Australian Banking Association

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[redacted]
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ABA submission to the review of the Australian Financial Complaints Authority

The Australian Banking Association (**ABA**) welcomes the opportunity to comment on the Treasury's independent review of the Australian Financial Complaints Authority (**AFCA**).

Our position

The ABA recognises the significant role that AFCA has in ensuring customers are treated in a fair and reasonable manner during the complaints process. We have maintained a strong, positive, and proactive relationship with AFCA since its establishment in 2018.

In our view, the AFCA model remains more effective than the three external dispute resolution (**EDR**) bodies that preceded it, being the Financial Ombudsman Service (**FOS**), the Credit and Investments Ombudsman (**CIO**) and the Superannuation Complaints Tribunal (**SCT**). We note that AFCA works with our members at all levels, including caseworkers and managers, to achieve positive outcomes for our customers.

Having said that, the ABA considers that the current review is timely. Three years into its tenure, there is room for improvement regarding AFCA's operational effectiveness. We have developed our response with a focus on providing constructive suggestions to improve the operations of the EDR scheme in alignment with its mandate of fair, efficient, timely and independent decision-making.

Key recommendations

The ABA considers that the operation and structure of AFCA could be improved in the following four areas: governance, timeliness, advocacy, and procedural fairness.

Governance

The Government should aim to improve the governance of AFCA through instituting greater transparency in its decision-making processes, stronger accountability for its performance and greater consultation with industry.

The Government has also asked stakeholders to consider whether there is a need for AFCA to have an internal mechanism where the substance of complaint determinations can be reviewed. The ABA is not supportive of creating another internal review stage for complaints, on the basis that it will decrease the timeliness of decisions and increase the cost.

Timeliness and efficiency

The timeframes in which AFCA cases are resolved are generally shorter than during some of its predecessor EDR schemes. However, timeliness is still a concern, with some complaints taking more than six months to a year to progress from preliminary assessment to determination. Such lengthy decisions often come at significant expense to both the customer, in terms of stress and financial pressure, and to the financial firm.

We are of the view that the number of long-dated cases could be reduced through:

- better prioritisation of high impact cases
- a more judicious use of rule 8.3 to appropriately decline certain cases, and
- the eradication of inefficiencies in the case management process.

In addition, the ABA suggests that timeliness and efficiency could also be improved by AFCA setting clear complaint timeframes and reporting publicly against those.

Advocacy

The ABA considers that AFCA has not always strictly met its mandate of independence and fairness, instead having acted on occasion as a consumer advocate or de facto policymaker. A key example of this is AFCA's current approach to the apportionment of liability for scams. The Government should clarify the role of AFCA, including when it is to defer to its regulatory counterparts on issues of policy.

Procedural fairness

There is scope for AFCA to improve the consistency and quality of its decisions by placing a greater emphasis on its procedural fairness. The ABA has documented several cases where the outcome could have been improved if AFCA had followed a transparent and fair decision-making process.

We recommend that AFCA place greater focus on:

- maintaining adequate contact with all parties to the complaint
- ensuring certain matters are excluded, and
- documenting the preliminary assessment of complex cases.

The ABA has provided more detail on these themes in Appendix A, as well as a response to each of Treasury's questions in Appendix B, and further supporting evidence in a confidential Appendix C.

Kind regards

Jessica Boddington
Policy Director

About the ABA

The Australian Banking Association advocates for a strong, competitive and innovative banking industry that delivers excellent and equitable outcomes for customers.

We promote and encourage policies that improve banking services for all Australians, through advocacy, research, policy expertise and thought leadership.

Australian Banking Association

Appendix A: Thematic considerations

The ABA considers that AFCA is generally effective in meeting its statutory objective to resolve complaints in a way that is fair, efficient, timely and independent. However, its operation could be improved in the following four areas: governance, timeliness, advocacy, and procedural fairness.

1. Governance

The Government should aim to improve the governance of AFCA through instituting greater transparency in its decision-making processes, stronger accountability for its performance and greater consultation with industry.

Transparency of decision-making

Recommendation 1: The Government should require AFCA to share its internal guidance on good industry practice with industry and other key stakeholders, and with the public where appropriate.

