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Director
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The Treasury
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Via email: AFCAreview@treasury.gov.au

1. The FBAA welcomes the opportunity to make a submission into the Review of AFCA, and appreciates the extension of time for submission as granted.

2. Our submission is informed by first-hand observations and from information provided by members about their experiences with AFCA.

3. We believe improvements can be made to AFCA to make it fairer for member firms being drawn through the process when they have done everything reasonable to try not to have that happen. The consultation paper uses the term "appropriately calibrated". It is our view that AFCA is not appropriately calibrated at this present time.

4. The FBAA supported a single EDR scheme. Where two EDR schemes existed previously, the FBAA received a greater amount of negative feedback against the Credit and Investments Ombudsman than against the Financial Services Ombudsman. It was perceived that of the two schemes, the Financial Services Ombudsman was a more mature scheme, more impartial and usually made balanced determinations based on sound factual and legal bases.

5. It was hoped and expected that the formation of a single EDR Scheme would deliver greater efficiency and consistency. This in turn could have relieved some of the pressure that members were feeling when faced with having to deal with an inconsistent and sometimes irrational EDR scheme. This has not been the outcome. What we did not anticipate through the formation of AFCA was the noticeable shift towards consumer advocacy. The role of EDR appears to have changed from umpire to advocate under AFCA.

6. Where EDR should be a neutral arbiter, AFCA is seen as strongly pro-complainant.

7. Some of the behaviour observed by AFCA is indicative of an advocacy body rather than a reactive dispute resolution scheme. AFCA conducted national roadshows and encouraged complaints. It was reporting weekly complaint statistics and celebrating high call volumes in the manner of an organisation aspiring to reach certain performance targets. The explosive growth of the EDR scheme undoubtedly caused resourcing and recruiting pressures which were clearly apparent in the inconsistency of decisions and the lack of qualified and experienced staff.

8. We found this behaviour very troubling for it is our perception, our expectation, that AFCA represents no one and everyone at the same time. AFCA should be reactive. It should hear matters brought to it but should not tout for business or celebrate complaint volumes.

9. One party should not be punished every time irrespective of whether they win or lose, however financial firms lose every time a matter reaches AFCA because of how party accountability and cost structures are administered.

10. In summary, the FBAA has concerns with how AFCA has performed to date. Our primary concerns are:

    a) AFCA is too consumer-biased and is not fair to both parties;

    b) staff members are not adequately qualified or experienced to be making some of the decisions they make;

    c) complainants are not required to establish a bona fide claim before financial firms are put to significant expense responding to a complaint;

    d) there is no way for a financial firm to bring a complaint to a close without delivering an outcome the complainant is satisfied with – regardless of how absurd or unrealistic a claim may be;

    e) AFCA fees are applied too liberally and financial firms are punished by the fee structure regardless of whether they have done anything wrong or not.

11. AFCA has too much power. It is empowered to decide complex issues with power to award financial outcomes exceeding the monetary jurisdiction of the District Court without being bound by rules of evidence and is not subject to any checks and balances.

12. EDR should exist to resolve simple, low dollar value disputes. Everything else should be adjudicated in the correct jurisdiction of the Courts. All that is happening by endorsing the AFCA regime in its current form is denying justice to financial firms by endorsing risk-free exploitation by disingenuous complainants or providing a risk-free pathway to entities that would otherwise have to engage legal advisors and bear the cost, and risk, of running a dispute to a truly impartial decision maker.

Yours faithfully

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The FBAA Submission

13. The Consultation paper is divided into three sections. The bulk of our submission relates to the first section which is whether AFCA is appropriately calibrated. Under this section we address the first questions in the consultation paper which are copied below.

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?

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

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?

Please provide specific examples or case studies to support your responses. These may be provided to Treasury confidentially with any personal details of complainants and case references numbers omitted.

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

14. The FBAA does not believe that AFCA is resolving complaints in a way that is fair, efficient, timely or independent.

15. In summary we believe that:

a) AFCA asks too little of complainants to establish a bona fide complaint then demands too much of financial firms to extricate themselves from a complaint;

b) Financial firms are charged regardless of whether they have acted appropriately or not;

c) There is no way to conclude a dispute without the customer "being satisfied" meaning financial firms have to keep increasing their offer or endure the full weight of the process and its fees;

d) Different entities are subject to different risks solely because they are AFCA members.

Fairness to all parties

16. Financial firms are often no more experienced or sophisticated than a complainant yet they are put to considerable lengths to prepare information to respond to a complaint.

17. It is our perception at present that AFCA will allow almost any claim, no matter how incomplete, incorrect or without foundation. Consumers are not required to present evidence or much of a case to answer before a member firm is expected to engage with them.

18. Complaints are often opened against financial firms where it is unclear what the financial firm is alleged to have done / contravened. In some cases it is not even clear if the financial firm is the correct party to the conduct yet they are still required to mount a response.

19. The moment a complaint is commenced, all rights of the financial firm are suspended. We have seen secured assets stolen and destroyed and lenders unable to enforce sizeable loans against secured property where the complaints are largely baseless and complainants have merely frustrated recovery for an extended period of time by exploiting the system.

20. In contrast to the amount of information the complainant needs to advance, the requests for information that AFCA serve on financial firms can be oppressive.

21. Most courts and tribunals have minimum requirements of probity and require a litigant to make an answerable case before another party is put to the task of mounting a response or a defence. If a person brings a baseless claim in court, the other party can move to summarily strike the matter out.

22. AFCA offers no such avenue which results in every financial firm dragged into a complaint incurring costs and the stress of dealing with a heavily pro-complainant system.

Example 1 – advancing a complaint without defining the contravention

A financial firm had a complaint opened against them on the basis that the complainant (who was merely lodging a complaint to avoid paying fees that had been agreed to) said they had provided misleading *financial advice*. The financial firm was a broker who had arranged a small commercial loan under difficult conditions. The loan was due to settle within days of the property settlement and the customer asked the broker via email if they could take funds from one account to settle on the property deal then reimburse that account with a new loan that was being settled shortly after. The broker said that would be fine. The customer then claimed the broker had provided misleading financial advice.

