Queensland Law Society

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Office of the President

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Our ref: [BF-WD/KS]

Mr Michael Tidball
Chief Executive Officer
Law Council of Australia
GPO Box 1989
Canberra ACT 2601

By email: [redacted]

Dear Mr Tidball

Review of Australian Financial Complaints Authority

Thank you for your Memorandum and the opportunity to provide input for a Law Council submission to the Department of Treasury in relation to a review of the Australian Financial Complaints Authority (**AFCA**). The Queensland Law Society (**QLS**) appreciates the opportunity to collaborate with the Law Council on these issues.

This response has been compiled with the assistance of the QLS Banking and Finance Committee and the Competition and Consumer Law Committee, whose members have substantial expertise in these areas of law.

Following consultation with its Committees, QLS recommends the Terms of Reference be expanded to include the following areas.

1. **Delivering against statutory objectives - AFCA's jurisdiction - credit repair providers**

We recommend that AFCA's jurisdiction and membership base be expanded to include paid representatives or claims agents (specifically, 'credit repair' or 'debt solution' providers).

Businesses participating in the debt and credit repair sector offer a service to consumers which purports to obtain amendments and/or deletions of entries on their credit records to improve the 'credit rating' of the consumer and, consequently, their prospects of obtaining further credit.

The Senate Standing Committee on Economics released the *Credit and financial services targeted at Australians at risk of financial hardship* report in February 2019, which examined the behaviours of this sector. The report identified the credit repair sector as problematic, observing that providers in this space routinely engage in misleading and arguably predatory behaviour targeted towards a cohort of particularly vulnerable Australians.

QLS notes that the Senate Standing Committee on Economics recommended that the credit repair sector be subject to "compulsory membership of the AFCA, giving clients access to an External Dispute Resolution scheme".

This is already required under the Privacy Act for all credit reporting bodies and for all credit providers which wish to access and notify credit information to a credit reporting body, although for those providers of credit who do not have Australian Credit Licences, such as the providers of utilities and telecommunication services, there are a number of other EDR schemes.

While this simple requirement may be sufficient to provide consumers with access to a costs-free dispute resolution mechanism, it will not be helpful to creditors, be they credit, utilities or telecommunications service providers, unless AFCA changes its Rules to accommodate such complaints.

A number of systemic issues have been identified within the credit repair sector, including:

- The fees charged by providers are often not transparent and are disproportionate to the service delivered and can leave consumers worse off;[1]
- Providers tend to charge fees for obtaining credit reports and using dispute resolution services (such as those offered by AFCA) that are free for consumers to access directly;[2]
- Providers often fail to advise consumers of free alternatives such as AFCA, legal aid, or community financial counselling and also fail to inform consumers that they may themselves, free of charge, obtain a copy of their credit reports and object and complain about entries which they believe are not justified;[3]
- Consumers are often referred to inappropriate remedies which may be expensive and cause lasting damage.[4]

The consumers targeted by credit repairers tend to be low income and vulnerable and are particularly susceptible to misleading and unscrupulous behaviour. QLS therefore recommends that the activities of credit repairers should be subject to AFCA processes, so the review may consider how to best protect vulnerable consumers and the integrity of the credit reporting system.

QLS is of the view that the seriousness of the conduct involved and the number of instances of its occurrence in the relevant market calls for structural rather than situational solutions.

The inequalities of power between consumers and credit repairers and the damage such does to the integrity of the credit reporting system justifies systemic intervention, which should include requiring membership of AFCA as one element of that reform.

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[1] The Senate, Economics References Committee, *Credit and financial services targeted at Australians at risk of financial hardship* (22 February 2019) 9, 57 <https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Economics/Creditfinancialservices/~/media/Committees/economics_ctte/Creditfinancialservices/report.pdf>

[2] Ibid 60.

[3] Ibid, 57.

[4] Ibid 56-58.

2. Delivering against statutory objectives - AFCA's powers to refer the conduct of debt and credit repair providers to other regulators

QLS notes that some of the behaviours of unlicensed credit repairers may fall within the ambit of the prohibition on engaging in legal practice when not entitled to do so.[5]

Currently, AFCA does not have the power to refer specific matters to regulatory authorities such as the Legal Services Commissioner; rather, it only authorised to refer serious contraventions of law[6] and systemic issues to the Australian Securities and Investment Commission (**ASIC**), Australian Prudential Regulation Authority (**APRA**) or the Commissioner of Taxation.[7]

Consideration should be given to whether AFCA's referral powers and practices should be expanded, including clear authority to refer to a wider range of regulators such as the Legal Services Commissioner. The capacity to refer to other regulators should be enlivened if AFCA determines that the complaint before it gives rise to a concern that a company or individual has inappropriately engaged in legal practice or other regulated behaviour.

We also recommend that consideration be given to whether AFCA should have authority to maintain and publish a list of proscribed persons with whom AFCA will no longer deal, including persons who have a demonstrated history bringing frivolous matters before AFCA.

