AUSTRALIAN
RETAIL
CREDIT
ASSOCIATION

Behavioural Research & Policy Unit
Australian Securities and Investments Commission
MELBOURNE VIC 3001
Via email

06 April 2018

Dear

Submission on CP 298 *Oversight of the Australian Financial Complaints Authority: Update to RG 139*

Thank you for the opportunity to provide a submission on Consultation Paper 298 *Oversight of the Australian Financial Complaints Authority: Update to RG 139* (CP 298).

For background, the Australian Retail Credit Association (ARCA) is an industry association with the objective to promote the integrity of the credit reporting system, enabling better lending decisions.

Credit reporting is regulated by *Part IIIA* of the *Privacy Act* (Part IIIA), and that Act requires credit providers engaging in credit reporting and credit reporting bodies to be members of an external dispute resolution scheme that is recognised by the Information Commissioner.[1] Recognition by the Information Commissioner is separate to the ASIC approval process for the Australian Financial Complaints Authority (AFCA). We expect, however, that AFCA will also seek recognition from the Information Commissioner and will consider complaints regarding credit reporting matters.

Accordingly, ASIC's expectations of AFCA, as set out in the updated Regulatory Guide 139 *Oversight of the Australian Financial Complaints Authority* (RG 139), will directly impact that organisation's consideration of credit reporting matters.

We have previously provided feedback on the operation of AFCA, most recently to the Transition Team led by Dr Malcolm Eady (copy attached as *Annexure One*). To date, we understand that the outcomes of that process have not been made public.

As noted in our submission to the Transition Team, Part IIIA establishes a facilitative regime that gives industry rights and responsibilities related to the operation of the credit reporting

[1] Both the Financial Ombudsman Service and Credit & Investments Ombudsman are recognised EDR schemes for the purposes of the Privacy Act.

system in order to ensure an effective, consistent and fair system. Our primary concern is that AFCA not make decisions that restrict or re-interpret those rights and hence the ability of industry to utilise the rights in a manner consistent with the purpose for which they were granted.

Our concern is not individual decisions, which will be decided on "what is fair in all the circumstances", but with decisions that appear to create novel interpretations of what otherwise is considered established law, industry code, or good industry practice.

In our submission to the Transition Team, we made a number of suggestions that we believe would assist AFCA to operate in a way that would improve its decision-making process and ways for stakeholders to raise concerns with, or dispute, systemically important decisions that may be incorrect (*without* seeking to overturn the outcome of a particular dispute).

Broadly these suggestions involve AFCA implementing Terms of Reference that:

i. encourage AFCA to identify when it is being asked to make a systemically important decision; and
ii. require AFCA to implement processes to ensure better decision making in respect of those decisions, such as:
    a. providing reasons for decisions that explicitly state whether the decision is based on law, an industry code of practice, good industry practice or fairness;
    b. using a panel when a decision is likely to involve a systemically important interpretation of law or code of conduct; and
    c. seek the input of relevant stakeholders before making a systemically important decision (which would include industry associations that represent businesses that could be impacted by the decision).

As noted in our submission to the Transition Team, the decisions of an EDR scheme have the potential to significantly disrupt the operation of financial service providers – and, in the case of credit reporting related decisions, businesses in other industries such as telecommunications, gas and electricity providers (which are also 'credit providers' within the Part IIIA meaning). The risk of this happening will increase over the next year, as industry moves to adopt the comprehensive credit reporting system (triggered by the proposed mandated supply of comprehensive credit reporting information by the major banks), which is likely to present complaints that involve new legal concepts and types of data.

The role of the independent assessor process is vitally important to ensuring that AFCA has followed the correct process when making a systemically important decision. However, the particular respondent may not always invoke the independent assessor in cases where AFCA may not have followed the correct process. This is for numerous reasons, including significant reputational and financial impacts of pursuing disputes and whether the respondent has a proper understanding of the wider industry implications of the decision.

Accordingly, in respect of the *Proposals* in CP 298, our primary recommendations are:

1. **Proposal B5(d):** In addition to accepting service complaints from all users of the scheme, the independent assessor should accept complaints regarding a failure to follow process from other relevant stakeholders, including industry associations and consumer representatives, where that failure has potentially impacted AFCA's decision in respect

of a systemically important issue. This will ensure that the independent assessor is able to consider the processes followed by AFCA when making a systemically important decisions, even if the respondent does not raise a complaint.

2. **Proposal B5(i):** To the extent that AFCA has made a systemically important decision that creates a novel interpretation of law, industry code or good industry practice, it is important that industry quickly understand if the proper process in making the decision was not followed – this will avoid unnecessary process reengineering. Given the significant changes that will be happening as the industry moves to a comprehensive credit reporting system, this will be particularly important for decisions that involve credit reporting related issues. We recommend that there be a requirement for the independent assessor to issue a public statement as soon as possible if the assessor finds that AFCA has not followed the required process when making a systemically important decision (whether or not this has the full detail that would otherwise be required).

We have set out some additional specific feedback in *Annexure Two*.

If you have any questions about this submission, please feel free to contact me or Michael Blyth.

