

AFCA Review Secretariat
The Treasury
Langton Crescent
PARKES ACT 2600
AUSTRALIA

CHERPA Inc.
PO Box 156
Moonah TAS 7009

26th March 2021

www.cherpa.com.au

Re: Review of the Australian Financial Complaints Authority 2021

Dear Sir or Madam,

Thank you for the opportunity to participate in this review.

Please find attached our submission, as well as supporting documents from CHERPA's membership. We welcome any feedback, or further dialogue on this matter.

We would appreciate a confirmation of the receipt of this submission.

We look forward to your response.

Sincerely,

Steven King
President
CHERPA

[Redacted Signature]

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CHERPA Submission

to AFCA Review Secretariat

26 March 2021

Regarding the Review of the Australian Financial Complaints Authority 2021

Overview

CHERPA (Consumer Household Equipment Rental Providers Association) is the peak body for the domestic household rentals industry, or more specifically, operators that provide consumer leases within Australia.

Although CHERPA exists to represent industry members, as a non-profit peak body we are equally concerned for our consumer stakeholders. We strive to assist our industry members with effective self-regulation through adherence to our [Code of Conduct](#), a prerequisite for CHERPA membership.

Our code of conduct exists to preserve not only the safety of our consumers, but to provide an ethical and responsible framework for our industry members to operate within. The code of conduct is the industry benchmark for best practice and aims to preserve the wellbeing of all stakeholders.

Submission Purpose

This submission highlights the need to reform certain aspects of AFCA's operations, with the intent of maintaining the integrity of their statutory objective of resolving complaints in a way that is "fair, efficient, timely and independent", among other issues.

Executive Summary

AFCA is ostensibly an equitable financial complaint resolution service provided for complainants to have a safe and fair forum by which to resolve their concerns. Granted this is a necessary function, as the interests of consumers must be protected at every level of government.

However, despite AFCA's obvious outward commitment to fairness, CHERPA and its members have identified a number of key problems in which AFCA's premise is in conflict with its own principles. Unless these points can be resolved, we feel that AFCA remains fair in name only.

The following submission comprises points of concern and recommendations raised within the scope of AFCA's review submitted by both our membership body as well as our executive, plus a short list of other concerns.

Key Points

The following points address the submission terms of reference **point 1**, subpoints **1.1, 1.2** and **1.3**.

1. **Inequality regarding binding nature of AFCA resolutions:** As the most concerning point of this submission, the very nature of AFCA's dispute resolution carries the fatal flaw of being **non-binding upon consumer complainants**.

In the *Treasury Laws Amendment (Putting Consumers First—Establishment of the Australian Financial Complaints Authority) Act 2018*, Subdivision B, section 1051 "Mandatory Requirements", under *Operational Requirements* paragraph (4)(e) it states:

(e) under the scheme, determinations made by the operator of the scheme are:

- (i) binding on members of the scheme; but
- (ii) not binding on complainants under the scheme;

CHERPA notes that the premise of the scheme appears flawed in that it cannot be said that any mediation process that is binding upon one party and non-binding upon the other is fair, as there is a clear difference in the balance of power between the parties. Under such circumstances, **it does not matter how fair a process is in resolving a complaint if the premise itself is flawed**.

If one party is not bound by the process then they have no obligations to either *do* or to *not do* anything, and can proceed with complaints with absolute impunity.

- **Point 1 recommendations:**
 - a) **Resolutions binding upon all parties:** Make AFCA's resolutions binding upon both the complainant and the AFCA member. Inform the complainant of this binding nature of the resolution and their obligations under the scheme before allowing them to make a complaint.

This recommendation will fix the fundamental flaw in AFCA's premise and promote fairness and equitability among all parties in the complaint resolution process.

2. **Inequality regarding requests for information:** Further to point 1 above, CHERPA notes that in many instances, complaints to AFCA progress regardless of their requests for further information from the complainant being ignored. Conversely, any failure on the part of members to provide any information requested by AFCA is heavily penalised in the complaint resolution process. In essence, complainants bear almost no responsibilities for the information they provide under AFCA's requirements, **and many complaints progress regardless of how committed the complainant is to the process**.

- **Point 2 recommendations:**
 - a) **Mandatory compliance with AFCA requests for complaints to progress:** Make all of AFCA's requests for information and otherwise mandatory upon both parties,

including upon complainants. If a complainant does not provide the necessary information in the specified time frame, then the complaint does not progress further.

