Min-it Software

Review of the Australian Financial Complaints Authority 2021

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Background Information

We would like to take this opportunity of thanking Treasury for the extension of time granted to make this submission on behalf of Min-It Software ("Min-It") clients.

We welcome the opportunity to make this submission to Treasury on the Australian Financial Complaints Authority. We consider it fortunate the review is required by Section 4 of the Treasury Laws Amendment (Putting Consumers First—Establishment of the Australian Financial Complaints Authority) Act 2018 ("the Act").

Aside from the software produced in-house, specifically by or for franchised organisations, Min-it is a leading loan management software supplier to non-ADI credit providers, both in Australia, New Zealand and more recently, Papua New Guinea, the United States of America and South Africa. These clients range from lessors, small lenders offering anywhere from $300 - $10,000, other lenders offering larger amounts, typically $5,000 - $50,000 or more, car financiers, home mortgage providers and those offering business loans.

The vast majority of Min-It's clients are not affiliated with any industry association.

Introduction

We were more than a little surprised at the narrowness of the Terms of Reference for this inquiry and at the suggested level of submission. It presumes that External Dispute Resolution ("EDR") works well for all parties. There appears to be no follow up with public hearings or stakeholders scheduled. We trust this is not a consultation that meets the necessity of having one where the outcome is predetermined.

The Australian Financial Complaints Authority ("AFCA") was created by the current government as an attempt to avoid a Royal Commission inquiry into banking. It did so by effectively allowing the larger of the two predecessor EDR scheme providers, the Financial Ombudsman Service Limited ("FOS"), to continue at the expense of the other (Credit Industry Ombudsman Service Limited ("COSL") in order to create just one industry wide provider. ASIC has not approved any other EDR scheme provider since and has publicly stated it will not appoint any others[1].

In November 2017, we stated in our submission[2] to Treasury's consultation on AFCA's establishment, that "knowing the Government has already tabled the *Treasury Laws Amendment (Putting Consumers First—Establishment of the Australian Financial Complaints Authority) Bill 2017* ("the enabling Bill") before the Senate, what is very clear is that unless the Transition Team get it right, industry will get nothing better, and probably worse, than we have now and paying dearly for it."

We are still largely of that view for a number of reasons which are detailed on the following pages.

In summing up our concerns with AFCA, it is worth repeating that we have not moved from our earliest position on EDR, outlined to ASIC in our 2009 submission[3], as stated overleaf.

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[1] Australian Securities and Investment Commission, 2021. "*Dispute Resolution*". Available online https://www.asic.gov.au/regulatory-resources/financial-services/dispute-resolution/ viewed 23 March 2021.

[2] Joint Min-It Software and Financiers Association of Australia submission, 2017. Treasury Consultation – Establishment of the Australian Financial Complaints Authority, 26 November, 2017, page 5.

[3] Joint Min-It Software and Financiers Association of Australia submission, 2017. ASIC Consultation – *Dispute resolution requirements for consumer credit and margin lending,* 11 September 2009, page 11

> *"Consequently, there is a real danger the EDR scheme providers may not dispense natural justice to both parties if there is a distinct bias, implicit by their membership, in favour of the consumer over the lender. Those administering EDR schemes must be impartial and free of the politics of the need to dispense social justice. From the lenders' perspective, the EDR process must not deteriorate into some form of kangaroo court biased in favour of the consumer on the basis some think the business can afford it and business is always in the wrong. If consumers enter into contracts, then both parties are entitled to rely on contract law."*

Regrettably, at least for those businesses and licence holders required to be 'members' of AFCA, they are still unable to do so. Some might wonder why we even have such legislation when a private company can effectively usurp the role of the politicians, the regulator and determine what it considers fit in the circumstances. AFCA should not be the quasi-regulator it has been encouraged to become.

Politician's Viewpoint

There has been a great deal of recent comment from the Prime Minister and other Parliamentarians about the rule of law and the presumption of innocence that has been reported in the media[4].

The problem with EDR is the rule of law goes out of the window. Even if a lender has done everything correctly in accordance with the law but fights the complainant through AFCA, one of its mediators may well determine the consumer deserves some form of financial remediation. This is because AFCA considers "all the circumstances" that the consumer subsequently supplies to it **after** the loan has been provided. Where the consumer has either lied (yes, they do so in droves[5]) or the lender's list of assessment questions hasn't been of sufficient detail to enable it to pick up any issues, particularly if the loan has been applied for and executed online, it's a two-edged sword. Borrowers do not want to answer copious amounts of questions as they want a quick process to apply for money yet for the lender, it may cost both profit and/or capital if AFCA finds against it in a complaint.

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4 As examples:

Napier-Raman, K., 2021. "'*Presumption of innocence', 'matter for the police', 'rule of law' — politispeak rules, OK*", Crikey, 2 March 2021. Available online https://www.crikey.com.au/2021/03/02/parliament-assault-scott-morrison-coalition/ viewed 4 March 2021;

Taucher, P., 2021. "*Morrison wrong on presumption of innocence*", Independent Australia, 8 March 2021. Available online https://independentaustralia.net/politics/politics-display/morrison-and-porter-wrong-on-presumption-of-innocence,14870 viewed 9 March 2021;

Withers, R., 2021. "*The man in the glass house*", The Monthly, 23 March 2021. Available online https://www.themonthly.com.au/today/rachel-withers/2021/23/2021/1616472776/man-glass-houseviewed 25 March 2021.

