Review of the Australian Financial Complaints Authority: What the FOS is going on at AFCA!!

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Concerned private citizen observing from the sidelines how AFCA manipulates the process, frequently to the detriment of the complainants. No Accountability for their actions, no matter how unreasonable they may be. Uses information which is both inappropriate and damaging as it allows the FSPs to use the same information (now deemed acceptable because AFCA/FOS have done so.) to shift blame and intimidate.

18 March 2021

Dear Sir/Madam,

This submission deals with a very specific topic within the broad range of subject matter about which one could make comment.

It is my view, however, the matter raised is one of significance as it goes to the very core of what AFCA represents and the level of justice it delivers; not just the level but more importantly, the sense of justice it is seen to be delivering to the wider community.

It is about Accountability. Sadly, in the existing arrangement, there is none. The rules are clear, once a determination is made, there is no second chance. Whilst the original intent seems noble as it potentially creates an even playing field and prevents those with deep pockets drowning the system in litigation, it also has flaws. Serious flaws.

As with all "noble ideas", the restriction of no appeal can also be subject to manipulation and self-interest.

I recall there was a Court case back in the early days of FOFA when AMP took FOS to court over a determination. The Court stated that whilst AMP had done everything correctly and the FOS judgement was unsound, AMP had joined the scheme and was therefore required to abide by the said rules of the scheme.

A limited option of review would not seem unreasonable. Penalties of substance could be applied where a FSP is deemed to be trying it on to deter frivolous appeals. However, I digress and believe that the lack of Accountability which AFCA is afforded in denying any re-assessment of a determination, is flawed.

Especially when there is clearly a strong case for such a reform; desperately needed reform with Govt oversight and teeth to stop the manipulation of the process.

To highlight the reasons for this concern, I am submitting a determination (601743) made in October 2019

It is an appalling judgement where the use of cherry picked information, selective misinformation and worst of all, the validation of the misguided conclusion that it was all the client's fault, using a totally inappropriately cited High Court case. It also brings to light how the process can be used to suit AFCA and, often the FSP, to the detriment of the complainants.

I have included Attachments; the numerous information exchanges which support the statements being made here.

The background is simple. The clients were farmers in their 60's. Loaded and sophisticated investors; apparently!

That is if you believe the hype promoted by the lawyers

The clients explained their situation clearly to AFCA. They were farmers and the husband, by an accident of birth, was born into a family which has been farming in a very stable area for several generations on the same property.

The area also happens to be a hugely popular tourist spot. So like most farmers, they are asset rich and income ok. The impression presented in the determination and earlier document exchanges was that they were "wheelers and dealers" and sophisticated investors. The farm, as stated, is in a very favourable location but this did not make them sophisticated "wheelers and dealers".

Due to the location of the farm and the enormous growth in the area, part of the farm fell into the local Town Planning Scheme and some modest subdivision was allowed. So they did a modest development of hobby farm blocks and the proceeds from this funded their SMSF, providing them with regular cashflow for retirement outside of the farm. Hardly makes them "wheelers and dealers".

To set up their affairs separate from the farm, they sought advice and part of that advice was to invest in Prime.

Now we get to the heart of the matter.

A major thrust into the heart of Accountability is the use of a much cited High Court case. Certainly FOS/AFCA have flogged it to death. Yes, you probably guessed it:

The High Court in Toll (FGCT) Pty Ltd v Alphapharm Pty Ltd [2004] 219 CLR 165 stated at 184:

"…where a person has signed a document, which is intended to affect legal relations, and there is no question of misrepresentation, duress, mistake, or any other vitiating element, the fact that the person has signed the document without reading it does not put the other party in the position of having to show that due notice was given of its terms."

The use, actually the abuse of this High Court case, is tragic and yet FOS/AFCA have allowed it to be quoted ad nauseam. The problem with this case is it has no relevance to the vast majority of clients seeking justice. Whilst it may have been used in an appropriate situation and appropriate for the persons involved, it is clearly irresponsible for all but a limited number of situations.

However, ██████ appears to have little understanding of that fact and uses it, like so many others as the primary reason for the denial of justice because the claimants didn't read every page of the SOA or the PDS. That's 166 pages of jargon and unfamiliar concepts. The clients are elderly Farmers. We'll also ignore the misrepresentation part too.

Yet, the preamble to this case states clearly: "Each of the four parties to the case is a substantial commercial organisation, capable of looking after its own interests." This is a clear acknowledgement that the Court see a business in a very different light to a private individual.

Even to the untrained, me included, most people know that that pretty much all consumer legislation currently in place, is the result from a High Court case, in which one party, a business using its experience, knowledge and resources to take advantage of the other party who have none of the above. Yet here it is cited as totally relevant when the preamble is very clear, it is not.

The damage the abuse of this case is causing simple folk in their dealing with AFCA is a disgrace. Why?

AFCA misuse of this case has given FSPs permission to also do the same. I quickly point to another ongoing case.

