

## **Submission into the review of the Australian Financial Complaints Authority (AFCA)**

The Terms of Reference (**TOR**) for the review states that the legislation requires the review to consider whether AFCA has been effective in resolving complaints in a way that is 'fair, efficient, timely and independent', taking into account feedback provided by consumers and small businesses.

This submission is based on a complaint lodged by the directors of a company (complainant) with AFCA in relation to National Australia Bank (**NAB**), and how AFCA dealt with the complaint.

### **Complaint background**

NAB Business Banking was approached by the complainant for a loan to fund the potential purchase of a property. The complainant's directors had a longstanding relationship with NAB for over 20 years, and had multiple consumer mortgages in the past under their own names with NAB.

The mortgage was approved, subject to the directors acting as guarantors and property valuation, which the directors agreed. The company then purchased a trust property.

NAB Business Banking proved to be dysfunctional when it came to actually settling the loan. First, the guarantors had to re-sign the guarantor documents as the business banker had given the directors the wrong forms to sign. Second, the loan went through a further approval process, for which the reason remains unclear as there were no changes to the director's circumstances, and the loan was below the conditional amount approved. And third, NAB required the directors to amend the trust deed, worded verbatim to NAB legal team's requirements as they would not accept any other wording. The directors nevertheless complied with all of NAB's requirements up to that point.

However, less than two weeks prior to property settlement, the business banker raised yet another condition, stating that NAB's "mandatory policy" required the directors to provide lawyer certificates to confirm that they had obtained legal advice regarding their obligations as guarantors.

The directors objected on grounds that NAB was forcing the directors to potentially waive their legal professional privilege, was contrary to the *Banking Code of Practice* which did not mandate this requirement, and also unconscionable as NAB only disclosed their policy less than two weeks prior to the date of settlement, leaving little choice for the borrower and guarantors. The directors asked the business banker to escalate the issue to senior management.

Two days later, the business banker responded by emailing the directors all the loan documents, including the guarantor forms, but not a copy of the loan terms and conditions, and personally arranged for the directors to sign the documents at a designated date, time and NAB branch before one of its branch managers. The business banker had also sent the branch manager all the loan documents, including her written letters confirming that the loan and guarantors had been approved, and for the branch to sign and witness all the loan documents on behalf of NAB.

At the NAB branch, the directors signed all loan documents, executed by the branch manager on behalf of NAB. The branch manager also provided a NAB waiver certificate for the directors to sign in lieu of the lawyer's certificate, and explained the guarantor duties to the directors. The directors signed the certificate, and the authorised branch manager signed it on behalf of NAB. The directors left the branch relieved that the loan settlement was on schedule as NAB had executed all the loan documents.

Approximately 7 days prior to settlement date, the business banker advised the directors that the loan would not be advanced without the lawyer certificates. The directors raised a further complaint through NAB's complaint resolution centre, however NAB insisted on the lawyer certificates and would not advance the loan otherwise. The directors had no choice but to fund the substantial settlement amount out of their pockets, otherwise be held to ransom by NAB.

NAB then withdrew money from the directors' personal bank account for "legal fees" without notice or authorisation. The fees were eventually refunded after successive complaints, and NAB certainly took its time. NAB also refused to promptly return all the signed mortgage documents, including the mortgage deed, leaving the company and the directors financially exposed.

The directors lodged an application with AFCA seeking compensation and for NAB to be referred to ASIC or ACCC for alleged misleading and deceptive conduct and other contraventions. The directors further suggested that it was in the public interest for AFCA to investigate NAB, due to the potential for borrowers to be exposed to significant risk by purchasing a property based on a purported loan approved, subject to unknown future conditions imposed by the bank. However, AFCA made a determination in favour of NAB.

The AFCA experience in relation to the complaint process is detailed below, which raises concerns regarding AFCA's process and whether it acts impartially.

### **Response to the TOR**

#### ***Delivering against statutory objectives***

AFCA failed to meet at least two of its statutory objectives of resolving complaints, namely, conducting reviews in a fair and independent manner.

AFCA held a telephone conciliation conference between the parties, attended by an AFCA appointed conciliator, and a recently assigned AFCA case manager. The conciliator and case manager were involved in joint and private negotiations with each party.