5 For example, The West Australian published details of a UBS survey in 2017 that 32% of applicants for home mortgage applications contained deliberately false statements in order to get the loan. See https://thewest.com.au/business/banking/one-in-three-borrowers-lie-to-lenders-to-get-a-home-loan-study-finds-ng-b88595914z viewed 24 March 2021 and the article by Joye, C., 2018. - *Westpac 'not an irresponsible lender;'* Australian Financial Review, 21 September 2018. Available on line https://www.afr.com/personal-finance/westpac-not-an-irresponsible-lender-20180920-h15o6z viewed 22 September 2018 where Westpac advised the Federal Court almost 81% of applications for a home mortgage contained declared living expenses below the Household Expenditure Measure (HEM) benchmark. Refer final judgment in Australian Securities and Investments Commission v Westpac Banking Corporation (Liability Trial) [2019] FCA 1244 (13 August 2019) available online http://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/cth/FCA/2019/1244.html viewed 28 March 2021.

Politicians clearly see AFCA as doing a great job. For example, as recently as 15 March in the Senate, Senator Brockman in the second reading of the *National Consumer Credit Protection Amendment (Small Amount Credit Contract and Consumer Lease Reforms) Bill 2019 (No.2)* said:

> "In 2018, we had the establishment of AFCA. I think in the future this date will be looked back on as a very important date, because AFCA has provided a forum through which individuals can take complaints in the lending space to an independent authority, at no cost to themselves, which, again is very important. This is not weaponising and forcing people into the courts at extraordinary costs. We all know that that cost barrier of entering the legal system, particularly on small amount credit contracts, but even on larger amount contracts, can be very difficult for average income earners. Going to court is an extraordinarily expensive business, even if you believe you have a very, very good case. The delivery of AFCA as a low cost, independent authority, where disputes can be resolved in a way that is advantageous to consumers, has been a great step forward. From memory, the information coming out of AFCA shows that some 70 per cent of resolutions of claims in AFCA proceedings were found to favour the consumer. I will correct the record if I'm wrong on that, but I'm reasonably sure I'm correct. It's only been in place for three years, since 2018, so we have a relatively new dispute resolution body which is proving to be very advantageous to consumers. It is something that we as a government can be very proud of. But, as a society, we've now got an avenue towards the resolution of disputes for people who are perhaps sold products or enter into arrangements that are not advantageous to them and have some legal problem associated with them. Those disputes can be resolved in a way that is low cost to all parties and result in a fair outcome for consumers." [6]

In that same session, Senator McDonald[7] commented

> "I also want to draw the chamber's attention to AFCA. AFCA is a free, fair and independent authority which manages complaints and claims. We heard evidence from them about the

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[6] Commonwealth of Australia, 2021. Senate Hansard, 15 March 2021, p.17. Available online https://parlinfo.aph.gov.au/parlInfo/download/chamber/hansardr/45e337fe-e329-4a9c-aaa8-7cf07dbc4b50/toc_pdf/House%20of%20Representatives_2021_03_15_8575.pdf;fileType=application%2Fpdf viewed 20 March 2021.

[7] Ibid 5, p 19.

speed and success they have in attending to complaints that consumers have around any poor practice that may exist in the financial industry."

These two senators, whilst talking about this "free, fair and independent authority", both express their contentment that AFCA provide a "fair outcome" that is "advantageous to consumers". There is no presumption of innocence here; no following the rule of law. Senator Brock obviously believes that lenders are in the wrong around 70% of the time based on AFCA's "success". Yet, neither belief is true. The law these politicians passed requires AFCA to be "fair, efficient, timely and independent". That requirement applies to **both** parties, not one that favours the consumer over the lender as they clearly espouse.

Senator Brockman further stated that "[t]his is not weaponising and forcing people into the courts at extraordinary costs." We argue this a myopic perspective. It is true that consumers are able to utilise AFCA instead of going to Court if they wish at far lower cost. Unfortunately, the EDR process does not strictly apply the rule of law as a Court or Tribunal (with a capital "T") would. Those that promote its use do so as a means of promoting government-sponsored theft of lender's profit purely to appease consumers' poor credit choices and in some instances, their reluctance to repay the financial service provider. Consumers, their advocates and others such as financial counsellors together with companies that provide budgeting, credit repair and debt management all use EDR costs as a weapon. This is nothing new; it occurred under FOS and COSL as well.

AFCA's cost structure can be anything but "low cost" as we will detail later. Of greater concern to the industry sector providers of consumer credit and leases is the perceived and ongoing belief that there are so many consumers who have been "sold products or enter[ed] into [financial contract] arrangements that are not advantageous to them" and as a result, have some legal problem associated with them. That "legal problem" they generally have is no more than the consumer failing to pay the lender or lessor in accordance with the contract, usually multiple times.

Lenders that lend their own money do not do so unless they have the firm expectation they can recover the principal with a profit. These companies are not charities but no one forces these consumers to take on the debt. It is not in any lender's or lessor's interest to provide money or goods to a consumer that either will be unable to repay without hardship or where the product is unsuitable.

Unfortunately, there are some politicians that still believe the consumer advocates' stories this is a prevalent practice. Indeed, the Senate Economics Legislation Committee did not want to listen to the truth when we provided it during its Inquiry into the National Consumer Credit Protection Amendment (Small Amount Credit Contract and Consumer Lease Reforms) Bill 2019 (No. 2)[8]. Instead of taking the time to verify the truth they are presented with, it is far easier to accept the propaganda, half-truths and deliberate misinformation the advocates consistently peddle. In doing so, they fail to see their own cognitive bias.

