

**SUBMISSION PROVIDED BY THE  
FINANCE INDUSTRY DELEGATION  
TO  
THE REVIEW OF THE  
AUSTRALIAN FINANCIAL COMPLAINTS AUTHORITY**

To: AFCA Review Secretariat  
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## Introduction

This outline submission is presented on behalf of the Finance Industry Delegation (the Delegation), a representative entity supported by 187 small, medium and large Australian Credit Licensees - credit providers, broker and lessors - across Australia, all of whom face an ever increasing and onerous burden of compliance regulation. All are mandated members of AFCA.

Notwithstanding the contents of this submission, the Delegation has developed a very good working relationship with several of the senior management at AFCA, including the CEO and Ombudsman and the Deputy Ombudsman.

We do not have any complaints concerning access, or the opportunity to participate in consultation with AFCA. We appreciate the courtesies extended and recognise that many of the issues raised in this submission go to Government policy and are not within the purview of AFCA to address.

However, they are within the purview of Treasury to address during the current review process, and present recommendations for change to the Ministers involved. It is unfortunate that the review's Terms of Reference are so narrow.

It must be remembered that AFCA was established in great haste and numerous inadequacies were ignored or adopted that now deserve elimination or modification.

Treasury requested consideration of case studies. To include case studies in this submission would breach Treasury's demands for a brief submission. If requested, we have them available for direct contact by the Treasury Secretariat.

The writers not only coordinate the Finance Industry Delegation, but also conduct one of Australia's busiest compliance consultancies that is constantly addressing AFCA complaints, in an effort to advise nearly 100 credit provider clients on appropriate responses to AFCA communications. One of the writers also relatively frequently meets or has telephone contact with senior AFCA officers on a constructive 'as needs' basis, either as a compliance adviser or on behalf of the Delegation.

## General concerns

The Delegation makes this submission reflecting on a background of participating in government and parliamentary consultation processes since 2001. This is the writers' 59th submission on behalf of the non-bank lenders, brokers and lessors who support the Delegation, and on behalf of the industry sector as a whole, with most of the submissions being far more substantial and detailed. As a result, the Delegation provides this submission with the following general concerns:

1. Treasury's preference for a maximum of 4 to 5 pages would indicate that the Department is attempting to restrict information flow to the review process.  
This restriction makes it impossible to accept Treasury's invitation to provide case studies, while still listing all the areas of concern.
2. The limitations in the terms of reference imply a limited review - not a general review, as is required.
3. There is no indication of public hearings, stakeholder consultation meetings and the like.
4. Following the departure of the very professional Mr Christian Mikula as the senior Treasury officer co-ordinating the 2011/12 amendments to the National Consumer Credit Protection Act consultation process, which provided substantial and very fair opportunities for all stakeholders to participate, such a model has not been adopted by Treasury in its "consultation" efforts associated with any proposed further amendments to the National Consumer Credit Protection Act, or in regard to this review of AFCA .

5. The Delegation fears that this limited process and apparent disinterest in non-bank finance industry views is now entrenched as part of Treasury's culture.

In providing this outline submission we trust that, by its conduct of this review, Treasury will show the level of integrity and professionalism that existed in its review/consultation activities associated with non-bank credit in the period 2008 to 2012.

If the review process is to later include opportunities to present as a witness, or participate in consultation meetings, the Delegation would be more than pleased to be involved.

### **RESPONDING TO THE TERMS OF REFERENCE**

Please note, where it appears that Treasury have asked 2 or more questions in the one subsection, we have attempted to separate the different elements that may require different consideration and responses.

#### **Terms of reference 1 [AFCA meeting statutory obligations]**

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

Answers:

**(1A) Fair:** Does AFCA resolve complaints in a fair manner?

- (a) The policy of placing fairness above any meaningful consideration of what the credit law prescribes, and that which ASIC stipulates in its Regulatory Guides, places AFCA decision making in highly subjective territory.
- (b) With the Fairness Project still to be completed, it could be argued that there is little guidance on what constitutes "fairness" available to AFCA case managers.
- (c) The acceptance of "information" from the consumer, without any mandated testing as to its veracity, provided under the rules of responsible lending included in the National Consumer Credit Protection Act.
- (d) The promotion of an open complaints policy, rather than encouraging responsible and honest complaints.
- (e) Complainants can 'play the system', with vacuous and vexatious complaints, delay in providing AFCA with requested information during the first and second stages of AFCA case manager attention, or not provide any at all - knowing they have already cost the "member" nearly \$1,000 in AFCA fees, regardless.
- (f) "Credit repair" companies are ruthlessly blackmailing the lender into removing legitimate information from consumer credit files, with the threat of the lender incurring AFCA fees and the loss of management time in order to give attention to the AFCA complaint. This situation is destroying the credit reporting system as a reliable source of information for responsible lending decisions, rendering credit reports an increasingly unreliable source of information - contrary to ASIC (and others) encouraging "members" to acquire credit reports as part of their process of assessment of suitability.
- (g) The AFCA promotion of a free service - when it is anything but free to the broker or lender "member".
- (h) AFCA has not been interested in being provided with information concerning the often many attempts by the "members" to communicate with complainants before or during the 21 days refer back period. That means the complainant can easily manipulate the situation, without any adverse repercussions, with the "member" being forced to pay for the application and stage one fee associated with these complaints.

### Recommendations - Fair

1. That AFCA give attention to court decisions concerning fairness, for overall consistency.
2. That AFCA case managers be more substantially trained in law, to improve their knowledge of legal precedent to apply in their decision making.
3. That AFCA recommence its "Fairness Project" as soon as possible/practicable.
4. That AFCA recognise and apply the credit law.
5. That AFCA recognise and apply the ASIC Regulatory Guide content (ASIC's expectations) applicable to the complainant's circumstances.
6. That a complainant's deliberate evasion of a "member's" attempt to contact them, prior to and during the 21 day refer back period, be a circumstance for AFCA to deny the complainant dispute resolution.

#### **(1B) Efficient:** Does AFCA resolve complaints in an efficient manner?

- (a) The "member" is presented with a summary of the complaint and the outcome expected, which is often almost crude in its lack of detail - making informed and reasonable response difficult.
- (b) There is inadequate opportunity for explanation of the complainant's motivation or the complaint.
- (c) There is no opportunity for the parties to present or suggest questions to go to the other party for response.

### Recommendations - Efficiency

#### Complaint process commencement -

1. That a detailed form for the complainant or their adviser to fill in, when lodging a complaint, be developed.
2. That the parties be able to submit questions to the case manager for presentation to the other party.

#### **(1C) Timely:** Does AFCA resolve complaints in a timely manner?

- (a) Generally but, in many cases, structural changes to the complaint management rules would contribute to a more timely result.
- (b) It is often the consumer who makes the most unwelcome contribution to a lack of timeliness out of laziness, vindictiveness, or knowledge concerning the process.
- (c) The ease with which a consumer can lodge a complaint encourages simple text messaging and flippant regard for the process by many consumers.

### Recommendations - Timeliness

1. Clearer rules concerning the engagement of AFCA be developed to present to every complainant at the outset and to be included on the AFCA website.
2. An appropriately detailed complaint form for initial lodgement be introduced, so that the substance of the complaint and its legitimacy can be easily identified and addressed more easily and quickly by the lender or broker in the complaint process.

#### **(1D) Independent:** Does AFCA resolve complaints in an independent manner?

- (a) The consumer advocate or associated professional backgrounds of a number of case managers is of considerable concern.
- (b) The lack of opportunity for case managers to actually meet and discuss the issues with the parties, or at least telephone/teleconference them, is a serious contribution to the perception of a lack of independence.

- (c) The organisational culture involving published bragging about outcomes that favour the consumer, and how much money AFCA has forced lenders to repay consumers, encourages a case manager decision maker mindset that is far from independent.
- (d) The relative lack of management, finance and general business experience, as opposed to consumer advocate or the like experience amongst case managers, entrenches this mindset.
- (e) The Delegation is not convinced that the AFCA help to complainants under the “Assisted Registration and Referral” process is independent given the content in the application document provided to the lender or broker on many occasions. They give every appearance of being a “stitch up” of the “member”.
- (f) It is nonsense to expect that AFCA will provide a fair and reasonable dispute resolution process where both sides will get an equal chance in a culture that strongly favours past pro-consumer professional experience recruitment and the encouragement of complaint numbers.