AFCA issued a notice on the broker demanding they explain how their email response to the customer's question about using money from one account to settle a deal was not *financial advice*. The broker had to seek professional advice to assist with their response. *Financial advice* is not a concept that exists in financial services laws or consumer credit laws. Financial services laws have financial products and *financial product advice* and the statement made by the broker was not *financial product advice*. Consumer credit laws have credit assistance and the statement made by the broker was not credit assistance. The ASIC Act did not cover it either. When AFCA was asked to clarify what it meant by "financial advice" it pushed past the issue to demand more information from the broker.

The broker incurred thousands of dollars of costs trying to understand what the basis of the complaint was and it was too technical a point for a layperson to grasp. AFCA never defined the concern beyond stating the complainant had complained they received misleading financial advice.

23. This complaint should never have been validated. What AFCA should have done was to identify a cause of action. It should have defined "financial advice". Instead it issued a directive to the financial firm to present to it an argument as to why certain conduct was not "financial advice", thereby implying that financial advice was a thing and that the member had given it and had engaged in misleading conduct in relation to it. The allegation made by the complainant that the financial member gave them financial advice was not even actionable.

Oppressive requests on financial firms to produce records

24. AFCA demands a lot of information from financial firms when a complaint is initiated. It sometimes takes firms many days to compile responses. AFCA also appear to use template/pro forma requests for information that request policies, procedures and documentation that bears no relation to the complaint.

25. **Appendix 1** contains an anonymised request that is representative of a first volley from AFCA and which puts financial firms to hours of work compiling a response.

26. In contrast, a complainant is not required to produce any documentation to substantiate a complaint. They are able to make vague accusations and allegations of verbal conduct with minimal detail.

    For example, if a customer alleges they were provided misleading information over the telephone, the financial firm is required to respond to the allegation by providing call recordings or file notes or detailed information from staff trying to prove it did not happen. Of course, where the alleged conduct never happened, financial firms are put to enormous work to try to adduce evidence to support their argument that no misleading information as provided. An allegation as simple as “you told me over the phone I wouldn’t have to pay those fees” blows up into a paper war for the financial firm that will ultimately be ordered to pay AFCA fees for the dispute regardless of whether a finding is made in their favour or not.

27. In respect of fairness, timeliness and independence, we see this an area that requires significantly more strategic assessment from AFCA. It is not fair that a financial firm should be subjected to demands for large volumes of material where complainants produce very little. Nor is it fair for financial firms to incur AFCA and professional fees defending against baseless complaints alleging oral misrepresentations.

28. AFCA’s current approach is that the moment a complainant has lodged information with it, regardless of how specious, it fires off a demand on a financial firm to produce volumes of information and to provide further information that effectively provides assistance to help AFCA define the complaint.

29. What AFCA should do is continue correspondence with the complainant until it is satisfied the complaint is valid, and the complainant has provided enough information that the financial firm can respond to it.

30. We are concerned there are elements impacting proper decision making by AFCA staff at a preliminary level including KEIs and a reluctance to put complainants to any trouble.

31. AFCA should be mindful of the impact its requests for information have on financial firms. These requests should be:

    a) Made only after a complainant has established a bona fide cause of action and produced some minimum amount of evidence that could assist AFCA’s determination and give the financial firm something to respond to;

    b) very targeted to only require the information AFCA has determined is required as opposed to the catch-all demands for information that are frequently made.

AFCA Fees are unfair

32. Financial firms are penalised every time a matter is lodged with AFCA. We recognise members are eligible to apply to have their fees refunded for 2 matters per year where AFCA finds 100% in their favour however:

    a) It is always open to AFCA to attribute some negligible element of fault to the financial firm to void their fee refund; and

    b) 2 fee refunds per annum can be eroded by one non-genuine complainant trying 2 times or soliciting others to make false complaints.

33. AFCA should never charge a financial firm fees where the financial firm has done nothing wrong. The cost to a financial firm should be zero. The cost of investigating and hearing baseless complaints should be absorbed by AFCA and not passed on to financial firms. There is no accountability for AFCA staff if they can levy fees from a financial firm to recover their costs regardless of how they act. If AFCA were required to absorb the cost of inefficiencies and allowing baseless claims to run, we believe AFCA staff would act more judiciously.

34. Additionally, AFCA fees should never exceed the amount in dispute. AFCA fees run into the thousands when the amounts in dispute can often be in the hundreds.

35. It is a topic of discussion among financial firms about what their financial threshold is for pursuing a complaint to AFCA. Sadly, for many firms they find it is more cost efficient to walk away from pursuing claims for amounts in the thousands of dollars rather than pursue a consumer and ris being drawn into an EDR claim.

36. It is a sad indictment on AFCA that firms are thinking this way. Both parties should be free to pursue their rights without fear of persecution and a truly neutral scheme would provide such a mechanism.

37. We see this as a very unfair but very realistic threat caused by the fee structure of AFCA and the lack of scrutiny applied to complaints (or perhaps the mindset that every complaint is genuine and must be fully heard).

    Example
    It is a very real scenario under the AFCA regime that a customer approaching the last few thousand dollars of repaying a loan can stop payments and demand the credit provider write off the balance. The credit provider's first response may be to say "no" but the customer then alleges a breach of responsible lending or claims they were given verbal information that varied the written terms of their contract (e.g. " you told me I wouldn't have to pay off the balance if my repayments were up to date"). What happens from there is a predictable path:

- The financial firm states it has a contractual right to recover the outstanding payments.
- The customer threatens to complain if the financial firm does not write off the outstanding balance as they feel they have already "paid enough".
- The firm declines to write off the outstanding balance and so the customer complains to AFCA.
- AFCA will accept the complaint. It will demand the credit provider's records. It will likely demand the credit provider's NCCP compliance documentation, policies and procedures and all correspondence with the customer.

- It will reassess the loan, applying its own responsible lending assessment methodology and not that of the credit provider.

- It may or may not agree the lending decision was reasonable.

