

## **VACC responds on the Government's final report to the Review of the Australian Financial Complaints Authority (AFCA).**

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## About VACC

Australia's automotive industry is diverse and encompasses a variety of sectors. Table 1 shows that in aggregate the industry employs 384,810 people across 72,521 individual businesses and contributes over \$39 billion in industry value-added to Australia's economy. Of the 72,521 businesses representing Australia's automotive industry, most are small and family-owned businesses.

The Victorian Automotive Chamber of Commerce (VACC) is Victoria's peak automotive industry association, representing the interests of more than 5,000 members in over 20 retail automotive sectors, who employ over 50,000 Victorians.

VACC members range from new and used vehicle dealers (passenger, truck, commercial, motorcycles, recreational and farm machinery), repairers (mechanical, electrical, body and repair specialists, i.e. radiators and engines), vehicle servicing (service stations, vehicle washing, rental, windscreens), parts and component wholesale/retail and distribution and aftermarket manufacture (e.g. specialist vehicle, parts or component modification and/or manufacture), and automotive dismantlers and recyclers.

**Table 1: Automotive Industry, National economic Summary 2019/20**

ANZSIC CODE	INDUSTRY SECTOR	EMPLOYMENT (No.)	BUSINESSES (No.)	GDP CONTRIBUTION* (\$billion)
941	Automotive Repair and Maintenance	140,850	40,220	11.0
391	Motor Vehicle Retailing	71,450	5,361	7.7
2311, 2312, 2313, 2319	Motor Vehicle and Parts Manufacturing	37,050	3,148	3.72
400	Fuel Retailing	34,450	3,972	3.38
392	Motor Vehicle Parts & Tyre Retailing	34,750	4,285	2.1
350	Motor Vehicle and Parts Wholesaling	26,200	5,488	6.13
2399, 2462, 2491, 2461	Other Specialised Machinery & Equipment Manufacturing	10,000	837	1.6
6611	Passenger Car Rental & Hiring	7,120	2134	1.7
4231, 9429	Outdoor Power Equipment	4,650	1285	0.3
4245, 9429	Marine Equipment Retailing	3,210	818	0.22
4241	Bicycle Retailing	5,020	1,103	1.3
4610	Towing Services	3,040	2,460	0.2
9429	Agricultural Machinery Retailing & Repair	7,020	1410	N/A
	<b>TOTAL</b>	<b>384,810</b>	<b>72,521</b>	<b>39.35 billion</b>



## Contents

<b>About VACC.....</b>	<b>2</b>
<b>Background .....</b>	<b>4</b>
<b>Why is the Review important for VACC members?.....</b>	<b>5</b>
<b>Key Recommendations and takeaways.....</b>	<b>6</b>
<b>Summary .....</b>	<b>9</b>

## Background

The 2021 Review of the Australian Financial Complaints Authority (AFCA) was undertaken by the Government in response to a statutory requirement<sup>1</sup>, which saw the Government receive 167 submissions. The review provided an opportunity for feedback on the operation of AFCA since its establishment in November 2018, and to consider whether further enhancements should be made to ensure the external dispute resolution (EDR) scheme is appropriately calibrated and operating effectively.

AFCA plays an important role in the financial system, providing consumers and small businesses that have complaints about their financial firms, with access to an out-of-court dispute resolution service that is free, fast and binding. The Victorian Automotive Chamber of Commerce (VACC) supports AFCA's formal obligation to identify systemic issues arising from complaints against AFCA's members.<sup>2</sup>

VACC's [submission](#) provides commentary into the effectiveness of AFCA's processes for the identification and appropriate response to systemic issues arising from complaints in the general insurance motor vehicle industry and in relation to consumers who have been misled by intermediary vehicle lease brokers, or credit financial institutions, in the lease agreement of a new motor vehicle from a franchise dealer.