The ABA is grateful for the guidance that AFCA provides to industry and the public through the publication of fact sheets and approach documents, such as the guidance on chargebacks during the COVID-19 pandemic. Given that AFCA is not a policymaker or regulator, the guidance it provides must aim to enhance a consistent understanding of the requirements imposed by financial regulators and the Government, as well as those agreed in relevant industry agreements and codes.

Whilst there are numerous factsheets, approach documents and response guides available on AFCA's website, the ABA notes that there appears to be further internal guidance or positions that are not made public. Publishing this guidance is important for transparency's sake. It is also likely to yield better consumer outcomes over time, as it contributes to a common understanding of both parties' rights and obligations.

Case studies

As highlighted in the determination extracts below, AFCA appears to apply some very specific rules regarding 'good industry practice' within responsible lending. This guidance has not been made public.

AFCA determination 1

"…*Good industry practice* requires a financial services provider to sensitize principal and interest (P&I) loan repayments by adding an interest buffer of 1.5%. This is to allow for interest rate variations over the life of the loan…"

AFCA determination 2

"…It is *generally accepted industry practice* for a financial firm to accept rental income (discounted to 80%) from a borrower's investment property in its assessment of a loan..."

AFCA determination 3

"…Based on the available information, it appears the Bank adopted the HEM benchmark figure as it was the higher of the two figures at the time and was a more prudent measure. This accords to *good industry practice* where the known living expenses are lower than the acceptable benchmark figure..."

The existing guidance can be published without taking away from AFCA's flexibility to assess complaints on a case-by-case basis. In doing so, the ABA suggests that AFCA should:

- engage industry and consumer advocates to develop a strategy for publication (including the scope of matters to be covered, prioritisation of issues and a timeline)
- conduct public consultation before the existing good industry practice guidance documents are published, and
- have a mechanism for regularly reviewing and updating the documents in consultation with industry and consumer advocates.

Importantly, consultation with financial firms, regulators and industry associations (including the BCCC) should ensure that AFCA's positions on good industry practice do not conflict with regulatory, prudential and industry requirements, nor extend these requirements beyond what the parliament and regulators intend. For example, AFCA determination 3 (noted above) referred to good industry practice as requiring an interest-rate buffer of 1.5%. We note that this guidance conflicted with that provided by APRA at the time the loan was made, i.e., "…good practice would apply a buffer over the loan's interest rate, *usually the standard variable rate*, to assess the serviceability of the borrower".[1]

External accountability

Recommendation 2: The Government should require AFCA to develop key performance indicators that it can use to measure and benchmark its performance over time, and to report on these publicly. This should include a benchmark for complaint resolution timeframes.

The publication of an organisation's performance against key indicators is an important accountability measure aimed at increasing the effectiveness of the organisation over time. As AFCA exists to provide independent and fair dispute resolution services to individuals and small businesses, it is important that any indicators that are developed are tied to the execution of this mandate.

As an example, AFCA could adopt a key performance metric linked to the timeliness of open systemic complaints. Our members note that there can often be a long lead time between when a case is closed and when a financial firm is alerted to a possible systemic issue. This is not in the interests of customers or of industry, as it can result in future harm arising that could have been avoided if the systemic issue were resolved sooner. Other performance measures could include the details of stakeholder engagement conducted, measures around the training that it provides to staff and frequency of contact with complainants and firms during a matter.

Case studies

The following examples illustrate the types of delays that can occur with systemic issue identification.

AFCA determination 4

- Original complaint raised to AFCA on 13 January 2020.
- Complaint closed on 28 April 2020.
- Systemic Issue Notification raised 8 December 2020 (i.e., 8 months after complaint was closed).

AFCA determination 5

- Original complaint raised to AFCA on 18 November 2019.
- Complaint closed on 30 December 2019.
- Systemic Issue Notification raised 23 April 2020 (i.e., 4 months after complaint was closed)

Engagement with industry

Recommendation 3: The Government should strengthen the agency's engagement by:

- appointing a senior dedicated industry liaison executive within AFCA to develop an engagement strategy and provide a defined point of contact for financial firms, and
- convening an industry advisory panel (equivalent to its existing Consumer Advisory Panel) to assist in providing AFCA with perspective on important issues affecting the industry.

