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The Treasury
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By email: afca@treasury.gov.au

Dear Neena

ESTABLISHMENT OF THE AUSTRALIAN FINANCIAL COMPLAINTS AUTHORITY

Thank you for the opportunity to provide feedback on the *"Establishment of the Australian Financial Complaints Authority, Consultation Paper, November 2017"* (**Consultation Paper)**. In this submission we also refer to the *Treasury Laws Amendment (Putting Consumers First – Establishment of the Australian Financial Complaints Authority) Bill 2017* (**Bill**). Our comments are made on the assumption that the Bill is enacted in substantially its present form.

AFIA is well placed to advocate for the finance sector given our broad and diverse membership of over 100 financiers operating in the consumer and commercial markets through a range of distribution channels.[1]

AFIA understands that the primary purpose of the consultation is to assist the Transition Team formulate advice to the Minister of Revenue and Financial Services as to the critical issues which she should turn her mind when determining to approve or not the applicant entity (**Applicant**) to become the Australian Financial Complaints Authority (**AFCA**) in accordance with the criteria laid out in the Bill.

It is not envisaged, we understand, that selection of the Applicant will be the outcome of a competitive tender process under which the successful applicant is selected from a number of applicants on the basis that it most fully meets the selection criteria. Rather there will likely only be a single applicant in actuality and/or substance.

This is an important contextual point. It is important given the Government's firmly stated intention that AFCA commence on 1 July 2018. The single applicant process in conjunction with the short time frame creates a structural incentive, or bias, to approve the sole applicant to ensure the target date is met: the only candidate will be approved, not necessarily the best candidate had the process allowed other potential candidates time to offer alternate solutions.

A related contextual point is that the AFCA reform does not, as yet, enjoy widespread industry support. Certainly, AFIA has had significant concerns with the AFCA reform to date. However, now that the decision to implement the model has been made AFIA would rather work with the Government to ensure that the AFCA reform is achieved and our feedback is underpinned by this aim.

Given the structural bias to appoint the sole applicant and the present low level of industry confidence in the reform AFIA considers it critical that there be:

(i) *genuine* industry representation on the AFCA Board;

(ii) a *truly* independent assessor of AFCA which has both *actual and apparent* independence; and

(iii) *truly* independent reviews of AFCA which have both *actual and apparent* independence.

AFIA does not as yet have confidence that these good policy design features will be a part of the AFCA model under consultation. Consequently, concerns within the broader financial services sector will persist if implemented unchanged.

[1] AFIA notes that in relation to this consultation the views of our major and regional bank members are represented by the ABA and not ourselves on this policy reform area.

However, AFIA also considers that there are opportunities for the Transition Team to make strong recommendations to the Minister on these, and other important, issues which will assist address these concerns and boost broader support for the reform.

Executive Summary

AFIA's principle recommendations are as follows:

- The Minister should appoint the Independent Assessor to ensure that the assessor is truly independent and enjoys the widespread support of both consumers and industry after consulting widely.

- AFCA should be required as a part of the Terms of Reference to grant full authority to the Independent Assessor (appointed by the Minister) as its agent to commission independent reviews on its behalf.

- The Terms of Reference should explicitly state, using in part the Minister's terminology in her letter to AFIA [Ref: : MC17-007032] that for a decision to be fair in all circumstances AFCA's approach to decision-making must ensure that it provides fair outcomes for consumers and financial providers as well as have procedural fairness observed.

- All sectional interests should be represented on AFCA's Board, with no sectional interest dominating. All directors must undertake to act in the interests of the entirety of the EDR scheme and not just the sectional interest which they represent.

A full list of AFIA's 10 recommendations are contained in **Appendix One**. We encourage adoption through this consultation process.

An explanation of the rationale as to why AFIA's recommendations are good policy is contained in **Appendix Two**. This includes the specific endorsement of certain recommendations made by other industry associations.

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

If you have any questions in relation to this submission or we can otherwise assist please contact me on 0419 967 918, or Paul Stacey, Associate Director, Policy on 0400 438 623.

