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RETAIL
CREDIT
ASSOCIATION

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29 March 2021

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Review of the Australian Financial Complaints Authority

Thank you for the opportunity to provide a submission to the Review of the Australian Financial Complaints Authority (AFCA).

ARCA is the peak industry association for businesses using consumer information for risk and credit management. Our Members include credit providers, credit reporting bodies and, through our associate Members, many other types of related businesses providing services to the industry. Collectively, ARCA's Members account for well over 95% of all consumer lending in Australia.

ARCA has a particular interest in credit reporting and holds a number of roles in respect of that industry, including being the member association for industry participants, administrator of the business-to-business rules for the exchange of credit information (i.e. Principles of Reciprocity and Data Exchange (PRDE)) and, on multiple occasions, acting as code developer for the consumer facing rules (i.e. the *Privacy (Credit Reporting) Code 2014*). Given those roles, ARCA has a particular interest in how complaints regarding credit reporting are dealt with by AFCA.

As set out in AFCA's 2019-20 annual review, 6,381 of the 80,546 complaints received that year included a credit reporting related issue, making it the single most common issue

reported as part of a complaint[1]. Because of this, as an industry association we have had a considerable focus on understanding the detail of credit reporting related complaints, as well as how these complaints are handled by AFCA.

We have provided our feedback to the review questions in the following table. However, we make the following overall observations:

1. In the last 12 – 18 months, AFCA has shown a clear willingness to engage constructively with ARCA and has generally been open to reviewing whether action is required in response to ARCA's concerns with its decision-making processes or particular complaint outcomes – particularly through the COVID-19 pandemic. This engagement includes a monthly meeting between senior AFCA representatives and ARCA during which the organisations discuss individual complaints and complaint trends, and share industry insights that may be relevant to each other.

2. AFCA's remit is large and complex, and from its inception as a 'one stop shop' for complaints, it represented a significant expansion in size and scope compared to its predecessor schemes. Since that time, its size and scope has only continued to increase. This appears to be causing some challenges, including (i) inability to identify when a new issue is being considered for which no AFCA approach exists, which can lead to decisions being taken at junior levels in the organisation that create 'precedents' or uncertainty for industry stakeholders as to AFCA's expectations; (ii) AFCA's process to develop approach documents itself does not necessarily involve consultation with external stakeholders, and where ad hoc feedback is provided there is no process to respond to or discuss that feedback before an approach is finalised; (iii) decisions/approaches adopted at senior levels of the organisation do not always appear to be cascaded to all levels of the organisation; and (iv) staff do not always have the knowledge, experience and expertise to properly consider complaints.

   Recommendations:

   (i) That AFCA improve its processes to identify new issues where an organisational approach is required, and that this process should include seeking and responding to stakeholder feedback.
   (ii) That AFCA's process for developing approach documents incorporates a formal process for obtaining and responding to stakeholders before an approach is finalised.

3. The application of AFCA's 'fairness' jurisdiction is problematic in relation to credit reporting. The credit reporting system underpins the efficient and responsible provision of credit which enables individuals, households and businesses to achieve their goals as well as driving broader economic growth. The law establishing the system has already provided for a balance between the interests of credit providers (and the general community) and that of individual consumers (who may have 'negative' credit information recorded in their credit reports). Some AFCA decisions appear to have introduced additional 'requirements' based on 'fairness' and even required credit providers to record credit information that was not consistent with the requirements of Part IIIA of the

[1] Individual complaints can include multiple issues. AFCA does not publish the proportion of these complaints where credit reporting was the predominant issue.

Privacy Act.[2] Recent credit reporting-related decisions suggest that AFCA may be forming a view that recognises that the concept of 'fairness' in respect of credit reporting has already been embedded into the legal obligations[3], but we are yet to see this approach formalised.

Recommendation:

(iii) To ensure consistency and transparency, we recommend that AFCA publish an approach document on their approach to credit reporting including the application of their 'fairness' jurisdiction.