### **Recommendations: Independence**

1. That AFCA adopt a recruitment policy for case managers and management that encourages the employment of a more diverse range of decision makers.
2. That an opportunity for case managers to contact or meet parties personally be introduced.
3. That personnel training incorporate invitations for “members” to address case managers, and their managers, and be available for Q&A sessions to enhance AFCA personnel’s understanding of the industry they effectively regulate.

### **Terms of reference 1.1 [Dispute resolution]**

**(1.1A) Dispute resolution approach:** Is AFCA’s dispute resolution approach producing consistent, predictable and quality outcomes?

- (a) The consistency and predictability is that the approach will produce pro-consumer biased outcomes.
- (b) Where a complaint proceeds to case manager consideration, the quality of the outcomes varies from satisfactory in up to approximately 70% of cases, to unrealistic and pandering to the consumer in the balance of the decisions.
- (c) The consistency and predicability is dominated by a credit industry sector that does all it can to avoid incurring the AFCA fees and the management time allocated to deal with the complaint going to AFCA. Capitulation at complaint submission stage is the dominating approach. Resolution of approximately 60% of all cases in the 21 day refer back period is not something that AFCA can brag about - it largely represents the lender or broker just capitulating to the complainant, regardless of merit, in order to avoid the allocation of the management and adviser time required to responsibly respond, along with avoiding the AFCA case consideration fees.

In the SACC and MACC sectors, larger public companies, as well as smaller companies, have adopted this avoidance policy.

- (d) The credit reporting body “member” is frequently confronted with the choice of removing an honest and factual piece of information from a consumer’s credit reporting body file, at a cost of \$35 to \$85 paid to that body for the removal, or fighting with an AFCA complainant who has lodged a fictitious complaint and thereby facing AFCA fees approaching \$1,000, assuming the matter does not go to an AFCA second stage.
- (e) The fee structure encourages “member” capitulation to all requests in order to avoid the AFCA complaint costs, so that:

- i. Consumers, often encouraged by consumer advocates, are rewarded for “trying it on” with frivolous or baseless complaints, knowing they can effectively blackmail the “member” with the AFCA costs;
- ii. credit repair companies can use the threat of going to AFCA, in order to get negative information removed from their client’s credit files; and
- iii. this blackmail process leads to a massive diminution in the veracity of credit reporting bodies’ information/credit files, due to the removal of information by the “member” under unjustified pressure from the complainant and, more particularly, the complainant’s consumer advocate adviser or “credit repair” company.

Both classes of advisers have KPIs to meet, the latter also with the need to justify the considerable fees charged to the client, who often could have resolved the issue with the lender by offering (only) to pay what they paid to the “credit repair” company - or less. This is hardly a “quality outcome”.

- (f) The AFCA imposed demand that the lender suspend all repayment expectations during the course of the complaint review process, means that consumer/complainants get further into debt. This is hardly a “quality outcome”.
- (g) AFCA officers are too ready to mistakenly assume that the complainant is genuine and honest.
- (h) There is no apparent mechanism for a database check at the outset by AFCA case managers, to determine whether or not the complainant is a serial complainant, or the consumer has lodged an identical or near identical complaint before and been unsuccessful.
- (i) There is no apparent automatic mechanism for a preliminary assessment as to whether or not the complainant is frivolous, before the stage 1 costs are incurred by the “member”, or before the “member” has been forced to allocate management and adviser time to alert AFCA to this possibility.
- (j) The AFCA processes are encouraging complainants to lodge bogus complaints, make outrageous claims for damages, manipulate the system to reduce the amount of critical information on their credit report - and generally lie.
- (k) The opportunity to “award” damages is a farce, with no clear criteria associated with financial loss available and the awards being arbitrary, according to highly subjective guidelines and motivated by a concern on the part of the AFCA decision makers to be punitive - when AFCA is not a court with the right to impose fines.

The Delegation notes that the guidelines for non-financial compensation are expressed at D.3.3 as -

For privacy complaints - *“...injury has occurred to the Complainant’s feelings or humiliation has been suffered by the Complainant”*.

For other complaints - *“degree or extent of physical inconvenience, time taken to resolve the situation or interference with the Complainant’s expectation of enjoyment or peace of mind has occurred”*.

The Delegation is unaware of any psychologist being employed by AFCA in such decision making.

