

REVIEW of the AUSTRALIAN FINANCIAL COMPLAINTS AUTHORITY

Australian Government- The Treasury

Submission

Director.

AFCA Review Secretariat,

Financial System Division,

The Treasury,

Langton Crescent,

Parkes ACT 2600

By email: AFCAreview@treasury.gov.au

26 March,2021

Dear Director,

1)

Preamble

The contents of this submission are summaries of experiences and observations of AFCA's operation and its handling of matters submitted to them by various entities where I have either been a complainant, represented or acted for them since the establishment of AFCA in 2018. The banks associated with the cases have been the Westpac Banking Corporation and the Commonwealth Bank/Bankwest. The entities are in the small business category.

The most recent data published by AFCA reveals as at 30 June 2020 that they received 80,546 complaints of which 4,172 were from "small businesses" and 46,820 came from the banking and finance product sector making it the largest area from which complaints are generated. There is no segregation of the small business category for example what was primary production and other classifications of the small business sector.

AFCA have not categorised the type of product that make up banking and finance (loans or other?). It is assumed that all small business complaints are because of banking and finance products (loans/credit facilities). What was the nature of the complaint.? Moreover, AFCA do not publish the value of the claimed amount of the small business cases: this will not be an accurate statistic because AFCA will not accept claims outside of their jurisdiction limits

thus the initial dollar claimed against the banks is predicted to be far in excess of AFCA's incomplete records of small business complaints in general.

AFCA's jurisdiction limits are unacceptably set low and really do not represent small business operating needs. The Financial Remedy cap (\$1 million for credit facility related or \$500K for non credit facility related) is unlikely to compensate for the full damages caused by bank misconduct, unconscionable misleading conduct so where do small business go to seek full compensation for damages?

The Treasury review of AFCA "terms of reference", clearly highlights that small business are not in forefront of concern by government and any Dispute Complaints framework. Within it makes reference to Section 4 of the Treasury Laws Amendment (Putting Consumers First – Establishment of the Australian Financial Complaints Authority) Act 2018. The TOR raised the subject of credit facilities provided to primary production businesses but there was no emphasis on small businesses outside of primary production. The small business sector has not been articulated in an agenda.

AFCA have demonstrated incompetence, bias, are unwittingly influenced by the bank and lack of an understanding of the cases submitted. They are out of their depth when it comes to understanding small business operations and the modus operandi, the communication and relationship between lender and borrower (a partnership in business as it should be known) and the norm of bank lending. The creation of AFCA was the genesis of a consumer focused dispute and complaints framework called Financial Ombudsman Service (FOS) AFCA did not inherit any commercial or small business competencies.

The aforementioned is possibly caused by the fact that few if any senior executives and the AFCA board have no business or every day life business experience. As published, their backgrounds are from bureaucratic, consumer and or technical work experience groups and the appointments of its staff appear to be jobs for the boys (or with 75% of all senior and board placements are female maybe its jobs for the girls); the promotion to staff AFCA came from the FOS entity which was not qualified to administer small business complaints.

AFCA is an inbred organisation. This cannot create independence and diversity of thinking or decision making. The organisation will not change whilst the AFCA Board appoints its own directors.

2)

Delivery Against Statutory Objectives

Is AFCA resolving complaints in a way that is fair, efficient, timely and independent. **NO.**

a) *We had submitted our complaints in early 2019 and they were not addressed or finalised according to AFCA until late 2020.

*We had requested a status report on the processing of our complaints and received a reply from AFCA that they have been inundated with complaints and could not set a completion date (this is after almost 18 months following our submission.)

*We protested that the case in question was owned and operated by syndicate members in their 70s and some were not of good health. After an unacceptable time lapse for a determination we requested that AFCA action the matter.

*AFCA replied that to receive priority status we had to qualify and meet their criteria.?? AFCA requested a copy of all medical history and proof of age of the syndicate members. The indignity of this appalling demand was evident. We complied in part with this information with the exception that some of the medical practitioners refused to submit a certificate to AFCA for the reasons that it was confidential information and insulting.

b) AFCA increased the claim requested amount to above their capped limit then advised it was outside of their jurisdiction.

c) AFCA will not process any claim if the entity has been deregistered due to the time passed from the event of misconduct by the Bank. Not until that entity has been re-registered will AFCA process the application of complaint. There are very few entities/borrowers after being defaulted by a bank that could remain in business or afford to continue with registration of the company. AFCA will not indicate if the application could be successful if the entity was re registered. *This requirement must be amended because there is inequality if the complainants were a partnership and not an incorporated entity then AFCA would process it but not if it was previously a company.*

d) AFCA's Small Business credit related facility limit is based on the original approved facility limit. This limit may not represent the balance of the loan which could have been reduced from repayments or sale of assets by receivers appointed by the bank.