Kind regards

Helen Gordon
Chief Executive Officer

Appendix One

List of AFIA Recommendations

1. The following guiding principle be added:

   *"**Best practice governance** – AFCA will adhere to best practice governance requirements of an equivalent sized ASX-listed organisation and any derogations from those high standards will be publicly articulated with supporting reasons and endorsed by ASIC."*

2. The third guiding principle be amended to read as follows:

   *"**Adoption of what's working** – effective and well-established dispute resolution processes only should be incorporated into the new body – ineffective practices should be discarded and there should be no change in the absence of clear evidence to justify it and shape its design.*

3. The Terms of Reference should explicitly state, using in part the Minister's terminology in her letter to AFIA [Ref: MC17-007032], that:

   "The requirement that decisions be fair in all circumstances requires decision-makers:

   (a) observe procedural fairness in the way they reach decisions; and

   (b) to ensure that their decision-making provides fair outcomes for consumers and financial providers."

4. The eligibility criteria for a panel review should explicitly include the circumstances where a party to an AFCA determination contests that the determination was not made in accordance with the law.

5. The panel reviewing a contested AFCA determination on the basis it was not made in accordance with the law should include a legal practitioner who is not an employee of AFCA and whose practice is not financially dependent upon participating in AFCA panel reviews.

6. The Terms of Reference should explicitly 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.

7. The Minister appoint the Independent Assessor to ensure that the role is truly independent and enjoys the widespread confidence of both consumers and industry after consulting widely with ASIC, consumer advocates, industry and other relevant stakeholders.

8. In relation to the Independent Assessor:

   (a) the assessor's charter should be established via a separate consultation process having regard in particular to relevant features of the Inspector-General's role;
   (b) the nature of the assessor's appointment by the Minister and accountability to the Minister will serve to ensure that the assessor remains independent of AFCA. The assessor should be required to meet with the Minister every six months and its reports be published as public documents;
   (c) the assessor should have guaranteed access to the AFCA Board;

(d) the assessor should have the capacity to refer matters of serious misconduct or systemic issues to ASIC to take appropriate action using its enhanced oversight powers;

(e) the well-established and widely respected practices used in the taxation context in circumstances where the ATO disagrees with the Inspector General's assessment should be used in the EDR context where AFCA disagrees with the assessor's assessment.

(f) a review of the assessor's functions and operation should be conducted in accordance with the now usual statutorily mandated post-implementation review of between three and five years post commencement.

9. The Transition Team should seek expert guidance from the ASX and the Australian Institute of Company Directors as to the Board governance arrangements with which an ASX-listed company of an equivalent size to AFCA would be expected to comply and that those standards be applied to AFCA.

10. In accordance with a sensible reading of section 1051(3)(d) that:
    (a) all sectional interests be represented on the Board, with no sectional interest dominating;
    (b) the requirement that industry sectional representative directors have an additional skill set enables the appointment of directors who are:
        (i) persons currently working in the kinds of businesses operated by members; and/or

        (ii) persons currently working in industry associations with experience of the kinds of businesses operated by members;

    (c) a condition of appointment to the Board be that all directors must act in the interests of the entirety of the EDR scheme and not just for the sectional interest which they represent.

Appendix Two

AFIA recommendations

AFIA's comments on the Consultation Paper are restricted to "Part 1 – Terms Of Reference" and "Part 3 – Governance". AFIA makes no comment on "Part 2 – Superannuation".

PART 1 – Terms of Reference

Question 1. Are there any other principles that should be included in the guiding principles for AFCA's establishment?

1.1 AFCA is by design a monopoly organisation with a captive market and, in the absence of clear rules of operation, has the potential for unconstrained pricing power. It can therefore be expected, over time, to act in the same ways as other like monopolies, albeit subject to the constraining influence of ASIC's enhanced oversight the extent of which is unclear. A common feature of monopolies is a tendency to avoid transparent and accountable governance processes. This can have disastrous consequences in the long term.