- (l) The AFCA process involves significant imposition on the “members”, but little attempt to control the complainants. The Delegation questions whether or not adequate instruction is provided to complainants and potential complainants, while the “member” is expected to know and operate under all of AFCA’s rules. This is unequal and leads to complainant abuse of the system.
- (m) The lack of any opportunity for the parties to appear in person before the AFCA case manager/decision maker, as the state consumer tribunals very successfully provide.

- (n) The opportunity to ignore compliance with the law as a defence and substitute the highly subjective “fairness” test.
- (o) There is no mandated requirement that the complaint must first go through the Internal Dispute Resolution process. While recognising the utility of the 21 day refer back policy, this creates administration costs for AFCA, which the “members” bear. A straight refusal for AFCA to do anything until the IDR process has been employed, would be considerably less expensive by way of AFCA administration costs. It must be remembered that ASIC strongly emphasises the use of the IDR process.
- (p) There is no preliminary consideration at the lodgement of objection stage that would provide a, hopefully, cheaper culling process, on the basis of inconsistent and non-existent information and evidence that can be tested prior to any consideration at the current first level stage.

### **Recommendations - Dispute resolution process**

1. That AFCA introduce a robust process of initial examination of the consumer complaint, before any move to the current Stage 1 in the AFCA process.
2. That AFCA introduce an opportunity for case managers to make preliminary enquiries before Stage 1 and not charged at Stage 1 fees, to determine whether or not the complaint has relevant merit to proceed further in the AFCA processes.
3. That the opportunity to award non-financial damages be removed.
4. That a consumer behaviour code be developed. This code to be utilised in the first assessment of the complaint - recommended at the application stage.

**(1.1B) AFCA’s capability:** Is AFCA capable of producing consistent, predictable and quality outcomes?

- (a) The consistency and predictability is that the outcomes will generally be predicated on a pro-consumer bias.
- (b) The quality of the outcomes is seriously diminished by this pro-consumer bias, which is unjustly costly to lenders and brokers and encourages irresponsible money management, an entitlement attitude and an irresponsible approach to borrowing money by complainants.
- (c) There is a continuing apparent failure to acknowledge the content of ASIC Regulatory Guides and the imposition of the ASIC interpretation of the credit law contained in those guides. The Delegation is left with a view that inadequate training time has been allocated to the consideration of these guides.
- (d) At A.2 in the AFCA “*Operational Guidelines to the Rules*” there is a table headed “*Principles that underpin the scheme*”. At point (e) in the table is an assertion that AFCA will “*have appropriate expertise and resources to consider complaints submitted to it*”. Point (d) commences, “*support consistency of decision making...*” The AFCA structure currently does not maximise what should be the interface between these 2 principles.
- (e) No opportunity for the broker or lender to challenge the case manager’s statutory interpretation, in circumstances where experience and training in statutory interpretation may be lacking.
- (f) The tendency of AFCA case managers, for at least a period, appeared to automatically award \$500 for “damages” to the successful complainant. Highly subjective and simplistic categorisation has been involved.

### **Recommendations - AFCA capability**

1. That the recommendations elsewhere in this submission for broader recruitment of personnel, enhanced training and contact with the lenders and brokers at training sessions, and during the complaint process, be adopted.

2. That, when approaching their decisions, AFCA case managers appropriately explore whether or not the lender or broker behaviour was compliant with ASIC's wishes, as published in ASIC's Regulatory Guides, and avoid making decisions that effectively punish the lender or broker for acting in accordance with ASIC's wishes, by imposing a contrary view based on some vague notion of "fairness".
3. That AFCA case managers are trained to be fully familiar with the content of ASIC Regulatory Guide 209 in particular, to be fully familiar with what ASIC demands in regard to responsible lending.
4. That the AFCA structure be amended to facilitate a case management committee approach. That groups of case managers, recruited with varying skill and experience sets, should undertake a peer analysis of each case - in the same way that hospitals have introduced multi-discipline doctor committees to routinely review all patients' situations, before the case manager/doctor presents their diagnosis to the patient.

### Terms of reference 1.2 [Systemic issues]

**(1.2A) Identifying systemic issues:** Are AFCA's processes for the identification of systemic issues arising from complaints effective?