Delivering against statutory objectives

Is AFCA meeting its statutory objective of resolving complaints in a way that is fair, efficient, timely and independent?

Whilst attempting to split our responses into the relative sections, there are cross-over areas and so the following sections are not strictly definitive so as to avoid repetition.

Fair

Following representations from another industry representative, it has been possible to hold high-level discussions with senior AFCA staff and Board members and this has proven useful. AFCA realises that it is limited by the legislation under which it was set up. For example, in February 2021, the author and others had discussions with senior officers and managers in Treasury, ASIC and AFCA on the misuse of EDR by debt management and credit repair companies on lenders in particular. This resulted in a consultation on proposed Regulations that will require these companies to hold an ACL as of 01 July 2021. That date and requirement cannot come soon enough.

Last year, AFCA announced it was moving forward with its Fairness project but this was then put on hold because of the COVID-19 pandemic. Given AFCA launched this project itself, it suggests it already knows it is either not acting fairly or is perceived by those that pay for its services as not acting fairly. We await its re-engagement.

[8] Joint FAA and Min-It Software Submission, 2020 and opening address at the Melbourne hearing on 13 March 2020.

We do not believe AFCA acts fairly all the time as Case Study 1 clearly shows.

Whilst it is true AFCA has only been in existence for 3 years, it‘s not really “a relatively new dispute resolution body” as Senator Brockman claimed. AFCA is nothing more than a revamped FOS. AFCA acquired some of COSL’s staff but all the original case management staff had prior experience working for either predecessor EDR scheme. Consequently, there is no excuse for favouring consumers over lenders unless, of course, this is tacit admittance this is what they were already doing. Based on anecdotal evidence supplied by our clients, unfortunately it has been the case in a number of instances brought to our attention.

We are aware some of the AFCA staff have previous employment or activity with consumer advocacy groups and the like. According to our clients, there is an attitude that’s noticeable when they deal with these individuals. Generally, their starting position is the financial firm (“FF”) is wrong or has done the wrong thing and the FF should provide recompense no matter what. FFs are cash cows and they can afford it. In our view, AFCA should recruit case management staff in particular that are from outside these groups in order to provide more openness and transparency when dealing with them.

That FF are ’members’ of AFCA is a joke. It is compulsory. FFs are required to accept AFCA’s contractual terms prior to applying for an ACL and must remain so in order to maintain that licence. That members cannot do anything apart from pay is indicative of the one-sided nature of the way the Authority was set up by Government. FF cannot appoint Board members, change or lobby to change the fees or change the Rules similar to any other membership organisation. We would go so far as to question the use of the term “Authority” in its title. AFCA is not strictly a Government Authority but a private company set up as a legislative requirement effectively under the control of ASIC. ASICs regulatory guidelines RG267 and RG165 sets out how the company must operate. RG165 is to be withdrawn on 5 October 2022 when it is anticipated all predecessor complaints have been resolved.

We believe there is also a need for FF to know with whom they are dealing. There are individuals in some community groups who indicate they are ‘financial counsellors’ but yet have absolutely no knowledge of the law. It is arguable they are Financial Counsellors (“FC”) in the truest sense and have had the required training. We suggest all FC should be registered with AFCA and receive a

registration number. The registration of these individuals should incur no charge. These individuals tend to register their complaints with AFCA, regardless of whether the matter has been through IDR or otherwise. If an FC assists a complainant, then we believe AFCA's complaint fee to the FF should be capped. One lender has suggested this be $100 but another suggested a maximum of $500.

It is not a lender's role to educate FC, but even those that have undergone training still have no idea what they are talking about. When pushed to explain their reasoning, they freely admit to not knowing the law and based on anecdotal information, they hate being proven wrong.

One further point demands attention as it is occurring all too often. If a complainant does not (or refuses to) respond to a FF's attempt to contact them during the 21 day (currently 30 days due to COVID) period allowed, AFCA should deny the complaint from progressing. The complainant should not be in a position to incur the 'member' with additional financial costs because of their intransigence or disregard.

All our clients believe AFCA should reject frivolous and vexatious complaints. They also believe in the requirement the complaint to have gone through formal IDR responses rather than AFCA taking it upon itself to escalate the matter to the next level.

Efficient

The Registration and Referral stage initially consists of either 2 or 3 emails. The FF initially receives an email advising a complaint is coming. Within a day or so, the second email contains the customer complaint details and the resolution the complainant seeks. Based on the content, AFCA make an assumption as to whether or not the complaint been through IDR. If it has not, the FF needs to engage with the complainant and see if some resolution can be achieved. The third email is where the FF goes back and advises AFCA IDR has not occurred and the FF will be using the period of time allocated to liaise with the complainant and complete the IDR process.

Where AFCA deems it has been through IDR or if the FF responds early requesting a Rules Review and it gets knocked back, the complaint is automatically escalated within 2 days to the next case management level. The time period the FF is initially given is shortened considerably. Our clients feel

they should be entitled to the full period initially stated so they can attempt to resolve the matter and minimise their costs. Automatic escalation appears designed for efficiency but there is a clear conflict of interest for AFCA to maximise its costs at the expense of procedural fairness to the FF.

Timely

In general, our clients have expressed no issues with AFAC's timeliness apart from it reducing the 21 day period in certain circumstances (see above under "Fair'). However, a number of clients have incurred significant delays and Case Study 2 is a current example of this. This case also shows that AFCA will approve any complaint from a company that claims to be a small business, regardless of whether it meets any other objective test such as that of the ATO in defining what a small business is. Both we and the FF believe this is unfair and no Court would entertain such a bias.

