Review of the Australian Financial Complaints Authority

The Treasury ACT

Official Submission by Suzi Burge 26 March 2021

In my opinion which is derived from personal experience, official documentation and dealings with AFCA (Australian Financial Complaints Authority), AFCA is not fit for purpose.

It is imperative that any complaints authority is independent of the organisation that the complainant is complaining about. In my opinion any organisation tasked with investigating customer complaints such as 'FSP' (Financial Service Provider) complaints 'MUST' act independently and can not be funded by the organisations they are investigating. There is no degree of separation within the funding model, which lends itself to a significant conflict of interest. This conflict of interest causes significant consumer detriment. When errors are made by employees of AFCA, they are totally ignored in spite of being repeatedly addressed by consumers. The lack of mechanisms within the organisation to have these errors competently addressed is absent. AFCA employees dismiss their own Rules and guidelines and it is these Rules and Guidelines that they are bound to. Serious errors have been made in multiple cases and this has enabled the misconduct by the FSP's to continue.

It is not appropriate that there is no appeals process for complainants when employees of AFCA inadvertently make errors and then AFCA employees escape scrutiny for their wrongful actions – refer section A.22 Immunity from liability of the AFCA Rules and Regulations. No effective Business model should include immunity for the very employees who are to implement the Rules and Regulations when errors occur, this paradox is at the heart of AFCA's failings.

Complainants must be compensated for the true loss that has occurred as a result of wrong doing by the FSP. It is inappropriate to cap loss at an amount that does not restore the complainant to the position that they were in prior to the wrong doing. All serious misconduct 'MUST' be reported to the relevant authorities for full investigation and full compensation.

In my matter AFCA CEO and Chief Ombudsman, David Locke flew to Launceston Tasmania to meet with me in mid May 2019 after I contacted him in relation to statements that were made in the **'Resolution of disputes with financial service providers within the Justice system'** inquiry. Some of Mr. Locke's statements in that inquiry are as follows:

Exert from Transcripts 'Resolution of disputes with financial service providers withing the Justice system' inquiry

- ***Mr Locke:*** *I start from the standpoint of what's fair for consumers.*

CHAIR: *Yes, and whether the injustice itself was addressed or not.*

Mr Locke: *And I start from the standpoint that if there is injustice then, the sooner that's set right, the better. But I do think it's really a matter for government rather than for us.*

Mr Locke: *The second part is: what about what we can't consider? What AFCA is prevented from considering is a case that was previously dealt with by FOS or CIO. That's if there was a determination or a settlement. Certainly if the predecessor organisations got that wrong then of course I would have no objection to that being reconsidered and determined. I don't think that it would be appropriate for AFCA to do that or for AFCA's rules to be changed to*

do that.

- ***Mr Locke: I think there are challenges if you are reopening matters that perhaps have gone to court or perhaps have been dealt with through the ombudsman scheme. I don't think it is entirely without problems. But, fundamentally, I start from the standpoint of what is fair for consumers. If things were got wrong then I think they should be set right.*** *[emphasis added]*

I felt reassured by Mr. Locke's words in that inquiry and confident that AFCA might finally be the complaints authority we urgently needed for Justice to Prevail and the Banks to face prosecution for their serious misconduct. In my matter I experienced an extremely flawed Financial Ombudsman Service (FOS) determination (299356) that was never fully implemented by the FSP as was required by the FOS Terms of Reference. **PLEASE NOTE AGAIN**: The Chief Ombudsman and CEO of AFCA has stated that if FOS or the Court's got it wrong, then it should be made right. Mr. Locke 'MUST' be made accountable for his statements, which at this present time, appear to be 'False and Misleading statements' made in a Parliamentary inquiry. Wrongful Court and FOS Determinations 'MUST' be set right. To allow Bank skulduggery to go without prosecution and the many wrongs not set right is simply soul destroying to those Bank Victims who continue to fight for Justice due to the inefficiencies of the FOS/AFCA process.

Mr. Locke in my meeting mid May 2019 undertook to review the final determination [redacted] He read the confession by [redacted] formerly of the CBA, now of Westpac dated 5/2/2019 and was shocked. An exert from [redacted] letter is below. This confession should have been enough for Mr. Locke to have my Determination ruled Null and Void and a full investigation conducted, but this did not happen. It appears CBA misled FOS in their investigation of my complaint 2012 -2014. [redacted] words reiterates the fact that CBA knew they had engaged in serious misconduct by placing a loan before me to sign, knowing that it contained 'False and Misleading' information. CBA should have been prosecuted - 'Obtain Financial Benefit for Deceit'. Where would I be if the loans had not been made as CBA state? Certainly not in the devastating situation I now find myself in. AFCA failed to make right a monumental mistake in relation to FOS wrongful Determination 299356 as Mr. Locke states he would.

