

Submission for a review of AFCA

To Afcareview@treasury.gov.au

from Leon Ashby, John Kovar, David Neve and others who have been involved with various AFCA Cases

sent via email [REDACTED]

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

Problems we are raising

- 1) Claim size limits need removing
- 2) Limits to the date disputes are considered from needs removing
- 3) An enforcement process to obtain documents from FSP's is necessary
- 4) Establish an Independent Organization AFCA has to be responsible to
- 5) AFCA case managers often need advice from External Professionals
- 6) AFCA needs to hold the banks (Financial service providers)- FSP's accountable
- 7) AFCA needs to be transparent about it's statistics with annual reports
- 8) AFCA should be Government funded (from Banking fines)
- 9) AFCA needs to independent from the Government
- 10) AFCA seems to handle small complaints well
- 11) AFCA needs a process to get a legal determination from a court on behalf of the consumer.
- 12) AFCA board needs to be independent and made up of people nominated by the public
- 13) AFCA gives consumer 7 days to respond, while FSP takes months or years to respond
- 14) AFCA case managers must respond to all complainant points made
- 15) AFCA mark 2 must be able to revisit FOS / Cio / AFCA determinations if requested
- 16) AFCA needs a complaints department that solves problems within AFCA
- 17) A Fund is needed for those that have lost everything (to an FSP) to be able to legally challenge the FSP in court.
- 18) A better system of conference calls with AFCA is needed
- 19) AFCA makes statements without documented evidence.
- 20) AFCA will not revisit an incorrect decision
- 21) AFCA will not give guidance or advice from other decisions
- 22) AFCA has no understanding of loan covenant implications EBITDA ICR LVR
- 23) AFCA does not recognize interest only short term loans are illegal
- 24) AFCA has its own system of loan serviceability that favours FSP's
- 25) AFCA wrongly will not accept complaints from deregistered small businesses
- 26) AFCA wrongly lumps Guarantors claims with Borrowers claims
- 27) AFCA does not share its file on a complainant with the complainant

Note*

This is a result of a lot of hard work by people that assist with AFCA cases more or less fulltime. We hope AFCA or the review committee take this and our other

submissions seriously and can see this as a valuable constructive criticism. We believe AFCA and the Federal Government should build a working relationship with AFCA assistants to provide a financial system that gets to the truth and enables some justice for our community.

1. Problem - The claim limit of \$1-\$2 million is unjust.

1. Justification:

- Why should there be a limit on justice?
- 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.
- Court is not an option for a person with nothing on welfare as most of the legacy case victims are. They deserve an opportunity to resolve their matter - 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 cover-up the worst cases from getting some justice.
- Many cases with over \$2million are bank victims who have been bankrupted (criminally and deliberately by the Banks to immobilize them) and they 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. Having no system to deal with their complaint is unacceptable in our society, it serves no purpose to better the justice system for our community

1. Solution

- There should be no limit for a claim payout

1. Conclusion - If this cannot be remedied, then AFCA is not fit for purpose

2. Problem - The claim time limit of 2008

2. Justification

- In a number of cases we know where most the wrong doing was in 2007
- AFCA's procedure was to ask the FSP if the case can be looked at prior to 2008, of course the answer was NO.
- Of course an FSP that subscribes to AFCA is not going to allow a time limit extension if they have something to hide.
- Asking the FSP to be reasonable is like asking an alleged criminal if the case can be heard in court. A design fault in the system, that has to be changed.

2. Solution:

- There should be no time limit - if evidence of wrong doing is available

- The FSP should not be asked if the case can be looked at prior to 2008. The case should be looked at from the date the loan started. No restriction on time limits.

2. Conclusion - If this cannot be remedied, AFCA is not fit for purpose

3. Problem - AFCA cannot look at complaints to do with non AFCA members

3. Justification

- 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 organizations and no subsidiaries, 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).

3. Solution:

- AFCA is given the right to pursue all financial institutions
- We demand a different organizational 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 minimizing practices which cause complaints.

3. Conclusion - If this cannot be remedied the AFCA process is piecemeal and not fit for purpose

4. Problem – AFCA accepts any Banks word without documentation evidence

4. Justification

- 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.