1.2 In this circumstance the recent well-publicised situation of CPA Australia may provide a useful illustration of what could happen. CPA Australia like AFCA has in effect a captive market. If CPA qualified persons wish to continue to use the CPA qualification in their professional lives they have to pay an annual membership fee to CPA Australia each year, amongst other things. If AFSL and ACL licensees wish to continue in their business of providing financial advice, products and credit they have to be a member of an ASIC-approved EDR Scheme (likely AFCA) and pay an annual membership fee to AFCA each year, amongst other things.

1.3 It would seem that a key structural failing of CPA Australia's governance structure was an opaque process for appointing directors, their rotation and removal which had the effect of making the board in practice unaccountable to members. In turn, reputational damage saw the CPA Australia brand potentially impacted.

1.4 AFCA will, like CPA Australia, be in receipt of significant annual revenues. Based on the current revenues of the two existing EDR Schemes and the Superannuation Complaints Tribunal, AFCA's annual revenues can be expected to be between $75M to $100M.[2]

1.5 Moreover, AFCA is intended to serve a public purpose of helping consumers have confidence in the financial system. Therefore the detriment of any reputational damage to the AFCA brand of an equivalent governance failure would be felt more widely across the community and economy than the damage to the CPA Australia brand.

1.6 For these reasons AFIA considers that a further guiding principle needs to be articulated. This principle is that AFCA's corporate governance arrangements will conform with best practice for equivalent sized ASX-listed organisations and that any derogations from those high standards will be publicly articulated with supporting reasons and approved by ASIC.

1.7 AFIA also considers that the third principle could be better articulated. AFIA agrees that what's working should be adopted. But, AFIA also considers that what isn't working shouldn't be. There was no suggestion in the Ramsay Review that all was working well in the existing EDR regime. If a practice in the existing regime can be improved, then AFIA can see no legitimate reason why AFCA would not improve upon that practice.

[2] For example, FOS' revenue for the 2016-17 financial year alone was $52,241,680.

1.8 AFIA has had the benefit of reading a draft of ARCA's submission and endorses the additional guiding principles recommended by this association.

AFIA recommendations:

1. The following guiding principle be added:

*"**Best practice governance** – AFCA will adhere to best practice governance requirements of an equivalent sized ASX-listed organisation and any derogations from those high standards will be publicly articulated with supporting reasons and endorsed by ASIC."*

2. The fourth guiding principle be amended to read as follows:

*"**Adoption of what's working** – effective and well-established dispute resolution processes only should be incorporated into the new body – ineffective practices should be discarded and there should be no change in the absence of clear evidence to justify it and shape its design."*

Issue 2

Question 6. Are there any other principles that may assist in ensuring AFCA provides fair, efficient, timely and independent decisions?

2.1 Financial service providers are required to conduct their businesses in accordance with law. These licensed businesses establish their customer handling and compliance systems in accordance with the law. AFCA by design does not have to make decisions in accordance with the law, except in relation to superannuation disputes. Rather the law is only one consideration which AFCA decision-makers have to take into account when reaching decisions. There is no requirement that AFCA decision-makers must be legally qualified. This raises the possibility that even when the law is purportedly applied it is misunderstood.

2.2 The Consultation Paper contemplates that AFCA will establish some sort of doctrine of precedence. This is inherent in the requirement that AFCA "adopt a consistent approach to decision-making". Thus, licensed businesses will have to organise their business operations to comply with two justice systems – "the law" and "the lore", as developed by AFCA. This approach is inherently complex, creates uncertainty, and necessarily causes additional expense for businesses seeking to comply – a cost ultimately borne by consumers more broadly.

2.3 If a licensed business does not have the right to have the law applied to them then it is not unreasonable for these businesses to expect that AFCA will at least treat them fairly.