The ABA is appreciative of the efforts that AFCA has made, and continues to make, to engage with our members on key matters affecting the industry. As an industry body, we maintain regular monthly

[1] APRA, *APG 223 – Residential Mortgage Lending*, 2014. The average standard variable rate for owner occupiers was 5.93% in June 2014 according to RBA data on lending indicators.

meetings with AFCA and have found this dialogue to be a helpful avenue to share information and develop a common understanding of issues.

Notwithstanding the above, we consider that AFCA's external consultation mechanisms could be broadened and formalised to ensure that all financial firms have sufficient and equal access to raise emerging issues as they arise. The ABA notes that not all firms have the resourcing or necessity to cultivate a strong ongoing relationship with AFCA; noting that 81% of licensing members did not have a complaint escalate to AFCA in the last 12 months.[2]

For these reasons, some of the smaller financial firms find it difficult to reach the appropriate staff within AFCA when they want to raise an emerging issue or escalate a complaint. This issue has the potential to result in adverse competitive outcomes over time.

2. Timeliness and efficiency

The timeframes in which AFCA cases are resolved are generally shorter than during some of its predecessor EDR schemes. However, timeliness is still a concern, with some complaints taking more than six months to a year to progress from preliminary assessment to determination. Such lengthy decisions often come at significant expense to both the customer, in terms of stress and financial pressure, and to the financial firm.

We are of the view that these timeframes could be managed through:

- better prioritisation of high impact cases
- a more judicious use of rule 8.3, and
- the eradication of inefficiencies in the case management process.

In addition, as noted above, timeliness and efficiency could also be improved by AFCA setting clear complaint timeframes and reporting publicly against those.

Prioritisation of high impact cases

Recommendation 4: The Government should impose extra requirements on AFCA to support and educate consumers that are most impacted by delays to the complaint resolution process.

The ABA notes that some of the lengthiest AFCA cases involve situations where the customer is in financial difficulty. Whilst we understand that these cases can be quite complex to resolve, we are of the view that customers experiencing vulnerability should receive priority consideration, where possible. This is on the basis that the adverse impact of any delay is often magnified for such individuals.

Case study

The following is an example of a long-dated case where it was alleged one of the complainants was experiencing a type of vulnerability.

AFCA determination 6

The customer lodged a complaint with AFCA disputing that the Bank made an error in processing withdrawals from a savings account and in closing the customers' joint account.

This complaint contended that:

- the Bank made an error when it closed a joint account on the other customer's instructions (Customer 2) without seeking Customer 1's consent first
- Customer 2 then opened a savings account using the funds from the joint account
- Customer 1 alleged that Customer 2 lacked capacity to manage his own financial affairs.

From the date the complaint was lodged with AFCA until closure, the complaint was 700+ days old.

[2] AFCA, *Two-year report - 1 November 2018 – 31 October 2020*.

The Bank received AFCA's preliminary assessment in August 2019 stating that:

1. AFCA is unable to consider a complaint about a savings account without the NSW Trustee and Guardian's consent as one of the complainants is not a party to the account and a Financial Management Order is in place.
2. Regarding closure of the complainants joint account, AFCA found that the authority to operate was 'anyone to sign' and could not find that the Bank made an error by closing the joint account.
3. Furthermore, AFCA could not find that one of the account holders lacked capacity.

The Bank accepted AFCA's preliminary assessment. However, the complainants rejected the assessment and requested a Determination by the Ombudsman. In February 2021, AFCA issued its determination in favour of the Bank.

The ABA also urges the Government to require AFCA to educate customers of the potential wait times that may be involved with the consideration of a case, as well as any adverse impacts that may be felt as a result. For example, delays in the resolution of responsible lending cases can result in a detriment to a customer's financial position, equity or credit report. This can leave the customer in a much-worse financial position if or when the case is resolved in the lender's favour.

Case studies

The following are example of long-dated cases where the customer is experiencing a potential financial loss because of the delay.

AFCA case 7

This case has been open for 685 days as of 23 February 2021. There are open and active loans associated with this case which are accruing interest as the case proceeds. The customer has made no repayments on these loans while the case has been open. This will put the customer in a very difficult position should AFCA find in favour of the Bank, as the customer will need to make a suitable arrangement to repay nearly two years' worth of repayments.