Feedback to Review questions:

Review Question	**ARCA feedback**
Delivering against statutory objectives	
1. Is AFCA meeting its statutory objective of resolving complaints in a way that is fair, efficient, timely and independent?	**Baseless complaints/Fast Track process** • We are concerned that AFCA's Fast Track process may hamper its ability to meet this statutory objective. AFCA's Fast Track process is an administrative process (which sits outside its Terms of Reference) under which particular dispute types will be placed in the 'fast track' stream and resolved through an expedited and cheaper process. Conceptually, we support the use of this process however there are two features which are problematic. Firstly, as we understand it, all credit reporting disputes are automatically allocated to 'fast track'. Allocating all credit reporting disputes to AFCA's Fast Track process, is problematic because it by-passes consideration of whether the dispute has no merit (which would otherwise allow for the complaint to be discontinued (rule 8.3)). Secondly, as part of the Fast Track process, there is no ability for AFCA to conduct a merits assessment of a complaint, and instead, if the complainant chooses to do so, the only way for a Fast Track dispute to be resolved and closed is by an AFCA Ombudsman issuing a determination. This means that unless the consumer and the financial firm (i.e. the credit provider) accept the preliminary

[2] For example, AFCA has previously required credit providers to report repayment history information as 'up to date' for customers that are subject to a hardship arrangement, even though that customer was *not* contractually up to date. However, this issue has partly been addressed by a change to AFCA's approach and the remaining issues will be addressed through the introduction of 'financial hardship information' on 1 July 2022.

[3] See, for example, case 707198.

	assessment or proposed settlement then all disputes go to a "fast track" determination which costs the credit provider $3,000 (lower than non-fast track process but still prohibitive to credit providers). In effect, a credit provider is required to either pay $3,000 to challenge a complaint that has no merit, or else agree the baseless compliant is justified and make erroneous "corrections" to the credit reporting system (and potentially offer compensation to the consumer). • Given the cost of challenging complaints it is no surprise that, faced with this "prisoners dilemma", many credit providers will simply avoid the expense and "correct" the alleged "mistake". While rational for an individual credit provider, their decision impacts all users of the credit reporting system and undermines the integrity of the credit reporting system in performing its intended role. • Hence, ARCA considers that AFCA's approach does not support decisions that are "fair, efficient, timely and independent" in respect of credit reporting-related disputes and that AFCA's approach preferences "timely" resolution over other considerations. ARCA also questions whether AFCA's approach is consistent with their own published dispute resolution process, which suggests disputes are considered individually, and that only "low value" and "single issue" complaints are fast tracked, while more complex disputes go down their standard route. ARCA would suggest that credit reporting as a system is high value and has many complex attributes, and hence the blanket fast tracking of all credit reporting disputes is not justified. • AFCA's approach also creates a business model favourable for so called "credit repair" firms who take advantage of the dilemma faced by individual credit providers. Credit repair firms are the primary beneficiaries of AFCA's Fast Track process that lacks an adequate mechanism to identify complaints that have no merit at an early stage. We consider that this reflects a general reluctance by AFCA to properly deal with baseless claims at an early stage.

	• Industry sees significant numbers of complaints regarding 'enquiries'[4] being pursued by credit repair firms. Credit enquiry disputes themselves are straightforward and generally can be resolved with an assessment (did the consumer apply for credit with the credit provider and did the credit provider notify the consumer before obtaining a credit report to support its credit assessment). Credit enquiries are also a very common entry on a credit report, given many credit providers will conduct a credit enquiry as part of its credit assessment process. Information from ARCA Members indicates that credit repair firms commonly pursue claims to have enquiry information removed on baseless, and often contradictory bases.[5] Because AFCA's Fast Track process means these disputes can only be resolved with determination, credit providers are placed under considerable commercial pressure to remove the credit enquiry (and in turn, credit repair is encouraged to lodge more disputes given the ability to offer its clients an easy resolution to the presence of a credit enquiry on their credit report). This means that for credit repair firms, such complaints are pursued for simple profit (as the credit repair firms will charge a 'per' data element success fee, which can ultimately cost the customer thousands of dollars) and, as we have noted, place enormous pressure on credit providers to avoid the costs of the AFCA dispute[6] by removing the otherwise valid enquiry information. This results in valid and relevant information being removed from the credit reporting system which undermines the benefits of that system to the entire credit industry. • For example, case 707198 demonstrates the type of spurious disputes that proceed to determination. In that case, the credit repair firm cites a range of grounds with little or no evidence. The complaint

[4] i.e. a record on a consumer's credit report that a credit provider has accessed the credit report for the purpose of assessing an application for credit.

[5] For example, they may argue the contradictory bases that the customer did not make the application (i.e. it was third party fraud) *or* that the customer did not provide their 'consent'. Not only are those bases inconsistent (which means there is no clear basis argued for the removal) but the law does not even require 'consent' for a credit enquiry to be done (which demonstrates a lack of understanding of the law). We consider that AFCA does not currently do enough to identify and exclude such meritless complaints.

