

5 April 2018

Clare McCarthy  
Behavioural Research & Policy Unit  
Australian Securities and Investments Commission  
GPO Box 9827  
Melbourne VIC 3001  
By email: [policy.submissions@asic.gov.au](mailto:policy.submissions@asic.gov.au)

Dear Ms McCarthy

**OVERSIGHT OF THE AUSTRALIAN FINANCIAL COMPLAINTS AUTHORITY (AFCA) RG139  
UPDATED – PUBLIC CONSULTATION**

Thank you for the opportunity to comment on the above. We welcome the establishment of the AFCA and support the majority of the proposed updates to RG 139. Our key concern is the 'refer back' mechanism which allows financial firms a second opportunity to settle a dispute.

AFCA has been established to significantly improve outcomes for consumers and small businesses. It is not for the benefit of financial firms. The 'refer back' mechanism acts as a disincentive for financial firms to reach a timely, fair and reasonable outcome through its internal dispute resolution process. During the investigation period debt continues to accrue and, in some cases, banking services are withdrawn. Financial firms know a small business cannot survive extended periods without banking services. They rely on small businesses running out of resources to pursue complaints through to AFCA.

As outlined in our submission to the Treasury on 20 November 2017, Attachment A, we recommend the outcome of an internal dispute resolution (IDR) process be considered a financial firms final position. On the dispute being escalated to AFCA, AFCA should immediately commence its investigation.

In addition we would like to provide feedback on each of the question raised in the paper.

(B1) we agree with the proposed reporting requirements. However it is unspecified if, or what, penalties apply where these requirements are consistently breached. Further clarification is required.

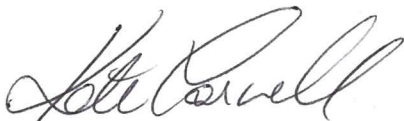
(B2) we are concerned with the broad nature of the terms 'serious' and 'reasonable' to determine when a contravention should be reported to you. As our work with you on unfair contract terms indicated, adding 'reasonable' to a contract did not make it fair as the word is subjective. We believe this rule could be strengthened by adding a list of breaches you would consider serious and must be reported.

(B3), (B4) and (B5) we agree with the majority the primary role, what is outside the role and the requirements of the independent assessor. What we do not support is the board of AFCA making the appointment. The assessor is responding to complaints on how AFCA deals with complaints which is guided by the AFCA board creating a conflict of interest. We propose that the independent assessor be appointed by ASIC to ensure total independence.

(B6) In our current technological, online, world there is sufficient time for financial firms to update all their legal disclosures and consumer communications to refer to AFCA. As we learned from the introduction of unfair contract terms no amount time will make financial firms comply with regulations. Businesses were given 12 months before the legislation came into effect to amend contracts to be fair. Still, a further 18 months on, only two of the four major banks have made the necessary changes. As stated earlier, AFCA is for the protection of consumers and small businesses. Financial firms must provide their customers the correct information to escalate a dispute to AFCA from 1 November 2018.

I hope these comments assist you and would be happy to discuss these matters further. Please feel free to contact either myself or Ms Jill Lawrence, on 02 6263 1558 or email [jill.lawrence@asbfeo.gov.au](mailto:jill.lawrence@asbfeo.gov.au).

Yours sincerely,

A handwritten signature in black ink, appearing to read 'Kate Carnell', with a stylized, cursive script.

**Kate Carnell AO**  
Australian Small Business and Family Enterprise Ombudsman

20 November 2017

Head of Secretariat  
AFCA Transition Team  
Financial Services Unit  
The Treasury  
Langton circuit  
PARKES ACT 2600

By email: [afca@treasury.gov.au](mailto:afca@treasury.gov.au)

Dear Sir/Madam

**RE: ESTABLISHMENT OF THE AUSTRALIAN FINANCIAL COMPLAINTS AUTHORITY (AFCA)**

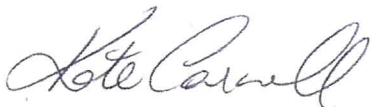
Thank you for the opportunity to respond to the Consultation Paper dated October 2017 on matters for the Minister to consider when seeing materials from potential operators of AFCA.

My office has two primary functions – advocating for and assisting small business and family enterprise. In performing the advocacy function, my office reviews key policies and laws which impact on small business, such as this bill creating the Australian Financial Complaints Authority (AFCA).

We welcome the establishment of the AFCA and outlined important considerations which were still missing from the proposed authority in our submission of 3 October 2017 to the Senate Economics Legislation Committee. Our comments in Attachment A are focused on making AFCA accessible and streamlined to ensure it is a real alternative for small businesses with limited time and money to chase justice.

We hope these comments assist the transition team's deliberations. Please feel free to contact either myself or Mrs Jill Lawrence, by telephone 02 6263 1558 or email [jill.lawrence@asbfeo.gov.au](mailto:jill.lawrence@asbfeo.gov.au).