4. Solution

- AFCA or complainants need a process enabling them to obtain all relevant documents from the FSP.

- AFCA needs an organization or public accountability process it answers to – to improve it`s outcomes (rather than be able to side with Banks and escape scrutiny.)
 - That organization needs to be able to refine the structure and accountability process of AFCA including it`s code of conduct, it`s goals and values as outlined in it`s constitution.
4. Conclusion - If this cannot be remedied, many case will continue not to get proper information and AFCA will not have the process (or teeth) to do it`s job fairly or properly.

5. Problem – Case manager skills vary from incompetent to excellent

5. Justification

- Some case managers do not understand the laws properly and advise complainants incorrectly - For example an AFCA case manager did not want to take one case on because it was part of a class action. The AFCA case manager said the case could not be in two forums at once. It took a lawyer from the class action to advise the AFCA case manager this was in fact wrong. AFCA relented and reinstated the case involved.
- In a case where specialist accounting was presented to the AFCA case manager and Bank representative, the response was – “That is above my pay grade, we need a professional for that”.
- AFCA don`t believe in CAPEX. This shows in recommendations where depreciation and tax are excluded from calculations.

5. Solution

- AFCA case managers need to be able to get outside professional opinions on complex matters.

5. Conclusion - If this cannot be remedied, AFCA will continue to be severely limited to fulfill it`s purpose.

6. Problem – AFCA generally treats the Banks as if they can do no wrong.

6. Justification

- AFCA refers questions and requests to the bank to answer, rather than look at the documentation and decide themselves.
- For bank victims who consider the Bank has destroyed them financially through no fault of their own it emotionally devastates them similar to having been violated and raped.
They believe a Process **that trusts the opinion of the violator rather than look at the documentary and witness evidence**, is the same power imbalance that rape victims experience when their abuser`s opinion is trusted above a criminal investigation.

- 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.
- AFCA must Not be a body that protects the FSP from complaints by FSP consumers.
- Gerard Brody has made a comment on video that no housing loan complaint in 2020 was won with the AFCA process. If true, that demonstrates bias.
- In our view AFCA is too close to the Banks as we understand they are member / funders of AFCA

6. Solution

- AFCA needs to be an independent body that holds the FSP's accountable for their actions in it's determinations of cases.
 - The AFCA process needs to have complete separation and no cross over of former bank employees within 5 years (or more) to be seen to be "above reproach" in being independent.
 - AFCA's outcomes need annual Transparency of statistics, (see next point)
6. Conclusion - If this is not remedied, AFCA will continue with insufficient integrity and independence and remain not fit for it's purpose

7. Problem – Transparency, AFCA does not explain determinations and a summary of outcomes to the public

7. Justification

- Banking critics need a bi-annual report that shows statistics and actions to correct faults in the AFCA system.
- In one case, AFCA has a case manager who **never** lets a consumer win a case. That needs to be reported publicly as it shows a prejudice against bank victims complaints.
- It also shows AFCA has a biased approach to determining cases by at least one of it's staff.

7. Solution

- There needs to be an independent body that holds AFCA accountable on issues the public need to know.
- That independent body to be able to take FSP's to court on behalf of victims.
- That independent body should demand a public annual report and act on deficiencies
- That report needs to show statistics demonstrating if there is bias towards an FSP
- AFCA needs to appear before the senate or House economics committee in Parliament house like some FSP's do, once a year to answer questions.
- And action must be taken to remove case managers who display a prejudice against bank victims.

7. Conclusion - If this is not remedied, AFCA will remain unfit for its intended purpose

8. Problem - Banks are member / funders of AFCA

8. Justification

- The funding link to AFCA means Banks can “Lean on” AFCA employees as the being the institution providing AFCA’s employees with their job.
- This moral (immoral) point inflicts a prejudice and power imbalance against complainants and borrowers (whether consciously or unconsciously).

