



SUBMISSION PAPER:

Submission to Treasury for the Review of the Australian Financial Complaints Authority

March 2021

This Submission Paper was prepared by FinTech Australia working with and on behalf of its Members; over 300 FinTech Startups, VCs, Accelerators and Incubators across Australia.



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About this Submission

This document was created by FinTech Australia in consultation with our 300 members. In particular, the submission has been compiled with the support of our Working Group Lead:

- Rebecca Schot-Guppy, FinTech Australia

This Submission has also been formally endorsed by the following FinTech Australia members:

- SideFund
- Square
- OpenPay
- SocietyOne
- Archa
- etika Australia
- Opensparkz
- PAX Technology
- MoneyPlace
- Banjo
- Omni-Financial
- Scantek Solutions Pty Ltd
- Campaign Agent Pty Ltd
- Paycepaid
- Frolo
- Longevity App
- OnDeck
- Sunshine Loans
- Payright
- Brighte
- Meeco
- GoodToGoLoans
- Valiant Finance
- Wise
- Intuit Australia
- Wisr



Submission Process

In developing this submission, our members held a series of Member roundtables/teleconferences to discuss key issues relating to Treasury's Review of the Australian Financial Complaints Authority.

We also particularly acknowledge the support and contribution of [REDACTED] from Cornwalls to the topics explored in this submission.



Context: Submission to Treasury for the Review of the Australian Financial Complaints Authority

FinTech Australia is grateful for the opportunity to make this submission to the Treasury. Several of our members are members of AFCA, as financial services licensees, credit licensees or accredited data recipients under AFCA's consumer data rights jurisdiction.

Our submissions

Set out below are our responses to selected matters on which the Treasury sought submissions. Specific examples are set out in the confidential annexure to this submission.

At the outset we would like to say that FinTech Australia and its members support the availability to consumers of robust external dispute resolution mechanisms. Further, FinTech Australia and its members appreciate the preparedness of AFCA decision makers to take the time to understand the service offerings of FinTechs to the extent the nuances of those offerings have a bearing on what constitutes good industry practice which in turn goes to the fair resolution of a complaint. The specific points made in our submission should be considered in the light of these general observations.

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

In general, our members believe that AFCA's decision resolution approach and capability is not producing consistent, predictable and quality outcomes.



Consistency and predictability

Our members have the following observations and suggestions.

	Observation	Suggestion
1	Response times are inconsistent, often ranging from 2 weeks to 2 months in complaints with the same subject matter.	<p>AFCA should publish a service charter so that similar cases are dealt with within a similar time frame. We acknowledge there would need to be allowances built into that charter to take account of unanticipated variations in the volume of complaints and the availability of decision makers. This service charter could be an elaboration of the timeframes presently outlined in AFCA's Complaint Resolution Process.</p> <p>In addition, there should be a focus on addressing a complainant's failure to respond within the stipulated time frame as this causes costs to escalate despite there being no engagement by the complainant.</p>
2	<ul style="list-style-type: none"> • The interpretation of what is within (and outside) AFCA's jurisdiction can differ - often quite markedly - from case to case. • Complaints in relation to the same issue can be dealt with very differently by different decision makers. • The jurisdiction in relation to systemic issues (A 17 in the 	<ul style="list-style-type: none"> • Additional training for decision-makers. • A more explicit focus on consistency and predictability of outcomes.



	<p>AFCA Scheme Rules) appears to have been invoked in some instances to assess matters that are otherwise beyond AFCA's jurisdiction. We provide more information in the confidential annexure.</p>	
3	<p>Not surprisingly, the level of familiarity of AFCA decision makers with industry features and best industry practice in new and emerging areas of FinTech, as well as established but specialised payment operations, differs widely. As a result, our members often find themselves having to explain the same industry features and practices to different decision makers from time to time. Our members feel that this may adversely impact on the consistency and predictability of outcomes. It also detracts from our members' confidence in AFCA as a reliable EDR body for FinTech and specialised payment operation disputes. In the words of one of our members:</p> <p>“We often receive requests to provide background and supporting evidence that are repetitive, having been provided to AFCA on a number of occasions previously but to different AFCA personnel. It has become an onerous and resource intensive task to educate AFCA staff on our business model when such information has already been</p>	<p>AFCA could create a sub-group or “centre of excellence” with selected Adjudicators, AFCA Panels and Ombudsmen being allocated to hear complaints in connection with FinTech, payments or cryptocurrency exchanges. This would be analogous to the dedicated sub-group in the Financial Ombudsman Service that historically dealt with EFT Code disputes (risk allocation for unauthorised card transactions). It would appear that the powers of the Chief Ombudsman under paragraph A13.1 of the AFCA Scheme Rules would permit this, as it enables the Chief Ombudsman to allocate complaints based on matters considered appropriate, including considerations of efficiency.</p>