AFCA case 8

The customer lodged a complaint with AFCA in relation to maladministration and the management of progress payments for a construction loan. The complaint remains unresolved and has been active for 503 days. There are open and active loans associated with this case which are accruing interest as the case proceeds. Both parties' equity positions continue to erode.

The customer has made a separate complaint to AFCA specifically in relation to timeliness and the management of the complaint. He has also commented to the Bank that he would not have utilised AFCA's services had he been aware of how long it may have taken to resolve these issues.

AFCA case 9

The customer lodged a complaint with AFCA in relation to the application of hardship and the Bank's right to sell a property as a mortgagee in possession. The case is currently active and has been open for more than 653 days. There are open and active loans associated with this case which are accruing interest as the case proceeds, resulting in an eroding equity position for the customer.

Use of rule 8.3 to decline appropriate cases

Recommendation 5: The Government should encourage AFCA to broaden its use of rule 8.3[3] to all matters that are appropriate.

[3] Rule 8.3 allows AFCA to cease progressing a complaint where:
- it is without merit
- no loss has been suffered (or has been appropriately compensated); or
- the financial firm has committed no error.

It is not in the best interests of the customer for a matter to progress when there is no chance it will be resolved in their favour. Similarly, progressing such matters results is an impost to the wider customer base of the financial firm that is required to cover the costs.

In particular, we consider that rule 8.3 could be used to decline cases in situations where:

- the firm has provided a full response with supporting information, and the customer has not provided any information in response to the firm's information
- the customer rejects a preliminary assessment without providing any reasoning.

Case study

The following is an illustration of where we consider rule 8.3 could have been used.

AFCA determination 10

The Bank provided their IDR response and substantial refund to the customer. As the customer did not contact AFCA, it was assumed that they were unsatisfied with the Bank's response and the case progressed to 'case management'. Case management questions were issued, and conciliation was booked in. It was not until the complainant did not turn up to the conciliation that the case was closed.

Eradication of inefficient processes

Recommendation 6: The Government should require AFCA to achieve finality of all matters to a case.

AFCA's current approach to case management means that finality is not always achieved through the determination process. This means that complaints can be perpetuated to the detriment and cost of the customer and financial firm.

Case study

The following is an example of a case where finality was not achieved in the initial determination.

AFCA determination 11

- Determination was issued on 13 November 2020.
- A one-month extension was provided to the customer on 16 December 2020.
- The complaint was closed by AFCA on 18 January 2021 due to no response from the customer.
- On 19 January 2021, AFCA provided an additional extension at the request of the customer to 15 February 2021.
- The case was finally closed 26 February 2021 when no response was received.

For example, AFCA's approach to the resolution of responsible lending complaints can address liability issues whilst leaving the repayment of the residual debt unresolved. The ABA notes that it can be difficult for customers and financial firms to re-engage after the EDR process has been finalised to agree how the any residual debt should be repaid. In some cases, this can result in a customer lodging a new complaint to AFCA regarding the same loan.

3. Advocacy

Recommendation 7: The Government should clarify the role of AFCA, including that:

- it is to defer to the Government and regulatory counterparts on issues of policy, and
- its mandate of fairness and independence precludes it from conducting consumer advocacy.

On its website, AFCA makes clear that it is "not a government department or agency, and… not a regulator of the financial services industry." In line with its mandate as an external dispute resolution

body, AFCA rather acts as an independent and impartial arbiter that "does not advocate for the position of either party to a complaint".[4]

The ABA considers that AFCA has not always strictly met the mandate of independence described above, having occasionally acted as a consumer advocate or de facto regulator and policy maker. A key example of this is AFCA's current approach to the apportionment of liability for scams.

Fairly assessing the apportionment of liability

The ABA is concerned about AFCA's current approach to apportionment of liability in cases relating to remote access scam cases and mistaken payment cases.[5] When considering these cases, AFCA will generally ascertain whether the customer has authorised the transactions. If it is determined that the customer did not authorise the transaction and did not 'contribute to' the loss, then AFCA considers that liability falls to the financial firm under the e-Payments Code.