8. Solution

- A Complete separation of interest is needed to allow perceived and actual “just outcomes”
- We are suggesting funding come from revenue from Banking fines (with any required “top ups” coming from a levy on banking profits)
- This incentivises banks to find ways to minimize complaints

9. Problem - AFCA is too close to Government

9. Justification

- The Financial services Minister / department has the ability to spin the way AFCA operates because it politicises and bullies the arguments pertaining to things like the limit on the size of claims and eligible dates of claims and other rules about AFCA.
- That appears to be because Banks can make donations to political parties and wine and dine the politicians who decide FSP legislative rules.

9. Solution

- Distance from Government from AFCA by instituting it as being run by a non profit group and the claim size limits and claim date limits be removed.

9 Conclusion

- If this remains unremedied, AFCA will remain a political football and be manipulated by both Banks and Federal Governments to suppress justice for bank victims.

10. Observation – In our view, we have found the way AFCA deals with minor complaints is generally ok and appropriate.

- 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. Problem - 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), nothing happens.

11. Solutions

- AFCA needs substantially more teeth (powers to take banks to court) or preferably
- Set up another independent community group / entity with the ability to go to court on behalf of the complainant needs to be set up.
- ██████████ has been lobbying for an “Equality of arms” system for victims. We strongly support such an idea.
- 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)
- If (in the future) there is only a handful of cases of wrongdoing, then these will be easily dealt with
- If (in the future) there is systemic problems, then Financial institutions will most likely settle quickly out of court and fix their systemic problems.
- 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.
- We believe the funding for a 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.
- This would minimize any taxpayer burden for a new or upgraded entity. (AFCA mk 2?)

12. We also believe the Independent nonprofit 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.

13. Problem – AFCA case managers setting short deadlines for consumers while responses from FSP's can take months or even over a year

13. Justification

- In many cases the norm is a 7 day time limit to respond or the case will be closed.
- A response from an FSP is typically 3 months (in the cases we have dealt with).
- It is not fair to have a 7 day limit when a case is being thoroughly investigated by an outside professional (e.g. forensic accountant)
- External businesses can't do their work thoroughly in 7 day deadlines. In matters where the ATO is involved, these take longer than that to get a response.
- Some advocates have several cases in AFCA at once.
- There have also been incidents where a person has a personal emergency, such as a family member in hospital and unable to go home, so alternative accommodation has to be arranged. The case manager ignores the request for extra time. Keeps sending notices the case will be closed in a few days.

13. Solution

- When a person requests a deadline be extended extend the deadline.
- Although everyone wishes cases to be finalized quickly, change the rules to accommodate requests to extend deadlines.

14. Problem – AFCA Case managers ignoring points made by complainants

14. Justification

- It is common practice for a case manager to come back with a copy paste titled My understanding of the case
- To then list items in point form
- But leave out many of the points made.

14. Solution

- As part of the AFCA code of conduct, make it compulsory for the case managers to respond to **all points**
- Make it clear to the case managers and the consumers that if points are being left out of the claim there needs to a process the complainant can make a public reporting of the case manager (e.g. on a web site) and AFCA

be able to face questions from the senate or HEC committee on the conduct of that case manager.

14. Conclusion - If this cannot be remedied AFCA will be severely restricted in its capacity to be fit for its purpose

15. Problem – AFCA refusal to look at anything dealt with by AFOS / CIO

15. Justification

- A 2014 FOS complaint was about how interest rates were not related to the reserve Bank interest rates. In other words RBA interest rates might go down, but FSP interest rates would go up. FOS ruled that there is nothing in any contract to say they must be related
- However a 2020 AFCA complaint was about bank default interest rates being higher than what the contract says. The Contract says default interest rate is 3% (PA) but default interest was charged at 36% (PA). AFCA said it can't look at (review) interest rates because it was previously dealt with by FOS. (but it obviously wasn't dealt with)

15. Solution

- Ignore FOS findings as they were somewhere along the lines of fair to completely unfair (that is the common sense reality of the range of service by FOS / CIO). It is impossible that FOS / CIO (or any institution) is always 100% accurate in its assessments.
- Therefore allow reviews of past FOS / CIO / AFCA findings to allow better outcomes.

15. Conclusion - If this is not remedied, AFCA will remain severely restricted in being anything like its intended purpose.