[6] The costs of dealing with a dispute taken through to determination include not just the AFCA fees, but also significant internal costs to collate and provide information required to respond to the credit repair driven complaint – and requested information is not always directly relevant to the validity of the matter under consideration

	involved 5 separate credit enquiries (2 on the phone in 2016 and 3 online in 2016, 2018 and 2019), where the complainant only acknowledged making one application. In short, the complaint was a mix of "it wasn't me", "I didn't do it" and "even if I did do it, I wasn't notified". As AFCA has no mechanism to identify that complaint as spurious, it went to a full determination (through the fast-track process). A review of credit enquiry determinations by AFCA demonstrates that this is not a 'one-off' case, but overwhelmingly reflects the outcome in almost all credit enquiry determinations (with the exceptions being for in-person credit applications where there is a more substantive dispute as to the verbal representations made to the consumer). • AFCA is aware of industry's view that the credit repair sector is taking advantage of AFCA's approach and is flooding the system with large numbers of disputes which clearly lack any merit. • We recognise that AFCA has proposed action to address such concerns, including by requiring those representatives to properly describe the basis for the dispute and to provide adequate documentation. AFCA has also indicated that it is open to reviewing its Fast Track process to allow for merits assessments to still occur for some disputes. However, the outcomes of this work have been slow to materialise. In the meantime, credit repair is continuing to take advantage of the AFCA dispute process to place inappropriate pressure on credit providers to remove otherwise valid information from the credit reporting system. *Recommendations:* (iv) AFCA review its approach to identifying complaints without merit, with a view to discontinuing those complaints at an early stage (including the application of the 'fast track' approach that is applied to all credit reporting-related decisions). (v) AFCA prioritise and finalise work to develop approach documents for credit reporting-related disputes, particularly those relating to 'enquiry' disputes (which will help to refine the nature and basis for the complaint at an early

	stage, and allow for the better identification of meritless complaints). **Recognising the role of CRBs** • Credit reporting bodies are required to be members of AFCA (pursuant to Part IIIA of the Privacy Act) and ARCA's CRB Members have noted the following feedback: o There are inconsistencies around jurisdiction rulings regarding 'credit score' complaints where a dispute does not relate to the contents of a credit file, but instead, disagreeing with the derived score. AFCA will still consider some of these complaints and deem others outside jurisdiction. It has not been made clear what criteria AFCA is using to determine what is inside/outside jurisdiction. o CRBs are limited in the level of investigation they can conduct regarding some matters, such as whether a hardship notice or request has been made to the CP (which would, in some circumstances, prevent a CP from reporting default information to the CRB). A CRB Member reports that they have been a party to complaints cases where they have confirmed with credit providers a hardship claim was not in place when a default is listed, however the matter ultimately found in favour of the complainant (and against the CRB) making an assessment on the probability of circumstances. As the CRB holds no direct credit relationship with the complainant this decision appears to reflect a misunderstanding of the role of a CRB compared to the role of a CP.
1.1 Is AFCA's dispute resolution approach and capability producing consistent, predictable and quality outcomes?	• When AFCA was being established, many stakeholders (including ARCA) noted the need for AFCA to provide clear, consistent and adequately detailed reasons for determinations. • We appreciate that AFCA has sought to provide such reasons in determinations. However, we note that there is still a level of inconsistency and lack of clarity between determinations as well as between determinations and preliminary views published at

	early case management stages within AFCA. Further, some determinations and preliminary views appear to include irrelevant, incomplete or wrong commentary (even where the outcome of the complaint is ultimately correct). For example, in case 718731 a preliminary assessment was issued by AFCA for a repayment history information (RHI) dispute which incorrectly applied the notification obligations imposed on a CP when disclosing RHI. Had this approach remained, it would have had a significant impact on the disclosure of all RHI by the CP (as well as across industry). ARCA provided its view on this preliminary assessment to AFCA, and ultimately it was agreed that the approach taken did not reflect an overall AFCA approach. Nonetheless, ARCA's view is that such an outcome could have been avoided if all AFCA decision-makers (whether at early case management or determination levels) had a consistent understanding of the legal requirements for RHI notifications. • Although AFCA decisions do not have strict 'precedent' value[7], it must be recognised that they do have broader relevance and influence beyond the dispute in question. Firstly, for the credit provider who receives either the determination or the preliminary assessment, the approach articulated, particularly if it is inconsistent with the credit provider's existing approach, can then result in an overall review of that credit provider's approach (noting the risk of ongoing adverse AFCA decisions against that credit provider, or the prospect of a systemic issues report to ASIC). This can lead to significant changes and investment by the credit provider to achieve consistency with the AFCA approach. Secondly, other credit providers will review public determinations and may treat the commentary as applying mandatory compliance obligations. Where those decisions lack clarity or do not provide the full context of the decision, other credit providers may be misled in relation to their obligations. Over the last few years, we have had feedback from our Members that the outcome of certain AFCA disputes relating to the reporting of hardship information during hardship arrangements was resulting in credit providers delaying their adoption of comprehensive credit reporting. Finally, we believe that those decisions have been used by credit repair