This recommendation will further promote fairness through making complainants similarly responsible to members for complying with AFCA requests.

3. **AFCA's acceptance of complaints without IDR evidence:** CHERPA notes that AFCA's process does not require any evidence of any internal dispute resolution process between a member and a complainant to be complete before it accepts complaints. This is despite ASIC's Regulatory Guide 271 (and predecessor RG 165) requiring a final response in writing be provided to the complainant within 45 days after any IDR process is initiated between the complainant and member.

This leads to many complaints that could have otherwise been handled at the IDR level being referred unnecessarily to AFCA.

➤ **Point 3 recommendations:**

- a) **IDR request with strong encouragement:** AFCA should both request and *strongly encourage* all complainants to provide a copy of their final response from IDR with their complaint.
 - a. In doing so, AFCA should provide complainants with detailed information about what to do if this final response is not provided by the member.
- b) **Processing delay of 45 days:** If the complainant is unable or decides not to provide a copy of their final response with their complaint, AFCA should proceed with their complaint but **delay the processing of their complaint by a minimum of 45 days**, and inform the complainant of such. This, again, is to place some of the onus for their complaint resolution back on the complainant and lessen the attractiveness of making a complaint to AFCA without pursuing IDR.
- c) **Easy IDR response provision:** AFCA should make it easy and accessible to upload a copy of the final response from IDR through their online form, or whatever portal they use to receive complaints. Similarly, the IDR final response should remain a central element of AFCA's complaint handling process, and should be referenced at all stages of receiving a complaint.

Each of the above recommendations will help to decrease the number of unnecessary complaints forwarded through AFCA by dealing with them at the IDR stage.

4. **Costs of complaints received by AFCA:** Currently the cost of all complaints handled by AFCA are invoiced only to AFCA members, and not to complainants or any other party, regardless of the complaint outcome. Additionally, the tiers of AFCA's cost structure become more expensive the further a complaint progresses in its resolution framework. This means that despite the resolution process itself, or any admission of error on behalf of the member, there is a financial disincentive on behalf of members to proceed with AFCA's arbitration to its final outcome, who instead are persuaded toward capitulation so as to avoid unnecessary cost.

This is particularly true for members dealing with small contracts, where the cost of dispute resolution from AFCA would be a high proportion or potentially in excess of the value of the contract under dispute.

➤ **Point 4 recommendations:**

- a) **First tier cost revocation:** Cease to charge AFCA members the first tier cost which is charged immediately upon the mere registration of a complaint against them. The cost of complaint registration alone can represent a high proportion of the value of a member's contract under dispute.
- b) **Fee cap:** Introduce a fee cap for members based on a pro-rata determination of the disputed contract's value. For example, the final resolution cost could be capped at 10% of the contract's value, unless AFCA makes a determination against them.
- c) **Member size limit:** Cease to forward any administration costs on to AFCA members under a certain size, whether determined by annual turnover, number of employees, or otherwise, unless AFCA makes a determination against them.

Each of the above recommendations will assist in minimising the burden of AFCA costs on members from spurious complaints.

5. **AFCA used as a tactic for commercial gain:** CHERPA has observed the proliferation of "Credit Repair" agencies, operations with an ethically dubious premise who frequently utilise the standover tactic of recommending a customer make a complaint to AFCA, regardless of the merits of that complaint, in order to force a settlement or capitulation from the AFCA member in question. As we have noted earlier, there is a strong financial disincentive for members to fight such complaints in the case of small contracts, meaning the very act of making a complaint is often enough to end the matter in the complainant's favour.

These agencies appear keenly aware of this fact and exploit it to their advantage.

➤ **Point 5 Recommendations:**

- a) When a consumer makes a complaint to AFCA represented by a third party, any costs charged by AFCA should be charged only to the party whom AFCA **rules against**, including any Credit Repair agency or legal service. That third party may then choose to pass those costs along to the consumer at their discretion.

This recommendation will assist in halting the proliferation of spurious complaints that members currently experience.