- ***You have already been compensated for the Bank's maladministration in lending***

- *4.1 The Bank once more acknowledges the maladministration in lending with respect to both the BBL and the IHL. It accepts that the loans were inappropriate and should not have been made. This was determined by FOS on 13 August 2014 and that Determination is, of course binding on the Bank.*

Mr. Locke after meeting with me engaged the services of external lawyer [redacted] I believe [redacted] was supplied with [redacted] File Notes only and did not have access to the documents that should have seen this Final Determination referred to ASIC for full investigation or ruled Null and Void.

Below is an exert from a preliminary letter to [redacted] (AFCA) by Legal Practitioner [redacted] in her review of my flawed final FOS determination 299356. With the notations by [redacted], did AFCA ask for an independent review of my matter as Mr. Locke states he will do if determinations were 'got wrong'? No he did not.

- **2019 – 24th June** One very important observation that [redacted] made in her letter to [redacted] (AFCA) is the following:
    - *She also asserts in her email that "Internal CBA documentation which has been in FOS possession clearly states that with the 2008 and the 2010 loan, I was a Technical Decline, my financials were poor, my assets gave comfort and I was a 'win for the bank'." To my mind, if this was true. It was probably conscious (rather than inadvertent) maladministration – but not deceit or fraud.*

Conscious maladministration is deceit = fraud. There can be no other way this is viewed. In any case, I outlined enough serious misconduct to warrant AFCA referring my matter for a full independent investigation. A confession by the Bank as to the inappropriate lending and loans that should not have been made, should have been enough to do that on it's own.

Below is an exert from [redacted] letter in relation to 'Lessons for AFCA' I am unsure if AFCA have implemented [redacted] recommendations or not.

C. Lessons for AFCA

I think that there are lessons for AFCA arising from these files.

1. Small business customers

Whereas vulnerable individual complainants are often supported by a financial counsellor or consumer legal centre, small business customers do not necessarily have the same access or utilise these services to the same extent. Yet, despite that, I think historically FOS has provided less support to vulnerable small business complainants than to vulnerable individual complainants.

AFCA does now have small business complainants firmly on its radar. But I think it may be important to encourage staff to identify vulnerable small business complainants like Ms Burge and in appropriate cases try and assist them to access services that can support them through the AFCA process.

2. Quality of determinations

The 2014 Determination was not as clear as it should have been. This has created misunderstandings, subsequent complaints about FOS, lots of work and complainant distress. It underscores the importance of Ombudsmen taking the time to ensure the quality of their work.

3. Valuations

Once the new Banking Code of Practice begins, AFCA should expect banks to have a much fairer and more transparent valuation process than may have occurred for Ms Burge. Before a lender engages a valuer, there should be discussion with the borrower about who the valuer will be and any possible conflicts of interest they may have. For example, it may be appropriate for the lender to give the borrower the choice of 3 possible valuers. In addition, as per the Code, the valuation instructions and valuation report should be promptly provided to the borrower.

4. Compensation for maladministration/ responsible lending

First, I think AFCA should rethink the language it uses in relation to compensation for maladministration/ responsible lending. Contrary to what is often said, the AFCA approach is not always to put the borrower back in the position they were in prior to the lending. Rather the AFCA approach recognises that other factors can come into play, particularly how the borrower spends the money and the performance of investments they make with borrowed funds.

Secondly, I think that there is scope for a more liberal approach to compensating small business borrowers for maladministration. In Ms Burge's case, I think a strong case could have been made for compensating her for the costs associated with the sale of the Reuben Court property (agents' commission, advertising costs, legal costs and GST).

Thirdly, I think there is scope to look at loss more holistically where maladministration in lending occurs in relation to one loan, but not all loans. In Ms Burge's case, if as I suspect Ms Burge's ability to make payments on her investment loan (Loan 2) was compromised by being over committed as a result of her business loan (Loan 1), I think that there would have been a basis for some compensation eg to the extent of extra interest levied on her investment loan as a consequence of her default, pending the implementation of FOS's determination and the offsetting of the Loan 1 compensation against Loan 2.

5. Financial hardship

In maladministration/ responsible lending complaints, it is important that AFCA deal with financial hardship issues that arise as a consequence of the disputed lending. Ms Burge's complaint is not the only instance of which I am aware where there were hangover financial hardship issues that were not well handled by FOS.

D. Next steps for Ms Burge

The question then is what to do about Ms Burge's complaints and questions.

1. Ms Burge has said that she needs to be involved in external legal review of her case. I think it would be prudent for me to speak to her by phone after you have considered this draft (and helped me to understand the factual issues better), but before I finalise the advice to you.

2. Clearly you need to reply to Ms Burge's questions and address:

1. Why FOS did not report to ASIC her allegations of fraudulent changing of her loan application/ doctoring of figures used for service.

It would seem here that the answer is that FOS did look carefully at her allegations, that fraud is a serious allegation and requires compelling evidence, and that FOS was not sufficiently persuaded in her case that there was compelling evidence of bank fraud. It would also be worthwhile reiterating that as a

general principle adjustments in a credit assessment to borrower figures, consistent with a lender's credit policy (along the lines of those detailed in [redacted] letter) are legitimate.