Yours sincerely,

Mike Laing
Executive Chairman

AUSTRALIAN RETAIL CREDIT ASSOCIATION

ANNEXURE TWO:

ARCA's Submission on Consultation Paper 298
Oversight of the Australian Financial Complaints Authority – Update to RG 139

	CP 298 reference	ARCA Comments	ARCA Recommendation
1.	**B1** We propose to require that: (b) AFCA must make reports within a reasonable time, but no later than 30 days, of: (i) becoming aware that a serious contravention has occurred or may have occurred; or (ii) identifying a systemic issue.	We note that the current RG 139: *Approval and oversight of external dispute resolution schemes* (current RG 139) specifically requires a scheme, having *identified* a systemic issue or case of serious misconduct, to "*refer these matters to the relevant scheme member or members for response and action*" before *reporting* the matter to ASIC. We strongly suggest that the updated RG 139 include an equivalent statement that imposes an expectation on – and permission to – AFCA to seek the specific input of the firm on AFCA's *developing* belief that there is a reportable matter relating to the firm's conduct. While the updated RG 139 contemplates AFCA seeking ASIC guidance as to whether a matter is reportable (see RG 139.43), in many cases the uncertainty will relate to the facts that sit behind the complaint (e.g. whether an illegal action was the result of a one-off mistake, or a process failure). This is something that the firm will be able to clarify, rather than ASIC.	RG 139 should explicitly recognise that, if AFCA is developing a belief that a matter may be reportable to ASIC (or another relevant regulator), AFCA should, as a standard practice, inform the firm of its developing belief and seek the firm's specific input prior to making that report. This would not apply only if AFCA believed that it was unnecessary or inappropriate to seek the input of the firm.

		We recognise that, in limited circumstances, AFCA may believe it is unnecessary or inappropriate to seek the input of the firm before reporting the matter to ASIC or other relevant regulator. This would include where the facts supporting the report are clear, or where the firm has previously refused to cooperate in respect of the complaint. The inclusion of a specific legislative obligation on AFCA to report relevant matters to ASIC or another relevant regulator will increase the pressure on AFCA to report matters to the regulator. If RG 139 does not specifically recognise that AFCA may seek the input of the firm as it develops the belief that the matter may be reportable, it is likely to result in many more matters being reported. This will not only be an inefficient use of AFCA and the regulator's time, but will also damage the working relationship between AFCA, ASIC/other regulator and firms. If either AFCA or ASIC (or other regulator) subsequently publicises the report – and it is shown that the report was without basis – the error will damage the standing of the EDR process.	
2.	**B2(c):** AFCA should consult with ASIC if they are unsure about whether they should refer a matter to ASIC.	AFCA is likely to refer complaints to ASIC that it considers involves a systemic issue based on a particular interpretation of law or code of practice by AFCA. Where ASIC disagrees with this interpretation, it is important that that feedback be provided to AFCA as it could impact the decision of AFCA in that complaint or series of complaints.	The process for the reporting of systemic issues include a feedback loop to AFCA if ASIC does not agree with AFCA's interpretation of law or code of practice.
3.	**B3(a):** We propose to clarify in our guidance that the primary role of the independent assessor is to: (a)	While we recognise the primary role of the independent assessor is to consider the *process* followed by AFCA in coming to a decision, this should not prevent the independent assessor from identifying instances where	While the primary role of the independent assessor is to respond to complaints about how AFCA dealt with an individual decision, it should be open to the assessor to also make comments about the *correctness* of a particular

	respond to complaints about how AFCA dealt with an individual complaint or series of complaints. **B4(a):** We propose to clarify in our guidance that it is *not* the role of the independent assessor to: (a) undertake a merits review of an AFCA decision, including a jurisdictional decision.	there has been a patently incorrect interpretation of law or code of practice, or a finding in respect of good industry practice that is not supported in reality. For example, if a decision was made on the basis of good industry practice, we expect that it should be open to the independent assessor to find that AFCA had not taken the appropriate steps to identify what constitutes 'good industry practice' (i.e. the process was not followed). However, it should *also* be open to the independent assessor to find that AFCA's finding in respect of good industry practice was clearly not supported by the facts available to AFCA. If this is not the case, it risks placing too much focus on the process of making the decision, rather than the desired outcome of making *good* decisions.	decision (without that involving the decision being overturned). This will assist AFCA to identify areas in which it may need to improve.
4.	**B5** We also propose to require that that the independent assessor must: (a) be appointed by the AFCA Board, with its role and functions set out in the AFCA terms of reference; ... (c) be independent, with appropriate qualifications and experience;	In our submission to the Transition Team, we recommended that – in order to ensure their independence – the appointment of the independent assessor not be left to AFCA itself. In order to be truly independent, the assessor must be free to make decisions that are potentially critical of the Board's oversight of the organisation. If this recommendation is not accepted, we note that RG 139 must establish the basis on which the independence of the assessor *from the Board* is to be maintained. This would include requirements relating to the independent assessor's reporting lines, tenure, remuneration and performance management.	RG 139 should set out the basis on which the independence of the independent assessor is to be maintained, including the requirements relating to reporting lines, tenure, remuneration and performance assessment.
5.	**B5** We also propose to require that that the independent assessor must:	See the comments in the main section of ARCA's submission.	RG 139 should require the independent assessor to accept complaints from other relevant stakeholders, including industry associations and consumer representatives, where a failure to follow process has potentially impacted

