26th March 2021

Director
AFCA Review Secretariat
Financial System Division
The Treasury, Langton Crescent
PARKES ACT 2600
By email: AFCAreview@treasury.gov.au

Re: Review of the Australian Financial Complaints Authority (AFCA)

To whom it may concern

The National Credit Providers Association (NCPA) welcomes the opportunity to comment on the review of the Australian Financial Complaints Authority (AFCA). The NCPA provided feedback on the establishment of AFCA in 2018 and have since maintained a dialogue with officers from AFCA during its early years of operations.

The views expressed in this submission address the Terms of Reference and are based on the direct experience of NCPA members (businesses providing Small Amount Credit Contracts) who hold an Australian Credit License and are registered AFCA members.

Review Terms of Reference

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

Response: In short, no they are not. There is much room for improvement starting with a more realistic and economically viable fee structure that does not act as a disincentive for credit providers to pursue a defence or rebuttal of complainants lodged via the EDR scheme. As the AFCA must by its rules register every complaint from consumers regardless of the nature of the complaint hence cost recovery automatically kicks in regardless of whether the complaint has been through the IDR process or not.

This is perversely fostering an environment where the complaints system is being undermined by those seeking to exploit the rules to their own ends. This is to the detriment of credit providers who are adhering to the responsible lending obligations in the NCCP Act 2009, plus it is eroding any good faith that credit providers have in AFCA and the EDR scheme.

1.1. 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?

Response: The AFCA fee structure is not suitable for the Small Amount Credit Contract sector due to loans being less than $2000. Industry data collected over five years by CoreData Australia indicates the average size SACC in 2017/18 was $635 taken over an average of 5 months. When compared to the current AFCA fee structure, there is much evidence since the commencement of the AFCA that the fee structure and the cost to credit providers acts as a disincentive on SACC providers to pursue complaints past the initial stage of the EDR process.

The cost to credit providers of defending customer complaints (in particular frivolous or vexatious claims) for a SACC loan is as follows:

- Costs of referring a complaint to AFCA is $95 for the 1st stage,
- $855 for case management 1,
- $2,135 for case management 2,
- $2,280 for conciliation call, $
- $5,435 preliminary view decision,
- $8,535 escalation to the ombudsman, and
- $12,815 decision by the panel, regardless of the size of the loan.

Clearly, for a SACC on average of less than $1000, the AFCA fee structure simply means providers settle with the borrower despite there being no finding of breaches or fairness. In many instances, the complaints are pursued by borrowers despite initial feedback from AFCA that the claim will fail, as the borrowers are using the process to place commercial pressure on the credit provider knowing that the borrower, regardless of the outcome, is not required to contribute to the costs of the referral.

Consequently, in regard to Credit Reporting related issues (which form the significant majority of complaints lodged by consumers or on behalf of consumers by Credit Repair Companies against Small Amount Loan providers (both enquiries and default listing) the credit provider is left with no option but to breach their agreements with Credit Reporting Bureaus by requesting the removal of unremedied defaults or legally made enquiry. This goes against the intention of the credit reporting regime as defaults and enquiries are being removed rather than showing them as a legitimate enquiry or as an unpaid (or subsequent shown as paid out) default. This misinformation then creates a complete void of realistic credit reporting data used to make responsible lending decisions. The result of this now artificial reporting regime is that more consumers will qualify for loans they simply cannot afford, as their credit history is inaccurate.

The fundamental issue here is that consumers are increasingly gaming the current AFCA EDR process. It is well understood by credit repair agencies, legal aid staff and is becoming clear to SACC customers that the cost for a credit provider to resolve a complaint, no matter how frivolous, is significant. As a result, many lenders are not listing defaults and are consistently forgiving loan debts to avoid AFCA complaint fees.

Borrowers are increasingly cognizant of this flaw in the system. For example, a consumer who has been declined a loan due to a previous default on their credit file will make a frivolous complaint to the

original credit provider in order to pressure the provider to remove the default. SACC providers are correctly declining loans in these circumstances, but this often results in the customer complaining to AFCA. This behavior is concerning and is happening far too frequently. The NCPA has met with and brought this important issue to the attention of AFCA officials with no change to process, acceptance of such complaints or a change to the fee structure.

The NCPA considers the AFCA Charter and rules be immediately broadened and or modified to include an appropriate mechanism to prevent this 'gaming of the system' which if continued, undermines the responsible lending obligations of credit providers. Where consumers or agents acting on behalf of consumers (or advising consumers) who register complaints seeking the removal of a default on a credit file be removed, AFCA can determine they no longer be heard and maintain a public register of vexatious complainants. This public register, where there have been numerous frivolous complaints recorded by AFCA will assist to prevent the growing number of consumers with clean credit records as a result of lenders having little recourse but to remove or not list defaults on consumers files due to the completely unrealistic AFCA fee structure.

This can be demonstrated in the below case studies which are actual examples of engagement with AFCA minus any identifying information.

CASE STUDY ONE – November 2019. Correspondence between a small credit provider and AFCA.

Good Afternoon [redacted]

As per our phone call just now, [redacted] will remove the credit inquiry from [redacted] Equifax file as requested. This is not an admission of error, but due to the AFCA fee-structure. It is evident that our website is legitimate, and all processes resulting in a credit enquiry being made are followed correctly. Morally we would have appreciated being able to take this further to obtain a fair resolution. Unfortunately, as a small, self-funded franchise operator, it is not financially viable for us to do so.

It is thoroughly disappointing that we are left with no option than to submit to a ridiculous request from the complainant and his representative, solely due to the expense of the ordeal. Also, now the information reflected on the complainant's credit file will be diluted and should this be happening to more operators than just ourselves (which we believe it is), this leads to the questionable quality of data used within the industry, at no fault of anyone other than those imposing such large fees.

