair agent or the lawyer must pay the regulated fee of \$240.

The NCPA notes a number of other important issues be considered when framing the terms of reference for the new AFCA. The Consultation Paper notes the Organisational Requirements for the new AFCA Scheme will include;

*That membership of the scheme is open to every entity that is required to be a member of an EDR scheme; operations are financed through contributions by members; the scheme has an independent assessor; and complainants pay no fees and costs.*

The NCPA acknowledges the new scheme will need to be adequately funded to fulfil its charter. The NCPA notes the importance of setting the funding arrangements to accurately reflect the actual service provided by the scheme and not place a disproportionate weighting on smaller member firms. For member firms to have confidence in the new AFCA it must ensure the costs associated with the dispute resolution process does not discourage member firms from not contesting cases because of these costs. The NCPA notes revenue to the FOS scheme in 2015-16 was \$47M of which 74% was from dispute resolution fees with just 11% derived from membership fees and user charges. The NCPA is concerned the high costs of participating in the EDR under the existing schemes is far in excess of what is deemed fair and reasonable if the member firm goes through the process of disputing and defending the complaint. It is also noted that many other stakeholder groups highlighted the much greater capacity of bigger firms to absorb administrative costs than small lenders.

The NCPA also believes that given the AFCA will have the ability to operate with higher monetary limits, must be accountable for its decisions by providing its members with an avenue to review decisions via the establishment of an independent Consultative Committee. The role of the Consultative Committee would be to review decisions of the AFCA and would be a welcomed initiative. This review of decisions process is absent for the FOS and the CIO with EDR schemes showing little or no accountability to their members for their decisions. A Consultative Committee would address these concerns.

The NCPA believes that the new one stop shop model of dealing with consumer complaints can be successful if the above issues are considered when framing the operating principles of the new service provider, the Australian Financial Complaints Authority (AFCA).

## GUIDING PRINCIPLES

### QUESTION FOR DISCUSSION

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

Q1. The guiding principles are appropriate if followed implicitly. The NCPA has previously noted its concerns with current schemes in that it believes they do not follow the independent and fair processes, similar to a court.

## MONETARY LIMITS

### QUESTIONS FOR DISCUSSION

#### Specific monetary limits

2. As AFCA will be a new EDR scheme, is it appropriate to maintain specific limits for:
  - income stream risk disputes;
  - general insurance broking disputes; and
  - third-party motor vehicle insurance?
3. If these specific limits are to be retained, should there be an increase in the limits?

#### Impact on Professional Indemnity Insurance

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

Q2, Q3 & Q4. The NCPA has no comment as its members loans are low in value and will not breach a threshold or cap.

## ENHANCED DECISION MAKING

### QUESTIONS 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?
6. Are there any other principles that may assist in ensuring AFCA provides fair, efficient, timely and independent decisions?
7. To what extent should these principles be reflected in the Terms of Reference, while allowing for operational flexibility?

Q5. The NCPA believes a consultative committee be established for the purposes of peer review of complaints that are closed. This would lead to a process of continuous improvement and ensure that decisions are in accordance with the principles of the scheme and the best interests of all stakeholders. The consultative committee would report to the AFCA Board. In addition, the general principles and outcomes applied by the committee in its review process then be published for member reference. To ensure the confidence of members of the review process, there must be clarity and predictability of decisions if they are to subsequently take action to correct short comings in any of their products, services, processes or procedures.

Q6. That there be a requirement at all times to follow the law (and legislation) so as to avoid interpretations of the law. Members don't want quasi-legal outcomes with no right of appeal, as is the case with the CIO.

Allow for a member to appeal or challenge an outcome based on reasonable legal grounds and procedural fairness.

Q7. Principles must be prescribed within the Terms of Reference and not be adhoc so as to ensure certainty for members and complainants.

#### USE OF THE PANEL

##### QUESTIONS 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?
9. Are there other factors that should be taken into account when considering whether a panel should be used?
10. How best can AFCA provide clear guidance about to users about when a panel should be used?

