AUSTRALIAN
RETAIL
CREDIT
ASSOCIATION

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The Treasury
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24 November 2017

Email:

Submission on the consultation paper 'Establishment of the Australian Financial Complaints Authority'.

Dear

Thank you for the opportunity to comment on the Establishment of the Australian Financial Complaints Authority Consultation Paper.

The Australian Retail Credit Association (ARCA) is the peak industry association for organisations involved in the consumer credit reporting system. In recently announcing plans to mandate the participation of the major banks in the comprehensive credit reporting (CCR) system, the Government recognised that a properly functioning credit reporting system results in greater lending competition and better access to finance for Australian households.[1] ARCA's fundamental purpose is focused on the integrity and performance of that system, and promoting best practice in credit management and responsible lending.

The Consultation Paper (at Issue 15) recognises the fact that, under the Privacy Act, the Australian Financial Complaints Authority (AFCA) will need to be separately recognised by the Australian Information Commissioner in order to consider disputes dealing with an individual's privacy (including those relating to credit reporting). There are, however, additional differences – both regulatory and practical – between the types of disputes that AFCA will consider under the financial services laws (e.g. Corporations Act and National Consumer Credit Protection Act) and those in relation to credit reporting.

First, given the wide meaning of 'credit provider' under Part IIIA of the Privacy Act, the credit reporting regulatory framework applies to a range of businesses that are not caught by the financial services laws – including businesses such as telecommunications and utilities providers.

Second and critically, unlike the financial services laws, Part IIIA does not only provide for a consumer protection framework. Rather, it is also facilitative legislation giving industry rights and responsibilities related to the operation of the credit reporting system to ensure an effective, consistent and fair system. In this context, it should not be the role of an external

[1] See http://sjm.ministers.treasury.gov.au/media-release/110-2017/

dispute resolution scheme (EDR) to make decisions that restrict or re-interpret these rights and the ability of the industry to utilise these rights in a manner consistent with the purpose for which they were granted. Industry's implementation of comprehensive credit reporting has been delayed by a number of recent decisions of an existing external dispute resolution scheme, which if applied systemically would significantly undermine the value of information in the credit reporting system. Such outcomes seem totally inconsistent with the Government's recent announcement that they will mandate the largest credit providers to participate in CCR.

For these reasons, our recommendations in the attached submission are directed towards ensuring:

1. AFCA is established in a way that acknowledges and accurately reflects the regulatory framework that has been established to facilitate the public benefits gained from a properly functioning credit reporting system.
2. AFCA is more explicit regarding the basis for decision-making, including identifying whether they believe their decisions are consistent with established law, industry codes of conduct, or industry best practices.
3. AFCA implement processes to identify and deal with disputes that involve systemically important interpretations of law, industry codes of conduct or good industry practice, including engaging with relevant stakeholders before making a decision, use of panels and expanding the current test case processes to include referrals to the Australian Information Commissioner.
4. The overall governance framework within AFCA (including the independent assessor, independent reviews and the involvement of the AFCA Board itself) supports better decision making and provides for a process for decisions that involve systemically important interpretations to be reviewed.

To be clear, our primary concern here is not individual decisions which may always 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 codes, or good industry practice.

We have set out our specific recommendations in Appendix 1.

ARCA has had the benefit of reading draft submissions on the Consultation Paper from Australian Collectors & Debt Buyers Association (ACDBA), Australian Finance Industry Association (AFIA) and National Insurance Brokers Association (NIBA). All four industry associations (Joint Associations) share common significant concerns in relation to AFCA's implementation. These shared significant concerns are summarised in the matrix in Appendix 2.

Once again, thank you for the invitation to make a submission on the consultation paper. Feel free to contact me directly if I can provide further information, or Michael Blyth (Head of Government, Regulatory and Industry Affairs).