You mentioned in our phone call about there being little more you can do as we choose to be AFCA members – this is not a choice now that CIO and FOS have been dissolved, we must be AFCA members in order to trade & retain our Australian Credit Licence, so have no alternate than to operate under such an expensive EDR scheme. We are disappointed but will be actioning [redacted] request to remove the enquiry.

CASE STUDY TWO – September 2019. The experience of a small credit provider and the EDR process with AFCA.

A client complained to AFCA about their default being listed although they hadn't repaid their loan, and the complaint advanced to the Preliminary Assessment stage where AFCA found "partially in our favour", noting we could've done more to contact the client even though they believe it wouldn't have made a difference as the client was aware of the debt. As a small credit provider, we received a bill from AFCA for $4,750.

The client then withdrew their complaint and went to a credit repair lawyer. Our business was now out of pocket from the original loan, plus the AFCA fee, plus legal expenses, plus my time and it was still open to be challenged again. We ended up negotiating with the credit repair lawyer (yet more legal costs for my business) and had the client pay a reduced settlement amount on the loan for us to completely remove the default. This is what is happening under the high-cost AFCA complaints regime for loans of less than $2000. Further, now other SACC lenders will fall victim to this client now. This has been relayed to AFCA over two years but there has been no change and the response from AFCA has simply been to raise this issue during the review.

The current system is perpetuating an environment where there is no deterrent for clients to raise these complaints and game the system. The SACC provider is left with a substantial Bill and I feel we should be able to pursue these individuals in court for reimbursement of AFCA fees or for a complaints database to be made available to AFCA members so credit providers could search the database for client's names prior to approving a loan.

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?

Not applicable to NCPA members.

Internal review mechanism

3. AFCA's Independent Assessor has the ability to review complaints about the standard of service provided by AFCA in resolving complaints. The Independent Assessor does not have the power to review the merits or substance of an AFCA decision. Is the scope, remit and operation of AFCA's Independent Assessor function appropriate and effective?
4. Is there a need for AFCA to have an internal mechanism where the substance of its decision can be reviewed? How should any such mechanism operate to ensure that consumers and small businesses have access to timely decisions by AFCA?

Response: The NCPA considers an internal review mechanism is vital to a robust and effective complaints system. In particular, where AFCA is aware of multiple complaints from the same individual, seek an internal review and have the capacity to end the complaint process where it is found to be frivolous or vexatious.

The NCPA is aware that some SACC lenders are not reporting defaults, removing them or forgiving debts, and the AFCA policy is causing tremendous long-term damage to the industry and more importantly, to consumers. Credit reporting bureaus are becoming redundant in this sector which in turn will create more harm to consumers.

You may be interested to know that a recent case heard before the Fair Work Commission (FWC) Diane Porteous v G Kakafikas and A.G. Bek partnership t/a Yarra Glen Pharmacy (2019) Deputy President Alan Colman censured an employee for wasting the time of the FWC and her employer.

The Deputy President said, "the employee who had applied for an unfair dismissal remedy in the case and did almost nothing to pursue her claim other than completing an application form and paying a $73.20 filing fee. "She ignored directions of the Commission to file materials, she failed to participate in proceedings and did not discontinue the proceedings. While the Pharmacy, the public service, the Commission and ultimately the taxpayer were at work on the matter Ms Porteous did almost nothing".

The relevance to the current AFCA EDR system is that in many instances consumers are making complaints and despite initial feedback from AFCA that the claim will fail, the borrowers (consumers) are using the process to place commercial pressure on the credit provider knowing that the borrower, regardless of outcome, is not required to contribute to the costs of the referral.

In the above FWC matter Deputy President Colman found the process completely unacceptable and a waste of the FWC's time. It should also be noted that Federal Attorney General and Minister for Industrial Relations Hon Christian Porter is quoted as saying the government will consider giving the FWC power to impose penalties on sacked employees who make unfair dismissal claims they fail to properly pursue.

Further, the AFCA Terms of Reference and the Operational Guidelines note:

- Under TOR paragraph A8.3 – AFCA may decide it is not appropriate for it to continue to consider a complaint if it determines the dispute is without merit or the Financial Firm has committed no error. (The process for excluding a complaint under TOR paragraphs A4.5 and A4.6 is then applied).
- Under TOR paragraph C2.2(g) – AFCA has the discretion to exclude a complaint lodged by a credit repair agent, with the actual requirement that "(g) if the Complainant is represented or assisted by an agent who may receive remuneration for this service and AFCA considers that: (i) the agent is engaging in inappropriate conduct that is not in the best interest of the Complainant, or (ii) the complaint is not accompanied by information required by AFCA"

In default listing disputes where all the requirements of paragraph 9 of the CR Code can easily be demonstrated to have been met, and there is no substantive issue raised by the complainant, then the question is whether the AFCA process ought to include consideration of the exclusion of the dispute on merits grounds.

The NCPA contends that credit repair companies will often raise (1) failure to provide financial difficulty assistance; and (2) failure to give notices to the individual at their last known address as standard issues, with the objective of requiring an EDR investigation. However, you may also find that credit provider records may support a failure by the consumer to engage with the credit provider, and no 'return mail' – in which case the onus ought to be placed on the individual to provide supporting information, otherwise the dispute would remain without merit.

Additional Comments: The NCPA considers that Credit Repair Agencies, who are either submitting complainants on behalf of consumers or coaching consumers to make a complaint using cut and paste style form filling for the financial advantage of the Credit Repair Agency or advising consumers on how to game the AFCA EDR scheme, so as to assist consumers to pursue frivolous complaints, should be prevented from lodging complaints with AFCA and that AFCA have the power to refer these actions to other government agencies (such as ASIC or APRA) for investigation.