- (a) The current process encourages assumptions by AFCA personnel, based on completely unrepresentative samples of one or 2 cases. At A.17 in "*Operational Guidelines to the Rules*" there is a definition of a systemic issue - "*raised in a complaint or several complaints*" (our emphasis). This provides the opportunity for the AFCA case manager to assume a systemic issue and come to a decision concerning one complaint and, on that basis, commence a full blown investigation.
- (b) AFCA personnel are not trained law enforcement officers or legal investigators.
- (c) The role of AFCA should be to focus on the complaint at hand and not to act as an investigator for ASIC, which now has enough funds and personnel to do their own job.
- (d) It is procedurally improper to effectively turn a process of dispute resolution into the commencement of a robust investigation into the alleged existence of systemic issues.

As A17.2 of the "*Operational Guidelines to the Rules*" explains, "*We identify systemic issues that have implications beyond the immediate actions and rights of the parties to the complaint*". We cannot find any evidence of AFCA explaining to consumers that they may lodge a complaint, but AFCA's interest may not continue to focus on that complaint.

The desirable free flow of information - leading to a fair outcome for an individual consumer - is perverted by the need for lenders and brokers to take defensive and evasive action, just to ensure that there is no opportunity for the AFCA case manager to "suspect" a systemic issue.

- (e) AFCA's role subsumes ASIC's role. A17.4 in the AFCA "*Operational Guidelines*" admits as much, "*Where we determine an issue is definitely systemic in nature, we work with the Financial Firm to ensure all affected persons are identified and appropriately compensated for any financial loss and a strategy is put in place to prevent the problem from recurring*".

The Delegation finds this statement very confronting. A company that operates as a virtually private company, whose role is trumpeted as dispute resolution, has taken on the role of detective/investigator, prosecutor and judge - to rival ASIC, plus the DPP, plus the Federal Court, in the control of the financial sector's lenders, brokers and lessors, entirely at those "member's" expense.



## Recommendations - Systemic issues

1. That AFCA no longer concern itself with identifying systemic issues.
2. That AFCA recognise that its role is dispute resolution and not legal issue investigation and law enforcement.
3. That Section 1052E(1) of the Corporations Act and ASIC Regulatory Guide 267 and the ASIC Rules be amended to discontinue AFCA's current role in regard to systemic issues.
4. In the alternative, that AFCA comprehensively train its personnel to be investigators, that an allocated case manager for systemic issue investigation be appointed who has not previously been involved in the decision making concerning a lender or broker involved in a complaint that has come before them at an earlier time.
5. That the criteria for systemic issues be at least evidence of non-compliance involving numerous complaints - and certainly not just one or two.

**(1.2B) Response to systemic issues:** Are AFCA's responses to systemic issues arising from complaints effective?

- (a) AFCA's credibility is threatened by the lack of clear and meaningful criteria as to what constitutes a systemic issue.
- (b) AFCA's bragging about its identification of systemic issues is unsound, because there is no accompanying assessment as to materiality, number of cases involved as a proportion of total loans offered by the 'member' under the spotlight, or a transparent and professional investigation process.
- (c) AFCA attention to systemic issues discourages lenders and brokers from proceeding with the AFCA complaints process, and adopting a 'capitulation to complainant' policy, with all the attendant consumer downsides recognised elsewhere in this submission.
- (d) Ultimately, it is not what AFCA does, but what ASIC does about the systemic issues AFCA reports to ASIC, that determines effectiveness.

## Recommendation - Response to systemic issues

As recommended elsewhere in this submission, AFCA to focus on dispute resolution only and leave systemic issues to ASIC.

## Terms of reference 1.3 - Funding and fee structure

**(1.3A) Fees impacting on competition:** Do AFCA's funding and fee structures impact competition?

- (a) They favour the larger lenders and brokers, because those companies have more consumers over which to spread the costs.
- (b) They favour those lenders and brokers who deal with larger loans, because there are greater profits by amount, from which to pay AFCA fees.
- (c) The adoption by a number of major lenders and brokers of a policy of always capitulating and avoiding the AFCA process, provides them with a competitive advantage over those companies which the consumers know will challenge complaints and use the AFCA process where the consumer may lose and possibly face the embarrassment of being shown to be a liar.
- (d) There is no categorisation of complaints - the "little" complaints get lumped with the "big" complaints and face the same fee structure.