Other Concerns

CHERPA also notes the following concerns:

- The AFCA board includes no industry representatives, despite a membership of over 38,000 members. Instead, the 12 member board is made up of advocacy and consumer groups. CHERPA suggests that the board include a more equitable balance representing industry members, advocacy groups, and independent parties.
- The AFCA Annual Review contains only an aggregated figure of director's costs. For the sake of financial transparency, CHERPA believes it appropriate that the Review provide an itemised list of costs showing clearly the breakdown of director's expenses.
- AFCA currently reports to ASIC. However the scope of ASIC's remit is entirely different to AFCA. CHERPA recommends that AFCA report directly to a Minister.

- CHERPA notes that advocacy sub-committees were formed in March 2019 by AFCA CEO David Locke. However, financial services members did not have the opportunity to form a subcommittee. This is despite the fact that CHERPA and Financial Industry Delegation (FID) do meet periodically in consultation with AFCA executives.
- CHERPA notes that AFCA's CEO also functions as the Chief Ombudsman. Despite the overlap in their areas of interest, CHERPA identifies this as a possible conflict of interest, and recommends that the roles be separated.

Concluding Remarks

Despite the premise that AFCA exists to provide a fair and equitable financial complaint resolution service, some fundamental elements of the scheme's premise make it impossible for it to truly function in that role. Instead, AFCA operates more like a financial watchdog, with members being penalised (whether intended as penalties or not) at every stage of the complaint resolution process regardless of the outcome of those complaints.

This has led to a significant imbalance of power in favour of complainants in a scheme that has clearly set out to instead restore that balance.

Maintaining equality means allowing complainants to take responsibility for their complaints, similarly to the members they are complaining against. Otherwise, the presentation of AFCA's resolution process as being fair and equitable is little more than political show without substance.

Terms of Reference

Delivering against statutory objectives

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

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

1.3. 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?

RESPONSE 1 - Accepting Complaints without proceeding through Internal Dispute Resolution

The approach AFCA has taken to accept a complaint from a consumer means that a great deal of complaints that should not have been received by AFCA as the External Dispute Resolution provider are being submitted.

For example, a consumer may submit their complaint directly to AFCA without first going through the Credit Licensee's internal dispute resolution (IDR) process; and while the credit licensee has a right to reply to AFCA to advise if they did indeed proceed through their IDR or not, the case remains active with AFCA and is not closed.

This puts the Credit Licensee at a disadvantage and reduces their ability to negotiate terms where a third-party, who should not have been involved at all, is required to receive a report of the resolution and will not close the issue until the complainant confirms with them that they are satisfied.

The reason why this issue perpetuates is that there is a significant gap in the process as AFCA will accept a complaint without a copy of the final written response from the Credit Licensee.

As the committee would be aware RG271 (and its predecessor RG165) require complaints to be handled at IDR by the Credit Licensee and where no resolution has been reached, the Credit Licensee is to provide the consumer with a final written response and then the customer has the right to take the matter to AFCA. While the form to submit a complaint on AFCA's website does pose the question whether a final written response has been provided, there is no mechanism in place or requirement for the consumer to submit a copy of the final written response for AFCA to accept the complaint.

This omission would create a significant volume of complaints that AFCA would need to address and costs to manage this volume as each case is assigned to a Case Manager, clogging the system, and potentially taking resources away from serious cases. As published on the AFCA Datacube between July 2020 and December 2020, AFCA received 34,212 complaints with 17,097 (49.97%) of those complaints resolved at Registration and Referral stage (<https://data.afca.org.au/at-a-glance>) which essentially means that the complaint was resolved at IDR. AFCA do not publish if those complaints had received a final written response at IDR before the consumer submitted the complaint to AFCA, however, we would encourage the Director to have AFCA provide this information.

Many of our members report that the greater majority of their complaints, and in some cases all of their complaints, have not yet been through the members IDR process.

RECOMMENDATION 1

AFCA should be required to receive a copy of the final written response from the Credit Licensee before accepting a complaint and where none is provided the case should be closed immediately and the Complainant advised to contact the Credit Licensee.

RESPONSE 2 - Costs of a complaints raised with AFCA

The AFCA fees for a complaint being raised need to be redeveloped in line with the nature and amount of credit that was initially provided.

The typical contract value of consumer leases provided by CHERPA members is circa \$1000-\$4000.

When a complaint is registered to AFCA, a fee of \$100 is charged immediately whether or not this issue had been through the Credit Licensee's IDR process. For our members, this fee of simply raising the complaint with AFCA can be a considerable amount of the total contract value.