16. Problem – When you make a complaint to AFCA and there is no response regarding your case, the case is deemed closed, with an assumption that it was dealt with 100% correctly. Even when the complainant has strong evidence to the contrary.

16. Solution

- Just as every large organization has a complaints department that seeks to resolve problems, so too should AFCA.

- Also a list of the different cases and their determinations (with names deleted) should be put on a web site as a reference for other complainants to compare their complaint with.
- This could speed up how cases through AFCA can be determined.

17. Problem - AFCA does not share its file on a complainant with the complainant.

17. Justification

- Despite claims that the AFCA process would be fair and transparent. Complainants asking for the AFCA files has on their case have been refused.

17. Solution

- Allow AFCA`s files on a case to be released to the complainant perhaps from Six months into the AFCA process has occurred.

18. Problem - Conference call meetings between FSP`s and complainants / AFCA are mostly inadequate,

18. Justification

- They are done one week after information exchange,
- They are time limited (2 hours)
- not recorded
- extra persons not allowed in
- no follow up

18. Solution

- More conference calls, (could become zoom meetings) if needed and allow more people into the call and if requested record it and make it accessible to participants to review.
- If time limit is used and more needs to be discussed have another call within a week or so. (Rarely occurs)

18. Conclusion - If this cannot be remedied AFCA will not be suitable for quite a number of bank victims.

19. Problem - An incorrect recommendation (by AFCA) will not be changed.

19. Justification

- This assumes all systems and procedures and staff are 100% functional - when they are not. They vary from excellent to terrible.
- It ignores the dysfunctional characteristics of some AFCA staff

- the determination process has no input from the consumer, which means the case manager can hide whatever information they want without the consumer's knowledge
- The consumer has no ability to present the case to anyone else (ombudsman) for a review
- This does not meet procedural fairness

19. Solution

- Have an independent board look at the unresolved complaints and decide if they have merit.
- The independent board to consist of consumers and professionals internal and external.

19. Conclusion - If this cannot be remedied AFCA will not be able to deal with many cases where a dispute remains unresolved.

20. Problem - AFCA makes statements without documented proof

20. Justification

- For example AFCA waits 3 months for an answer from an FSP about if a case can be looked at going back before 2008
- After 3 months, the notified FSP said NO

20. Solution

- Proof that the question was asked in writing (copy of email)
- Proof of response (date time explanation, justification)

20. Conclusion - If this cannot be remedied we think AFCA is not fit for purpose

21. Problem - No guidance or advice from AFCA from past determinations

21. Justification

- This means issues that AFCA has dealt with thousands of times and can answer with complete certainty, they won't answer
- So the consumer needs to do the research and find out for them selves (despite the information being known from a previous case or ten)
- This means the consumer and their team have to be pretty bloody good at understanding laws and regulatory guidelines and even then when an argument is sound they can lose.

21. Solution

- From all the experience AFCA has had, they need to be able to advise the consumer via a special section of help for consumers.
- As previously mentioned, this could be done on a web site with an anonymous reporting of the case particulars and its determination.

- A free independent legal advice service to complainants should be part of this process also.

22. Problem – AFCA has No understanding or guidelines on Covenants EBITDA, ICR, LVR ratios.

22. Justification

- These are complex accounting figures used by banks as covenants in loan agreement, yet they are unrealistic ways of measuring a business's viability. For example if a business's turnover fluctuates more than a covenant allows - it is a breach of covenant, so if a business turnover ever decreases after a bumper year it is an EBITDA covenant breach.
- We have internal documents that show how the Banks credit assessment employees use that info without the consumers knowledge to then order the bank's team to talk to the consumer and start selling asset's. [REDACTED]
- This [REDACTED] never stops until all the assets are sold. Even when the business is trading profitably and has never missed a payment of any sort.
- AFCA say it's beyond their jurisdiction. This should then escalate to a court case funded by a fund collected by Banking fines. (See [REDACTED] Equality of Arms" summary.