Independent

We must question the Chief Ombudsman's motives when he has publicly stated that he wants more complaints to deal with[9]. It is disconcerting for members to have the Chief Ombudsman gloating over how much money his organisation has forced FF to repay consumers. If he is on a performance bonus (and no member knows because senior staff remuneration is not disclosed), then there is a distinct conflict of interest.

A small number of clients commented on the 'help' AFCA staff give to complainants. They feel this generally goes above and beyond what any FC provides and the way these complaints are worded, they are pre-engineered to provide some form of recompense. Our clients feel it smacks of a kangaroo court.

The lack of knowledgeable case managers with actual lending experience as opposed to consumer advocacy is highly evident. More than half of our respondents stated some AFCA case managers

9 In the Black, 2020. "AFCA chief David Locke's clean slate", 01 April 2020. Available online https://www.intheblack.com/articles/2020/04/01/afca-chief-david-locke-clean-slate viewed 21 March 2021.

appeared to have formed a view favouring the consumer well before any information from the FF is requested.

Is AFCA's dispute resolution approach and capability producing consistent, predictable and quality outcomes?

In our view, if lenders are compliant with the National Consumer Credit Protection Act 2009 (Cth) ("NCCP"), its Regulations and ASIC's Regulatory Guidelines and other laws (e.g. Privacy), AFCA should find in favour of the lender every time. The legislation passed by Parliament does not prescribe fairness. Courts do not take fairness into account, only the legislation. The way under which AFCA acts is an abuse of power. AFCA should not be able to impart its own take on the legislation simply to satisfy subsequent consumer dissatisfaction. This, we know, is completely at odds with the Chief Ombudsman's aims[10] as David Locke sees "fairness" applying above all else.

Equally, if AFCA accepts a consumer's complaint, should the consumer lodge further complaints relating to the same loan or lease, we are of the opinion the same case manager should be allocated to deal with it or them. We are aware of instances when a consumer has lodged multiple separate complaints all stemming from one loan or lease and each has been dealt with by a different case manager. This usually occurs where the last complaint is found in favour of the lender and so a further complaint is lodged. In all the instances of this practice brought to our attention, every one of these additional complaints has been vexatious. Unfortunately, AFCA has a policy of accepting every complaint, vexatious or otherwise and the lender pays the price. This is both at a financial level with AFCA's costs, an operational level as it diminishes management resources to continually answer the complaints and at a reputational level. AFCA reports on the number of complaints, genuine or otherwise, lodged against every financial service provider. Our clients are not satisfied this is fair.

There are some 'savvy' consumers that have or are using the EDR system to inflict reasonably serious damage on the industry. One of the methodologies financial counsellors and consumer advocates use against lenders and lessors is their recommendation that the consumer stops paying anything whilst the dispute is afoot. Their standard opening approach under IDR is a demand that

[10] Ibid 8

the lender or lessor remediate the consumer by writing off the loan or goods value and pay back all the money the consumer has paid to date. The threat is if the lender or lessor doesn't come to the party, then the matter is referred to EDR. This amounts to nothing more than extortion. It has been particularly the case with Credit Repair companies. This past week, despite these companies knowing it to be contrary to the Credit Reporting Bodies terms and conditions, we have been shown requests to remove genuine credit default details on a "non-admission" basis. From correspondence viewed, it is more than apparent there are a significant number of lenders deleting default information to avoid referral to AFCA so as to avoid costs. In doing so, it damages the integrity of the credit reporting system.

Unfortunately, when such complaints are referred to AFCA, it still doesn't then make the consumer recommence any payment. This is a source of great discontent for the industry. From a credit management perspective, of which the author has many years of experience, it beggars belief that AFCA would encourage the consumer to get further into arrears. Increasing the debt or reducing the repayments also only serves to extend the FF's debt recovery time. In our view, consumers should be encouraged to recommence payments, even if only partially. If the complaint is found in their favour, the lender or lessor could then be required to reimburse the consumer within a set number of days.

Three clients questioned the basis of AFCA's 'damage' amounts. Amounts from $500 to $5000 are bandied about as 'reasonable in the circumstances;' as though they are insignificant. These are amounts plucked out of thin air for the most part. Unfortunately, all this comes off the FF's bottom line. Politicians complain about smaller lenders rates in particular but when one takes into account other costs and what some consider as AFCA's unreasonableness in their awards for non-financial damage, it is little wonder their rates are at the maximum allowed. As all FF know, there is no such thing as a free lunch.

Are AFCA's processes for the identification and appropriate response to systemic issues arising from complaints effective?

Insofar as identification is concerned, AFCA cannot even ensure consumers get the lender name correct. We have a client whose name starts with "A" that appears at the top of the list of AFCA

members. This client constantly has complaints lodged against it when the consumer is not even a client. It has been frustrating and a waste of their valuable time constantly going back to AFCA and disputing the complaint.

The issue with identifying "systemic issues" is it is open to abuse. Furthermore, it is in AFCA's own interest to claim a systemic issue because this generally results in a higher determination fee being paid. As far as we know, no AFCA staff has been trained in investigation work. Basing a systemic issue on one complaint may be reprehensible and cause the FF great discredit. In our view, AFCA should leave such investigations to those more capable in ASIC. What we do not know or are aware of is if AFCA's processes, on suspecting a systemic issue, focus more on that than the resolution of the complaint. AFCA should be required to disclose on what basis it determines a systemic issue and its subsequent processes as a matter of transparency.