Should the complaint progress from Referral and Registration stage and move to Case Management this fee increases to \$890 and depending on the resolution can see fees more than \$3000.

Our members report, that it is simply not viable for them to allow any complaint to move to Case Management given the cost as they would lose money on the contract. This is regardless of whether they feel confident in their position or not as it is cost prohibitive to do so.

In CHERPA's view, the system should be fair and equitable for all participants in the EDR process. The cost prohibitive nature of AFCA to our members means that we are unable to be treated fairly.

RECOMMENDATION 2

AFCA fee structure should be fair and equitable to all AFCA Members to be able to participate and defend their position.

RESPONSE 3 – AFCA being used as a tactic for commercial gain

Our members report that there has been considerable increase in the use of AFCA by Credit Repair agencies who attempt to remove default and enquiry information from their client's credit history.

They report that the Credit Repair agencies are also aware of the associated costs AFCA charge when a complaint moves into case management and use this as mechanism to coerce our members to retract these listings.

This is despite the CHERPA member providing evidence that the Credit Repair's client was informed as per the requirements under the Privacy Act.

As illustrated above, our members are often forced to concede on these matters in the face of growing costs despite being well within their rights and having been through the appropriate processes to make such listings with a credit bureau.

It is the view of CHERPA that the use of AFCA as a commercial deterrent was not the intent of the dispute scheme. However, the ease of access to these schemes has created a method for vexatious claims to prosper as our members are left to foot the bill and there is no consequence to the Credit Repair agency.

RECOMMENDATION 3

AFCA should have the authority to redirect its fees and charges where a complaint is lodged by a firm representing the consumer (ie. Credit Repair firms), and AFCA has found in favour of the Credit Licensee, back to the firm representing the consumer.

CHERPA

By email

[Date]

Dear CHERPA,

We thank you for the opportunity to provide feedback in support our industry submission for the AFCA review. 1st Choice Rentals, as an AFCA member, would like to comment on the EDR process based on our experience.

All stages of AFCA's complaints handling, and decision-making the processes must accord with their principles of procedural fairness. The Principles state that AFCA will "consider complaints submitted to it in a way that is:

- (i) independent, impartial, fair,
- (ii) in a manner which provides procedural fairness to the parties
- (iii) efficient, effective, timely, and
- (iv) cooperative with the minimum of formality"

Their role is to assist consumers and small businesses to reach agreements with members about how to resolve their complaints. Their position is to be impartial and independent, and to not act for either party to advocate their position.

In our view the AFCA process places much more responsibility on the member than the complainant. In our experience, the EDR process is in effect weighted towards the complainant.

- The responsibility for time, all financial cost and compulsory reporting against the member are all borne by the member
- Determinations made by AFCA are binding only on the member and not on a complainant
- The complainant can ignore AFCA's requests for information and/or documents, and the complaint will progress

The automated nature of progression creates more revenue for AFCA but doesn't always achieve a fair outcome for the member. By allowing the scheme to continue in its current format, all responsibility falls to the member, and they are being penalised. The member can follow all instructions, respond to all AFCA's requests within their timeframes, bear the financial cost and the record against their name but if then the complainant fails to respond, there is no consequence for that. How does this result in "fair" outcomes?

We are increasingly seeing frivolous and opportunistic complaints that are used as an avoidance measure. Of the complaints received each year, a large number are closed because the complainant fails to respond. This supports our view that complainants are using the process as an avoidance mechanism rather than for genuine reasons.

In these instances, our reports show that following the requests of providing information to AFCA, results in cases progressing automatically, only then can they be closed due to no response. The onerous financial cost burden is weighted on us as members at each stage and applies whether or not the Complainant responds to AFCA and engages in the process.

AFCA specifies the time provided for a member to resolve a complaint, having regard to any applicable regulatory guidelines. If a Complainant does not respond to the member during this time, the member has no opportunity to resolve the complaint directly and the case progresses. The Complainant should have a level of responsibility to engage in the process. If they are not engaging, the process should cease until the member has been given the opportunity to complete their own IDR process.

AFCA should close any complaints for non-response, without charge and these complaints should be recorded separately and for AFCA internal purposes. Cases should not be able to escalate if the Complainant does not engage in the IDR process, or fails to respond to AFCA at any stage. These changes would support the principles of procedural fairness and protect the member (rather than punishing) when they are the only party committed to the process.