2.4 The Minister in a communication to AFIA [Ref: M17-007032] stated her views that:

"As a non-legal body, it is reasonable that AFCA should make decisions that are fair in all the circumstances"

and

"I consider it critical that AFCA has a robust and consistent approach to decision making to ensure that it provides fair outcomes for consumers and financial firms."

2.5 The Minister clearly states her concern that the outcomes of AFCA decisions should not be fair just to consumers. She considers it critical that outcomes should be fair for consumers AND financial firms. Further, she is not merely concerned with procedural fairness. (The requirement that AFCA observe procedural fairness is contained in section 1051(2)(4)(b). This requires AFCA

to resolve complaints "in a way" which is fair.) The Ministers concern is that "**outcomes**" should also be fair, not just the way in which decisions are reached.

2.6 AFIA shares the Minister's concern that the outcomes of decisions be fair for consumers and financial firms. AFIA consider this requirement to be entirely appropriate for decisions by "a non-legal body" from which there is no substantive right of legal appeal for most business members.

2.7 However, this requirement that outcomes be fair to both consumers and financial firms is not articulated in the Bill. It therefore needs to be clearly stated in the Terms of Reference.

AFIA Recommendation:

3. The Terms of Reference should explicitly state, using in part the Ministers terminology in her letter to AFIA [Ref: M17-007032], that:

"The requirement that decisions be fair in all circumstances requires decision-makers:

(a) observe procedural fairness in the way they reach decisions; and

(b) to ensure that their decision-making provides fair outcomes for consumers and financial providers."

Issue 3: Use of Panels

3.1 As noted in paragraph 2.1 AFCA by design does not have to make decisions in accordance with the law, except in relation to superannuation disputes. This absence of legal accountability is also referred to in the FSC submission, which AFIA has had the benefit of reading. ARCA and AFIA have also both previously made submissions on this point. The absence of legal accountability is one of the major reasons why the AFCA reforms do not as yet enjoy widespread support.

3.2 As a practical matter for the Transition Team seeking to advise the Minister this means that in order to bridge the confidence gap the heavy lifting, as a matter of AFCA system design, has to be done by:

(i) linking the concept of "fair in all circumstances" to a credible standard which will both guide decision makers and provide a measure of accountability (given the absence of legal accountability). We note the FSC's comments as to the frustrations its members have experienced with FOS' approach to this concept.[3] In this regard AFIA considers the Ministers concern that it is critical that outcomes are fair for consumers and financial firms is helpful; and

(ii) clearly defining the purpose of panels, their eligibility of use criteria and the composition of the panels.

3.3 The Ramsay Review also saw a linkage between these two system design elements. The Ramsay Review Panel considered that:

"some of the concerns expressed by stakeholders [about the "fair in all circumstances" approach] could be addressed through the appropriate use of panels"[4]

also

[3] AFIA's membership comprises businesses which are members of both FOS and CIO and includes members who have moved from FOS to CIO. It is likely that at least some of AFIA's members have shared similar frustrations.

[4] Para 5.176, page 126, *Final Report – Review of the financial system external dispute resolution complaints framework*, April 2017 (Ramsay Report).

"panels can act to provide an additional degree of accountability (by including consumer and industry expertise) and oversight (through access to other relevant expertise) in a more timely and cost-effective way than a formal right of appeal."[5]

3.4 The Ramsay Review Panel therefore clearly contemplated that the panel function within AFCA would also effectively serve as an "internal appeal mechanism", in addition to the existing "multi-stage decision making processes" currently in practice with the Financial Ombudsman Service (**FOS**) and the Credit and Investments Ombudsman (**CIO**).[6] This is the "*additional degree of accountability … and oversight*" referred to by the Ramsay Review Panel.

3.5 If panels are to serve, amongst other things, as in effect an additional internal review mechanism this needs to be reflected in their eligibility of use criteria and the composition of the panels.

3.6 AFIA understands that ARCA's final submission will recommend that:

(i) AFCA keep statistics on all decisions which are not in accordance with the law, amongst other categories;

(ii) panels should include current industry and consumer representatives who have experience with the particular subject matter; and

(iii) if the relevant eligibility criteria on which the panel is hearing the dispute is because it raises a systemic issue then consideration should be given to not charging the costs of resolution to the financial services provider.