As to whether AFCA's processes are appropriate responses to systemic issues, it and its predecessor failed to discover many of those brought to the attention of the Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry. Furthermore, with the ability to capitulate at IDR, most systemic issues will never see the light of day at AFCA.

AFCA [11] has previously expressed a desire to increase its capabilities in the area of systemic issues and no doubt would like to increase the maximum amounts it can award to consumers. AFCA is not ASIC and must not be allowed to become a subsidiary of ASIC. It is up to the regulator to prosecute systemic issues and it must be re-iterated, this will be done using the letter of the law, not on some notion of 'fairness in all the circumstances' by a Court if it decides to prosecute.

Equally, whilst noting that the Office of the Australian Information Commissioner ("OAIC") recently awarded higher amounts than AFCA can for the privacy breaches caused by the Department of Home Affairs[12] due to non-financial loss, this is the OAIC doing so. If AFCA wants to have the ability to apply what are in reality, fines, then Government must make AFCA a proper Tribunal (with

[11] Ibid 8

[12] Office of the Australian Information Commissioner, 2021. Determination IPP-4 –IPP 11, '*WP' and Secretary to the Department of Home Affairs (Privacy) [2021] AICmr 2*', available online https://www.oaic.gov.au/privacy/privacy-decisions/privacy-determinations/ viewed 13March 2021

a capital “T”). With that comes all the necessary judicial oversight that is currently non-existent. Industry would welcome such a move.

Do AFCA’s funding and fee structures impact competition? Are there enhancements to the funding model that should be considered by AFCA to alleviate any impacts on competition while balancing the need for a sustainable fee-for-service model?

In our opinion, the Chief Ombudsman should not hold the Chief Executive Officer position. How a Chief Ombudsman can attempt to be fair but not take into account the financial impact of the organisation’s decisions as its CEO is beyond us.

AFCA’s fees are structured so as to encourage FF capitulation as early as possible. The table on the following page shows how this is achieved.

AFCA staff makes the decision as to whether Fast Track, Standard or Complex applies. Fast Track is fast and there is belief amongst FF that AFCA push more complaints via Fast Track to maximise its revenue. The jump in fee from $2,130 to $3,975 is not insignificant and a clear incentive if AFCA rewards its staff based on revenue achievements.

In our opinion, if the decision is in favour of the FF occurs at case management level, as happens with many complaints but the consumer chooses to appeal it, then there should be no further cost to the FF. There is currently nothing the FF is able to do to prevent this and this may simply be an attempt to extract financially punitive retribution on the FF at no cost to the consumer. If the FF elects to appeal, then we appreciate the costs should be borne by the FF. Alternatively, AFAC’s fee structure could be amended to require a consumer wishing to dispute the initial finding to pay the same fee difference as it would cost the FF. That would be fair on both parties.

Complaint fees

The following table shows the complaint fees for each resolution point and stream for complaints closed from 1 July 2020.

All figures in this document include GST.

Complaint Closed Status	Invoice Service Code	Resolution point	Fast Track	Standard	Complex
ALL					
CRGR	RGR	Registration & Referral	100		
CTOR	N/A	Rules Review	0		
CFCM1/CCM1	FCM1/CM1	Case Management 1	890		
CCM2	CM2	Case Management 2		2,225	2,515
CCM2	CM2C	Case Management - Conciliation		2,375	2,755
CFPRV	FPRV	Fast Track - Preliminary View	2,130		
CFDEC	FDEC	Fast Track - Decision	3,975		
CPRV	PRV	Decision - Preliminary View		5,655	7,055
CDEC	ODEC	Decision - Ombudsman		8,880	11,355
CDEC	PDEC	Decision - Panel			13,330
	OCON	Ombudsman Conference	1,415		

All figures include GST and have an annual CPI related increase applied.

Source: AFCA Complaint Fee Guide

Under ASIC's Regulatory guidance and AFCA's own Rules, a complainant is supposed to have gone through the credit provider's Internal Dispute Resolution ("IDR") first. There are many instances where this does not happen, and as stated previously, this is largely promoted by credit repair and debt management service providers, consumer advocates and /or financial counsellors. They do so as a means of financially burdening the credit provider from the outset and it's all part of the coercive philosophy behind the use of EDR.

For ‘members’, AFCA’s Datacube reveals little. Lenders in the SACC and lease sectors cannot tell how many complaints there genuinely are because they are not broken down by sector. Equally, it does not reveal the manner by which complaints are received. We suggest, though, the vast majority will likely arise from the website. If so, rather than someone having to enter data manually, the information will automatically be entered into database fields and a query easily created that sends the credit provider an email.

As its Complaint Fee Guide notes, “AFCA is a not for profit organisation which operates as a ‘user pays’ service. Complaint fees charged to member financial firms cover the cost of AFCA investigating and handling a complaint, whether or not a complaint is upheld. The fee applicable to a complaint does not depend on the complaint outcome, the merits of a complaint or how long a complaint has been in a particular complaint status.”

The Datacube for the period July – December 2020 shows approximately 50% of all complaints are resolved at registration. For credit providers, the resolved figure is even higher at 60%. Given lenders strive to minimise their complaints, both in number and in financial terms, capitulation is often far cheaper than proving one has acted correctly. Being and proving one is right and fighting the complainant costs the FF in both time, resources and financially.

On that basis, we question whether the cost of registering a complaint on AFCA’s systems, even allowing for a significant percentage to be manually entered, is truly reflective of its actual costs. Rather than adopt a fee-for-service model by sector, all complaints are priced on an across the board basis. We suggest there may be some distortion in doing so.