Yours sincerely

Mike Laing
Executive Chairman

Appendix 1 – ARCA's specific recommendations

Part 1 – Terms of Reference	
Guiding principles for AFCA's establishment	1) We recommend that the following guiding principle also be adopted: "***Continuing active consultation and engagement*** *– AFCA will continue to actively engage and consult with stakeholders during the establishment phase of the scheme.* 2) We understand that AFIA has recommended that: a) the third guidance principle be amended to recognise that AFCA should both adopt what is working, but also discard ineffective practices; and b) a fifth guiding principle should be added that would require AFCA to adhere to best practice governance requirements. We agree with the reasons provided by AFIA and support their proposals.
Issue 2: Enhance decision making	We make the following recommendations to improve the decision making of AFCA, in particular in relation to questions of interpretation of the law, industry codes of conduct or good industry practice, that are novel and that may have implications to businesses other than the respondent (i.e. that are 'systemically important'). The potential for such disputes to be treated differently under the terms of reference of an EDR scheme is not new; both the Financial Ombudsman Service (FOS) and the Credit and Investments Ombudsman (CIO) have procedures for dealing with 'test cases'. However, we understand that such processes are rarely invoked. This is not unexpected as the cost implications – together with the potential reputational risk of having a publicly reported case in the financial service provider's name – would make the decision to invoke the test case process unpalatable. Our recommendations are designed to improve the handling of disputes that raise systemically important issues for both consumers and the financial service provider by keeping the process within AFCA as often as possible. This will, amongst other benefits, reduce the time for resolving the dispute (compared to the issue being taken through the courts). 3) We recommend that the terms of reference reflect that: a) In addition to the current practices of FOS and CIO to provide reasons for decisions, all decisions of AFCA (whether set out as a preliminary view, recommendation or determination) should clearly state whether the decision is based on law, an industry code of practice, good industry practice or fairness. If AFCA considers that the application of the law or code of practice to a particular dispute is unclear, this should be noted. b) Where AFCA makes a decision other than in accordance with the law or code of practice - or which diverts from a previously adopted AFCA position - this should be noted and

	reasons provided. c) AFCA should regularly provide statistical reporting on the basis upon which decisions are made (i.e law, code of practice, good industry practice or fairness), including where the decision diverts from the law, code of practice or previously adopted AFCA position. **Comment:** We recognise that AFCA must be free to make decisions that achieve 'fairness in all the circumstances'. However, requiring AFCA to identify the basis on which a decision is made will promote well-reasoned and more transparent decision-making processes. Likewise, it will provide confidence to the wider industry to know when a decision does or does not require changes to systems and processes to give effect to AFCA's interpretation. This data will also assist in identifying areas of legal uncertainty and where the law may not be providing adequate protection to consumers (i.e. where AFCA finds that, although the financial service provider was acting in compliance with the law or code of conduct, the outcome was not 'fair in all the circumstances'). In requiring AFCA to report on the basis of the decision, we see this being done in a simple manner of identifying the law or code of conduct relevant to the dispute (of which there may be more than one) and stating in a form such as 'yes', 'no' or 'unclear' whether the decision is supported by that law or code of conduct. Again, this would be in addition to the current practices of FOS and CIO to provide reasons for decisions. 4) We recommend that the terms of reference reflect that: a) AFCA proactively identify when a dispute is likely to involve a systemically important interpretation. b) AFCA encourage respondents to identify, and flag to AFCA, when a dispute is likely to involve a systemically important interpretation. c) AFCA to implement a documented process to identify relevant stakeholders who may be impacted by a decision in respect of a systemically important interpretation (which, in the case of credit reporting, may include entities outside the credit reporting system) and to seek the input of those stakeholders prior to making a decision. **Comment:** As noted in our cover letter, the decisions of an EDR scheme have the potential to significantly disrupt the operation of financial service providers. This is particularly the case where decisions are made without a proper understanding of the particular topic. While the particular respondent may be relied upon to a certain extent to provide that input, this is not always going to be sufficient. For example, that respondent may not necessarily have a proper understanding of the wider industry implications. In addition – particularly in relation to credit reporting – there may be