This limit must be amended to either no limit preferably or the balance of the loan as at the date of lodgement of the complaint. In its current form AFCA supports the banks in another excuse to eliminate applications based on out of date criteria and terms of reference,

e) Guarantor to a loan. Victimized and called on by the bank to make good the borrowers loan. AFCA treats them in conjunction with the borrowers limit and complaint therefore giving AFCA yet another excuse to eliminate the complaint. *This procedural condition should be changed to separate a guarantor's complaint to be different to that of the borrower. And, assume that the credit facility of the borrower is that of the Guarantor's when the call by the bank is based on the net amount of the loan.*

f) AFCA issued their determination to the bank before allowing us to the opportunity to respond.
AFCA failed with procedural fairness.

g) AFCA are too cosy with the banks. Bankwest wrote to AFCA addressed..” hi team this is the way we wish you to process the Case.” The Bankwest correspondence was not forwarded to us until we asked did AFCA receive any correspondence from them. AFCA forwards all correspondence from the complainant to the bank.

h) AFCA failed to understand the meaning of misleading and deceptive conduct and its implications to a borrower. The Westpac case was one where the Bank’s lawyers represented the Bank and issued a “line in the sand” six month extension to exit the bank facilities following a good relationship with that Bank. The Bank within three days reneged on the agreement and issued letters of demand on the borrower and guarantors. The Bank gave less than two days to payout the loan. AFCA did not consider that this was an unreasonable timeframe. Despite the fact the Bank confirming that the meeting took place where the six month was offered and agreed , the Bank admitted that it omitted to document the agreement but subsequently tried to force on us a subsequent change of terms contrary to the agreement and detrimental to us. There were unequivocal and contemporaneous notes taken by us at the meeting and witnessed and legal correspondence confirming such to the banks lawyers.

There were without question and evidence that the bank had offered through their lawyers the line in the sand and six months which was proved to be the case. Our case was one of misleading and deceptive and unconscionable conduct.

So what did AFCA conclude? Firstly they state that it would be unlikely that the bank would have offered the extension. Secondly..” for there to be an agreement for a further moratorium there must have been a meeting of minds between two parties...I am not satisfied there was a meeting of minds..”

The Bank refused to sign off on a strata plan that had been executed by the regional council as approved. The Bank had approval the loan on the condition that the development be strata and they had obtained a valuation on this understanding. This was another complaint of Westpac as refusal caused us to cancel exchanged contracts of sale of the industrial units. In addition it under valued the complex as a sale in one line, as apposed to individual sales, in effect halved the value consequently, Westpac then made a demand that the loan to security ratio had reduced and demanded we make a special repayment otherwise we would be in breach of loan covenants. We made a special payment of \$500K. Within days of the bank’s acceptance of this special payment, through their lawyers they issued a letter of demand giving us 7 days to payout the loan. Again AFCA did not consider that Westpac’s action was unreasonable. To conclude the summary of unfair treatment and support of the Westpac by AFCA, the bank wrote to question how a strata approved plan would be beneficial to us??

AFCA then advised that the Bank's lawyer representative did not have the authority to offer the "line in the sand" agreement. Proof that the offer was made! A law firm representing the Bank and having a Westpac employee present at the "line in the Sand" meeting is authorisation.

AFCA did not request any documentation on the complaint against Bankwest. It was dismissed as unnecessary.

AFCA is also obligated to consider and investigate poor service and rudeness by the banks. AFCA failed to condone Westpac's management when its senior manager swore and stated that he "was [REDACTED] in charge and we will do what he [REDACTED] tells us to do." Westpac were vindictive and thuggish in their handling of our matter.

We appealed AFCA's decision in favour of the Bank. And not surprising of AFCA's incompetent and bias management, our appeal was determined by the senior case manager, the same case manager that processed our application and favoured Westpac.

Imagine an appeal court being one of the same court that made a determination. It would be unheard off.

2) Systemic Issues

On 13 July 2020 I wrote to Mr David Locke- Chief Ombudsman and Chief Executive Officer on AFCA's obligation to report systemic issues. I referred to the Bankwest takeover by the Commonwealth Bank in 2008 where approximately 2000 Bankwest commercial customers were defaulted by the CBA. An admission by the Commonwealth Bank's Deputy CEO [REDACTED]. Further [REDACTED] made an admission at the Banking Royal Commission that "the Bank's actions were unfair, the bank planned and in fact reduced Bankwest commercial loans by \$4 billion following the takeover of Bankwest from 2009 to 2012. There was no consultation with the customer prior to appointment of investigating accountants etc."