- The AFCA staff member may have a personal view about the cost of credit and if they feel it is too high may be inclined to think the lender should offer a discount. The written disclosure in the contract is largely disregarded, particularly if the complainant alleges circumstances that call into question the reliance they placed on the written disclosure (e.g. they did not read it, were told it meant something different etc). Where it goes from here is:

    - If AFCA does not agree it will order further sanctions against the credit provider and will charge them fees ranging between $4,000 and $10,000 if the matter proceeds to an Ombudsman determination.

    - If AFCA does agree it will tell the complainant to make the balance of their payments. The complainant can simply disregard this and if the credit provider attempts enforcement action the complainant can lodge a new complaint to frustrate enforcement. After that is dealt with and the credit provider default lists the customer they can make a further complaint about the default listing.

    - If the financial firm defends the baseless allegation of breaches of responsible lending it will still get a bill from AFCA for between $4,000 and $10,000. It will have incurred its own internal staff costs and possibly external advisory fees. It will have been prevented from recovering from the complainant for a period ranging between months and years.

38. The above example is the reality that financial firms face every time they deal with a difficult customer. Firms should not fear enforcing their contracts or defending baseless allegations but they do. Because every single time there is a cost regardless of fault.

39. A financial firm should not have to waive fees or walk away from debts that are legitimately owed to it simply because the threatened cost of a customer complaint to AFCA will make pursuing the fees uncommercial.

40. The number of customers becoming aware that they can use AFCA to frustrate financial firms out of pursuing legitimately owed debts is growing. A number of organisations also exploit this.

41. The FBAA makes two proposals in relation to fees:

Proposal 1

AFCA should absorb the fees of every complaint that is determined in the financial firm's favour every year. The number of fee refunds should not be limited to 2.

Proposal 2

AFCA fees should never exceed the amount in dispute. If a dispute is over $500, a financial firm should not have to walk away because it is uncommercial to defend a complaint.

This second proposal to cap fees at no more than the amount in dispute would also encourage AFCA to be more realistic about what disputes they entertain.

42. We have been provided with examples of where AFCA 'hurries' complaints through the initial stages to more advanced stages of the process.

43. AFCA is conflicted because it charges substantially higher fees when pushing complaints through registration into case management conference, preliminary determination and ombudsman decision stages. Faced with escalating costs, this places additional pressure on financial firms to cut their losses and settle.

Example 1 – Commencing a new complaint and moving straight to case management conference

44. A finance company provided loans for customers buying interests in timeshare. A customer made a complaint about the product against the firm that issued the timeshare units. The finance company was not a party to the complaint. The complaint against the timeshare company had advanced to the case management conference stage. AFCA contacted the finance company to advise "omitted" to include the finance company at the outset but would bring them in as a party to the complaint at the case management conference stage. The financial firm was unaware of the complaint and had not been given any opportunity to respond to the complainant prior to being drawn into the complaint that was already on foot. The complaint was about the product and not the decision by the credit provider. Both parties were levied with fees.

45. AFCA and members are well aware of the financial pain points caused by the various fees levied at stages of EDR. AFCA is aware that it can encourage settlements by pushing matters into the next fee bracket.

46. It is unfair that hardworking AFCA members are forced to offer compensation to undeserving complainants simply because it is cheaper and less stressful than defending themselves with a reasonable expectation that they will be vindicated if shown to have behaved reasonably.

Unbalanced outcomes

47. AFCA delivered a report covering its first two years of operation to 31 October 2020[1]. The figures are quite shocking and do not reflect fair, impartial and balanced outcomes. We struggle to understand why a Scheme that promotes itself as providing fair, free and independent solutions to financial disputes would endorse statistics that show that 72% of complaints are resolved in favour of complainants or that more than $477.4 million has been extracted from members through AFCA's dispute resolution work.

48. This figure merely shows that financial firms are being forced to capitulate.

49. It must be remembered that most member firms will have already done everything they can to be reasonable and accommodate a complaint before it escalates to AFCA. Financial firms do not want to find themselves at AFCA. Members do everything possible to resolve complaints fairly and reasonably with customers. A statistic of 72% of complaints that make it to EDR being resolved in favour of the complainant does not suggest fair outcomes.

50. We have examples of members spending upwards of $100,000 defending claims that should never have proceeded. Once AFCA has initiated a complaint, a financial firm must do everything in their power to respond, defend and present cogent argument. AS indicated previously, some matters are complex and require a financial firm to seek external assistance / advice.

51. Where a complainant is unreasonable, they only need to keep saying 'no' to a resolution and AFCA will progress the claim to the next stage because their rules require it. At each stage the time and advisory costs mount for the member firm while the complainant risks nothing.

[1] AFCA Two Year Report. 1 November 2018 – 31 October 2020.

Asset finance – complaints regarding the goods

52. We have numerous examples of where a customer has financed an asset through an unrelated financier then had issues with the asset and stopped repaying their loan. We understand that customers frequently do not differentiate between the asset provider and financier.

53. It Is not uncommon for AFCA to draw more than one party into a complaint and levy fees against both parties. A common case is an asset financier and a broker. Where a customer raises a complaint regarding finance provided over an asset such as a motor vehicle, AFCA may draw in the broker and the credit provider and levy fees against each. Often neither party is aware of what the other is being told.

Example 2 - AFCA re-framing the complaint

A customer financed a motor vehicle and had mechanical trouble with the vehicle. They told the financier they did not want the vehicle anymore and told them to "come and pick it up". The financier informed the customer they were not the vendor of the vehicle and told them how to follow up an issue with the motor vehicle through the motor vehicle dealer and to contact the State Fair Trading Office.

The customer did not want to keep paying their loan and complained to AFCA. The original complaint identified mechanical issues with the vehicle as the cause of the complaint.

In the first telephone conference with AFCA the financier again stated it was an issue between State Fair Trading and the motor vehicle dealer.

The AFCA officer said they would accept the complaint as a responsible lending complaint against the financer because the customer has said they were not happy paying their loan when the car wasn't running and the financier should never have loaned them money to buy such a bad vehicle.

The original complaint said nothing about the conduct of the financer or anything about the lending decision. It was purely a complaint about the asset.