AFIA supports all three recommendations.

AFIA recommendations:

4. AFIA recommends that the eligibility criteria for a panel review should explicitly include the circumstances where a party to an AFCA determination contests that the determination was not made in accordance with the law. (In making this recommendation AFIA is minded of the FSC's submission to the Ramsay Review Panel that this should not have the unintended effect of creating the need for legal representation before the panel.[7])

5. AFIA recommends that the panel reviewing a contested AFCA determination on the basis it was not made in accordance with the law should include a legal practitioner who is not an employee of AFCA and whose practice is not financially dependent upon participating in AFCA panel reviews.

Issue 4: Independent Reviews

4.1 It is critical to the credibility of the EDR regime that AFCA be subject to truly independent reviews. As noted on page 12 of the Consultation Paper reviews are truly independent when they are independent both in practice and in perception.

4.2 FOS has in the past engaged consultants to conduct reviews, notably the engagement of CameronRalph Navigator, a reputable firm of consultants, in July 2013 to conduct a six-month assessment of its operations. This was no doubt a valuable exercise and a number of useful suggestions were made and we acknowledge FOS's selection of reviewer to assist achieve this. The AFCA reform looks to improve on that system.

4.3 However, this consultancy engagement was not a truly independent review. It was not truly independent because it was not independent both in practice and in perception. This statement

[5] Para 5.189, page 128, Ramsay Report

[6] These two phrases were used in the Minister's letter to AFIA.

[7] Para 5.182, page 127, Ramsay Review.

is not a comment on the professionalism of this firm. It is solely a comment on the circumstances within which that firm's professional services were engaged.

4.4 The nature of a consultancy engagement is that the commissioning entity (in this instance FOS):

(i) chooses the identity of the consultant;
(ii) determines the scope of the engagement – what matters are in scope, what matters are out of scope;
(iii) selects the time frame within which the services have to be delivered; and
(iv) decides on the price which it is prepared to pay to acquire of these services.

All of these issues are legitimate matters which needed to be considered in any consultancy engagement. There will also normally be discussion between the client and the consultant, and no doubt also in this instance with ASIC. But at the end of the day it is the commissioning entity which determines these matters. And when the entity who is being reviewed pays for the review it is not a truly independent review and can never be so because it is not independent "in perception".

4.5 The drafting of the Bill's provision in relation to "independent reviews", unlike the "independent assessor, is on first analysis not as helpful to establishing "truly independent reviews" as it is to establishing a "truly independent assessor", both of which build consumer and industry confidence in AFCA. The wording of section 1051(3)(a) is a little different to that in section 1051(2)(c).

4.6 Section 1051(3)(a) reads:

*"**the operator of the scheme commissions** the conducting of the independent review of the scheme's operations and procedures*" (emphasis added)

4.7 The difficulty is immediately apparent. If AFCA commissions the conducting of a review of its operations and procedures then it is not "truly independent" because it lacks apparent independence. This undermines public confidence in the EDR scheme which undermines the very purpose of section 1051(3) which is intended to build public confidence in the scheme.

4.8 AFIA's recommended solution is that the Terms of Reference require AFCA to give the Independent Assessor, which is appointed by the Minister, full and irrevocable authority as its agent to commission independent reviews on its behalf. In this manner AFCA will have met its requirement to commission independent reviews for which it will have to pay. This it will have done through the appointment of an independent agent.

4.9 Apparent or perceived independence is achieved because the terms of the agency appointment give the agent full and irrevocable authority to commission the review AND the agent has public standing having been appointed assessor by the Minister. This approach also meets the AFIA recommended principles of best practice governance and only adopting what's working.

AFIA recommendation:

6. AFIA recommends that it is specifically articulated in the Terms of Reference that AFCA is required to grant full and irrevocable authority to the independent assessor as its agent to commission reviews on its behalf with the benefit of also ensuring the reviews will be perceived to be truly independent.

