HISTORY OF COMPLAINT TO CREDIT AND INVESTMENTS OMBUDSMAN.

I write to draw your attention to issues surrounding the processes of the Financial Ombudsman's Service (FOS) and the Credit and Investments Ombudsman (CIO). In our opinion there are matters which should be brought to light. There are questions which need to be answered. One difficulty is that the issues are complicated. We will try to put the facts as succinctly as possible.

1. In 2007 we transacted a Reverse Mortgage. The Lender was and we were advised that the loan manager would be The advance was $100K. It was at a fixed rate and the loan was to run until the survivor of us went into aged care.
2. We intended to pay out the loan after a few years. The fixed rate break fee (FRBF) was brought to our attention. In the supporting papers the worst case scenario was for the FRBF was quoted at $15K.
3. In 2011 we enquired as to the pay-out figure. We were advised that the FRBF was then approximately $75K. It was thought that the position may improve if interest rates edged up again and so we took no further action for the time being.
4. In 2014 we were advised that the FRBF was $125K. We decided to pay it out and set about raising the cash. However in early 2015 upon requesting the up to date FRBF we were told it had risen to $235K.
5. The writer is a lawyer of 46 years standing with experience in contract law. The documents clearly show that our contract was with is not mentioned in the contract as a party or as having any role. We therefore made a Complaint to the FOS. Briefly the Complaint was based on the following:-
   (a) Our contract was with . The FRBF would become payable if suffered a loss. had already advised in writing that it suffered no loss. Therefore, although the contract could have imposed an obligation to pay a third party's loss, it failed to do so and the FRBF was not payable. In respect to this, and to the matters set out in (b) and (c) below, we said that the drafting of the contract had been bungled and any loss suffered should be sought from those who prepared such contract.
   (b) We argued that the FRBF was void for contractual uncertainty. The FRBF was expressed to be the actual loss incurred. Although the contract could have included various deeming clauses in order to enable calculation of the actual loss incurred by reference to such benchmarks, it failed to do so. It was therefore impossible to calculate the actual loss incurred as know nothing, for example, of our state of health.
   (c) It had been said by that the FRBF was the figure resulting from the application of a "complex calculus formula". Further, and in the alternative, it was argued that by reason of the matters referred to in (b) above this formula could not take into account variable factors, applying only to us, which might have yielded an accurate result.
   (d) Finally it was argued that the application of the FRBF was unfair and unreasonable.
6. In May of 2015, the FOS refused to deal with the Complaint on the basis that had appointed to act as its manager. We were told that the CIO was the correct

forum. This is despite the fact that we had no contractual relationship with whatsoever. Our contract was with . We had no alternative but to submit the Complaint to CIO. This left open the gaping question as to how we would enforce against any Determination made by the CIO, as such determination would not be made against the party with whom we had contracted.

7. was asked to respond, and did so in July 2015. This response made no attempt to respond to the issued raised in paragraphs (a) – (d) above. Instead it dwelt on the assertion that we were aware of the inclusion of the FRBF provisions. At no stage had we indicated otherwise. Our argument went to the enforceability of the contract. We responded to CIO to the effect that had not addressed the issues in dispute. In August the CIO promised an Initial Review by October 2015.
8. In November the CIO produced a mangled summary of the Complaint including reference to our request that the FRBF be "waived" – something we had never requested. We were told that would have a further opportunity to respond by 9th December.
9. Upon consideration, on the 30th November 2015, we withdrew the Complaint outlined in paragraph 5 (d) above. We also indicated that we would strongly argue that the FRBF was an unenforceable contractual penalty in light of the recently decided High Court Cases of *Andrews* and *Paciocco.*
10. gave a further "response" on the 8th December. It was a copy of its response of July 2015. We replied that was treating the Complaint process with contempt. The "response " dealt in detail with Complaint 5 (d) above, which had been withdrawn. We re-stated our case clearly to CIO.
11. CIO then told us in February that a Review would be forthcoming in March. We suggested a conciliation conference. We wanted to confront with the legal issues and have them respond. We were told that a conciliation conference was not appropriate as a resolution seemed unlikely. We thought this was absurd. Most Mediations start off with one party or the other seeming intractable.
12. On 6th April CIO promised a Review by the 18th May. We again restated our position in detail.
13. On the 26th May we spoke with the case manager at CIO. In respect to this:-
    (a) We were told that considerable time had been expended in obtained details as to how the FRBF had been calculated. We responded by saying we had never contested the quantum of the FRBF.
    (b) Reference was made to the fact that we were aware of the FRBF provisions in the contract. We replied that we had never denied this. We say those provisions are unenforceable.
    (c) We pointed out again that a response to the legal issues raised should be sought from

14. We received the Review on the 31st May 2016. We responded that we were astounded that the review dealt in detail with complaints which we either did not make (re the quantum of the FRBF) or withdrew months ago (re the FRBF being unfair or unreasonable) – yet failed to deal with the real issues detailed to CIO repeatedly. A further detailed Response (of 11 pages) was prepared by us and sent to and the CIO. We were assisted in this, and much of this was written by an acquaintance of ours who is a Q.C.
15. We requested that the Ombudsman make a Determination taking into account the matters raised in the Response.