## Recommendations - Fee structure

1. That a review involving consultation with "members" of AFCA be conducted, to explore the criteria that may be employed to determine a new range of AFCA fees.

These providing greater recognition of fairness and reducing the anti-competitive nature of the current AFCA fee structure.

2. That this review consider the current policy of universal free access for complainants and its various abuses by complainants.
3. That AFCA introduce a more flexible fee structure.

**(1.3B) Enhancements to the funding model:** Are there enhancements of 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?

- (a) For impacts on competition, see discussion above.
- (b) For emphasis, the indirect impacts on competition deserve recognition, see discussion above.
- (c) It should not be overlooked that it is not just the fee structure that requires amendment, but also some areas of AFCA expenditure require greater control, with the realistic aim of reducing them. See general comments at the conclusion of this submission.
- (d) The failure to recognise that the Small Amount Credit Contract lenders are facing complaints concerning loans that would have generated gross incomes of amounts far less than the fees for the AFCA objection lodgement and first stage of consideration.

### **Recommendations - Funding model enhancements**

1. That a review involving consultation with “members” of AFCA be conducted, to explore the criteria that may be employed to determine a new funding model, providing greater recognition of fairness and reduce the anti-competitive nature of the current AFCA fee structure and its contribution to funding.
2. That this review reconsider the current policy of universal free access for complainants and its various abuses by complainants, as a possible contribution to funding.
3. That AFCA introduce a more flexible fee structure as part of a restructuring of the funding model.

### **Terms of reference 2 [Primary production businesses]**

Please note that this area is not applicable for Finance Industry Delegation supporters.

### **Terms of reference 3 [AFCA’s Independent Assessor]**

**(3A) Scope:** Is the scope of AFCA’s Independent Assessor function appropriate and effective?

- (a) The Delegation is concerned that the role of the independent Assessor is too narrow.
- (b) The current limitation of taking complaints from third parties and identifying areas of service performance that require change, is too limited and under employs a scarce resource.
- (c) Although not directly relevant to the Independent Assessor, the Delegation is also concerned that the complainant has first to go directly to AFCA with their complaint and wait for that complaint process to conclude, before contact with the Internal Assessor. This is a double-up which could increase the complainant’s stress and introduce an unnecessary, unwarranted and potentially damaging time delay.

The Delegation considers the arguments for maintaining the two successive opportunities, applying to the IDR/EDR “member” situation, lacks strength because the situations are not analogous, because both complaint lodgement avenues are in-house and the outcome is directly reported to the CEO in both cases.

- (d) It is of concern that the Independent Assessor reports only to the CEO in the first instance. This may introduce a communication funnel, or block, to full disclosure to the board and could be a very significant issue if the complaint involved the service levels of the CEO.
- (e) The Delegation notes that the Independent Assessor also reports to the Minister, but there is no mandated process by which the Minister can report their observations to the Parliament.

### **Recommendations - Scope**

1. That the scope of the role be redefined to clearly include efficiency, effectiveness and accountability assessments or audits as a more appropriate and necessary operating description.
2. That the opportunity be available for the complainant to go straight to the Independent Assessor with their concern.
3. That the Independent Assessor's role be considered one of a comprehensive independent (non-financial) audit role, with clarification that, apart from taking service related complaints, the role is more than identifying service issues and producing statistical reports.
4. That the Independent Assessor have the opportunity to report to the board first, and/or simultaneously to the board and CEO, at their discretion.

**(3B) Remit:** Is the remit of AFCA's Independent Assessor function appropriate and effective?

- (a) The Delegation considers that the current role is too limited (see discussion immediately above).
- (b) The given opportunities to report to the public and within AFCA every 6 months may appear impressive, but the content of the reports is lacking useful information. However, the posting on the website as a public report and the presentation in the Annual Report is impressive.
- (c) The conduct of the complaint assessment being limited to a written complaint, as the only contact during the complaint process, is of concern.
- (d) The non-existence of an auditing process for efficiency and effectiveness involving representation from "members" on the audit panel/committee, is of concern.
- (e) It appears that the Independent Assessor has no power to award damages to the "member" who has suffered financially, due to AFCA's poor service levels.