2. The Opteon valuation

Presumably FOS was not aware that [redacted] had previously worked for CBA. But I would suggest caution – you probably don't want to lend weight to Ms Burge's view that [redacted] was hopelessly conflicted. You might want to refer to the new valuation process protections in the Banking Code of Practice (albeit acknowledging that these are too late to assist her).

3. Process of accepting the Determination

Clearly Ms Burge was given some useful assistance from FOS in the month after the Determination. She received a lengthy and helpful letter from the Ombudsman. She was also given a short extension to decide whether to accept the Determination. Ideally comments in response to Ms Burge about this issue would be as neutral as possible, without overly defending or criticising the process that applied.

4. Deed of Settlement and Release of 7 March 2016

If, as I am assuming, this related to court proceedings to which FOS was not a party, you would not want to comment on this.

5. Re-opening of Ms Burge's Determination

Ms Burge has challenged AFCA's statement that a FOS Determination cannot be changed by pointing to the fact her 2014 Determination was changed under the slip rule. She has also asserted that CBA's conduct was deliberate/ deceitful and implied that is a basis for re-opening the Determination.

I cannot agree with her. It is a fundamental tenet of the scheme that a determination is final. That applies regardless of the merits of the Determination.

MY COMMENTS It seems FOS were prepared to change the determination for CBA, but not myself when mistakes were admitted by Ombudsman [redacted]. Discovery of this email in 2019 should have seen AFCA open the Determination for full investigation or ruled Null and Void as was to happen with the CBA in August 2014.

Email 9th October 2014 From [redacted]

"*We need to say that 2 options are"*

"1. Issue an amended Determination. The effect of this is to render the Det issued on 13 August null and void. A new amended Determination will be issued setting out the amount owing by the Applicant which includes the GST amount. The App will be given another 30 days to accept or reject

before our file closes.

[redacted] letter continued:

I wonder, however, if you would consider writing to CBA, telling them about this review and asking them if they would be prepared in the circumstances to consider waiving a portion of her debt (up to the amount of additional compensation that I am suggesting Ms Burge should perhaps have been awarded by FOS)? I appreciate that this would be a radical proposition and that CBA may just refuse. But I can't see any other way to provide fairness to Ms Burge.

My Comments: Key words here [redacted] believes that I have not been provided fairness.

Complaints Lodged since the inception of AFCA

- 4 June 2019 @1.37pm – Credit Corp Collections Pty Limited.
  - Undue Harassment of a third party and using an unauthorised address of a third party when serving documents that were consequently never received by myself.
  - This complaint has now been referred to an Ombudsman for Final Determination.

- 5 July 2019 @ 3.23pm – Latitude Finance Australia
  - Wrongful Sale of a Debt without providing proper documentation. This includes Legal Name, Contract, Proof of Debt (first statement after the Date of Contract)
  - This complaint was deemed to be not against GE but against Credit Corp Collections Pty. Limited as the purchaser of the debt. It was forwarded to the case officer for the Credit Corp complaint to be included with that complaint. Many requests for an update as to the status of this portion of the complaint have been ignored by the case officer.

- 8 July 2019 @ 7.04pm – Commonwealth Bank of Australia
  - Forced signing of a Deed of Settlement and Release that also contains a crime 'Perverting the Course of Justice'.
  - Case dismissed without investigation. Reason: It was part of a Court Action. The Deed itself was done behind closed doors and never viewed by any Judge. I was told that if the police investigated then to come back and they would look at it then? As the Deed contains a Crime this should have been immediately referred to ask for a full investigation.

- 31 May 2020 @ 4.34pm – Commonwealth Bank of Australia
  - Inappropriate sale of Investment Property prior to sale of Family Home as per Court recommendations – Unconscionable Conduct. Failure to sell Investment property in a reasonable time frame. Sale of Investment property and family home knowing the loans were inappropriate and should not have been made. Obtain Financial Gain by Deceit. CBA refusal to adhere to a FOS Determination and the consequential failure by AFCA to report the findings of it's own external review of the Determination to the relevant authorities. Failure to report to ASIC the confession by CBA that the loans were inappropriate and should not have been made and failure to re-open my matter based on this information. CBA's refusal to allow the difference between the unconditional sale of the investment property and my family home to be paid into the Court's to allow me to stay in the Family home.

- 15 June 2020 @ 3.16pm – Commonwealth Bank of Australia
  - AFCA's failure to act on its own independent legal advice in relation to FOS determination 299356. AFCA's failure to report CBA when AFCA's independent legal advice states that my matter was more likely 'conscious maladministration' rather than inadvertent. Conscious = Deceit. This becomes more evident with CBA [redacted] wording that the loans given to me were inappropriate and should not have been made. By presenting me with a contract to sign knowing it contained false and misleading information is a breach of the Corporations ACT 2001 Section 1308.

AFCA have failed to be the 'Independent', 'Free from Bias' Complaint authority it was intended to be. A more appropriate Complaints Authority that does not rely on funding by the Banks 'MUST' be implemented.