Yours sincerely,



**Kate Carnell AO**  
Australian Small Business and Family Enterprise Ombudsman



## ATTACHEMENT A

### ISSUE 1: *Monetary Limits*

Specific monetary limits

- A. Monetary limits should apply across category of complainant, not product, with the exception of superannuation. For example, limits apply if a complainant is a consumer or a small business.
- This will:
- maximise clarity and access to justice
  - avoid technical objections by members
  - ensure equity across multiple categories of dispute arising from the same course of events e.g. a loan facility which includes an equipment loan with associated insurance policies
- B. Credit facility caps for small business to be soft barriers. AFCA needs to be able to consider the circumstances of a small business. Where a lender has frozen access to funds it leaves the small business with limited or no resources to access alternative pathways, such as the courts. While caps can be increased to broaden eligibility it may be reasonable to retain set limits on maximum compensation.

### ISSUE 2: *Enhanced Decision Making*

#### Promote consistency

##### *Precedent*

Principles of precedent should apply to promote consistency. For example if a notice period for enforcement action under a default is found to be unreasonable this issue does not require reassessment in another case. To assist complainants and members, AFCA should provide an online searchable database of decisions considered to be precedents. This would aid both complainants and members to resolve matters at the internal dispute resolution phase and potentially reduce the same issue being repeatedly escalated to AFCA.

#### Fair

##### *A power to obtain information and documents*

This is critical to enable access to any and all information related to a case as the complainant may not know the nature of all records. For example, where a member engages an investigating accountant to assess the health of the business, AFCA will need to have access not only to the report held by the member but the basis on which the investigation was conducted, such as the instructions.

The draft bill provides AFCA with the power only in relation to superannuation complaints but does not appear to provide a similar capacity for other, non-superannuation complaints. Having an explicit power to require the documents would leave no doubt as to the EDR's ability to obtain information in relation to a dispute.



Australian Government



Australian  
**Small Business and  
Family Enterprise**  
Ombudsman

## **Efficient**

### *Members' adverse presumptions if evidence not provided*

Adverse presumptions should apply for the benefit of complainants. This encourages members to present all information and records to AFCA or face a binding presumption that the evidence would be unfavourable to the member. For example if a member does not provide a copy of the letter of instructions to a valuer, a presumption will arise that the document is unfavourable to the member's case.

### *Internal dispute resolution (IDR)*

Where a dispute has been through a member's IDR process the determination made should be considered as the members' position on the dispute. AFCA must immediately commence its investigation. This will encourage members to resolve the dispute through their internal schemes. Where a dispute has not been through a member's IDR process it may be better serviced initially by being referred back to the member for IDR processing. The timeframe allowed for a member to work through its IDR process and advise its position must be considered part of the maximum timeframe for consideration by AFCA.

## **Timely**

### *Maximum timeframes*

Small business is reliant on cash flow and has limited resources to divert to disputes. As resources are diverted to address a financial dispute, a small business borrower will struggle to sustain the day-to-day operations of their business. Time from lodgement, through investigation and determination to effecting the determination cannot exceed six months. Our Small Business Loans inquiry found that, during a dispute, banks will significantly increase interest rates and/or freeze access to funds. While a small business may be able to survive under these conditions over a short term, extended delays will cause the small business to become insolvent even where AFCA subsequently find in favour of the small business.

## **ISSUE 3: Use of panels**

Time is critical to complainants. To ensure equity, as far as possible AFCA should make interim findings and require interim payments and actions to minimise impacts on the complainant pending expert opinion being received. In this way the impacts of time delays to obtain a view from an expert panel will be reduced as far as possible. Clear guidance can be provided through an online checklist for use by complainants and members.

## **ISSUE 4: Ensuring Accountability Through Independent Reviews**

### *Preliminary Review after first year*

We support an initial review of AFCA after one year of operation. This could separate new matters and legacy matters as the processes may need to vary. The review should include a focus on the effectiveness of the processes including from the time taken from lodgement to determination and time taken to implement a determination.





Australian Government



Australian  
**Small Business and  
Family Enterprise**  
Ombudsman

In addition the review should also look at how members affect determinations, for example details of unsatisfied payments by members following AFCA decisions. Both the member's actions and the impact on the complainant must be reviewed. The outcome of the review should be made public and any recommendations for monitoring future determinations considered by ASIC.

#### **ISSUE 5: *Independent assessor***

The independent assessor should be appointed by ASIC for a fixed term and draw from individuals with dispute resolution experience and high community standing. We support transparency of the assessor's activities through publication of reports, reviews and recommendations by the assessor to the AFCA board. This would be on the provision that data is anonymised and other privacy requirements are met.