The NCPA is not opposed to the Use of Panels, however notes they should only be used to provide expertise consistent with the principles outlined in the recommendation of the Ramsay Review (p 129), and not be used in the role of a regulator. In particular, 'systemic issues' could be considered matters outside of the terms of reference for the Use of a Panel, and would be more properly considered by the regulator. The NCPA is of the view the AFCA is a dispute resolution body, not a regulator.

Q8. The NCPA considers the Use of a Panel would be limited to very complex cases. On this basis whilst a timely outcome would be the preferred position, the NCPA supports the use of appropriately skilled panel members from a cross section of industry, the legal fraternity and consumer groups, which means there will be costs which may be unavoidable, however, costs should be minimised where possible. A user pay model could also be applied in the event a member elected to have a matter

referred to the Use of a Panel. Given the very complex and fluid nature of the Credit Industry, it should be considered that several panels be available whose members have the required experience, exposure and understanding of the law in relation to the matter being considered.

Q9. Have an internal appeal process where the AFCA could appeal a Panel decision based on a finding that did not follow precedent.

Q10. Provide a written policy based on the principles of when the Use of a Panel will apply. This may include the complexity of the issue, and a threshold value for losses incurred.

## 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?

Q11. The NCPA supports an independent review of the operations and procedures of the new AFCA scheme and considers a comprehensive review be conducted within 18 months from commencement. It is vital that members have confidence in the new AFCA scheme and a timely and truly independent review will ensure this confidence is not eroded. Subsequent ongoing reviews should occur every two years.

## INDEPENDENT ASSESSOR

### QUESTIONS 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?
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)?
14. Should the independent assessor have guaranteed direct access to the AFCA Board?
15. What other reporting arrangements should be in place (for example, if there is serious misconduct or a systemic issue)?
16. Should the independent assessor publish their findings in each case on an anonymised basis?
17. What should happen if AFCA disagrees with the independent assessor's decision?
18. When should a review of the functions and operation of the independent assessor be undertaken?

Q12. The NCPA supports the establishment of an independent assessor which should be appointed by members or a panel comprised of members. The independent

assessor's findings should be published in the ACFA Annual Report. The Charter of the independent assessor should be defined and articulated in the new AFCA terms of reference. All parties to a dispute be they consumer, business or industry body should be able to make a complaint to the independent assessor.

Q13. To ensure the ongoing independence of the independent assessor, terms should be fixed with nominations to the position to be ratified by AFCA members for a period of two years. Member firms could be given the opportunity to ratify the appointments.

Q14. Yes, the NCPA believes the independent assessor have direct access to the AFCA Board and would be appropriate together with a requirement to report such interactions to members.

Q15. This should be reported to the Chair or CEO of AFCA and to the Minister and regulator.

Q16. Yes, all findings should be published, available for public scrutiny similar to the publication of ASIC decisions, as any finding of the independent assessor that is in conflict with the AFCA Board is in the public interest.

Q17. For these matters, they should be referred to the Minister or the regulator.

Q18. Consistent with the review of the AFCA, every 2 years is appropriate to ensure confidence in the independence of the assessor and give exposure to a range of external views.

## EXCLUSIONS FROM AFCA'S JURISDICTION

### QUESTIONS FOR DISCUSSION

19. Do existing exclusions from FOS and CIO jurisdictions present any unreasonable barriers to accessing the schemes?
20. Is there more that could be done so that complaints lacking substance are excluded from being dealt with by AFCA?
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?

Q19. No, however the NCPA considers more could be done to exclude vexatious and repeat complaints.

Q20. Yes, as indicated above the current schemes are being abused as an easy out for complaints not related to product, price or responsible lending. For example, Privacy Act matters should be referred to the Office of the Australian

Information Commissioner (OAIC). This would include Credit Reporting Body issues. This is important to small amount loan providers as presently there is a significant cost to a provider every time a vexatious complaint is made.

Q21. Publish a list of complaints not suitable for the attention of AFCA with a list of alternative agencies or bodies where the complainant should direct their concerns/complaint. These would include matters that would be best dealt with by a financial councillor, industry body or the OAIC.