[7] Noting under Rule A14.2 of AFCA's Terms of Reference, previous relevant decisions of AFCA or predecessor schemes are one of four factors in AFCA's decision-making approach

	firms as a business development opportunity, spawning additional like complaints (even where the decision misdescribes the law).[8] While ARCA is not suggesting that this broader influence or impact needs to be (or indeed can be) necessarily curtailed, this does illustrate the broader consequences that will flow if AFCA's approach is incorrect, especially if this is not addressed within AFCA or by industry[9]. *Recommendation:* (vi) AFCA streamline its internal processes to ensure any decisions (whether at preliminary assessment level or determination level) are subject to a thorough quality assurance process which focusses on consistency with overall AFCA approaches. (vii) AFCA continue to work on refining and improving the published reasons with a specific focus on being clear about what was central to their decision, and avoiding commentary on areas that were not (we note that our earlier commentary regarding the general work to improve the knowledge, experience and expertise of decision makers would help this). In this regard, we note that at present a published decision will cite a range of factors relevant to a decision. In some instances, these factors are 'balanced' against one another, with the more relevant factors explicitly noted. However, in other instances, the decision-making factors are listed without identification of the clear rationale for the final decision. For example, in credit enquiry determinations (for example, case number 707335), AFCA have considered a range of factors in determining the dispute outcome – where those factors have no bearing on the outcome of the issue in dispute but have instead been erroneously raised by the credit repair firm. (It should be noted this has the further and unfortunate effect of giving

[8] Frustratingly, credit repair firms will often use the commentary in decisions to make further claims without any suggestion that the fact scenario supports those claims.

[9] It should be noted in many respects, this concern has led to ARCA devoting considerable time and effort working with its Members to understand AFCA approaches, educate its own Membership about some of the more concerning approaches adopted by AFCA, and also seek to directly challenge AFCA (or support Members challenging AFCA) where it can to alleviate these concerns.

	undeserved legitimacy to the 'scatter gun' approach to AFCA complaints taken by credit repair).
1.2 Are AFCA's processes for the identification and appropriate response to systemic issues arising from complaints effective?	• We are aware of an instance where AFCA raised a systemic issue with ASIC before raising it with the Member which was inconsistent with AFCA's rules (A.17.2), but we understand this was an oversight and not reflective of AFCA's usual practice. • We also have had feedback that AFCA has indicated to a Member that they were considering using the systemic issue process in an area for which AFCA lacked a settled approach. In the absence of a formal approach being finalised we do not believe reporting of systemic issues is appropriate.
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?	• As described earlier, in relation to credit reporting complaints, AFCA's funding model and processes create disincentives for AFCA Members to challenge AFCA even when they believe a case has no merits – it creates incentives for credit repair paid representatives to lodge disputes with no merit. Disputes cost nothing to lodge and once lodged provide credit repair companies with the appearance of legitimacy that also helps them justify their unreasonable up-front fees to consumers. • Moreover, the credit repair industry is very dynamic – if they get closed down in one area (e.g. default listing) they shift focus to another area (e.g. credit enquiries). Hence, what is required is an overall change in AFCA's approach to dealing with the credit reporting sector to address the underlying incentives to bring disputes lacking merit to AFCA. • In relation to competition impacts, we receive complaints from large and small credit providers regarding the high costs of challenging unmeritorious complaints due to AFCA's approach to credit reporting disputes. However, in our experience smaller credit providers are more likely to acquiesce at an earlier stage due to the costs of the dispute process and subsequently take a more conservative approach to lending in the future to avoid the risks of complaints. Hence, there is an impact on competition. • We would also re-iterate that the integrity of information in the credit reporting system is