This approach is in direct conflict with the preliminary position that ASIC has taken during the e-Payments Code review. ASIC has proposed that the framework in the Code relating to mistaken internet payments does not extend to instances of frauds or scams. It intends to "enhance clarity of the current position" by revising the Code to include a warning to customers of this fact.[6] We consider that AFCA's approach thereby expressly conflicts with the policy intent of the financial regulator.

Case study

The ABA considers that following examples illustrate several concerns relating to the fairness of AFCA's approach to remote access scams and mistaken payments. In particular, the outcomes:

- assess whether the consumer has authorised a transaction and/or contributed to the loss in a way that is unduly generous to the customer and punitive to the financial firm, and
- conflict with the stated policy intent of other government regulators and industry standards.

We contend that some mutual responsibility must lay with the customer to understand and recognise scams or mistaken payment when they occur, especially in cases where a financial firm could not have intervened to prevent the transaction.

AFCA determination 12

The customer lodged a complaint with AFCA disputing a transaction made under a remote access scam. This complaint contended that:

- he was contacted by a third party purporting to be from a telecommunications company, who told him he was at risk of having his computer and internet hacked
- he allowed the third-party remote access to his computer and, at their direction, logged on to internet banking so they could check whether it had been hacked
- he acknowledges that he received a security code on his banking token and probably entered the code when asked by the third party to do so
- he found $19,000 had subsequently been transferred from his account and contacted his Bank
- the Bank was able to recover $4,968.90 of the disputed transaction but otherwise declined the complainant's claim on the basis that he provided the security token code to the third party.

In the determination, AFCA found in favour of the complainant. The reasoning included that he did not knowingly authorise the transactions because, when entering the passcodes, the complainant would not be aware that the fraudster could see the information he was entering.

[4] https://www.afca.org.au/about-afca
[5] Remote access scams involve an individual being contacted via phone, text or email by a scammer falsely claiming to be from a familiar company, such as a bank, telecommunications company, software company or government agency. The scammer will trick the customer into providing remote access to their computer, and then the scammer will often use this remote access to illegally transfer funds.
[6] ASIC, *Letter to Stakeholders – ePayments Code review*, 9 December 2020.

AFCA determination 13

The customer lodged a complaint with AFCA with respect to a mistaken internet payment made to an unintended recipient's account. This complaint contended that:

- the customer made two internet banking transfers of $50,000 each from their account to an unintended recipient's account held with the receiving Bank (Bank 2)
- the complainant entered the wrong account details and reported the mistaken internet payments to the Bank with which she held her account (Bank 1)
- there was $85,494.52 available in the unintended recipient's account
- Bank 1 was able to retrieve the first $50,000 mistaken internet payment from Bank 2, and
- Bank 2 refused to return any additional funds with respect to the second mistaken payment as there were insufficient funds in the unintended recipient's account.

In the determination, AFCA found in favour of the complainant, on the basis that:

- Bank 1 had complied with its own obligations under the ePayments Code
- Bank 2 did not comply with its obligations under the ePayments Code because it did not return all the funds that were in the unintended recipient's account
- it would be unreasonable for the complainant to bear liability for the breach of the Code
- the fairest outcome was for Bank 1 to be held liable for the Bank 2's breach and for the complainant's Bank to seek recovery against the receiving Bank.

AFCA's determination did not include awareness of requirements under the AusPayNet Guidelines, which state that Banks are permitted only to return full amounts (not partial amounts).

4. Procedural fairness

AFCA should focus on ensuring procedural fairness as a mechanism to improve the consistency, predictability and equity of its complaint outcomes. The following issues are examples where the ABA considers that a focus on procedural fairness could improve the quality of case outcomes.

Maintaining adequate contact with all parties to the complaint

Recommendation 8: The Government should ensure that AFCA has robust case milestones that must be observed, including an opportunity for both parties to submit and refute all evidence at-hand.

The ABA has received feedback to the effect that AFCA does not consistently reach out to financial firms ahead of a determination being made to discuss the evidence and reasoning for the decision. This lapse is most impactful in the case where a verdict has changed from the preliminary assessment stage, based on further intimations or assertions being made by the complainant.

The current lack of communication can lead to poorer quality outcomes as the financial firm is not then given the opportunity to provide further evidence or express its concerns about the facts of the case.

Case studies

The ABA considers that the following examples illustrate instances where AFCA did not allow the financial firm to provide further evidence to contest all matters under consideration.