AFCA would then have capacity to identify those representatives whose actions are harmful rather than helpful to the consumer. This mechanism could be structured in a similar way to the ASIC registers of banned and disqualified persons and the unlicensed companies list (companies which have contacted Australians with unsolicited offers of unlicensed investments or credit).[8]

3. The monetary jurisdiction for awards of indirect and non-financial loss

Currently, AFCAs monetary limit for claims for indirect financial loss or non-financial loss is capped at $5,400.[9] Some committee members consider that this limit is too low for any meaningful distinction to be made between the severities of the non-financial and indirect loss suffered as a result of poor conduct.

QLS agrees that a review of these monetary limits should form part of the review, so their adequacy can be assessed in the review and stakeholders can give their perspectives on this issue.

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[5] In Queensland, engaging in legal practice is regulated under the *Legal Profession Act 2007* (Qld) (see particularly s 24) and other States have similar regulation, noting that some States operate under the Legal Profession Uniform Law.

[6] For examples of contraventions, see AFCA, *Operational Guidelines to the Rules* (January 2021), 87 <https://www.afca.org.au/media/1112/download>

[7] *Corporations Act 2007* (Cth) s 1052E.

[8] https://asic.gov.au/for-consumers/banned-and-disqualified-people/

[9] AFCA, *Complaint Resolution Scheme Rules* (13 January 2021) para. D4.1 <https://www.afca.org.au/media/1111/download>

4. Appeal pathways from decisions made by AFCA

QLS Committee members have expressed differing views about the desirability of merits review from decisions made by AFCA.

Some members did not support the Independent Assessor having the ability to review the merits or substance of an AFCA decision and did not support rights of appeal to a Court or Tribunal.

Some committee members considered that expanding rights of review would lead to less timely decisions, negatively impacting the efficiency and effectiveness of the scheme. Further, financial firms already have the ability to run test cases, and consumers are not bound to accept decisions of AFCA.

It is also important to note that there are already existing avenues of appeal from decisions of AFCA if the decision is:

- outside the AFCA Rules or otherwise beyond its jurisdiction;
- not made according to AFCA's own Rules;
- otherwise made in breach of the procedural principles of natural justice; and
- so unreasonable as to be incapable of being made by a properly informed decision-maker in the position of AFCA as originally described in the decision of *Associated Provincial Picture Houses Limited v Wednesbury Corporation* [1948] 1 KB 223.

Further, AFCA is not a court. It is a dispute resolution scheme and such schemes are, as described by O'Shea and Rickett in "In Defence of Consumer Law" (2006) 28 (1) *Sydney Law Review* 141:

> *"... less concerned with the articulation and determination of legal rights than with the simple resolution of disputes...Decisions under the schemes create new rights and obligations rather than declare existing ones. There is no power to order discovery of documents or to subpoena witnesses. Enforcement of scheme decisions is not directly sanctioned by the state. No bailiff will execute a warrant issued by an industry-based dispute resolution scheme."*

This passage has been cited with approval in *Wealthcare Financial Planning Pty Ltd v Financial Industry Complaints Service and Norris* [2009] VSC 7; *Mickovski v FOS and Metlife* [2011] VSC 257; [2012] VSCA 185, *Utopia Financial Services Pty Ltd v FOS and Rees* [2012] WASC 279) and *Cromwell Property Services Ltd –v- FOS and Radford* [2014] VSCA 179.

One of the necessary attributes of all such schemes is that they bring a degree of finality to disputes. Further avenues of appeal will therefore undermine AFCA as an effective dispute resolution scheme. Given the inequality of litigious resources for consumers as opposed to financial firms, even if the AFCA Rules provided that respondent initiated appeals were funded solely by the respondents, this would still be disadvantageous to consumers.

It is also, in the long term, not good for industry if review lead to longer timeframes to resolve disputes. Only the legal profession would benefit.

Other members considered that merits review of AFCA decisions should be available. The monetary jurisdiction of AFCA is considerable and there is a need for judicial review, or at the

very least review by a properly resourced, experienced and qualified Independent Assessor, in particular cases. The current test case regime is unsatisfactory as:

- it requires AFCA to permit a test case to be run and also allows AFCA to impose conditions, at its own discretion, as a pre-curser to providing permission;
- it is limited to "test cases", which does not extend to or include one off poor decisions (the consequences of which can be significant given AFCA's monetary jurisdiction);
- the financial institution is required to pay the costs of both parties which often makes the running of "test cases" uneconomic and, in effect, an illusory right. Some members would respectfully suggest that the lack of test cases run under the current arrangements has been driven by this economic reality, rather than reflecting a high level of acceptance of AFCA's decisions.

If you have any queries regarding the contents of this letter, please do not hesitate to contact our Legal Policy team via policy@qls.com.au or by phone on (07) 3842 5930.

Yours faithfully

[redacted]

Elizabeth Shearer
President