#### **ISSUE 6: *Exclusions from AFCA's jurisdiction***

The only disputes to be excluded should be those settled in court as these decisions are legally binding. Where disputes have been considered by other schemes, but that scheme cannot make a binding determination, the dispute should be eligible for consideration by the AFCA. For example, Farm Debt Mediation (FDM). FDM aims to mediate an outcome but does not have the power to enforce compliance of an agreed outcome. Reviews of FDM have shown an imbalance of power in favour of financial institutions with a depth of resources. At mediations the complainant may attend with a representative and have to negotiate with four or more experts from the financial institution. Where an agreement is mediated it sets out the terms but not the form. Often financial institutions seek to formalise the agreement through a Deed which prohibits the complainant taken any further action and indemnifies the financial institution.

##### *Complaints lacking substance*

To minimise the impact of complaints lacking substance the AFCA could model a triage system of changes made by the Financial Ombudsman Service (FOS). FOS cleared a back log of cases by implementing strategies including a fast track for simpler and low value disputes, reduced touch points in the process, earlier provision of experts and clearer decision formats to communicate messages to both sides of a dispute.<sup>1</sup>

A triaging system to assist applications and screen for vexatious claims will also be required to allow AFCA resources to be directed to speedy resolution of genuine disputes. We suggest funding models allow for these triage services as detailed later in this submission.

---

<sup>1</sup> <https://www.fos.org.au/resolving-disputes/our-new-process/>.

### **ISSUE 7: *Ensuring directors Have appropriate skills***

We strongly recommend the appointment of one or more directors experienced in small business issues in addition to consumer issues. The Small Business Loans Inquiry highlighted the importance of understanding the specific pressure points and nuances associated with small business financing and operations. Many sophisticated small businesses have complex financial arrangements that require expertise to avoid inappropriate categorisation of their issues and to ensure informed analysis of impacts associated with financial disputes.

### **ISSUE 8: *Board responsibilities***

Governance rules must expressly emphasise the importance of independence and lack of actual and perceived conflicts of interest with the financial sector. As members pay for the operations of AFCA they are not shareholders. Therefore, governance processes must allow robust avenues for external regulators to have oversight of operations and to take effective action for any breaches of directors' duties.

### **ISSUE 9: *Accountability to stakeholders***

We strongly recommend that AFCA's terms of reference include express mention of small businesses as stakeholders. As discussed earlier, the impacts on small business extend beyond those of consumers as detailed in the final report from our Small Business Loans Inquiry. How the AFCA deals with the specific needs of small business will have a profound impact on how effective the scheme is for small business complainants.

### **ISSUE 10: *Funding matters for consideration***

#### *Proper complaints lodgement*

Funding for services to triage matters and assist with lodging applications could reduce the number of vexatious claims and processing burden to the scheme. For example registered organisations that complete an AFCA training module on eligibility criteria may perform this role.

#### *IT Systems and ongoing upgrades*

Funding must accommodate immediate information technology set up but allow for continual upgrades. The currency and quality of public interfaces with complainants and members is vital for information provision, lodgement of complaints, effective administration and overall efficiency of the scheme.

#### *Funding for AFCA investigations*

Funding should support AFCA investigating issues outside of specific cases where patterns appear from the nature, content or themes of the case load. Identifying and setting precedents against poor practice will expedite resolution of future disputes and minimise similar disputes coming to the scheme. Publication of these precedents will signal to members and complainants alike the likely outcome. This funding for



investigations can produce guidance notes or other information to influence behaviours by member or complainants to minimise growth in disputes.

#### *Fund of Last Resort*

We suggest AFCA creates a fund to make compensation payments. The fund would apply to at least two categories of disputes. AFCA matters subject of a decision where the member cannot pay e.g. insolvent members or those that cease to exist. The second component of the fund should at least cover existing unpaid decisions by other tribunals or schemes. Referrals to the fund would receive immediate payment and not involve a further hearing or determination. The parameters and limits for payments can be set in proportion to the size of the fund and other reasonable criteria<sup>2</sup>.

#### **ISSUE 11: *Interim funding arrangements***

Interim funding will need to support:

- A. resolution of legacy cases from previous schemes as a priority;
- B. establishment of single platform for AFCA;
- C. publicity and awareness raising of AFCA.

#### **ISSUE 12: *Transparency and accountability***

The conditions set for the scheme to be accountable to members for fees must expressly include measures beyond a cost/benefit analysis to members. Failure to do so can undermine the objectives of the scheme. We strongly propose that accountability for fees must include the interests of other stakeholders and extend beyond financial measures. For example measures of behavioural changes by financial institutions will be relevant, together with measures of consumer and small business confidence in members.

#### **ISSUE 13: *Privacy***

We agree that AFCA will need to be recognised by the Australian Information Commissioner as an EDR scheme.

#### **ISSUE 14: *Dealing with legacy disputes***

We agree that legacy disputes be transferred to AFCA and given priority for determination. This is preferable to running tail claims in four different EDR schemes. Consolidating the disputes will allow resolutions to be tracked by AFCA and potentially provide precedents for future cases.

---

<sup>2</sup> For example the UK Financial Services Compensation Scheme makes some payments for losses to individuals and smaller businesses under its eligibility rules. See <https://www.fscs.org.uk/industry/about-fscs/further-details-on-the-fscs/scheme-limitations/>