	<p>provided.”</p> <p>A separate but related point is that, anecdotally, many AFCA staff do not appear to be aware of AFCA’s new Consumer Data Right jurisdiction. Some of our members have become AFCA members because that is needed in order to become an Accredited Data Recipient in relation to the Consumer Data Right. These members include those who have no consumer-facing Apps and who are therefore unclear what complaints about them may be made via AFCA. This may be more a matter for ACCC/Treasury but the general point for AFCA is that its decision makers and staff generally need to be given assistance/training in relation to the Consumer Data Right jurisdiction.</p>	
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Fairness and efficiency

Our members have the following observations and suggestions.

	Observation	Suggestion
1	<p>Here is a sample of the observations we have received from members on fairness:</p> <ul style="list-style-type: none"> • “AFCA’s system is heavily weighted to benefiting savvy consumers (who are able to utilise the fee structure to which 	<p>It appears to us that fundamental changes need to be made to address the fairness issues that have been raised by our members. These may include, but are not limited to, the following measures (which are not mutually exclusive):</p>



<p>members are subject) to extract unfair settlement terms from members.” This is because there is a rapidly escalating fee model for unresolved complaints which gives a member a strong incentive to arrive at a quick resolution with a complainant. Savvy consumers are aware of their increasing leverage the longer a complaint remains unresolved. “The final review at Ombudsman stage incur member fees of \$9,000 - \$13,000. Given that many complaints concern amounts much less than this, the member is almost always incentivised to pay any amount less than these values to resolve a complaint, regardless of its validity. These results are not fair, and do not incentivise good consumer or good member behaviour.”</p> <ul style="list-style-type: none"> ● “Our experience is that there is little or no onus on the complainant to substantiate their claim. We have received multiple complaints from complainants who have not even been provided with a ‘financial service’ by us.” ● “When we dispute the validity of a complaint, the review process is painfully long, and it remains unclear to us what evidence we are required to produce, such that the process often feels arbitrary and ad hoc.” 	<ul style="list-style-type: none"> ● Adjust the member fee scales so as not to effectively force members to settle what they consider to be unmeritorious claims just because it is not commercially sensible to escalate the claims. For example, this may include a mechanism to ensure that where claims are less than a certain value, fees could be capped to reflect the level of the complaint and the time that would be required for review rather than a flat fee structure. ● Implement procedures for a more stringent assessment of whether a complaint is actually within AFCA’s jurisdiction in the first place. That is, there should be clearer parameters around who is eligible to proceed through the EDR complaints process to assist in filtering out the complaints which are out of scope. ● Remove member fees for facilitating complaints where the complainant has not attempted to contact the member or attempted to engage with the member’s internal dispute resolution process. ● Remove or reduce member fees where a complainant abandons a complaint or does not contact the member. ● Remove or reduce member fees where the complaint is found in
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<ul style="list-style-type: none"> • “Beyond jurisdictional reviews (which are more likely to be handled independently), the majority of AFCA’s conflict resolution processes appear to favour the complainant. This is because, in our experience, AFCA will take no steps to mediate the complaint but will instead burden the member to resolve the dispute by agreeing to complainants’ unreasonable demands under the threat of the cost of escalating the complaint further.” • “AFCA supports complaints that are vexatious and lacking in substance.” • “There is an unclear and significant scope currently set around who can and cannot progress a claim with AFCA. Due to this lack of parameters we receive a number of complaints, and often feel obliged to simply settle a complaint that has come through this pipeline, whether it’s valid or not. This is because costs, both personnel and financial, start accruing as soon as a complaint is lodged with AFCA, and we simply do not have the bandwidth or the finances to let the complaint draw out through the EDR process.” • “Complaints are raised where the remedy sought is outside AFCA powers or would require 	<p>favour of the member.</p> <ul style="list-style-type: none"> • Adopt a sliding scale member fee structure. Where a complaint of low value is identified, AFCA could refer this to the member at no cost for the member to attempt resolution with the complainant directly. If the complainant then wishes to proceed with a full complaint, AFCA could initiate the current process but with the applicable fees being commensurate to the value of the claim. Additionally, member fees should only be finalised and charged to the financial firm if the full complaint is resolved in favour of the complainant.