We consider that by not enforcing the requirement to respond AFCA is going against its own Principles. In the complaint scheme rules A.9.5 it states: "If a party to a complaint without reasonable excuse fails to provide information, or to take any other step required by AFCA, within the AFCA specified timeframe, AFCA may take whatever steps it considers reasonable in the circumstances: b) If the Complainant fails to comply with an AFCA requirement, AFCA may refuse to continue considering the complaint".

Managing AFCA claims is challenging for those of us in small business. We have learned that to successfully negotiate the scheme, and detailed knowledge of the AFCA system is required. An efficient policy-based approach is essential to avoid the pitfalls of the system. We have learned from experience that the current process does not encourage a platform for fair review. Members are not encouraged to provide information or attempt to defend their position. Instead members are encouraged to resolve as quickly as possible. This commercial stance equates to making settlements to avoid the process. We doubt the "fairness" of a system where members are cornered into making commercial decisions which include writing off debts and making generous settlement offers, just to push for the quickest resolution.

Small businesses like ours hold small value contracts. An average contract could be \$2000. When we consider the costs of an AFCA complaint (time/financial/reporting) and compare it the value of the contract, often, we are faced with the cold-hard fact that it isn't commercially viable to continue.

1st Choice would like to use the following case studies as examples of where responsibility lies and why we believe AFCA is one-sided in nature.

Case examples: -

Summary	Our action	Time cost	Financial cost	Reporting cost	Outcome
Client complained about repair process for a leased item	Member requested Rules review as not in AFCA jurisdiction N.B. client was not paying, and no payments have commenced to date	Detailed written responses provided to AFCA Case closed @ Case Management	Cost to member \$890.00	Reported on annual comparative reporting	Complainant failed to respond Cost to Complainant \$0.00
Client complained about default judgement obtained	Member requested Rules review as Court Judgement had been obtained but was not actively being pursued as client was without employment N.B. client was not paying, and has paid nothing to judgement debt	Case closed @ Case Management Case reviewed, AFCA confirmed that enforcement is within AFCA jurisdiction, but the Complainant failed to respond to AFCA	Cost to member \$890.00	Reported on annual comparative reporting	Complainant failed to respond Cost to Complainant \$0.00
Client complaint – breach responsible lending on finalised contract	Member provided evidence to AFCA maintaining no breach of Responsible Lending	Case closed @ Case Management Case reviewed, all documentation provided to AFCA, AFCA satisfied with response, but Complainant failed to respond to AFCA	Cost to member \$1855.00	Reported on annual comparative reporting	Complainant failed to respond Cost to Complainant \$0.00
Client complaint – declined hardship request	Member had provided hardship details to client, but client did not complete or contact to	Member was able to resolve directly with client after the initial timeline expired	Cost to member \$890.00	Reported on annual comparative reporting	Cost to Complainant \$0.00

	discuss. Client did not respond to member within the IDR timeline, AFCA escalated to Case Management N.B. client was not paying, and no payments have commenced to date				
Client complaint – declined hardship request	Member had provided hardship details to client, and client was waiting for approval for Centrelink payments. Member gave additional time to client to complete hardship application N.B. client was not paying, and no payments have commenced to date	AFCA escalated the complaint because the “timeline” to resolve had expired.	Cost to member \$855.00	Reported on annual comparative reporting	Cost to Complainant \$0.00

To make a further argument, we believe that AFCA is not the most effective or efficient medium that members could engage for external dispute resolution processes. Given the small value and the nature of our industry contracts, complaints would be better handled by NSW Fair Trading. They provide core dispute resolution services for smaller claims, and their processes designed to assist those with less resources or capabilities. The cost structure for NSW Fair Trading is constructed to handle small claims in an efficient and cost-effective manner compared to AFCA.

In theory the user-pays system is designed in part to encourage members to resolve complaints early in the internal complaint stage. The AFCA cost structure means that there is very little benefit for members in actively defending claims for less than \$10,000. This results in businesses being forced to make commercial decisions, based on the cost of the complaint process, rather than evidence or technical points of the law. There is no weight placed on a member having done “nothing wrong” but rather settling the complaint as quickly as possible with a consistent stream of small settlements which can represent a significant loss for members.

We request that CHERPA consider including our arguments when preparing our submission and contact the writer should further clarification be required on the points raised.

Kind regards,