AFCA determination 14

The customer lodged a complaint with AFCA disputing the repayment history information (RHI) on their credit file. This complaint contended that:

- the customer was in financial hardship due to loss of employment
- the Bank was aware of this financial hardship, and

- the Bank should have supressed the customer's RHI.

In the preliminary assessment, AFCA found in the Bank's favour that all RHI had been reported correctly. The customer rejected the findings of the preliminary assessment and the case progressed to determination stage.

In the determination, AFCA found in the customer's favour and that the Bank should correct the RHI. This decision was based on the following reasoning:

- a phone call was made in August 2017 where the customer put the Bank on notice of hardship
- the Bank failed to contact the complainant after their account fell into arrears, and
- no further communications were recorded from August 2017 until 5 April 2019 when the bank called the complainant to discuss a block on his account.

The Bank disputed the above findings on the basis that they are factually inaccurate. It says that, although it received a pre-determination call from the AFCA adjudicator, the adjudicator did not explain the decision or allow the Bank to review the case in further detail. If it had been given a chance to provide more evidence, the Bank would have been able to refute the claims with evidence of further contact with the customer after they fell into arrears.

AFCA determination 15

The customer lodged a complaint with AFCA disputing the RHI on their credit file. This complaint contended that the customer was in financial hardship during 2018 to February 2020.

In its preliminary assessment, AFCA found that the RHI for August and September 2019 should be amended. The Bank agreed to the amendment on this occasion to resolve the complaint; however, the preliminary assessment was subsequently rejected by the complainant.

In the determination, AFCA found that the RHI for February, March, August and September 2019 should be amended. The Bank had concerns about this finding, as the only contact with the complainant during this time was a response from an automatic SMS where a promise to pay was confirmed.

After conversations between the Bank and the lead ombudsman at AFCA, it was agreed that the determination would not be published. The main reasoning behind this was that the AFCA adjudicator should have given the case manager at the Bank a pre-determination call to discuss the finding and allow the Bank an opportunity to provide further evidence.

AFCA determination 16

In this case, AFCA issued a preliminary assessment in favour of the customer without issuing any formal request for information from the Bank during the case management stage.

Ensuring certain matters are excluded

Recommendation 9: The AFCA rules should be amended to clarify what constitutes an individual 'claim'. This should include a more robust approach to excluding complaints at an early stage where:

- the value of the complainant's complain exceeds $1 million (under rule C.1.2(e))
- there is a more appropriate place to deal with the complaint, such as a court (under rule C.2.2(a)).

The ABA has observed that AFCA does not always exclude complaints that strictly fall within their exclusion rules. For example, complainants are occasionally allowed to limit their claim to $1 million or break down their complaint into multiple cases (where the issue in dispute is identical) to fit within AFCA's jurisdiction.

The exclusion rules exist, in part, in recognition that there are some matters that are better suited to be considered by a court, given the complexity or amount under contention and the need to substantiate evidence. We encourage the Government to require AFCA to strictly adhere to the current exclusion

rules. This is to ensure that either party is not disadvantaged by an outcome that could be better decided in court.

Documenting the preliminary assessment of complex cases

Recommendation 10: The Government should place appropriate limitations on the use of verbal assessments to ensure that they are not used for more complex categories of complaints (including responsible lending cases).

AFCA can provide preliminary assessments verbally or in writing. We consider that verbal delivery can be a useful way to expedite simple matters. However, it is to the benefit of both parties to have a written record of the facts and reasoning involved in complex cases, to ensure that no evidence falls through the cracks that all issues are dealt with in a fair and transparent manner.

Australian Banking Association

Appendix B: ABA views on the submission guidance

Please find below our answers to the questions posed by Treasury in the submission guidance.

Delivering against statutory objectives

1. Is AFCA meeting its statutory objective of resolving complaints in a way that is fair, efficient, timely and independent?

The ABA considers that AFCA is generally effective in meeting its statutory objective to resolve complaints in a way that is fair, efficient, timely and independent. However, we note some recommendations to align AFCA's operations more closely with its objective in Appendix A.