	(d) accept service complaints from all users of the scheme;		AFCA's decision in respect of a systemically important issue.
6.	**B5** We also propose to require that that the independent assessor must: (f) make recommendations, as appropriate, to the Chief Ombudsman and to the AFCA Board; … (h) make quarterly reports to the AFCA Board and ASIC.	EDR schemes have the potential to significantly disrupt the operation of financial service providers. If the independent assessor finds that AFCA has failed to follow the required process, or a decision is patently incorrect (see our comments in Item 2), it is important that the negative industry-wide impacts of such a decision be unwound (without seeking to overturn the outcome of the particular dispute). While the independent assessor cannot direct AFCA to take specific action, if a recommendation is not followed, reasons should be given and ASIC should be advised.	RG 139 should clarify that the recommendations of the independent assessor should directly address the negative impacts of the decision – which, in the case of a systemically important decision, will include addressing the impact on the wider industry. It would be helpful if RG 139 included examples of recommendations that address particular types of process failures. For example, in respect of a failure to follow process in respect of a systemically important decision, the recommendations should include that AFCA: • Clarify the basis on which a decision was made (i.e. law, code of conduct, good industry practice or fairness). • When considering similar complaints in the future, use a panel and/or engage with relevant stakeholders to better understand the issues before making a decision. • Develop guidance/position statements on specific issues or complaint types and, in doing so, seek feedback from stakeholders. • In respect of complex legal issues, obtain external advice from sufficiently senior counsel. If the independent assessor's recommendations are not accepted, AFCA should be required to provide reasons and this should be included in quarterly reports to ASIC.
7.	**B5** We also propose to require that that the independent assessor must: (i) make annual public reports on: (i) complaints	See the comments in the main section of ARCA's submission.	RG 139 should require the independent assessor to issue a public statement as soon as possible if the assessor finds that AFCA has not followed the required process when making a systemically important decision (whether or not this has the full detail that would otherwise be required).

	received; (ii) findings or recommendations made; and (iii) outcomes achieved as a result of recommendations made.		
8.	**B6** Our proposed expectations for financial firms are that, by commencement (no later than 1 November 2018): (a) any final response or written reasons financial firms give to a consumer about a dispute at IDR will refer to AFCA; (b) financial firms will update online information and forms to refer to AFCA, as appropriate; and (c) personalised disclosures, including periodic and exit statements, will refer to AFCA.	We strongly submit that it is not reasonable to expect financial firms to have updated all disclosure documents by 1 November 2018 (or earlier, if commencement occurs before then). The variety and number of documents that must be updated means that this task will be a significant undertaking. It is also made more difficult as: • firms do not yet know the contact details (in particular the web address) of AFCA; • the date of commencement is not yet certain – changes of this nature will require planning and scheduling within the firm's change management timetable; • it is possible that AFCA will require a particular form of disclosure in relation to its contact details and consumers' rights to engage the scheme (particularly on communications issued through IDR, as referred to in B6(a)); and • firms that engage in credit reporting will need confirmation that AFCA has been recognised by the Information Commissioner to consider disputes in relation to credit reporting. We note that firms that are currently members of the Financial Ombudsman Scheme (FOS) or Credit and Investment Ombudsman (CIO) will already include the	While financial firms should currently be compiling a list of documents that require updating, RG 139 should recognise that the resource-intensive task of actually updating disclosure documentation cannot commence until: • AFCA has confirmed it's contact details, including its web address (which will differ from the existing EDR schemes); • AFCA has confirmed it's commencement date; • AFCA has confirmed what form of disclosure that it will require – in particular, in respect of the disclosure issued by IDR when responding to a customer complaint. • For those firms engaging in credit reporting – AFCA has been recognised by the Information Commissioner. Given the variety and number of documents that must be updated, RG 139 should provide a period of 12 months from confirmation of the above matters for firms to complete the updates, subject to: • an expectation that firms use best endeavours to complete the changes as soon as reasonably possible; and • an assessment by the firm as to whether the existing disclosure on a particular document could result in a material risk of misleading a consumer as to their rights.

		details of those schemes, and the consumer's right to complain, in their disclosure documentation and other communications. Provided the relevant websites, phone numbers and other contact methods are maintained by AFCA in the transitional period, there is little risk that a consumer will be misled as to their ability to complain to a relevant EDR scheme. If firms are given a reasonable period to update the wide range of documents, they will be able to better focus on updating the documents that have a higher risk of causing confusion (e.g. those documents which may refer to the out-dated monetary limits applying to disputes).	RG 139 should require AFCA to maintain the existing websites, phone numbers and other contact methods of FOS and the CIO during the transitional period and for a reasonable period afterwards (noting that, even if new disclosure documents are updated, it is likely that some consumers will refer to old documentation when they have a complaint).