Example 3 – trying to include the financer

A second example from an asset financer. The customer complained about mechanical issues with the vehicle. They were directed to the appropriate regulatory authority and the dealer.

The customer complained to AFCA citing mechanical issues. AFCA allowed the complaint. The financier advised its role was solely that of the financer. AFCA asserted they "may be" a linked credit provider when they clearly were not. The financier was required to prove to AFCA they were not a linked credit provider and subsequently were charged AFCA fees. AFCA should have undertaken an inquiry at its own cost to determine whether the financer was a linked credit provider. This would have clearly shown the financier had no relationship to the motor vehicle vendor and they should not have been drawn into the AFCA complaint.

The credit provider had done everything it could to help the customer and had done nothing wrong yet still incurred AFCA fees.

AFCA saw the financier as a soft target and believed it could leverage an outcome for the complainant. The conduct of the AFCA staff member was inappropriate but the financial firm had no genuine recourse against their conduct. The most efficient pathway was to help the AFCA staff

member arrive at the correct conclusion and release them from the complaint then incur the AFCA fees for doing so.

Asset finance and AFCA intervention preventing action to preserve the asset

54. Examples provided to us also include instances where financial firms have obtained orders from the court to repossess property but have then been directed to cease further action by AFCA.

Example 4 – interference with proper recovery action

55. In one case a customer had stopped servicing a motor vehicle loan for several months. When the financer took steps to enforce the contract, the customer complained to AFCA and continued to use the vehicle for many months while the complaint was going through its processes. The complaint was baseless and was ultimately dismissed. The financer obtained a court order to repossess the car. On the day the police and court sherrif were on site and the repossession order was being executed, the complainant called AFCA and lodged a new complaint. An AFCA staff member immediately contacted the financer and directed them to cease enforcement action. The basis of the complaint was identical to the already dismissed complaint. The AFCA staff member demanded to see a copy of the court order and insisted the vehicle remain with the complainant while they considered the complaint, the court order etc.

    In this situation, having obtained a court order, AFCA should have allowed the repossession to proceed and should have dealt with whether the conduct was appropriate after the fact. The financer had been attempting to enforce the contract for more than 12 months and had taken appropriate steps through the Court. AFCA should not have interfered on such limited information as a verbal complaint yet the staff member insisted it was their mandate to do so.

    Over the period the customer had been able to frustrate recovery of the asset, they were not paying for it and had mistreated it to the point where it no longer had any value. The financer was prevented from taking action in a more timely manner to protect the asset. There was no downside risk to the customer of acting inappropriately while the complaint process was being drawn out.

    Once the asset was recovered and was in such poor condition it could not realise enough to discharge the loan owed by the customer the financer could see the folly of pursuing the customer for arrears or default listing them. That customer defaulted, did the wrong thing and exploited EDR and was rewarded with the free use of the vehicle, a clean credit record and was able to apply for finance with other financers without those financiers being correctly informed about the credit risk they were taking on.

    Only a pro-consumer attitude could hail this as a good outcome. The fair result would be for the customer to pay what they owe or be default listed for not doing so. They should have incurred some cost for wasting the time of AFCA and the financial firm. The financial firm should have incurred no cost because they did nothing wrong. The customer's credit record should serve as a warning to future lenders of the true credit risk they would be taking on.

Example 5 – AFCA preventing action to preserve the asset

In another matter a financer was attempting to repossess the vehicle from a customer in Queensland who had ceased making payments on their loan. The customer lodged a nonsensical complaint with AFCA. No merit review was done of the complaint, instead the usual process of issuing letters and requests for information from the financer was undertaken.

The financier provided their first response which was a simple case of them saying they provided a loan, the customer stopped paying, they contacted the customer to try to make suitable arrangements and got nowhere. After weeks of the customer not responding to further requests, AFCA closed the complaint. The customer had driven the vehicle to Western Australia and abandoned it there.

56. We recognise there must be a balance between the rights of the parties, however the current rules are too imbalanced. The moment a customer makes a complaint, AFCA dives into putting the financial firm to proof, assesses the lending decision, reviews all of the correspondence to the customer including everything that may have been exchanged over the life of the loan and approaches every situation from the perspective that the financial firm has does the wrong thing unless their records are good enough to exculpate them. They prevent secured creditors taking reasonable steps to secure assets or permit unreasonable interference with minimal checks and balances.

57. This is not the process of a balanced, impartial arbiter but that of consumer advocate.

58. There have been instances where AFCA staff have made serious errors of judgment. From a members perspective, when going through an AFCA dispute there is no pathway out other than to endure until a complaint reaches its natural end or until it is withdrawn. Any objection directly to the staff member is simply rejected and firms cannot seek a review of that staff member's conduct.

59. Where the consequences of poor judgment from AFCA staff are evident, financial firms have no place to take their concerns. They are simply dismissed.

60. There needs to be more accountability for sloppy, lazy, parochial or outright poor conduct by AFCA staff members. Currently there are absolutely no consequences and no avenue for financial firms to pursue even though AFCA is purportedly acting in the interests of both parties.

Example 6 – AFCA allowing bogus complaint without conducting probity checks

61. A disgruntled client told a relation who they had referred to the same financial firm to complain. A financial firm assisted the first customer with a small commercial matter. The customer was disorganised, provided the wrong dates and caused delays. They ultimately did not use the financial facility they engaged the broker to obtain on their behalf. The broker had done considerable work to secure finance for the customer and raised an invoice for their fees. The customer said they would pay then subsequently did not. The broker obtained a court judgment for payment of the fees. They then issued a statutory demand to recover the unpaid fees. The matter was commercial but the financial firm also provided services to consumers and was an AFCA member on that basis. The customer lodged an AFCA claim citing the broker had provided misleading "financial advice". The broker had to postpone court proceedings.

62. AFCA directed the broker to produce a detailed chronology of every record, every point of contact had with the customer over a 6 month period. The complainant merely said "you gave me misleading advice".

Customers are not accountable

63. When a complainant does not provide the complete truth or worse, blatantly lies, there are no consequences.

64. Most customers are honest and do the right thing, but then weaknesses in any system are not exploited by the honest people but those with ill intent.