### **Recommendations: Remit**

1. That the opportunity to submit matters for consideration to the Independent Assessor be widened.
2. That the Independent Assessor be expected to provide more in their reports than just simple statistics, so that the reports become a report on the content of the reviews, allowing a clear understanding to the reader of the issue and how it was resolved.
3. That the Independent Assessor have the power to award compensatory damages to a "member" who has suffered financial loss due to AFCA poor service delivery.

**(3C) Operation:** Is the operation of AFCA's Independent Assessor function appropriate and effective?

- (a) The opportunity for the Independent Auditor to seek peer review and expert advice, before concluding any review process, appears very limited.
- (b) Apart from reporting to the AFCA CEO and the board, the opportunity to report to the "members" is limited to a brief statistical summary report in the Annual Report.

- (c) This report does not provide any detail of work in progress.
- (d) We note that this report, when included in the Annual Report, is controlled/edited by those who compile the content of the Annual Report and it cannot be assumed that what the Independent Assessor intended to have included in the Annual Report is actually included.
- (e) The opportunity only for contact in writing by the complainant introduces a potential bias, because the Delegation presumes that the Independent Assessor then has personal contact with those in AFCA who are the subject of the complaint about their service levels.
- (f) The performance service complaints against AFCA service levels arbiter being a single person employed by AFCA, impacts on performance in a role that normally involves the opportunity for peer interaction in the process of decision making, whether personally or by way of reference to published precedent. Both opportunities appear unavailable.
- (g) The performance complaints person (Independent Assessor) reporting case details and determinations only to the AFCA CEO and board (responsible for recruitment and employment, with advice from the CEO), challenges the status of necessary independence.

### **Recommendations - Operation**

1. That the Independent Assessor be provided with a budget to engage professional sources of advice when it is determined that such engagement could improve the review process and outcome.
2. That the Independent Assessor's reports be widened in their content, as recommended immediately above.
3. That, after the written complaint is lodged, the Independent Assessor have personal contact with the complainant.
4. That the Independent Assessor include details of the case and the resolution (redacted if necessary) in their reports published on the website and in the annual report.

### **Terms of reference 4 [Review of AFCA decisions]**

**(4A):** Is there a need for AFCA to have an internal mechanism where the substance of its decisions can be reviewed?

We assume that this is a reference to case manager decisions.

- (a) Any appeal process available within AFCA at the moment appears to introduce a conflict of interest involving preserving the organisation's perceived integrity, and supporting group members (fellow AFCA officers).
- (b) Delegation supporters are not convinced that the current limited opportunities are robust and objective enough.
- (c) Currently, effective appeal consideration is primarily possible by representative organisation presentations that provide opportunity for changing AFCA policies, but not necessarily give attention to an individual complaint.
- (d) The complainant can appeal an AFCA decision, the target of the complaint cannot. This denies natural justice and a mechanism of proper control of AFCA decision making and procedural fairness.

### **Recommendation - AFCA decisions review**

That AFCA introduce what is basically an internal tribunal of at least three people who have not had anything to do with the complaint at hand, and who are not part of the

immediate management team directly responsible for the case manager involved in regard to the subject complaint.

**(4B):** How should any mechanism operate to ensure that consumers and small businesses have access to timely decisions by AFCA?

1. Informally.
2. In the manner of a state consumer claims tribunal - involving personal attendance at a hearing.
3. Not applying the rules of evidence.
4. Allowing the parties to present their case orally.
5. Allowing cross examination by the review panel members.
6. Be preceded by provision of relevant documentation from both sides to AFCA, with copies for the other party.

### **Significant other concerns not included in the Terms of Reference**

The following are Delegation concerns that do not appear to be appropriate to list under the Terms of Reference listed above, but which are significant issues that should be addressed in the current review, or referred to the Minister for Ministerial consideration.

Unless Treasury addresses these significant issues in its report to the Minister for Superannuation, Financial Services and the Digital Economy, the information flow to the Minister will be seriously inadequate and the report will constitute misrepresentation by omission.

Further, fundamental inadequacies associated with current AFCA mandates, policies and processes will have been ignored, with another “sham” review. This will be a field day for a diligent member of a Senate Estimates Committee and an aggressive and competent Shadow Minister.

### **What the Terms of Reference should also have addressed**

#### **Structural concerns**

The history of the formation of AFCA is not an edifying one. The disgraceful features associated with its conception, formation and introduction should be addressed in this current review process - because they have led to systemic structural and authoritarian conduct problems.