One client that provides SACCs and MACCs suggested that AFCA should not able to award remediation in excess of the total amount paid or payable under the contract. This would then limit the FF to essentially recover of its principal. Awarding greater amounts than this, as occurs now, enshrines the principal of unjust disenrichment. This is perverse and one that should be discouraged at all cost.

One final point on AFCA's fees is 'members' have no control over its costs. AFCA can take on additional staff, pay Board members what they like and 'members' will be simply required to pay more if the CEO requests an increase by the Minister.

Monetary jurisdiction in relation to primary production businesses

Do the monetary limits on claims that may be made to, and remedies that may be determined by, AFCA in relation to disputes about credit facilities provided to primary production businesses, including agriculture, fisheries and forestry businesses remain adequate?

As none of our clients have provided loans for these sectors, we make no comment on this question. We will leave others with more experience to comment on whether or not the limit of $1.85m is sufficient.

Internal review mechanism

AFCA's Independent Assessor has the ability to review complaints about the standard of service provided by AFCA in resolving complaints. The Independent Assessor does not have the power to review the merits or substance of an AFCA decision. Is the scope, remit and operation of AFCA's Independent Assessor function appropriate and effective?

After canvassing some of our clients, almost none knew of the Independent Assessor ("IA") position. This was the same situation following discussions with some non-client lenders and brokers across the country. When it was explained what the Independent Assessor could do, not one would refer a matter. This is because:

a) AFCA staff must have concluded the complaint and it must have been through all AFCA's determination processes. The cost to the lender is therefore at least $8,880 before the IA can even look at the lender's aggrievement;

b) the process lacks any ability for timely or earlier intervention; and

c) all consider the remedies available as pathetic. An apology was said to be an insult and equally, all believed a payment equivalent to non-financial loss for a consumer contemptuous. This is because the lender or lessor may have spent thousands on not only AFCAs fees but independent legal advice and have incurred significant financial losses. All felt ‘members’ deserve better.

One broker (a non Min-It client) raised the question of whether the CEO, after receiving the IA’s report, bothered to pass on the IA’s comments to staff. This was because the broker was aware of little to no change in AFCA’s processes following one IA referral. We are aware the IA reports to the Minister but cannot find any indication of the Minister taking the matter up directly with AFCA. We can find no evidence the Minister tabling the IA’s Report in Parliament. There should be total transparency on this with Parliamentary oversight.

It must be acknowledged the IA provides an excellent though brief report for inclusion in the AFAC’s Annual Report and provides excellent statistics, far better than AFCA’s DataCube, but we believe this should not define the role. What ‘members’ cannot be sure about is whether the Annual Report contains all the details provided by the IA. One way around this would be for the IA to certify that the report contains full disclosure, in a similar manner to an Auditor’s report on a Statement of Accounts.

In our opinion, the IA role should be expanded so that it:

1. reports, besides to the Minister, to both the Board and CEO so that the Board can require the CEO implement appropriate action to ensure there is no repetition of the issue(s) raised; and

2. is able to intervene in the complaint process where there are service issues raised by the ‘member’ before the complaint is fully concluded.

Is there a need for AFCA to have an internal mechanism where the substance of its decision can be reviewed? How should any such mechanism operate to ensure that consumers and small businesses have access to timely decisions by AFCA?

We are of the opinion this question asks whether or not AFCA's decision-making processes at case management and determination levels should be reviewable. We believe they should. The best internal mechanism would be for the consumer or the FF to be able to take the matter to a Court for judicial review. This is no different to the way the Administrative Appeals Tribunal works. Keeping everything in-house does not afford industry any degree of transparency or impartiality in AFCA's decision-making processes. We argue there may be an overwhelmingly strong desire to see an internal decision vindicated.

We will also mention here that if a 'member' has made application to a Court, that AFCA should have no further say in the matter. The Court must deliver the appropriate judgement. At present, AFCA can and has instructed a Court to not proceed. We consider this an abuse of process. Any taxpayer should be entitled to take a matter to Court or a Tribunal for a decision rather than being prohibited by AFCA through what is essentially an unjust and unfair contractual arrangement.

Case Study 1

"Karen" (not her real name) purchased a vehicle from a motor vehicle dealer using its in-house finance company. Total amount financed was $12,088.79 over a 3 year term. Karen has at least 4 years' experience working in the banking industry and knows all about IDR and EDR. Between when Karen took possession of the vehicle on 23 March 2018 and when it was finally surrendered on 5 March 2020, 47 months later, she enjoyed full use of the vehicle but paid just $3,491.40.

There were 64 dishonoured payments and 5 Default Notices issued. She made 3 scheduled direct debit payments but did eventually make another 24 manually. She lied consistently, made false promises and AFCA's actions worsened the situation for the lender. The Case Manager's actions at level 1 further restricted the lender's options.

All the interest charged ($5,520.82) together with other fees ($1,122.39) was written off. The vehicle was subsequently resold for $8,000. EDR fees and losses on the loan total $8,802.21 but this excludes management and staff time dealing with this individual and AFCA totaling over $20,000. The lender's total loss on this loan is in excess of $28,800. This also excludes the cost of bringing on a temporary staff member to cover for the staffmember involved whilst dealing with AFCA on an almost full –time basis.

AFCA's actions have scarred this lender and its faith in the industry. It has not lent since incurring this action and it has taken 12 months for it to look at starting to recommence lending.