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	<p>the member to breach a legislative or regulatory requirement.”</p> <ul style="list-style-type: none">• “We appreciate that it is difficult to find a funding model that serves a diverse pool of members. We consider that some discretion should be afforded in certain situations where costs can outweigh the level of complaint. Particular scenarios where we believe this occurs include credit repair firms who seek to make credit file amendments through the AFCA complaint process, and vexatious claims. In addition, where complainants fail to respond within timeframes, matters can progress (causing costs to escalate) despite the financial firm attempting to resolve the issue and there being no engagement from the complainant. We believe the ability for matters to progress despite a lack of responsiveness from the complainant creates an inherent financial incentive (particularly for paid representatives) to stall negotiations and act against the spirit of the external dispute resolution process.”• “We believe that many members, particularly large ADIs would be finding ways to close complaints, to the detriment of the AFCA member and industry	
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	<p>integrity, rather than bear AFCA costs for complaints which are unfounded.”</p>	
2	<p>The fairness issue about the fee scales for escalation of disputes is particularly acute for members whose entire business model is based on low value contracts (e.g. small amount credit contracts). These members are in practice required to settle or accede to all complaints because they cannot afford to let a complaint - and the fees they pay - escalate.</p> <p>This is a competition issue as well.</p>	<p>Adjustment of member fee scales so as not to compel some members to accede to all complaints in practice, because escalation is always unviable economically. Please see our suggestions in item 1 of this table.</p>
3	<p>Here is a sample of the observations we have received from members on efficiency:</p> <ul style="list-style-type: none"> • “We have multiple examples of AFCA taking 7 weeks or longer to review responses submitted by us. We also find the vague and confusing nature of many complaints to exacerbate the inefficiency of the process.” • “In our experience, some matters can be drawn out over a number of months, in some cases beyond a year. We don’t believe that it is a timely or efficient outcome for either the complainant or the relevant financial firm.” • “AFCA sometimes makes broad 	<ul style="list-style-type: none"> • We acknowledge that it is neither fair nor appropriate to require complaints to be made with the precision of a legal pleading. Nonetheless, to mitigate inefficiency in having to deal with vague and confusing complaints, AFCA should explore if there could be clearly defined types of complaints a complainant can select from, as well as clearly defined compensation requests. In other words, AFCA should explore a “drop down menu” mechanism to channel/guide a complainant to define their complaint. This will not preclude a complainant who wishes to make a detailed and coherent “free form” complaint from doing



<p>requests for information from us (e.g. “all data relating to the customer’s account) when in fact a complaint only relates to a short period of time. “We believe the information requested by AFCA should be ring fenced to information relating to the specific complaint.”</p>	<p>so.</p> <ul style="list-style-type: none"> • To the extent it is not currently happening, AFCA’s requests for information should be ring fenced to the information relating to the specific complaint, not all the information pertaining to the overall relationship between the complainant and the member. • AFCA should have some set parameters or quick resolution ability around complaints related to credit file change requests. All businesses rely on the integrity of the credit reports and also have obligations to ensure information placed on credit files is correct. Accordingly, members understand the importance of these decisions being made correctly and, further, that the information recorded is correct and complete. Vexatious or unfounded requests to remove listings causes undue administrative burden and costs to members and can undermine the integrity of the credit reporting system.
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Are AFCA’s processes for the identification and appropriate response to systemic issues arising from complaints effective?