VACC, as an automotive industry employer association, protects and promotes the interests of its members. Given VACC's duty and responsibilities and appreciating AFCA can consider complaints from consumers about general insurance motor vehicle products and credit institutions, VACC sees AFCA as a powerful authority to identify and eliminate the root cause of various motor industry sector systemic issues that have not been previously addressed.

## About AFCA

- As of 31 October 2020, AFCA has 782 employees, working a full-time equivalent load of 755 employees.
- In the first two years of its operation, the overall average timeframe for a complaint lodged with AFCA was 74 days.
- In AFCA's first two years of operation, 2,287 possible systemic issues were identified by AFCA complaint resolution teams and referred to AFCA's systemic issues team.
- The majority (78 per cent of systemic issue closures) were closed after the systemic issues team's review and without further investigation required –  
or at the point the case was first referred to them.
- Over 96 per cent of AFCA's Ombudsmen hold a law degree and are admitted as a lawyer with a supreme court. AFCA describes the remaining 4 per cent as holding relevant qualifications, including commerce and economics degrees and dispute resolution and mediation accreditation.
- 85 per cent of AFCA's case managers and technical specialists working in insurance hold a legal, accountancy, commerce or relevant finance, business degree or professional qualification.

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<sup>1</sup> Treasury Laws Amendment (Putting Consumers First—Establishment of the Australian Financial Complaints Authority) Act 2018 section 4.

<sup>2</sup> All Australian financial services licensees, Australian credit licensees, authorised credit representatives and superannuation trustees are required to be a member of the Australian Financial Complaints Authority (AFCA) under their financial services licence conditions, in accordance with ASIC Regulatory Guide RG 165. Members include banks, insurers, credit providers, financial advisers, debt collection agencies, superannuation trustees and many more.

- AFCA's systemic issues team considered the remaining 433 (22 per cent of systemic issues closures) to be possibly systemic and referred them to the financial firm seeking further information to determine whether it was a definite systemic issue.
- The majority of complaints to AFCA are lodged by consumers. Across the first two years of AFCA's operation, approximately 94 per cent of complaints were lodged by consumers (144,256) and 6 per cent by small businesses (8,910).

### Overview of the dispute resolution framework<sup>3</sup>



### Why is the Review important for VACC members?

Complaints are an important indicator of AFCA's members' ability to comply with the General Insurance Code of Practice (the Code) and meet its regulatory objectives. VACC members dealing with insurers are predominantly small motor repair businesses, who over time, have been placed under a glass ceiling by insurers. This glass ceiling relates to preferred repairer schemes, restricting consumer choice of repairer policies, dictating repair methods, quoting methods, repairer warranties, parts used for vehicle repairs, with the most concerning being dispute resolution opportunities and objectivity amongst the insurer's Internal Dispute Resolution (IDR) processes and fairness principles. Each issue directly affects the consumer and flows onto VACC repairer members.

The role of the vehicle owner is at the heart of the relationship between motor repair businesses and insurers. This role has evolved over time, however, AFCA's role and power to address systemic issues that arise from the aforementioned issues between the insurer and repairer is not well known. By identifying the reoccurring complaints AFCA receives lodged against insurers on a daily basis, AFCA can go some way to question the status quo and broad obligations that an insurer is expected to uphold in order to keep their Australian Financial Services (AFS) license.

<sup>3</sup> Ramsay I, Abramson J and Kirkland A (2017) Final Report: Review of the financial system external dispute resolution and complaints framework, report to the Minister for Revenue and Financial Services, p 33.

Complaints are an important indicator of a motor vehicle insurer's ability to comply with the Code and meet its objectives. Understanding the reasons for an 'expression of dissatisfaction'<sup>4</sup> provides members of AFCA, and the Code, with important insights into their products, compliance frameworks and organisational approach. VACC acknowledges that The Code Governance Committee<sup>5</sup> will continue to monitor complaints to better understand the reasons behind the complaints, as well as AFCA member responses. However, VACC recommended a deeper analysis into the root causes of complaints be undertaken with individual subscribers (insurers), to truly understand why specific motor vehicle insurance complaints are made against the insurer time and time again, highlighting that ASIC also has a fundamental role to play in this analysis.