22. Solution

- AFCA need to be familiar with and well educated on the functionality and dys-functionality of EBITDA, ICR, LVR ratios.
- For example a Covenant of EBITDA at zero % means the earnings before tax has to be exactly the same every year. Not a dollar more and not a dollar less. (a modern day pound of flesh?). These are the little understood technicalities of this term.
- We cannot believe that would be legal in a business contract.

23. Problem - Interest only short term loans have been used by banks to destroy profitable businesses but the "trick" is not understood by AFCA

23. Justification

- Lots of Bank victims were caught out with these.
- Previously rolled over, reviewed, renewed, then suddenly account manager disappears, loan expires instead of being rolled over.
- Interest only loans are hard to refinance with another company as they are not amortized (don't show the ability to pay off the loan)

- The Bank knows they can send in the receivers and profit from the “trick”
- AFCA doesn’t question the Banks on this practice nor understand the motive for the “trick”
- “AFCA’s approach” in their serviceability assessments for a loan has been approved as interest only for 2 to 3 years is to base the assessment on interest only repayments which is a breach of paragraph 25.1 of the CoBP (Code of Banking Practice) which states the “...your ability to repay it.” Interest only does not demonstrate ability to repay the loan it simply illustrates ability to repay interest.

23. Solution

- AFCA need to be educated on this legal trickery and be able to call it out.

24. Problem - AFCA has it`s own system of loan service ability assessment analysis that favours Banks irresponsible lending

24. Justification

- Everything a good accountant knows and can prove that makes a loan unserviceable is ignored by AFCA, so AFCA simply support the banks actions
- Irresponsible lending is a big issue with legacy cases, where the consumer misses payments from day one. (because they were setup to fail – (And the banks know how to profit from that)

24. Solution

- Set up an independent review of the credit assessment functionality guided by independent experts in the field

25. Problem - AFCA Will not accept complaints from businesses that have been de registered.

25. Justification

- This process is unfair because businesses that have been bankrupted by banks will not be able to maintain registration as would businesses wiped out financially.
- If AFCA is to be able to look at Financial complaints fairly then those who have been devastated by a FSP`s actions should be as entitled as anyone else

25. Solution

- Reverse the guidelines for non registered businesses.

26. Problem - AFCA wrongly lumps Guarantors claims with Borrowers claims.

26. Justification

- By lumping Guarantors claims with a borrowers claim, AFCA has an excuse to say the claim is larger and in most cases beyond the claim limit.
- This becomes another way that AFCA and not consider the complaint.

26. Solution

- Change the rules so AFCA considers Guarantors claims separate from the borrower.

27. Problem – There are so many points which make the AFCA process unfit for trying to achieve it's purpose of determining and sorting out Financial complaints.

We believe a small tinker with its structure and rules will not improve its performance in any way.

Justification

- If a car has a mechanical fault or an insurance fault - it is not roadworthy. The car is dysfunctional. If AFCA has a fault, at the moment, it is ignored. Like driving an unregistered, uninsured, un-roadworthy car. A completely dysfunctional AFCA is dangerous to those that use it.

27. Solution:

- If all the aspects of AFCA mentioned in this submission are not addressed, we believe AFCA will be recognized as a dysfunctional organization that is Not fit for purpose and become a laughing stock.
- This review was put into legislation because the majority of politicians believed it was not going to meet its goals and would need adjustment
- We believe the examples given (and other submissions) will demonstrate a far greater Revamp is needed than a few adjustments.
- We demand AFCA`s structure and rules should be wound up and given a complete revamp into AFCA mark 2.
- We implore there be no process which changes the name but keeps the same structure. The current structure should end with the end of AFCA mark 1
- The Federal Govt should Listen (and read) **all the complaints** by the consumers in this review.
- The review should List all the categories of problems
- The Federal Govt should Disband AFCA mark 1
- Consult those that have made constructive criticisms

- Start a new system that will refine it`s systems based on the constructive criticisms presented.
27. Conclusion – If the above is not done, AFCA will never be close to becoming suitable for the job it should do.

So to Summarise the Key points

We demand a new organizational structure (AFCA mark 2) to empower just Financial complaints 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 the small business ombudsman (or another independent person)
- 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.

Written by Leon Ashby, John Kovar and David Neve in cooperation with many bank victims.