Complaint #1 – complaint lodged with CIOL

Date	Action
21 April 2018	Default Notice issued
26 April 2018	Debtor lodged with CIOL. **Doesn't like FF's credit control**
26 April 2018	FF notified of complaint and reply sent. **CIOL advised by FF that complainant had not been through IDR and would attempt to resolve issue**
27 April – 16 May 2018	Various communications between debtor and FF occurred. **Debtor said she could pay then withdrew offer to pay 3 times then finally agreed to a new contract being drawn up and next payment date set.**
17 May 2018	FF agreed to vary loan terms and draw up new loan contract. **All arrears including missed and other dishonour fees cleared**.
25 May 2018	FF creates new contract

25 May 2018	CIOL closes complaint

Complaint #2 – complaint lodged with AFCA

Date	Action
23 June 2018	Default Notice issued as debtor didn't stick to agreed terms of new contract.
16 July – 7 December 2018	Further Default Notices issued. **Debtor pays arrears due as per Default Notice each time but then stops paying, account continually in arrears but states she has money to pay all the time.**
12 January 2019	FF issues Repossession Authority
16 January 2019	Complaint lodged by debtor **Debtor still doesn't like FF's credit control. Said she'd just given birth and in hospital.**
16 January – 3 February 2019	AFCA advised debtor unresponsive. **FF tried communicating 3 times but debtor wouldn't pick up phone or return emails. FF prepared interim response.**
4 February 2019	Debtor responds at 9:45pm. **Advised unavailable due to various health arrangements but wanted to make payment arrangement but no firm offer made**
5 February 2019	AFCA determines complaint should go to case management. **IDR timeframe ended. Due to late engagement, AFCA wouldn't agree to extension.**
5 February 2019	AFCA raises complaint to Case Management Level 1
6 February - 4 March 2019	Debtor initially unresponsive to Case Manager. Case manager requested Statement of Financial Position
5 March 2019	Debtor responds. **Debtor fails to attach Statement of Financial Position**
13 March 2019	Debtor supplies Statement of Financial Position.
14 March 2019	Case Manager schedules conciliation meeting for 21 March 2019. **FF encouraged to consider her financial position and attempt resolution. Statement of Financial Position showed she had a negative deficit of $246 a month. On this basis, FF suggested vehicle surrender and offered to pay for transporter costs back to its yard but no arrangement could be accepted.**
20 March 2019	Debtor cancels conciliation meeting. Case Manager advises

	meeting rescheduled to 27 April 2019
21 March 2019	Case Manager advises error in new date. Rescheduled to 27 March 2019.
27 March 2019	Case Manager advised FF at 8:18am that meeting cancelled. Meeting again rescheduled to 3 April 2019.
02 April 2019	Case manager advised FF new Statement of Financial Position supplied. **Debtor now shows surplus of $3,727 per month and is able to continue normal payments from 4 April.**
03 April 2019	Case Manager advised FF at 9:43am that meeting cancelled. **Debtor unable to attend and supplies medical certificate. Case manager requests postponing first repayment now due to 12 April.**
03 April 2019	FF contacts Case Manager and queries huge discrepancy between the Statements of Financial Position. **Case Manager advised SOFP to be taken at face value. FF to make further offer to debtor or else complaint would be escalated to Case Management level 2. FF given 6 hours to make decision.**
03 April 2019	FF capitulates to save fees and decides to accept new SOFP. **Agreement made to accept debtors proposal to make repayments and capitalise arrears after 6 months.**
08 April 2019	Debtor advises offer accepted.
11 April 2019	Payment due under arrangement. **Debtor fails to make first payment as agreed.**
12 April 2019	FF contact s debtor and makes arrangement to reschedule first payment to 18 April 2019.
15 April 2019	Debtor contacts AFCA for clarification on Missed Payment letter wording sent.
16 April 2019	Case Manager tries calling debtor but phone disconnected. Case Manager said debtor needs to make payment due 18 April but has until 23 April to reply and accept arrangement. **Why make date of acceptance after payment due date?**
24 April 2019	Debtor didn't respond nor make payment. Case Manager automatically elevates complaint to Case Management level 2 **This was the Case Manager allowing the debtor to undermine the arrangement and increase the FF's costs.**
16 May 2019	AFCA appoints new Case Manager at level 2

	This is 1 year after first recapitalisation of the arrears and 10 months of the debtor making no payments
28 May 2019	Case Manager reviewed complaint and requests updated details. **FF advises arrears repayment plan will increase repayments by $33 for next 26 weeks. FF asked if this was reasonable given her Statement of Financial Position.**
28 May 2019	Case Manager responds and said will request new Statement of Financial Position if it's changed.
7 June 2019	Case Manager puts new arrangement to debtor
27 June 2019	AFCA Rules Committee request further details on Missed Payment letters sent.
27 June 2019 – 2 September 2019	Debtor unresponsive to communications. Case Manager requested further Statement of Financial Position to verify current details. Case Manager wanted to offer debtor $500 for each of the 11 Missed Payment letters sent as Rules Committee believed they breach AFCA's Rules. **No explanation offered as to where the $500 was derived or why, when the letter was the same, was there a need to compensate for each one. It simply informed the debtor the payment had been missed and she could make immediate payment to avoid further action. Letter has since been amended**
2 September 2019?	Debtor advised financial position of April had deteriorated as she had been setting up a new business. After suffering extreme financial hardship, debtor advises is now in a position to resume normal payments and agree to the arrears recovery arrangement.
3 September 2019	AFCA advised FF debtor accepted offer and AFCA to close file. Payments to recommence 19 September 2019.
20 September 2019	No payment received.
04 October 2019	FF issued 7 day Breach Notice. **Debtor advised FF payments made but refused to supply details.**
11 October 2019	FF provides extension to debtor to remedy Breach Notice by 16 October 2019.