In addition, a systemic issue facing consumers, and one that is becoming more problematic, relates to consumers who have been misled by intermediary vehicle lease brokers in the lease of a new motor vehicle from a franchise car dealer. VACC makes commentary around this systemic issue under recommendation 14.

The Review makes 14 recommendations in total. Most of the recommendations focus on enhancements to AFCA's transparency towards parties to a complaint, and improvements to decision making processes.

## Key Recommendations and takeaways

- **Recommendation 2**

*The Review finds that AFCA needs to exercise caution in the application of its fairness jurisdiction. Recommendation 2 considers that in exercising its fairness jurisdiction when making decisions, AFCA should have primary regard to the four factors identified in its Rules – legal principles, **industry codes**, good industry practice and previous determinations.*

### VACC Comments:

Recommendation 2 highlights that having a strong industry code is crucial when an automotive industry complaint is raised by a consumer against the AFCA insurer member, which connects to a motor vehicle repairer. VACC is currently advocating and working with key government departments so that in Victoria a *new* mandated **Motor Vehicle Insurance and Repair Industry (MVIRI) Code** is developed to ensure a fairer trading environment for the Australian motor vehicle repair industry and addresses the negative behaviours of large insurers to small independent motor vehicle repair businesses. VACC recommend the Federal Government facilitate and also promote this at a national level. The current voluntary national code (except for it being mandated in NSW) is not working, has limitations, and requires changes to improve its effectiveness. Regrettably, insurers have increasingly dismissed the principles outlined in the MVIRI Code and instead have chosen, at times, to dispute repair estimation costs, unfairly cash settle customers, and delay vehicle assessments, or move vehicles away from one repairer to another, even when the customer has 'choice of repairer' in their insurance policy.

VACC supports AFCA acting on this recommendation.

- **Recommendation 3**

*AFCA should not advocate for, nor act in a manner that otherwise advantages, one party such that the impartiality of the complaints resolution process is compromised.*

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<sup>4</sup> For complaints received by financial firms before 5 October 2021, Regulatory Guide 165 Licensing: Internal and external dispute resolution (RG 165) applies. ASIC has provided a deadline of 5 October 2021 for industry to comply with the new IDR standards and guidelines RG 271, with RG 165 being repealed from 5 October 2022.

<sup>5</sup> The General Insurance Code Governance Committee <https://insurancecode.org.au/>

VACC Comments:

VACC supports AFCA acting on this recommendation. AFCA's impartiality is essential for all parties to maintain confidence in the complaints resolution process. Procedural fairness must apply equally to both parties.

- **Recommendation 9**

*AFCA should amend its Operational Guidelines to remove the requirement for an applicant to demonstrate an error of law to access the formal forward-looking review mechanism. Applicants should be able to access it if they are able to demonstrate that the AFCA determination adopts an approach that could have a significant impact across a class of consumers, businesses or transactions.*

VACC Comments:

VACC supports AFCA acting on this recommendation, noting the determinations made by AFCA can and in many cases do impact small businesses and the respective industry, and not just the consumer.

- **Recommendation 11**

*AFCA should ensure thorough consultation is undertaken on each Approach Document prior to final publication.*

VACC Comments:

VACC supports AFCA acting on this recommendation. Government considers greater consultation by AFCA on Approach Documents will strengthen AFCA's complaints handling process by providing all parties with an opportunity to identify any issues in relation to AFCA's approaches to the handling of complaints. Currently, VACC is in dialogue with AFCA with an expectation that they will be able to provide an Approach Document for Unfair Contract Terms (UCTs). Currently, there is no Approach Document on AFCA's website in relation to how AFCA considers or identifies UCTs in complaints.