16. Whilst awaiting the Determination we wrote on a without prejudice basis to seeking a conference at which their legal representatives could meet with ours in order to thrash out the legal issues in the hope that a confidential settlement might be achieved. declined. We felt that was unreasonably confident , given that it had never responded to the legal issues raised, and sought an assurance that there had not been any communication between and the CIO of which we were not aware. We got a qualified response only.
17. On the 18th October the Determination was received. We attach a letter written to the Ombudsman which summarises our response to what we regarded as legal nonsense. There has been no reply.

It is our view that the history outlined above illustrates why there is a need for government regulation of the financial services industry.

The financial services industry enjoys the public and political kudos which flows from its assertions that complaints will be dealt with in an efficient, timely and independent manner, as an alternative to the Court process.

We believe the following questions also arise:-

(A) If the complaint procedure is an alternative to the Court process, should not the complainants be entitled to have their dispute determined upon properly applied legal principles?
(B)

(C) How can the Ombudsman service be seen to be efficient when the case manager never understood the basis of the complaint?
(D) Why did the resolution of this complaint take approximately two years?
(E) Would not government regulated Tribunal acting with true independence, and staffed by people properly applying relevant principles of law, be a far better alternative than the current arrangement?

11th November 2016.

Michael and Rani Ryan.

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27th October 2016.

Mr. Raj Venga,
Credit Ombudsman,
Credit and Investments Ombudsman Ltd.,
PO Box A 252,
South Sydney NSW 1235.

Dear Mr. Venga,

Re Complaint .

We have reviewed your Determination in this matter.

The findings leave us with no alternative but to pursue a resolution of this dispute via Court action.

The CIO website promises "…a free, **independent and impartial** dispute resolution service……. In doing so, we provide both consumers and financial services providers with an **alternative to legal proceedings** for resolving financial services disputes."

Alternative to legal proceedings

This would indicate to us that you would approach a dispute with the same forensic legal approach as would be adopted by the Court i.e. that you would apply the law. I am a lawyer with 46 years' experience in contract law. Bearing these factors in mind we ask the following questions:-

1. You have stated that (the FSP) was entitled to charge the FRBF. The contract documents clearly show that the FSP was not a party to our contract with . We owed no legal duties beyond the four corners of our contract. You have stated that "for relevant purposes" the FSP stands in the shoes of . There is absolutely no legal basis for this assertion whatsoever. Further you have stated that you do not accept "the argument" that any loss suffered by the FSP is not a loss suffered by . This is not "an argument". It is a fact. Our question therefore is – Why have the basic well-established principles of Privity of Contract been ignored?

2. You have found that the FRBF is not a penalty because "it does no more than recover loss arising from a specified event…etc." The point here was that the loss

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was not one of a party to the contract. Our question here is – Once again, why were the principles of privity ignored?

3. Our Complaint included an assertion that the FRBF was void for contractual uncertainty. Detailed reasons were given. Our question here is – Why was this matter not dealt with in the Determination?

4. You have stated that you adopted the Review of the 31st May 2016 for the purposes of the Determination. We find this extraordinary as the Review dealt largely with complaints which we either did not make or were withdrawn on the 30th November 2015. The Review also appeared to base its findings largely on the fact that we were aware of the FRBF provisions in the contract, as if, in some way, their very inclusion rendered us liable to pay a third party an estimate of its alleged loss. Our question here is – Upon what possible legal basis could the findings of the review be sustained?

Independent and impartial

We refer to the following facts:-

1. At no stage did the FSP ever respond to the legal issues raised by us and supported by Peter Murdoch Q C.

2. The only response made by the FSP to the Complaint was to refer to issues supporting their position that we were liable because we were aware of the existence of the FRBF clause.

3. On the 19th September we wrote to the FSP suggesting that they confer with us through their lawyers in order to thrash out the legal issues. The FSP refused to do so.

4. On the 25th September we wrote to the FSP noting that it had not responded to the legal issues and asking whether there had been communications or submissions directed by it to the CIO of which we were not aware. We were taken aback to receive a qualified response from the FSP.

5. In our opinion the legal matters raised by us are likely to have been rarely raised in the past. Yet the FSP seemed aggressively confident of the outcome.

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6. Further, it appears to us that the Determination has twisted the facts and misapplied the law in order to arrive at its conclusion – a conclusion that would no doubt be welcomed by the FSP and those funding the CIO.

7. These considerations raise a question in our mind. Without making any accusations, we ask - Has there been any collusion between the CIO and the FSP, or indeed any communication between the CIO and the FSP to which we were not a party?

We are currently preparing a submission to be directed to the Treasurer, the Minister for Finance, ASIC and Josh Frydenberg, our local Member, in support of the current move to disband the CIO and the FOS in order to set up government regulation of the industry by means of a Tribunal, staffed by people who are able to act independently and with proper knowledge of the law.

This letter will be appended to such submission, together with any reply you wish to make.

The absence of any reply will also be noted.

Yours faithfully,

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