2. Is AFCA's dispute resolution approach and capability producing consistent, predictable and quality outcomes?

The ABA considers that AFCA's approach is generally consistent and predictable. In particular, our members have noted an uplift in AFCA staff capability over the last year and a year wherein decisions have included more evidence and a better understanding of the law and industry practice. We consider that this is a significant achievement given the rapid growth of the organisation.

Despite this, we consider that there continue to be some issues with capability and approach that result in a lack of procedural fairness being applied to some cases. These issues are outlined in our observations contained in Appendix A.

3. Are AFCA's processes for the identification and appropriate response to systemic issues arising from complaints effective?

The ABA notes that ASIC and AFCA have overlapping powers to investigate and respond to systemic issues. This has resulted in some duplication of effort, with ASIC and AFCA commencing overlapping inquiries into the same issue and issuing information requests to affected firms. In addition, it is arguable that AFCA currently has a broader remit to investigate systemic issues as it can pursue issues of general fairness and compliance with industry practice, in addition to breaches of law.

We encourage the Government to consider the respective powers of AFCA and ASIC and seek to remove duplication. In doing so, the ABA suggests that it would be appropriate to preserve the primary role of ASIC as a regulator and AFCA as a dispute resolution body.

Recommendation 11: To reflect the above, the rules should be amended to:

- specify that AFCA must cease a systemic issues investigation if ASIC is investigating the same matter, or if there is active or regular engagement between ASIC and the firm on the issue
- include a more rigorous test of what constitutes a systemic issue
- specify a process, including timeframes, that AFCA must follow to notify and consult with relevant industry bodies regarding investigations that impact on industry-wide practice, and
- state that any remedial action required by AFCA should be reasonably proportionate to the severity of the systemic issue.

4. Do AFCA's funding and fee structures impact competition? Are there enhancements to the funding model that should be considered by AFCA to alleviate any impacts on competition while balancing the need for a sustainable fee-for-service model?

The ABA is concerned about the significant costs AFCA impose on financial firms. The cost of resolving a complaint through AFCA has grown exponentially since 2018, with cases costing between $4,000 to $13,000 regardless of the result.

These increasing costs place significant pressure on institutions to resolve matters purely on a commercial basis, rather than allowing the case to progress to a fair and reasonable outcome. This has an adverse impact on the behavioural incentives of market participants and goes against AFCA's mandate to resolve complaints in a fair and independent manner.

Whilst we recognise the need for fee increases, annual fee rises should balance all relevant factors. The increased use of merit assessments and rule 8.3, where appropriate, may reduce the number of non-meritorious complaints progressing to decision and alleviate cost impacts to financial firms.

Monetary jurisdiction in relation to primary production businesses

5. Do the monetary limits on claims that may be made to, and remedies that may be determined by, AFCA in relation to disputes about credit facilities provided to primary production businesses remain adequate?

The ABA considers that the current monetary limits are sufficient. We note that AFCA has upwardly revised these limits in the past (e.g., the maximum claim for a dispute relating to a primary producer loan was recently increased from $2 million to $2.17 million). The ABA is confident that AFCA will continue to review these limits in the future, as appropriate.

Internal review mechanism

6. AFCA's Independent Assessor has the ability to review complaints about the standard of service provided by AFCA in resolving complaints. The Independent Assessor does not have the power to review the merits or substance of an AFCA decision. Is the scope, remit and operation of AFCA's Independent Assessor function appropriate and effective?

The ABA understands that the Independent Assessor function is not widely used, with approximately only 0.2 per cent of complaints having been referred to the Assessor over the past two years. We consider that this rate of assessment is too low to provide an effective audit of AFCA's service approach. Further, we consider that the role and function of the Assessor is not adequately publicised, with many firms unaware of its existence.

In terms of the remit and scope of the Independent Assessor, the ABA suggests that it could be expanded to include the collection and publication of operational performance data (see section on governance in Appendix A). We do not consider that the Assessor should have a role in reviewing the merits or substance of AFCA decisions.

7. Is there a need for AFCA to have an internal mechanism where the substance of its decision can be reviewed? If so, how should any such mechanism operate to ensure that consumers and small businesses have access to timely decisions by AFCA?

The ABA is not supportive of creating another internal review stage for complaints, on the basis that it will decrease the timeliness of decisions and increase the costs associated with deciding a case.