65. Many disputes that end up at EDR get there because customers are being unreasonable or untruthful. Financial firms incur thousands of dollars in costs even if they are ultimately found to have done nothing wrong or if the complaint is judged non-genuine.

66. No licensee wants to go to EDR to receive a binding determination that they pay what they already knew they should and to then receive a bill from AFCA for thousands of dollars on top.

67. AFCA should not be seen as free hit for consumers to increase their offer or try to put one over on the financial firm yet it is seen by some as exactly this.

68. A high percentage of AFCA disputes resolve in favour of the complainant before proceeding to a determination, where the percentages reverse sharply. We have heard reports from members about complainants openly admitting in case management conferences that they only made a complaint to check if the offer they originally got from the financial firm was fair or to see if they could get a better offer. AFCA fees for reaching the case management stage exceed $1,000.

69. No financial firm should have to pay AFCA fees where a customer is merely trying to better their previous offer or is seeking a second opinion about the offer that has been made.

70. AFCA would be well aware of this type of behaviour but does not need to do anything about it presently because it is being paid by the financial firm to allow such matters to proceed.

71. We understand that EDR must be accessible and that there is no appetite to introduce any consequences which could disincentivise people from bringing a complaint. For this reason it is seen as repugnant to consider charging fees or penalties to complainants when their conduct is poor.

72. There must be some consequence for complainants lying to AFCA or running a complaint to see if they can get a better deal.

73. The FBAA is supportive of further exploring what options can be found to address untruthful, misleading or opportunistic behaviour.

74. At the very least, the cost of this conduct should be absorbed by AFCA and not passed on to members.

75. A common issue is dealing with claims of “verbal representations”. A complainant merely needs to say the financial firm told me XYZ before AFCA opens a complaint and puts the financial firm to proof.

76. Proving that a certain thing was never said or done is challenging and often times almost impossible. If a business uses call recordings the complainant can simply assert the recording was switched off.

77. A large proportion of AFCA members are hard-working small businesses. AFCA does not appear to distinguish between small and large firms. A few thousand dollars here or there is treated as a cost of doing business yet an AFCA award to pay non-economic loss coupled with hearing fees can quickly amount to a month’s income for a small business.

EDR notification

79. Licensees are required to advise customers that if their offer does not resolve their dispute to their satisfaction, that they can complain to AFCA and that it is a free service.

80. We understand the actual issue is outside the scope of this review. It does tie in against the issue of correctly managing customer expectations. We believe the wording of that notification is creating a misleading impression for some people. Many customers do not differentiate between a right to challenge an offer through EDR and consequence-free right to obtain a better offer.

81. We believe many customers think that if they want a better offer than the one made to them by the financial firm they should ask AFCA. The moment they do that, a financial firm is looking at AFCA costs into the thousands. Realistically a financial firm would struggle to withdraw an offer once made even if AFCA were to find in the financial firm's favour because a complainant will just keep on chipping away. AFCA applies pressure to financial firms to settle and to offer something to a complainant to placate them.

Fairness

82. The AFCA regime as it presently stand is unfair. It is unfair for 2 primary reasons.

83. Licensees cannot extricate themselves from a complaint once it is laid without either offering a settlement the consumer is willing to accept or travelling through the complete AFCA decision making process which will cause them to incur AFCA fees ranging upwards of $3,000 and time cost and professional advisory fees of many time this amount.

84. A simple solution to this is to cap a licensee's AFCA fees to no more than the amount in dispute. If a customer disputes a small amount, for example $500, a licensee should be entitled to defend that complaint, risking no more than the amount being contested. Presently licensees are being forced to walk away from amounts they are validly entitled to where EDR is threatened.

Awarding compensation for non-financial loss

85. AFCA liberally awards an amount to complainants for non-financial loss, even in cases where the determination is in favour of the licensee. Usually the amount is $3,000 with a maximum of $5,000 that can be awarded. This is a material sum of money for small firms.

86. We are aware of awards of non-financial loss being ordered for a wide range of issues. It has become something of a 'tax' on member firms or a consolation prize for complainants who are unsuccessful with their claim. We have heard of awards for non-financial loss being made in situations including:

    a) the complainant didn't like the way a staff member spoke to them saying they were rude or abrupt;

    b) the complainant was distressed by receiving correspondence from the member firm where such correspondence comprised a statutory notice using prescribed wording such as a notice of default or demand for payment or notification of intention to default list debt;

    c) the complainant was upset by having their vehicle repossessed;

    d) the complainant found the whole complaints process stressful and upsetting;

    e) the licensee made a relatively minor misstep - for example sending a system generated notice to a customer after a complaint had been lodged with the EDR scheme which AFCA

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then labels as enforcement action. AFCA should address this with nothing more than an apology. Awarding non-financial loss in the thousands of dollars is unfair.

87. AFCA's own guidelines state " In particular, we do not award non-financial loss compensation merely because the Complainant has suffered some inconvenience and anxiety. We expect Complainants to be moderately robust and to bear the normal degree of inconvenience experienced when a problem occurs and to take reasonable steps to manage the situation"[2].

88. We disagree that AFCA adopts this guideline. AFCA frequently dispenses non-economic loss awards and it is a source of enormous frustration for members. In particular, AFCA has a track record of awarding non-economic loss to complainants where they find in favour of the financial firm. The non-economic loss amount is dispensed as a consolation prize to the complainant.

89. In our view, it should be rare to award non-economic loss. It should only be awarded for particularly deliberate or egregious behaviour and should never be awarded against a financial firm when it is shown they have done little wrong. If a determination is substantially in favour of the financial firm it should not come with a sting in the tail in the form of an award against them for non-economic loss.

What should the settings be?

90. We want a fairer, more balanced regime for all parties. The consultation paper uses the term "appropriately calibrated". It is our view the Scheme is not appropriately calibrated.

91. The regime is unfair. Licensees cannot defend themselves against small amounts and bogus claims because the cost of AFCA fees and external advice quickly runs into the thousands of dollars. This in turn imposes a commerciality threshold on all disputes whereby a licensee loses less money to offer compensation to a consumer regardless of fault to save time and money.