Prior to the Conference, AFCA had advised that any information provided to AFCA would be shared with both parties to ensure procedural fairness. However, NAB had provided AFCA a copy of its Guarantee policy, advising that it did not wish for it to be shared with the complainant directors.

The NAB policy document remained on AFCA's file, and relied on by both NAB and the case manager during the conference, and thereafter, reflected in the case manager's recommendations. The directors had not received a copy of NAB's policy during the conference.

Further, during a private conference between the complainant director, conciliator and case manager, the case manager expressed strong views in favour of NAB, rejecting the director's view that NAB's internal policies did not take precedence over the law, as NAB had entered into a legally binding contract, knowing that the directors would not be providing the lawyer certificates.

The case manager had already made up his mind that NAB had not breached any laws by relying on a particular clause in NAB's loan Terms document, which he had received a copy from NAB the morning of the conference, but had not passed onto the complainant director until it became known to the director. When prompted by the director to explain his views, the case manager admitted that he had not reviewed the entire Terms document, and had focused only on one clause which NAB appeared to have pointed out to him during their private Conference.

The director refused NAB's meagre offer during a private conference, which had been communicated through the conciliator and the case manager. The case manager stated that NAB's offer was reasonable and that the complainant was unlikely to be awarded any compensation if the matter progressed to a determination by the Ombudsman. It is possible that AFCA advised NAB that their prospects were strong given the meagre offer that was made by NAB to the complainants.

The director raised concerns of reasonable apprehended bias directly with the case manager after the conference, as his views appeared to have been influenced by his involvement with NAB during their

private discussions, which could also affect his subsequent findings. The case manager did in fact make recommendations in favour of NAB, and provided the director with a copy of his findings.

The director formally rejected the case manager's findings. The recommendations were then referred to the Ombudsman for a determination. The director also raised a formal complaint for an Independent Assessor to consider the issue of procedural fairness, and whether it was appropriate for AFCA to allow any case manager to be involved in conference negotiations between the parties, given that an independent conciliator is appointed for that purpose. The director also requested AFCA consider whether it was appropriate for the case manager to continue managing the case, based on an apprehension of bias.

Following two internal reviews by two different officers, AFCA addressed the issues reasonably well. AFCA obtained NAB's consent to release a copy of its policy in response to the director's concerns of procedural fairness. However, with respect to the case manager's continued involvement, the director was assured by the AFCA officers that the Ombudsman would review all the documents, make an independent decision, and that the case manager's role was purely administrative.

The Ombudsman's determination concurred with the case manager. Similar to the case manager's findings, the determination omitted critical facts which formed the basis for the complaint, failed to address the legal issues detailed in the director's submissions, and misinterpreted the issues raised. For example, the Ombudsman stated "*There is limited information as to what occurred between 3 and 6 April 2019*". In fact, between those dates, NAB had arranged for the directors to sign the loan contracts and a waiver certificate at their nominated branch, a fact stated in every submission provided to AFCA by the director. Further, the only mention of the directors signing NAB documents in the Ombudsman's determination was in the 'Supporting Information' section, and did not state that the Bank also signed the loan contracts and accepted the waiver certificate in lieu of its own policy.

The Ombudsman determined that as NAB refunded the unlawfully withdrawn fees from the director's personal bank account, that the complainants suffered no loss. In effect, there were no consequences for NAB unlawfully withdrawing money from a bank account in which had no authority.

The Ombudsman advised that the *Australian Consumer Law* was not applicable, the relevant law being the ASIC Act, however did not consider the alleged contraventions under that Act.

The Ombudsman further stated that AFCA is not bound to legal citation rules, stating that the complainants raised issue with its referencing model. In fact, the director had explicitly referred to the supporting documents provided to AFCA by both parties in the submission, not legal citations.

There are other issues that the directors wish to raise regarding the determination made in favour of NAB, however for the purpose of this submission, the concern is that the Ombudsman's determinations are not reviewable.

### ***Internal review mechanism***

Given the experience dealing with AFCA, it is proposed that:

1. the Ombudsman's determination should be reviewable, including on its merits, contrary to the existing process whereby the Ombudsman's decision is final (according to AFCA);
2. complainants should be able to refer complaints directly to an Independent Assessor, and not through AFCA's chain of command, which could affect the outcome of their complaint;
3. conciliation conferences should be conducted with an independent conciliator, excluding any involvement of the case manager, which could affect their decision making.