Issue 5: Independent Assessor

5.1 Section 1051(2)(c) of the Bill requires as an organisational requirement that:

*"the scheme **has** an independent assessor"* (emphasis added)

5.2 Importantly, section 1051(2)(c) does **not** require that AFCA appoint the independent assessor. Section 1051(2)(c) **only** requires that AFCA has an independent assessor. The appointment

can therefore be made by another entity. The most appropriate other entity to make this appointment is the Minister.

5.3 The appointment of the independent assessor by an entity which is **not** being assessed by the assessor would mean that the assessor can "truly be independent, both in practice and in perception". As noted in page 12 of the Consultation Paper true independence is "important" in the context of independent reviews. True independence is also important in the context of an independent assessor and would accord with the principle of best practice governance (proposed by AFIA).

5.4 The UK model under which the scheme operator appoints an independent assessor and which FOS has recently followed, as discussed in page 13 of the Consultation Paper, is inherently compromised. The continued use of this model by AFCA would only diminish confidence in AFCA and the EDR system given its obvious lack of apparent independence.

5.5 AFIA suggests that if AFCA were to adopt what is in truth a "dependent" assessor model this would foster cynicism as to the real level of accountability to which AFCA, a monopoly body with a captive market, is actually subject and undermine AFCA objectives. This potential lack of industry confidence has already been expressed at a roundtable meeting with the Transition Team in the absence of a clear statement of the parameters of enhanced ASIC oversight. If ASIC were to appoint the independent assessor, and cost recover from AFCA, that would go some way to addressing that underlying industry concern.

5.6 However, AFIA considers it more important that the independent assessor should have an unequivocally strong public-perception of true independence. AFIA therefore recommends that rather than ASIC, the Minister should appoint the independent assessor, after taking the advice of ASIC and other interested stakeholders including industry bodies. The cost of the assessor should be recovered annually via a service charge to AFCA based on the independent assessor's audited accounts.

5.7 AFIA notes that Australia already has an existing model of a truly independent assessor who is widely respected. That assessor is the Inspector-General of Taxation (**Inspector General**). The Inspector General's appointment is not dependent upon the organisation his office is assessing, namely the Australian Taxation Office. This structure avoids the obvious conflicts inherent in the FOS UK model and which diminish the appearance of independence and standing of its appointed assessor, notwithstanding their personal qualities. The Inspector General answers to Parliament, not to the organisation he is assessing. AFIA's recommendation is in essence a modified Inspector General model: modified in that the assessor is appointed by the Minister rather than being a statutory office holder.

5.8 The Minister is no doubt well aware of the many benefits of the Inspector General since his agency falls within her portfolio responsibility. AFIA recommends that the Transition Team consult with the Inspector General to better understand what aspects of the Inspector General model can be readily incorporated into the AFCA model so as to improve perceptions of independence and confidence in the AFCA reform.

AFIA recommendations:

7. AFIA recommends that the Independent Assessor be appointed by the Minister to ensure that the role is truly independent and enjoys the widespread confidence of both consumers and industry, after consulting widely with ASIC, consumer advocates, industry and other relevant stakeholders.

8. Further In relation to the Independent Assessor:

   (a) the assessor's charter should be established via a separate consultation process having regard in particular to relevant features of the Inspector-General's role;

(b) the nature of the assessor's appointment by the Minister and accountability to the Minister will serve to ensure that the assessor remains independent of AFCA. The assessor should be required to meet with the Minister every six months and its reports be published as public documents;

(c) the assessor should have guaranteed access to the AFCA Board;

(d) the assessor should have the capacity to refer matters of serious misconduct by, or systemic issues, within AFCA to ASIC to take appropriate action using its enhanced oversight powers;

(e) the well-established and widely respected practices used in the taxation context in circumstances where the ATO disagrees with the Inspector General's assessment should be used in the EDR context where AFCA disagrees with the assessor's assessment; and

(f) a review of the assessor's functions and operation should be conducted in accordance with now usual post-implementation statutory review between three and five years post commencement.

