

Submission to Treasury on the review of AFCA 26th March 2021

from Leon Ashby and others who have been involved with various AFCA Cases

This submission is a summary of different people who have either had their case assessed by AFCA or have assisted others with their case with AFCA.

1. The claim limit of \$1-\$2 million unjust. Many have claims well in excess of \$2 million and they are excluded from an opportunity to resolve their case via AFCA - which is unfair.
 - Why should there be a limit on justice or at least an opportunity to resolve a matter? **There should be no limit for a claim payout** - if it can be substantiated with evidence.
 - The current system is like having a criminal justice system where petty theft has a remedy process, but theft over \$2 million doesn't. It is a Process seemingly designed to coverup the worst cases from getting some justice.
 - Many cases over \$2million in claims are bank victims who have been bankrupted (criminally) and do not have the finances to mount their case in court. Some are "Legacy cases" of which there is no system to deal with their complaint. **We are proposing a change to the AFCA rules to be able to deal with all these complaints.**
2. Similarly the time limit on a complaint should not be limited to since 2008.(or in fact any date).
 - In one case the fraud occurred before 2008 but was not discovered until 2014 but there is no flexibility for AFCA to look at the case
 - If a Case could be deemed as worthy of negotiation via AFCA. No time limit should apply.
 - **We are proposing a change to the AFCA rules so the older complaints can be dealt with.**
3. AFCA says it does not look at complaints which deal with financial entities which are not members of AFCA.
 - In one case, the Bank claimed the complaint related to it's subsidiary (which used the Bank's name) but it was a vehicle finance entity – supposedly separate from the Bank. (figure that out)
 - It claimed the subsidiary entity was not a member of AFCA therefore it could not look at the complaint.
 - By AFCA being limited to just its member organisations, it cannot deal with many financial institution's complaints. There should not be ways for any financial entity to slip out of a Financial complaints process (as there is at the moment). **Therefore we demand a different organisational structure.**
 - **We propose AFCA should be run by an independent non profit community entity with funding obtained from the revenue from Banking fines issued by regulators - and if it needs a funding top up – to be levied on the banks as a percentage of their profits. This provides an incentive on banks for minimising practices which cause complaints.**
4. AFCA does not demand documents from the bank to determine if the facts claimed by the bank are correct or not. This is a huge weakness in the system and needs remedying. The banks have a code of conduct **promising to hand over all documents requested by a customer, but no one including AFCA has an enforcement process.**
5. AFCA does not understand the laws properly and advises complainants incorrectly - For example AFCA did not want to take one case on because it was part of a class action. The AFCA case officer said the case could not be

in two forums at once. It took a lawyer from the class action to advise AFCA this was in fact wrong. AFCA relented and reinstated the case involved.

6. AFCA referred many questions and requests to the bank to answer, rather than gather their own information from the bank - this is pathetic when dealing with Banks who are prepared to do anything to cover up their wrong doings any way they can. **AFCA needs to have some teeth.(ability to take banks to court for a number of situations – e.g. not providing documents etc)**
7. In one case, the complainant had to quote laws from ASIC to AFCA, as to gain access to information from the bank regarding documents concerning their case.
8. In our view AFCA is too close to the Banks as we understand they are member / funders of AFCA **and that closeness needs complete separation to allow far better outcomes in line with what is just.**
9. In our view AFCA is also too close to Government with the Minister / department having the ability to limit the size of claims and eligible dates of claims and other rules about AFCA. **Further distance from Government is also demanded and the claim size limits and claim date limits removed.**
10. In our view, we have found the way AFCA deals with minor complaints is generally ok and appropriate.
 - o In these relatively minor cases (where no laws, or banking codes were broken), the opposing sides of the argument are heard and a negotiation of an outcome is attempted. This seems a reasonable approach for minor and unclear disputes however
11. Where there is substantial evidence, breaches of the banking code, documents have been forged, laws have been broken, and verbal and written agreements have not been kept by a financial entity, then because the victim cannot get them into court (either police refuse to take the matter on - or the victim has no funds to go to court, we propose either:
 - o **AFCA needs substantially more teeth (powers to take banks to court) or**
 - o **Another independent community group / entity with the ability to go to court on behalf of the complainant needs to be set up.**
 - o **Michael Sanderson has been lobbying for an “Equality of arms” system for victims. We strongly support such an idea.**
 - o **Financial entities have the means to defend themselves while destitute victims (who have lost all their assets through the illegality of a financial entities actions) do not, therefore it would only be fair to have a process to enable fairness and justice. (not just have a negotiation where the banks still have the major power balance in their favour)**
 - o **If (in the future) there is only a handful of cases of wrongdoing, then these will be easily dealt with**
 - o **If (in the future) there is systemic problems, then Financial institutions will most likely settle quickly out of court and fix their systemic problems.**
 - o **And if (in the future) the ability for an independent non profit group to get prosecutions for criminal activity in banking occurs, it will improve cultural practices of financial groups as well.**
 - o **We believe the funding for an Independent Legal advice available through a Group with the ability to go to court on behalf of victims, can be funded from the fines from the industry regulators (over \$1.8 Billion in the last 18 months we believe) As well as funds recovered from any criminal proceeds.**
 - o **This would minimise any taxpayer burden for a new or upgraded entity. (AFCA mk II?)**

7. We also believe the Independent Legal group should have

- A small board nominated by the public and chosen by someone such as the small business Ombudsman -
- This is so the board can oversee the choosing of lawyers and others who would be employed to give legal advice and represent victims.
- As well as the board face senate estimates questioning each year on it`s performance to resolve cases and improve the financial services industry standards

These are processes the AFCA system does not have at the moment, therefore it lacks teeth, authority and performance on anything other than minor disputes.

In summary we demand AFCA

- a) Remove the size of Claim limits
- b) Remove Limits to the date of dispute beginning from
- c) Have an enforcement process to obtain documents from banks
- d) Have a new organizational structure to empower just outcomes so:
 - It is independent of Banks & Government
 - Funded by bank fines & can get a top up from a levy on banking profits
 - Set up as a Non profit community group
 - Board nominated by the public
 - Chosen by small business ombudsman
 - Employs lawyers
 - Can fund victims who need to go to court against a bank
 - Provides “equality of arms” for victims to obtain court determinations
 - Faces senate estimates questioning each year.

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