	little incentive for that respondent to expend the time and resources to ensure that AFCA has all the relevant background to make the decision. While we are particularly concerned with the potential impact of AFCA's decisions on the integrity of the credit reporting system, we consider that requiring AFCA to engage with stakeholders in respect of systemically important decisions is good practice across all topics and will promote better acceptance of AFCA decisions amongst stakeholders. Our recommendations raise three options for dealing with systemically important disputes – engaging with relevant stakeholders before making a decision, use of a panel, and running a test case (which, for privacy-related disputes, could include referral to the Australian Information Commissioner). We expect that AFCA's operational procedures would provide guidance on when each of those options were preferable, based on an overall view of cost, timeliness and quality of outcome. In addition to those three options, recommendation 13 provides for an interested stakeholder to invoke the independent assessor process if the stakeholder considers that AFCA has not properly identified that a dispute involves a systemically important interpretation of the law or code of conduct prior to making a determination. 5) We recommend that the test case provisions of the terms of reference reflect that a financial service provider may ask for a privacy (including credit reporting) related dispute to be referred to the Australian Information Commissioner as a 'test case'. **Comment:** Unlike the financial services laws (i.e. Corporations Act and National Consumer Credit Protection Act), the Privacy Act gives the Australian Information Commissioner explicit guidance and determination-making functions. These powers can be used to settle systemically important questions of interpretation of law without the costs of taking proceedings in court. 6) We recommend that AFCA be required to undertake a capability review to ensure that it has all the required knowledge and skills to perform its duties. This should be undertaken with the input of relevant stakeholders and a plan for acquiring any additional knowledge and skills should be documented. 7) We understand that AFIA's final submission will recommend that the terms of reference recognise that AFCA observe procedural fairness and that decisions must be fair to both the consumer and the financial service provider. We support those recommendations.

Issue 3: Use of panels	8) We recommend that the terms of reference: a) Clearly set out the circumstances in which a disputant may request that a panel be used, including where a dispute is likely to involve a systemically important interpretation of the law or code of conduct. b) Require the panel to include an industry representative who has current and practical experience of the subject matter of the dispute. c) Require the panel to identify when a dispute is likely to involve a systemically important interpretation of the law or code of conduct and seek the input of those stakeholders prior to making a decision. 9) We recommend that where a dispute is likely to involve a systemically important interpretation, consideration should be given to not directly charging the particular financial service provider additional fees for requesting a panel.
Issue 4: Independent reviews	10) Given that the credit reporting system is in a transitional phase, and the significance that AFCA's decisions may have on the integrity of the system, we would propose a review of AFCA's treatment of credit reporting matters within the 12 – 18 months of the scheme becoming effective and that the Office of the Australian Information Commissioner be engaged in respect of that review. 11) We support AFIA's recommendations in relation to ensuring the independence of the independent review process.
Issue 5: Independent assessor	12) We support each of AFIA's recommendations in relation to ensuring the independence of the independent assessor and the ongoing operation of the independent assessor's role, in particular: a) that the assessor's charter be established via a separate consultation process; b) that the appointment of the assessor should not be left up to AFCA itself; c) the assessor should have guaranteed access to the AFCA Board; and d) the assessor should have the capacity to refer matters of serious misconduct or systemic issues to ASIC. 13) We recommend that, where a determination of AFCA raises a systemically important interpretation, a relevant stakeholder (such as an industry association) may invoke the independent assessor process to assess whether AFCA's handling of that dispute has met the terms of reference in relation to such disputes (as provided for in our other recommendations). **Comment:** Our other recommendations provide for processes under which AFCA will seek the input of relevant stakeholders in respect of disputes that raise systemically important interpretations. However, those processes rely on either AFCA or the disputants to identify that the dispute raises such issues and trigger those processes. This