Part 3 – Governance

Issue 10: Ensuring that directors have appropriate skills and experience without being simply representative of sectional interests

6.1 AFIA considers one of the greatest risks to the legitimacy and standing of AFCA in the eyes of the financial services sector is a perception that it lacks genuine industry representation on the Board. In this AFIA considers the Transitional Team would be better placed to advise the Minister if it reframed the discussion from the approach taken on page 22 of the Consultation Paper. AFIA considers that approach to be misconceived and not in accordance with a sensible reading of section 1051(3)(d).

6.2 AFIA has recommended that the following guiding principle be added to the list of principles for AFCA's establishment:

*"**Best practice governance** – AFCA will adhere to best practice governance requirements of an equivalent sized ASX-listed organisation and any derogations from those high standards will be publicly articulated with supporting reasons and endorsed by ASIC."*

6.3 The starting position therefore is that the AFCA Board governance arrangements should comply with the governance arrangements of an equivalent sized ASX-listed organisation, unless there is a strong public policy reason not to comply with those arrangements. In that event the derogation must by publicly articulated with supporting reasons and be endorsed by ASIC.

6.4 AFIA recommends that the Transition Team seek expert guidance from the ASX and the Australian Institute of Company Directors to full understand the best practice governance requirements with which the AFCA Board must comply.

6.5 Section 1051(3)(d) requires that:

"the operator's constitution provides that the number of directors of the operator who have experience in carrying on the kinds of businesses operated by members of the scheme must equal the number of directors who have experience in representing consumers".

6.7 Section 1051(3)(d) specifically contemplates that directors may be "simply representative of sectional interests". Half the directors are to be chosen solely because of their experience in representing one sectional interest, consumers. It would be an absurd situation for fully one half of directors to be appointed solely because they represent a sectional interest and the other half of directors to be appointed on the basis that they represented no sectional interest whatsoever.

Such a situation would only likely bring the AFCA Board into disrepute, notwithstanding the calibre of the individuals appointed.

6.9 A more sensible reading of section 1051(3)(d) is that all directors represent sectional interests, but in the case of directors who represent industry they must also bring the additional skill set of having "experience in carrying on the kinds of business operated by members of the scheme". Read in this way the section enables the Board to be more fully representative thereby increasing the legitimacy and standing of the AFCA Board.

6.10 On this basis persons who:

(i) currently work in industry in the kinds of business operated by members of the scheme could be appointed to the Board; and/ or

(ii) currently work in industry associations who have previous experience in carrying on the kinds of business operated by members of the schemes could be appointed to the Board.

6.11 Given this more sensible reading of section 1051(3)(d) the questions AFIA consider the Transition Team is better to focus on in this area are:

(i) what arrangements should be put in place to ensure that all sectional interests are represented on the Board; and

(ii) what arrangements should be put in place to ensure that all directors when they serve on the Board provide input which is in the interests of the entirety of the EDR scheme and not just that of the interests which they represent.

AFIA recommendations:

9. AFIA recommends the Transition Team seek expert guidance from the ASX and the Australian Institute of Company Directors on the Board governance arrangements which an ASX-listed company of an equivalent size to AFCA would be expected to comply with and that those standards be applied to AFCA.

10. AFIA recommends, in accordance with a sensible reading of section 1051(3)(d), that:

(a) all sectional interests be represented on the Board and not just one sectional interest (consumers);

(b) the requirement that industry sectional representative directors have an additional skill set enables the appointment of directors who are:

(i) persons currently working in the kinds of businesses operated by members; and/or

(ii) persons currently working in industry associations with experience of the kinds of businesses operated by members.

(c) a condition of appointment to the Board be that all directors must act in the interests of the entirety of the EDR scheme and not just the sectional interest which they represent.

Appendix Three – 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.	√	√	√	√