#### OTHER ISSUES TO BE ADDRESSED IN THE TERMS OF REFERENCE

##### QUESTIONS FOR DISCUSSION

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

Q22. The NCPA considers accessibility to AFCA to have adequate processes so as a consumer is not prevented from gaining access to the Scheme. However, as previously noted, there needs to be a more rigorous assessment of the validity of complaints to minimise vexatious complaints or complaints that should be directed elsewhere.

Q23. The NCPA has noted its concerns with the existing schemes in the preamble of this submission.

Q24. The AFCA always make decisions that are consistent with current laws and regulations.

#### SUPERANNUATION

The NCPA has no comment in relation to the SCT or superannuation.



## THE BOARD

### QUESTIONS 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?
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?
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?

Q28. Following the appointment by the Minister of a minority of the initial directors to the AFCA, the appointment of remaining director positions should be made by members. This could be done via public advertisement calling for nominations to the Board from within the membership of the AFCA. Alternatively, as part of the transition process, the Consultative Committee, would consist of members drawn from the financial services sector and nominate Directors (with relevant Industry experience) to fill the positions available.

Q29. As above.

Q30. The Board must be truly independent and representative of the financial services sector it is designed to serve, including independent from the regulator and conduct its business in accordance with its terms of reference and all relevant laws. Importantly, the transition to the new scheme must ensure transparency at all levels with a published well defined set of rules.

## BOARD RESPONSIBILITIES

### QUESTIONS FOR DISCUSSION

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

Q31. No, the NCPA considers the new AFCA should only be concerned with External Dispute Resolution.

Q32. The NCPA believes the ASX Corporate Governance principles should be adhered to under all circumstances.

Q33. Yes, the NCPA agrees that proper corporate governance principles are to be applied at all times.

## FUNDING MATTERS FOR CONSIDERATION AS PART OF AUTHORISATION

### QUESTIONS 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?
35. Are there any principles beyond those identified in paragraph 2 above that should underpin AFCA's funding model?
36. Should the funding arrangements for superannuation and non-superannuation disputes be separate and distinct, given the very different nature of these disputes?

Q34. The NCPA supports the establishment of a new Company for the purposes of operating a dispute resolution scheme and does not support the Company undertaking functions that do not directly relate to the resolution of complaints. The

NCPA considers the Company should confine its charter to dispute resolution and not focus on other areas for the purposes of broadening its revenue sources.

Q35. No.

Q36. Yes, the NCPA considers the funding arrangements required for the superannuation dispute resolution process must be separate to the functions of resolving disputes for holders of an Australian Credit License.

## INTERIM FUNDING ARRANGEMENTS

### QUESTIONS 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?
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)?

Q37. The NCPA considers this is largely unknown and would be difficult to quantify given there is no information provided on the costs of the existing EDR scheme and further, given the new AFCA will operate under different rules whilst providing a service that combines the functions of the two existing EDR providers. One view would be that the new service will be a streamlined process with no duplication or competition between service providers and as such, the fee schedule for member firms should reflect this greater efficiency. The NCPA notes that during the transition phase, accountability to members with strict budgetary controls is essential.

Q38. Consideration of a two (2) tier approach to membership fees could apply. The existing FOS fee structure could be applied during transition with a 2 part payment, if additional funds are required then a greater value invoice can be raised for payment of a second instalment, vice versa if less funding is required a lesser value invoice would be issued. This would assist in the transition period to ensure appropriate funding levels were maintained without further financial burden on members.

## TRANSPARENCY AND ACCOUNTABILITY

### QUESTIONS FOR DISCUSSION

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

Q39. The NCPA considers the principle stakeholders to which the AFCA is accountable must be holders of an Australian Credit License (ACL) and holders of an Australian Financial Services licence (AFS). The key objective and measure of importance to each stakeholder is the AFCA must at all times be fair and unbiased in its decision making and process and ensure its operations are independent from the regulator.

Q40. The NCPA acknowledges ASIC is a stakeholder in the financial services sector however does not consider ASIC should have a policy influence over the AFCA in its principle role of dispute resolution.

#### COMPULSORY MEMBERSHIP

##### 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?

Q41. The NCPA believes the AFCA Annual Report be published in accordance with standard accounting practices to ensure financial accountability to member firms. Additionally, the AFCA be mandated to address member firm enquiries in relation to finance and governance matters.