	fundamental to the role the credit reporting system plays in promoting competition across the industry. Hence, fee structures which undermine the credit reporting system reduce the value of the credit reporting system for all participants.
Monetary jurisdiction in relation to primary production businesses	
2. 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?	• ARCA does not have comments on this issue.
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?	• See our comments in response to (4).
4. Is there a need for AFCA to have an internal mechanism where the substance of its decision can be reviewed? How	• As noted in our preliminary comments, AFCA's remit is complex and large. New and proposed reforms, such as the broker best interest duty, the design and distribution obligations and the proposed changes to

should any such mechanism operate to ensure that consumers and small businesses have access to timely decisions by AFCA?	responsible lending[10], will make things even more difficult. It goes without saying that even the most highly qualified and experienced AFCA decision makers will, from time to time, make errors. Our experience with AFCA is that they are willing to acknowledge errors when they agree a mistake has been made. However, when industry and AFCA disagree on the substance of its decisions, there should be an internal mechanism to allow for review. • We note that there may be a concern that financial firms could trigger such a mechanism too readily and interfere with the ability of AFCA to make timely decisions (although, equally, the lack of an internal mechanism can interfere with AFCA's ability to make fair and efficient decisions). This risk could be mitigated through a number of measures, such as allowing each firm a limited number of unsuccessful 'challenges' per year (which would provide an incentive to only use those challenges for significant disputes). *Recommendation:* (viii) AFCA should have an internal mechanism that allows the substance of its decisions to be reviewed and which can be triggered by parties to the dispute. • In relation to credit reporting disputes, we note that there is often less need to 'overturn' the particular outcome of a single "bad" decision. Rather, as noted above, the real concern is that a published determination that includes incorrect analysis can have far reaching implications for the entire credit industry. *Recommendation:* (ix) AFCA should introduce a process to correct (through the inclusion of a clear notation) or withdraw a determination that is subsequently recognised as being incorrect. This would not

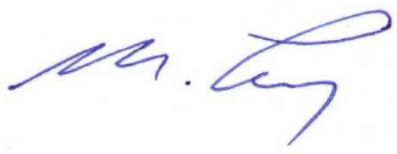
[10] While the responsible lending reforms are intended to simplify the obligations on credit providers, they will make it harder for AFCA to determine dispute relating to maladministration. The one NCCP framework will be replaced by multiple frameworks, i.e. NCCP for SACCs, 'Ministerial determination for non-ADI lenders and prudential standards for ADIs. The latter two of those regimes will (by design) set out less clear and consistent obligations compared to the existing NCCP regime.

	change the outcome between the financial firm and consumer. • We note that the process of questioning such incorrect determinations relating to credit reporting is often left for ARCA – being the industry association for the credit reporting industry. We broadly welcome the provision in AFCA's Operational Guidelines (at A15) for "formal reviews" that are intended to be triggered by an industry body or consumer organisation – although noting that a strict application of the requirement for the error to be an "error of law" limits the usefulness of this provision, especially when the law is not the decisive factor in AFCA determinations. We would also reiterate the need for AFCA's decisions to better explain the basis for a decision because it is difficult to consider the need for a review when the basis of the original decision is unclear. The short form determination used by AFCA does not provide detailed fact scenarios, and often only limited discussion and analysis of the relevant law and its application to the fact scenario. While it is appreciated that this short form determination is used to promote easy understanding of the outcomes of the dispute by the complainant consumer, it limits its value for third parties reviewing this determination. • To be clear, ARCA would not expect any review mechanism enacted by an industry body or consumer organisation to change the decision being reviewed. We see the purpose of these reviews is to challenge the substance of the decision and overall approach being applied in making the decision, with a view to changing the approach taken to future complaints. ARCA proposed such a process when AFCA was established but believe the current provision on AFCA's Operational Guidelines falls well short of this. • ARCA also sees the need for a formal review as a last not a first resort. ARCA acknowledges the willingness of AFCA to engage informally, and we believe industry and AFCA has benefited from these interactions. However, informal engagement has its limits e.g. where there has been acknowledgement of an error in a decision, there is no requirement for AFCA to formally change its approach (and as importantly, publicise that it has changed its approach). Given the individual public determination made in error is never

	corrected or withdrawn, the incorrect determination will continue to be available on AFCA's website and may mislead users of the scheme. *Recommendation:* (x) AFCA should provide greater detail about the process for "formal reviews" mentioned in their Operational Guidelines, and remove the limitation that these can only be initiated for "errors of law"

If you have any questions about this submission, please feel free to contact me on [redacted]

Yours sincerely,



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