- **Recommendation 12 and Recommendation 13**

*Where a systemic issue has been referred to ASIC or another regulator, AFCA should cease its investigation of the systemic issue. ASIC and other regulators should advise AFCA of the outcomes of the referrals they receive. However, AFCA should continue to resolve any relevant individual complaints.*

VACC comments:

VACC supports AFCA acting on this recommendation. The Review confirms ASIC's regulatory guidance on IDR makes clear that consumer complaints are a **key risk indicator** for systemic issues within a financial firm and the early identification and resolution of these issues by financial firms should minimise complaints escalating to AFCA. The Review also states ASIC receives a large volume of information from many sources, including through breach reporting and directly from consumers, where it should treat information from AFCA with an appropriately **high priority**.

The Review also considers that AFCA should publish a greater level of detail on the types of issues identified as systemic issues – in particular, those referred to regulators. While noting AFCA's constraints around its confidentiality restrictions, the Review considers that there is scope for further transparency in AFCA communicating with its users by sharing information on a de-identified, industry-specific basis. VACC believes AFCA should be more transparent in its public reporting of systemic issues, including on a de-identified basis as appropriate. This would include factors such as the industry to which the systemic issues relate, the nature of the complaints, the number of affected consumers, total value of remediation and reporting to the regulators.

VACC contends that despite AFCA not being a financial service regulator (such as ASIC or APRA), or more specifically connected to the motor insurer industry, AFCA has been given powers to assist and restore balance between motor insurers and repairers relating to decades old systemic issues. It is understood that when AFCA receives a complaint, they will consider whether it raises an issue that is possibly systemic. VACC subsequently argues that by receiving a number of new complaints about the same issue, or where the issue that affected the particular parties to the complaint could have affected others in a similar way, AFCA should address these issues as systemic and seek to understand the root cause.

- **Recommendation 14**

The *National Consumer Credit Protection Act 2009* (NCCP) should be amended to no longer require authorised credit representatives to be members of AFCA.

*VACC comments:*

VACC does not entirely support recommendation 14.

Although VACC agrees the obligation to pay compensation awarded by AFCA remains the responsibility of credit licensees, removing the joint and severe liability for credit representatives or intermediaries, is detrimental to consumers and automotive industry dealers.

Without the ability of a consumer to complain to AFCA about the direct detriment caused by the credit intermediary, consumers have lost a valuable watchdog and dispute resolution avenue, which is likely to now result in a lengthier and more complicated dispute resolution process. Subsequently, this may see consumers lost to the retail automotive sales sector.

It is therefore VACC's view that consumers are being severely disadvantaged by breaches and noncompliance of credit intermediaries under section 121 of the NCCP. It is also VACC's view that unregulated intermediary should be captured under section 9 of the NCCP and maintained under AFCA's resolution pathway.

VACC raises concern that recommendation 14 heightens the likelihood of consumer detriment, including the sourcing and provision of credit for the purposes of financing a new vehicle. VACC adds that with respect to the findings of the Hayne Royal Commission that any removal of such basic consumer protections flies in the face of what a reasonable person would expect in pursuit of protections when obtaining credit.



## Summary

VACC notes that AFCA is not a government department or agency, nor is it a regulator of the financial services industry. However, AFCA is required to report certain matters to regulators – ASIC, the Australian Prudential Regulation Authority (APRA) and the Australian Taxation Office (ATO) – including where a serious contravention of the law may have occurred, and to identify, refer and report systemic issues.

VACC cautions that any changes to the consumer and small business dispute resolution framework jeopardises fluid consumer to business transactions and would naturally provide protections and guidance in the allocation of consumer finance. To remove any consumer or small business protections contradicts the very essence of the Hayne Royal Commission findings.

As to continue AFCA's statutory objective, requiring its processes be appropriate to identify systemic issues arising from complaints, VACC still recommends a more direct root cause analysis be completed by AFCA – focusing on direct AFCA members. If not, then the systemic issues afflicting consumers will continue, which is limiting to both the wider motor and insurer industries and consumers alike.