	recommendation would provide for the situation where this is not done – or where AFCA does not give proper consideration to the stakeholders' views. This would not involve the independent assessor potentially overturning the original determination; rather, it would provide for an opportunity to change the position adopted by AFCA in relation to future, similar disputes.
Part 3 - Governance	
Issue 10: Ensuring that directors have appropriate skills and experience without being simply representative of sectional interests **Issue 11: Board responsibilities**	14) We recommend that all directors – not just those with experience in carrying on financial services businesses - demonstrate: a) that they not only have the relevant industry or consumer knowledge, but also the other elements that contribute to a director's competence, including critical thinking, ability to deal with complexity and ambiguity, sound judgment and ability to work in a team; b) an understanding of the role of a director and its duties and responsibilities. If a person, who has relevant knowledge and experience, does not have previous experience or training in acting as a director, they should be required to undertake appropriate training (such as the course provided by the Australian Institute of Company Directors) within 6 months of accepting the board role; and c) that they are able to dedicate sufficient time to the role of director of AFCA – particularly in the first 12 months where the establishment of the scheme will require significant resources. 15) We recommend that the directors chosen for their experience in carrying out the types of business operated by the members: a) be chosen on the person's ability to demonstrate suitability based on the matters described above, rather than whether or not they are currently employed in the sector. b) represent a mix of people with varying knowledge and experience – rather than attempting to ensure that all sub-sectors are "represented" – which given the diversity of the sectors and limited number of board seats appears the only pragmatic approach. 16) We support AFIA's recommendations relating to the application of best practice governance requirements by the AFCA Board. **Comment:** All AFCA directors must sit around the board table as AFCA directors, not as representatives of, and advocates for, sectional interests. "Industry" or "consumer representative" knowledge is only one element that contributes to director competence. In terms of "industry" directors, it would be impossible to have a reasonably sized Board that had expertise covering every sector. A mix of directors, some with depth in some areas, others with breadth across many areas might be useful – but all directors should have the same basic

	competencies, skills and experience required to be a director. The same would apply to directors who are selected based on experience in representing consumers. For industry and consumer directors, it is also irrelevant whether they are actively engaged in their sectors or not – competence (and the ability to commit the time) should be the major criteria. During the transition period, advisory panels can play a key role in ensuring the initial Board has the time to commit to the high workload. We note that, particularly in the transition period, the Board will play a significant role and cannot be seen simply as a "rubber stamp" for management. We note that, while the Ramsay Review recommended that the Board structure consist of an independent chair and equal numbers of directors with industry and consumer backgrounds, the *Treasury Laws Amendment (Putting Consumers First—Establishment of the Australian Financial Complaints Authority) Bill 2017* leaves open the possibility of allowing for a greater number of independent directors. We suggest that consideration be made to increasing the number of independent directors, for example to include 3 independent directors. This will help to reduce the risk that the Board operating along sectional interests and would assist with dealing with conflicts of interest amongst the Board.
Part 5 – Other issues	
Issue 15 – Privacy	We have addressed this issue through our comments and recommendations in respect of other issues.

Appendix 2 – Joint Associations shared significant concerns with AFCA Implementation

Issue	ACDBA	AFIA	ARCA	NIBA
1. Truly Independent Reviews True independence requires that reviews be independent in appearance and actuality. True independence requires that an entity separate from, and not subordinate to, AFCA commission the independent reviews of AFCA. The Joint Associations recommend that the terms of reference require AFCA to grant full and irrevocable authority to the independent assessor appointed by the Minister as its agent to commission independent reviews on its behalf.	√	√	√	√
2. Truly Independent Assessor True independence requires that the assessor be independent in appearance and actuality. True independence requires that an entity separate from, and not subordinate to, AFCA appoint the independent assessor. The Joint Associations recommend that the Minister appoint the independent assessor and that its charter be established via a separate consultation process with relevant stakeholders including industry.	√	√	√	√
3. Best Practice Governance AFCA will be a large institution with likely revenue of between $75 to $100 million per annum. The Joint Associations recommend that the Minister require AFCA as a condition of its appointment to adhere to the best practice governance requirements of an equivalent ASX-listed organisation and that any departures from those standards be publicly stated with supporting reasons and approved by ASIC.	√	√	√	√
4. Genuine Industry Representation on the Board Compliance with best practice governance principles requires all directors upon appointment to the Board to act in the best interests of direct stakeholders, both consumers and members. Members operate in a diverse range of industry sub-sectors. The Joint Associations recommend that all directors be chosen based on competence and knowledge and that industry-based directors be persons with current, or near current, industry experience in the types of businesses operated by members of the scheme	√	√	√	√