92. AFCA staff are unapologetically pro-consumer and there is nothing a financial firm can do to escalated concerns over the attitude displayed by a particular staff member.

93. Customers need to be accountable to for providing misleading or untruthful information. Regardless of whether a customer is aggrieved, under financial pressure or has poor recollection, there is no excuse for providing false or misleading information to AFCA yet licensees report enormous frustration trying to adduce evidence to prove that a certain thing did not happen or that it happened very differently to that asserted by the customer. Misleading the Court it is perjury. Giving false statements to a regulator such as ASIC carries heavy penalties and providing misinformation to police is an offence. Under a154 of the National Consumer Credit Code, a consumer may be liable for providing false or misleading information on a matter that is material to a decision to enter into a credit contract and it is a defence for a person who proves they reasonably relied on such a representation yet we have never seen nor heard of this section being invoked to deny a customer compensation or to assist a credit provider that has reasonably relied on misleading information provided by the customer.

Example 7 - Customer using AFCA for leverage

A financial firm inadvertently sent a letter to one customer containing some details of another customer. The second customer could not be identified from the information but the letter did contain information about their account conduct.

The recipient of the information contacted the financial firm and advised the information in the letter was related to a different account. The financial firm contacted the second customer and advised that

[2] AFCA Operational Guidelines 2021, p160.

some of their account information had inadvertently been included in a letter sent to another person in error but that no identifiable information had been shared.

The second customer demanded compensation. The financial firm offered an apology. The customer demanded more and threatened AFCA. When the financial firm asked the customer what they considered reasonable compensation the customer stated they were about to take an overseas trip and demanded the financial firm upgrade their airline tickets from economy to business class for 2 passengers. The financial firm declined and the consumer lodged a complaint with AFCA. The financial firm ultimately resolved the dispute for the payment of more than $500 – for a minor error where no loss was caused. The firm also incurred AFCA fees.

Example 8 – Customers threatening AFCA for unreasonable demands

94. A finance broker was contacted a by a customer they helped obtain a loan in 2006. The last record of contact the broker had with the customer was 2008. The customer said the broker had failed to contact them or negotiate better rates over the life of the loan and that they could have saved money on interest.

95. The broker had to provide a fulsome response to the customer. If the customer is dissatisfied by the response they may still lodge a claim with AFCA and the broker will be charged fees for as far as the customer wishes to push the complaint.

AFCA departure from the law

96. AFCA is not bound by rules of evidence or the law and can make determinations to produce outcomes that are “fair and reasonable in all the circumstances”.

97. It should only be in be exceptional circumstances that AFCA would depart from the law and should choose to apply a different outcome in the interests of fairness however it seems quite common.

98. The difficulty with this is that financial firms base their conduct around accepted industry practice and in compliance with the law. Laws exist to provide certainty and boundaries.

99. It creates a great deal of uncertainty for businesses where they can comply with the law but still be subjected to adverse findings by AFCA against some unwritten standard or expectation. AFCA is holding financial firms to standards of conduct which are not legal requirements.

100. We have numerous examples of where AFCA has held business to compliance with laws that did not come into existence until after the relevant conduct occurred or which are higher than the legal requirements.

101. One financial firm was the subject of a complaint over 3 contracts with a customer in 2008, 2012 and 2014. Two of the three contracts were offered at a time the business offered a product that was exempt from the responsible lending obligations. The complainant was coached by a consumer advocate. The complainant alleged breaches of responsible lending across all three contracts.

102. In the course of corresponding with the financial firm, AFCA made references to specific paragraphs of RG209 that were not included until the 2014 revision of the guidance. The financial firm pointed out that a) ASIC guidance was not the law and b) the specific references used by AFCA did not come into existence until after the conduct had occurred.

103. AFCA simply brushed aside the financial firm’s submissions without addressing the points about the entity being exempt from the laws or the fact that they were quoting and axiomatically

applying expectations of conduct that were not established until well after the conduct occurred. AFCA found the financial firm should have approached the credit contracts from the same perspective as responsible lending regardless of whether the laws applied or not. Clearly such an approach is nonsensical for a firm could not act in a manner consistent with standards that were not yet developed when the conduct occurred. It was clear the AFCA staff member was only capable of assessing the conduct against the framework they had been given and that framework was developed under a different set of expectations developed at a time much later than when the conduct occurred.

On the financial firm's analysis the customer could service. AFCA conducted a different analysis and decided they could not. In reaching this decision, the AFCA staff member had made their own assessment of serviceability using different capacity thresholds. The decision appeared pre-meditated so the submissions of the financial firm were dismissed.

104. The above example should not be dismissed as a "one-off". We have received considerable feedback from members that AFCA is incapable of assessing a matter against the standards and laws that existed at the time the conduct occurred and they instead choose to apply the current standards. Where accepted standards may have been lower or less well-developed at a point in time than they are now, AFAC staff use the excuse of saying that a firm should have known what was appropriate even though the standard applied is a much more evolved interpretation of the rules that existed at a particular point in time.

105. Financial firms are having the conduct they engaged in as far back as 2008 assessed against 2020-2021 standards and it is preposterous.

The unfair treatment of members offering unregulated products and services

106. Entities that are members of AFCA are at a significant disadvantage to competitors that are not AFCA members.

107. Take the example of two firms engaging in exactly the same commercial activity. One firm is an AFCA member because they also offer consumer credit and are required under their Australian Credit Licence to be a member of AFCA. The other firm only offers commercial credit and is not a member of AFCA. The firm that is a member of AFCA is at an unfair disadvantage because a commercial dispute that is excluded from the jurisdiction of AFCA for the non-member firm is not excluded for the member firm even though the activity in question is not regulated under the NCCP and would not give rise to a customer bringing the matter to AFCA.

108. It has happened on multiple occasions that AFCA has entertained complaints against a member relating to services/activities that would not require the member to hold a licence or be an AFCA member.

109. If the AFCA regime were fair, it would apply equally to all entities offering the same services and products. A firm should not be liable to have to respond to a complaint brought against it for an activity that would not require it to hold AFCA membership were that the only service being provided.