Complaint #3 – complaint lodged with AFCA

Date	Action
17 October 2019	Complaint lodged by debtor **Debtor wants to prevent enforcement action**

17 October 2019	FF requests Rules Assessment
18 November 2019	AFCA informs FF that debtor advised AFCA would not accept complaint but offered debtor opportunity to contact them by 26 November 2019 if she wanted them to reconsider
19 November 2019	FF advised by debtor she wanted to surrender vehicle.
27 November 2019	AFCA advised file closed.
01 December 2019	Debtor emailed FF and said she had decided to keep the car and requested arrangement. **FF declined as she had not kept to the terms of any previous arrangement**
02 December 2019	Debtor emailed AFCA and requested case be re-opened. Her financial position had now changed and put forward a payment proposal based on an updated Statement of Financial Position.
02 December 2019	AFCA reopen file and advised FF to hold enforcement action. **AFCA encouraged FF to make an offer based on ability to resume payments but did no verification of expenses**
03 December 2019 – 12 January 2020	Debtor appoints husband as representative. FF requests Statement of Financial Position and 90 days bank statements. . **FF undertakes credit check as well and determines :** **1. Income overstated;** **2. Large unpaid debts owing to solicitors;** **3. Undisclosed private school fees;** **4. A further vehicle had been purchased on credit and repossessed;** **5. Bank Statements confirmed debtor lied in October 2019 about her financial position; and** **6. Statement of Financial Position as supplied to be false.** **She had a deficit of $926 a month.**
03 December 2019 – 12 January 2020	FF wants to decline the offer based on its findings but AFCA advised if they did, case would be referred back to Case Management level with further fees. Entire process to recommence. **This was totally unfair of AFCA given the FF's findings. In essence, they were demanding the FF enter into a loan they knew would result in further dishonours and the debtor could not afford to repay. It would be a breach of responsible lending guidelines**
03 December 2019 – 12 January 2020	New payment arrangement agreed to simply to avoid further AFCA fees.

	Debtor makes no payments as agreed.
13 January 2020	Debtor proposes new payment plan. Her financial position has deteriorated again.
14 January 2020	FF made further offer to debtor simply to avoid further AFCA fees
14 January 2020	Debtor accepts new offer but makes no payments.
02 March 2020	Debtor advised FF that AFCA emailed to withdraw complaint
03 March 2020	AFCA notified FF case closed.
05 March 2020	Vehicle surrendered

Case Study 2

This case is currently ongoing. It involves a lender that supplied a commercial loan to another lender's subsidiary company for it to secure a property development approval. The original lender has since gone into liquidation and the director of the subsidiary company has now declared bankruptcy. The loan was originally secured over real property and the complaint is about the interest charged. The complainant claims misrepresentation of the interest as calculated.

Date	Action
27th October 2020	Complaint lodged by debtor
5th November 2020	FF lodges request for jurisdiction review
26th November 2020	FF lodges request for consent to deal with mortgaged property
27th November 2020	AFCA approve consent to deal with mortgaged property
13th January 2021	AFCA denies jurisdiction review, accepts complaint. **This is over 2 months**
15th January 2021	Finance company requests to object jurisdiction outcome
25th January 2021	Finance company submits objection regarding jurisdiction
29th January 2021	Objection denied by AFCA. Notified case manager will be assigned. **FF argued that the nature of the transaction was for commercial reasons and that the subsidiary entity was not operating as a small business. It was merely a property holdings company of behalf of a unit trust. The entity has no staff or carried on any business itself. It was not registered for GST and the FF was arguing on the basis of the ATO definition of a small business. AFCA's response was that it's an Australian registered company and therefore qualifies as an eligible person.**
12th February 2021	AFCA notifies FF Case manager assigned and requests submission by 19th February. **This is almost 3.5 month after the complaint lodged and first case manager is assigned**

19th February 2021	FF submits first submission to AFCA
19th February 2021	First submission by debtor lodged with AFCA
25th February 2021	Hearing date by AFCA
25th February 2021	FF submits interest calculation submission to AFCA as requested by case manager during telephone hearing
26th February 2021	Following hearing, AFCA requests further information from both debtor and FF. Due date 5th March. **This is supposed to be the last opportunity to lodge all relevant info before preliminary assessment.**
5th March 2021	FF lodges 2nd Submission with AFCA
8th March 2021	Debtor lodges 2nd submission but does not answer all questions as asked by AFCA and requests further extension to 12th March. AFCA grants this request. **This request made by the debtor after the deadline date**
19th March 2021	Debtor lodges 3rd submission but yet again fails to address questions asked by AFCA.
19 March 2021	AFCA requests debtor answer outstanding questions with a deadline of no later than 26th March 2021 **This request again made by the debtor after the deadline date**
29th March 2021	Debtor lodges 4 submissions to address outstanding question. **Complainant responds 3 days after last deadline date and in total, 25 days after AFCA's original deadline. AFCA undertook no assessment of the complexity of the question, and whether the extensions were reasonable, given all it had to do supply a spreadsheet showing its calculations and why the lender was incorrect.**
20 March 2021	AFCA advises case manager re-assigned to new role.
31 March 2020	Waiting on preliminary assessment and notification of appointment of new case manager. **Timeframe unknown**