Amendment of the AFCA legislation [Treasury Laws Amendment (Putting Consumers first) - Establishment of the Australian Financial Complaints Authority Act 2018] is significantly required, because this appears to be the only effective way of addressing the many structural concerns.

The historic and continuing issues of structural concern to the Delegation include:

1. AFCA’s monopoly status - now exploited, with massive increases in staff.
2. The fact that its title includes the word “Authority”, implying it is a part of the government apparatus - when in fact it is run virtually as a private company.
3. The fact that it was a politically inept attempt by the then Prime Minister and Treasurer to avoid a Royal Commission into Banking at any cost.
4. The assumption or pretence, by politicians, that AFCA would provide a better external dispute resolution service than its predecessors. It does not.
5. The apparently almost un-questioned adoption of the then existing Financial Ombudsman Service model. The Government of the day may as well have given FOS the monopoly powers.

6. The adoption of an entirely industry funded model, encouraging consumer exploitation of EDR without responsibility and with brutal AFCA public relations campaigns encouraging complaints from all and sundry - designed to boost AFCA's gross income, regardless of merit. Each unnecessarily and unfairly costing the victim lender or broker.
7. With the adoption of an entirely industry funded model - the exclusion of any consumer/complainant responsibility, where the complainant pays nothing - no matter how frivolous, vexatious or lacking in any merit, is the complaint.
8. The nonsense that lenders are some sort of "member", when "membership" is compulsory and there are no "membership" benefits. The exclusion of non-bank membership from board participation is extraordinary. This leads to a board dominated by consumer advocate connected personnel.
9. The lack of detail in financial reports available to those who provide all the funding is alarming.
10. The total lack of Ministerial responsibility and accountability, with only proposed fee increases having to go before the relevant Minister.
11. The lack of an effective reporting mechanism to Parliament.
12. The opportunity to accept legacy complaints - beyond the mandated record keeping requirements, concerning the number of years that records have to be kept under both the Tax Act and the National Consumer Credit Protection Act.
13. The opportunity for the Chief Ombudsman to also be the CEO, which imports major conflicts of interest. Basically, this is money maker v fair, reasonable and speedy resolution of complaints, and the elimination of all nonsense, or improper, completely lacking in merit, blackmailing, or vexatious complaints early in the process.
14. The issue of directors having a formal or informal decision making role in the organisation.
15. The role of ASIC as the (limited opportunities) supposed supervisor of AFCA, so that you have an industry regulator with controls over an industry disputes resolution entity - 2 roles that should be quite separate.
16. Token management by ASIC, which has demonstrated disinterest in that role.
17. The formal requirements that AFCA act as an investigator for ASIC and regularly report possible non-statutory compliance, when AFCA is not a trained investigator, or constrained by such things as procedural fairness and well accepted investigatory processes - again confusing roles.

### **Functional concerns**

1. The introduction of the Information Cube, with its opportunity to present biased and distorted information, without any accountability to the "members" of AFCA who are victims.
2. The introduction of greater publicity concerning the complaint responding companies, in an obvious effort to employ a blame and shame policy. This opens the door to a lack of countervailing explanation and correction of the information by the victim "member", before being posted by AFCA.
3. The raw publication of complaint numbers against a lender or broker - without any consideration of what proportion of total loans actually issued, or recommended by the lender or broker, that these complaints represent.
4. The poor financial accountability associated with aggregating expenses under general headings in the annual/financial reports, and the non-specific disclosure of directors' fees and senior staff salaries.

5. The establishment of a consumer advocate advisory panel, without the simultaneous establishment of an industry/“members” advisory panel (albeit this has been somewhat rectified following Delegation complaint to senior AFCA officers and at the 2020 AGM, and the Delegation is not now complaining about lack of contact with AFCA decision makers).
6. The failure to present minutes of previous AGMs in a manner that would allow review and presentation of follow up questions at the next AGM.
7. The critical need to separate published statistics according to loan size - SACC, MACC and AOCC. There has also been confusion between SACC and lease numbers in the past.
8. The costs associated with an unnecessarily large Board, including fees, travel and accommodation.

The Finance Industry Delegation thanks you for your attention to this submission.

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