110. There are clear policy reasons for excluding disputes involving commercial activities.

111. AFCA involves itself in complex and commercial matters that should be remitted to the courts.

112. AFCA must change this practice. A financial firm should not have a matter that would ordinarily be excluded from consumer EDR brought under AFCA merely because they are licensed to also offer consumer credit.

113. AFCA should confine eligibility to activities engaged in by the financial firm for which they are required to hold EDR membership. If the activity would not require them to hold EDR membership then complaints relating to it should be excluded.

114. A clear policy reason for this approach is that many commercial matters are complex and parties should be entitled to the protection of proper procedure and the rules of evidence yet they are denied this when matters are muddled through a scheme that was never conceived for such a purpose.

AFCA inventing new standards of conduct

115. Where AFCA does entertain commercial disputes against consumer credit licence holders, it applies a proxy for responsible lending under a little tested provision of the ASIC Act.

116. Section 12ED(1)(a) of the ASIC Act states "In every contract for the supply of financial services by a person to a consumer in the course of a business, there is an implied warranty that the services will be rendered with due care and skill".

117. We have seen requests from AFCA for small business complaints where AFCA has requested the financial firm provide information about how they had assessed the complainant's ability to service the proposed credit contract. The requests closely follow the records one requires to demonstrate compliance with the responsible lending obligations.

118. We have seen determinations where AFCA has asserted that a commercial lender can only demonstrate that they have rendered their services with due care and skill by having conducted a serviceability assessment of a commercial borrower in a manner that closely resembles that of an assessment of unsuitability required under consumer credit laws.

119. Commercial lenders take a very different approach to making a lending decision when compared to the very prescriptive nature of consumer lending. The records they obtain and the assessments they make cannot be compared to consumer loans. Furthermore, there are no requirements on commercial lenders to create the type of records AFCA insists on seeing when assessing complaints relating to commercial loans.

120. This approach by AFCA began to emerge around 18 months ago. More than one member had meetings with AFCA in early 2020 and flagged concerns with AFCA inventing an entirely new standard then holding businesses to it - even retrospectively.

121. AFCA's response was to 'welcome the feedback' and stated "We are continuing to develop our approach to complaints about inappropriate lending for small business and we will be undertaking targeted consultation in due course."

122. Such consultation has never taken place. AFCA continues to make decisions applying this novel approach to commercial lending and members are bound by the decisions. AFCA is making awards against commercial lenders because it determines that it cannot see where the lender conducted a serviceability assessment that AFCA finds acceptable even though there is no responsible lending equivalent for commercial lending assessments and a lender is under no legal obligation to record how it assesses a commercial borrower's capacity to service a proposed credit contract.

123. AFCA is in effect holding commercial lenders to an unwritten standard of lending practice and can apply it or choose not to apply it any time it wishes. There is no transparency, no consistency and no fairness in this approach.

124. AFCA has also indicated a disposition to apply the concept of unconscionability to any fees, charges and interest rates that it decides are too high. There is no benchmark, no guidance on this. Just AFCA inventing new standards and contorting complex legal principles such as unconscionability to defend a personal decision of the AFCA decision maker.

125. Unconscionable conduct is a complex concept that has previously been the domain of the Courts to rule on. The test for what determined unconscionable conduct was for a long time a test developed by the High Court of Australia under the decision of *CBA vs Amadio*. Where it was once understood as conduct where one party took extreme advantage over the other party that was suffering under a 'special disadvantage' such as a mental illness, language barrier or some other material barrier to their understanding, AFCA seems comfortable labelling conduct unconscionable for situations far more benign than a special disadvantage including where fees and charges were high and where customers were disengaged with the terms and conditions of a contract

In our view, issues such as determining unconscionability or misleading and deceptive conduct are beyond the capability of a scheme such as AFCA and should be referred to the Courts.

Question 1.2 - Systemic Issues

126. AFCA has a systemic issue division. The fees charged by AFCA for conducting a systemic issue investigation are excessive. AFCA usually directs the financial firm to conduct most of the work to address a systemic issue concern. AFCA approaches systemic issue concerns on the basis of putting the financial firm to proof that an issue is not systemic (i.e. you have done it once. Prove that it is not systemic). Such an approach is exhausting and requires financial firms to compile large volumes of records and undertake significant analysis only to conclude they have been unable to find further instances of a particular issue. AFCA has determined that it may commence a systemic issue investigation into any matter it chooses, even where there is no evidence of something having happened more than one time.

127. AFCA charges financial firms many thousands of dollars, upwards of $15,000 for conducting a systemic investigation. The fees involved are only loosely pegged to the amount of work undertaken and smack of revenue generation. AFCA is able to boost its revenue through systemic investigation fees.

128. This is not an "appropriately calibrated" position. A more appropriate position would be that AFCA must have evidence of the conduct in concern having occurred more than once before initiating a systemic issue investigation. Such information could come through having received more than one complaint in relation to that conduct against the same entity. It is unreasonable to subject a financial firm to a systemic issue investigation where they have had a single matter brought to AFCA.

Systemic issue actions – Example 1

129. A financial firm had a former employee who had listed serious credit infringements on the accounts of three customers. One customer complained. The financial firm reviewed the listings and found the SCI should not have been listed on one of the files. They removed the SCI and apologised to the complainant.

130. AFCA commenced a systemic investigation on the basis that other employees may not have complied with the relevant rules and timeframes for default listing customers. AFCA directed the financial firm prove that no other default listing breaches had occurred. AFCA had no information before it to suggest there were other instances. The original issue was clearly explained as the act of one employee who had not followed written procedures and the three listings made by that

employee were removed from the customer's credit files even where the listing may have been correct for two of them.

131. The financial firm had a written policy that clearly set out its usual approach to default listings and that policy demonstrated the financial firm had an awareness of the relevant requirements and timeframes.

132. The financial firm was required to go through more than 80 files where customers had been default listed and provide information about the date certain notices were given and when they were listed. No further issues were identified. AFCA issued a bill for $7,000 to the financial firm.