I highlighted to Mr Locke that AFCA would receive complaints from Bankwest victims regarding their treatment by the Bankwest/Commonwealth Bank and as a consequence it would represent Systemic Issue.

I pointed out that under Regulatory Guide Rule 267 AFCA had an obligation to report Systemic Issues such as the one that I had detailed. Further I stated that if AFCA is to uphold the integrity and understanding of ASIC's powers and responsibilities to act against the Commonwealth Bank's misconduct on behalf of small business would he report this Systemic Issue to ASIC to investigate?

I did not receive an acknowledgement to my letter from Mr Locke so it is assumed that AFCA's process for the identification and appropriate response to systemic issues is not effective.

3) Australian Securities & Investment Commission

AFCA is a subsidiary (or an AGENT) of ASIC in responsibilities. Much of the ineffective policing of the banking system and its misconduct is directed at ASIC.

On 8 March 2019 and 20 April, 2019 I wrote to ASIC's then Chairman [REDACTED] and its Deputy Chairman [REDACTED] requesting that they confirm the findings of Commissioner [REDACTED], in his report of 1 February 2019, that small business are protected within the ASIC Act and that little has to change regarding the law to protect small business.

Commissioner [REDACTED] highlighted on misconduct within the banking industry that the underlying principles would be the norm of conduct for a bank viz:

- i) Obey the law,
- ii) Do not mislead or deceive,
- iii) Act fairly,
- iv) Provide services that are fit for the purpose,
- v) Deliver services with reasonable care and skill,
- vi) When acting for another act in the best interest of that other.

Commissioner [REDACTED] stated .."the general obligation of Australian services licence (A FSL) holders as set out in section 912A of the Corporations Act are to do all things efficiently, honestly and fairly. This responsibility is reflected in the Australian Securities Investment Commission Act 2001.

AFCA should work also within the frame work of the ASIC ACT 2001 and make decisions influenced by what Commissioner Hayne highlights as the underlying principles of good conduct. I don't believe AFCA complies with this obligation and responsibilities as an AGENT of ASIC.

I did not receive a reply to any of my letters.

4) The Commonwealth Ombudsman

On the 3 June 2019 following the failure and ignorance of ASIC to acknowledge my concerns for small business I wrote to the Ombudsman to also confirm that it is ASIC's responsibility

and obligation to investigate misconduct. I did not receive an acknowledgement to my letter.

It is most concerning that during a Joint Committee hearing on "Impairment of customer loans" conducted in Sydney on 23 November 2015 ASIC stated that it had not pursued complaints of bank misconduct against small business entities because it was in the "too hard basket".

Further within the Ombudsman's policy it states. "we acknowledge that ASIC is not obligated to investigate every report it receives. The Law permits ASIC to be selective about matters it decides to take action on." The Ombudsman policy further highlights that if ASIC does not want them to investigate then usually the Ombudsman will not act. So who is ASIC accountable to and with its failure to protect small business and AFCA's incompetence it also has failed in its statutory objectives.

5) Internal Review Mechanism

AFCA's Independent Assessor is not known or at least made known by AFCA when replying to case determination. The Independent Assessor cannot be independent when this position sits within the executive management structure of AFCA.

From a bank victims point of view we don't see any advantage or point of this appointment when the appointment does not have the power to review the merits or substance of an AFCA decision.

The standard of service by AFCA should be further defined with time frames for delivery set to compare performance and outcomes BUT what if AFCA don't meet these standards? What happens?

We have never received any notification from the AFCA case managers that such a position is made available as another avenue for the complainants to lodge a complaint to review the standard of service. As such we consider the position to be ineffective and irrelevant for a complainant's benefit.

6) The Need for AFCA to Have an Internal Mechanism Where Decisions Can be Reviewed

Not only should there be a formal and structured review mechanism established it should be independent of AFCA and administered by qualified and experienced adjudicators that can mediate and make binding determinations akin to a court.

The operation should only focus on small business by definition with responsibility and authority to review dispute complaints with both the complainant and the bank presenting their cases. This adds the benefit of bringing together both the Bank and

the aggrieved customer and constructs a level playing field without the cost of going to court. Failure to accept decisions by either party then the option as a last resort is the court system.

Applicants to this mechanism would process through a qualification of admission by an initial review process.

The funding of this operation would be as same as AFCA's funding source.

AFCA would be released of the small business review process and focus on all of their current segments excluding small business.

Principally the establishment and focus of "this Internal Mechanism" would be the banking and finance classification Dispute and Complaints specialist.

7)Conclusion

I am available for further comment or qualification on my Submission.
Documentation to confirm my comments are available on request.

Sincerely,

Trevor Eriksson

[REDACTED]

[REDACTED]