We have no comments on the operation of section A 17 of the AFCA Scheme Rules relating to systemic issues.



The ability of smaller member organisations to assess meaningful data to assist with the identification of systemic risk is limited. Having said that, one such member said that it is able to utilise current data within the portal to obtain some insight into identified risks. That member added that it would always welcome an enhanced taxonomy/classification of complaints to provide more details to assist with analysing trends and risks. It added that the inclusion of root cause information could also assist in the diagnosis of systemic risks.

Does 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.

Yes, AFCA’s funding and fee structures adversely impact competition. The issues as to fees that we canvassed earlier in this submission have a differential impact on AFCA members. Larger and better resourced industry incumbents like banks may be relatively better equipped to incur the applicable fees where they consider it important to escalate a dispute to obtain an appropriate ruling. This may give those members an advantage when contrasted with smaller organisations (including start-ups) for whom the cost of escalation for an Ombudsman review (approximately \$10,000) is prohibitive.

A sustainable fee-for-service model should be considered based on the size of the firm and AFCA’s tier being very small, small, medium, large and very large firms. At present, smaller firms are incurring member costs for complaints no different to larger firms which makes it difficult and burdens the member to resolve the dispute by agreeing to unreasonable complainant’s demand as it otherwise would be unviable economically to escalate although the complaint might be considered unmeritorious.

We have suggested enhancements to the funding model in the section of this submission dealing with fairness and efficiency.



General Comments on Competition

On competition more generally, some of our members drew an unfavourable contrast between the EDR monopoly represented by the AFCA regime and the earlier regime in Australia where a financial firm which was dissatisfied with an EDR body could become a member of one of the other EDR bodies. This competitive tension, which could manifest itself in better outcomes as regards the fees, efficiency and fairness of competing EDR bodies (including fairness for complainants), no longer exists. This reinforces the importance of Treasury's current review. We are grateful for the opportunity to comment and hopeful that it will lead to positive changes being made by AFCA.

Is the scope, remit and operation of AFCA's Independent Assessor function appropriate and effective?

No. We support the Independent Assessor having the ability to review the merits or substance of an AFCA decision. In the words of one of our members, "installing a merits review function would hopefully place greater onus on front-line case managers to respond to members' challenges in a more consistent and considered manner."

On the operation of the function at present, another FinTech Australia member observed that it had attempted to use the Independent Assessor. However, an Independent Assessor has either not been made available or the member has been provided with a template response that suggested that the request for independent assessment was not considered in a meaningful way.

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



Yes, there is a need for AFCA to have an internal mechanism where the substance of its decision can be reviewed. The points made earlier in this submission about fees should be taken into account in setting the fees for the use of this mechanism.

Our members have commented further on that internal review mechanism as follows:

- “The review mechanism should be supported by some clarity for members as to the principles AFCA works to when considering complaints. At present it is completely unclear.”
- “Such review power should have the ability to deal with complaints in much the same way that an appeal court can deal with a court of first instance (rather than sending a complaint back to the original case manager). This would greatly help to speed up the process.”
- “We believe there should be an opportunity for further real-time review by an Independent Assessor of the merits of an AFCA decision as well as the method and information upon which the decision was made. This will also be an opportunity for AFCA to identify training it could provide to its employees by identifying recurring issues with its decision-making process.”

Conclusion

This submission attracted intense interest and extensive participation from our members. The matters covered are of immediate and significant concern for many of them. We are grateful for the opportunity to make these submissions and would be pleased to meet with the Treasury to discuss our submission in more detail if needed.

About FinTech Australia

FinTech Australia is the peak industry body for the Australian fintech Industry, representing over 300 fintech Startups, Hubs, Accelerators and Venture Capital Funds across the nation.

Our vision is to make Australia one of the world’s leading markets for fintech innovation and investment. This submission has been compiled by FinTech Australia and its members in an effort to drive cultural, policy and regulatory change toward realising this vision.

FinTech Australia would like to recognise the support of our Policy Partners, who provide



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- DLA Piper
- King & Wood Mallesons
- K&L Gates
- The Fold Legal
- Cornwalls