Systemic issue actions – Example 2

133. AFCA notified a financial firm of its determination of a definite systemic issue in relation to the way the financial firm assessed consumer capacity to service a proposed credit contract. The approach employed by the financial firm was the same as the approach (with minor differences) used by its competitors.

134. AFCA took it upon itself to impose a new standard of conduct for assessing capacity and then suggested the financial firm was falling short of its newly created standard thereby creating a systemic issue.

135. The financial firm sought top-level legal advice which when presented to AFCA was summarily dismissed with no further argument or justification. AFCA did not have to provide any reasons other that it did not concur.

136. AFCA was in a position whereby it could disregard all arguments put to it and make a binding, systemic issue determination that had questionable foundation that could have:

    a) imposed a different standard of conduct on one credit provider in a marketplace where many others were engaging in exactly the same conduct; and

    b) made a decision with financial implications running in to the tens of millions of dollars for the impacted entity.

137. Such a decision should be the sole domain of the Courts where parties have the opportunity to present legal argument and where the decision makers are suitably qualified. Parties have a right of appeal against a decision.

138. AFCA discontinued the systemic investigation in May 2020, only because of the impact of the ASIC v Westpac judgment that was handed down in August 2019 where the responsible lending obligations on a credit provider were examined in detail. The court decision supported the position advanced by the financial firm that its processes were in line with acceptable practice. The cost of defending against the unfair systemic issue determination was a six figure amount.

139. This second matter was beyond the capability of AFCA. It is of concern that AFCA could simply declare a practice to be systemic non-compliance when it is something so subjective or technical that it requires legal argument to define.

140. Under the current framework, a financial firm has no recourse against an AFCA decision. It cannot appeal a binding determination. It has no assurance that cogent legal argument will change the opinion of an AFCA action officer (or decision-making group) and has no transparency of the basis upon which such a decision could be made.

141. What if, instead of ASIC taking Westpac to court over its concerns relating to Westpac's approach to responsible lending assessments, AFCA had addressed it through a systemic issue

investigation? How would Westpac have prevented AFCA's systemic issue investigation? How could Westpac appeal a finding by AFCA that Westpac's approach was not adequate? What would prevent AFCA from disregarding any and all arguments put to it by Westpac's legal team?

142. While it is unlikely something such as this might happen against an entity the size of Westpac, it happens against small financial firms on a regular basis and there is nothing they can do about it.

143. AFCA needs to have stronger justification to commence a systemic issue investigation and must at the very least have evidence of an issue having occurred on multiple occasions. We acknowledge that errors embedded in systems that would replicate an error out over multiple customer accounts etc would still be justification for systemic issue investigations.

144. In our view the threshold for AFCA commencing a systemic issue investigation is far too low and is unfair.

Question 1.3 – Do AFCA's funding and fee structures impact competition?

145. As a body that represents more than 10,000 individuals and small firms our response to this question is a resounding yes.

146. AFCA fees for case management conferences and hearing fees are inconsequential for large entities such as large licensee groups and ADIs. The reality is you could probably never make the fees high enough to cause the sort of detrimental impact that AFCA fees have on small business and single person businesses.

147. The individual fees of an AFCA dispute can materially impact the profitability of a small business. We have made our submission points elsewhere about the cost of individual disputes, the tension created by the prospect of incurring AFCA fees versus capitulating to a questionable complaint and the impact the non-financial loss 'tax' AFCA appears pre-disposed to award to complainants for 'having a go'.

148. The costs of EDR should be proportionate to the size of the business and the size of the dispute to enable businesses to fairly defend against a complaint.

149. As it presently stands, a single business making $50,000 faces the same costs as a Big 4 bank. This clearly is not right.

Question 2 - Monetary jurisdiction in relation to primary production businesses

150. 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, including agriculture, fisheries and forestry businesses remain adequate?

151. The FBAA makes no submission against this question.

Question 3 - Internal review mechanism

3. 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?

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

Internal Review Mechanism

152. The FBAA has no firsthand experience with seeking an internal review of the standard of service provided by AFCA in resolving complaints.

153. We note the statistic reported in AFCA's annual review that 86% of complaints are not upheld or are resolved with an apology[3]. This suggests the current process is ineffective or largely a waste of time. Financial firms have already committed significant time and money to going through the EDR process and are likely to be discouraged from investing further time or money seeking a review of any aspect where it won't change the outcome and is likely to be dismissed or addressed with an apology.

154. We strongly support a mechanism to review the merits of AFCA decisions. At this point in time there is little transparency or accountability against AFCA staff. What experience and qualifications are staff required to have?? Who reviews their decisions? What are the consequences for staff making poor decisions?

155. Financial firms are vulnerable to poor decisions. Some seemingly very poor decisions have been brought to our attention and without an external review mechanism or ability for a financial firm to challenge such decisions there is nothing to give financial firms protection.

156. If little more comes out of the review of AFCA, it would be a significant improvement if the unfair fee structure were addressed and decisions were to be reviewable.

[3] AFCA 2019-2020 Annual Review p88.

Appendix 1 – Example of initial questions put to financial firm by AFCA

1. Member's substantive response to the complaint.

2. Please provide a detailed time line of events in relation to the loan since it was established [4 month period].

3. The account contract for both loans and applicable terms and conditions.

4. Contact, file, or system account notes from [6 month period] until present.

5. What happened at settlement for property 1, provide a copy of the settlement statement.

6. In your email dated dd-mm-yyyy you advised complainant to "use the money that's now in your account to settle the purchase of property 1". Can you please explain your position about how this is not financial advice and comment on complainant statement that Member failed to take into account the use of these funds was contrary to the prescribed purpose of the Lender's loans.

7. Please provide a response regarding complainant's claim that Member made misrepresentations surrounding the use of the funds from the construction loan to settle the purchase of property 1?

8. A copy of all correspondence between Member, complainant and legal adviser including the e-mail to complainant on dd-mm-yyyy.

9. Any additional information you would like AFCA to consider.

10. Is Member willing to make any offer to resolve the complaint at this time? If so, provide details of any offer Member is prepared to make.