Truck driver and cleaner. Advised into an aggressive, high risk strategy, complicated, big borrowings and so high debt. The SOA "forgets" to mention all the risk factors. Heavy duty risks. So does the adviser. There is some disclosure. Sufficient. Hmm, I think not. SOA and attachments are same old, same old. Lots of paper designed for people who can't read lots of paper. It is pointed out to the FSP that there is non-disclosure issues due to the missing risk factors. There is also a Gearing Acknowledgement. Yep, a specifically designed, additional form to cover the FSP bum but no mention of the missing heavy hitters in that document either.

I'm not making this up. The FSP cites, drumroll, Toll. The risk (well, one of the two) is mentioned in the attachments umpteen pages in. Eleven lines (half lines actually!) and so according to Toll, the FSP maintains this is disclosure and it's all the client's fault as they should have picked it up when reading the 80 damned pages or whatever was the number.

The silence from AFCA is deafening. This only one of many, many stories. BTW, I do not hold the case managers' accountable for this as most of them would have seen this case used so often, it is just accepted as normal.

It is wrong. It allows both AFCA and FSPs to massage liability, responsibility and Accountability and the application of such a court case in this situation, is just plain immoral. It is also does the High Court no favours.

A little quote from the farmers (obviously with a little help from friends; one of the benefits of living in a smallish town) in response to the following quote from AFCA:

"AFCA (and FOS) have previously adopted a high court ruling that accepts that a client is responsible when they sign a document saying that they accept what it says. This would apply to the situation here where you have been provided a PDS that clearly states the listing fee, and signed a document attesting that you have received the PDS and acknowledge the contents as part of your SOA recommendation."

Client response: "It seems to us that the AFCA determination and belief that the average person, should be competent despite ASIC's concerns to the contrary, is based solely on the High Court decision of Toll Pty Ltd vs Alphapharm Pty Ltd, as alluded to above. We say this because it has been mentioned several times earlier and again provided in the overview, as just mentioned, as justification of the AFCA stance. We find it curious that a single case between two businesses where the High Court stated, "Each of the four parties to the case is a substantial commercial organisation, capable of looking after its own interests." is given such a weighting. Is it therefore, AFCA policy that every High Court ruling on a business to business matter automatically flows through to consumers and therefore becomes adopted by AFCA in their assessments? Why is this view maintained despite the clear evidence that the Courts do differentiate between the expectations of capabilities of a business and those of an average person in business dealings? How can this position be seen as reasonable when the average person would think it unfair to apply such a standard to the client when the adviser/Advice Provider have failed themselves to read the same document?"

Interesting! Hmm, the adviser didn't read the PDS and doesn't have to it seems. Obviously knew that and didn't care. All that seems to matter is that the Complainants did. It does seem odd that the person being paid pretty well, $10,000 a year to provide advice and administer the clients' affair and, one would think, keep their money safe, doesn't have to read the documents. Or anyone at the FSP headquarters. How on earth do products get approved? But the client does!

Probably states it all, really! The damage, the one sided advantage being handed to the FSPs and manipulation of the process by using the Toll case, must be stopped.

But wait there's more of the Toll impact revealed further ahead. Oh, and before I forget, Toll also creates conflict of interest issues which are never disclosed but are very real.

The advice was provided on the 11 July 07 and this was smack on the cusp of the new PDS which is dated 6 July 07. SOA was generated on the 4 July 07. So it would be fair to assume that the earlier PDS was provided although AFCA believes what the FSP told them despite that the PDS date is not provided in the SOA. Doesn't matter as both PDSs disclosed the Listing Fee. The Listing Fee was not disclosed in the SOA. Why? No idea. Oh, silly me! Because the adviser didn't know it was there as he didn't read it. Nor anyone at the FSP's headquarters; the person or committee responsible for assessing and approving new products was obviously too busy to have time to read any PDSs or whatever!!

Now, like so much else, it appears and I also differ on what a SOA is all about although she is partly right although the disclosure reference is confusing given her views in relation to the determination. The Financial Planning Association rolled out a whole lot of training all over the country when the FOFA legislation first came out and we were taught a SOA is meant to do four things:

1. What we are doing? (Objective)
2. Why are we doing it? (Reason)
3. What are the advantages and what are the disadvantages? (Risk and Benefits Disclosure)
4. What is it costing? (Fees and charges)

So, as I see it, this was all intended to be in the SOA. Only one document for the client to read and digest. The SOA was even designed with separate sections for the Risk and Benefits. The risks listed in the one spot. Makes sense to me.

Not according to [redacted] who states the following:
"Of relevance, PS 175 notes that retail clients may receive a number of different documents for a financial product transaction (such as the investment in the trust). Each document is issued to clarify the following:

- what financial service I am getting (disclosure in a Financial Services Guide)
- what advice I am getting (disclosure in an SOA)

- what financial product am I buying (disclosure in a PDS).

An adviser is required to provide a retail client a PDS at the time it gives advice recommending an investment into a financial product. The SOA and PDS are documents which together contain the information the complainants should know before accepting and proceeding with the advice. "

Problem is that this dreadful over use of Toll usurps this role and in doing so, the legislation. The requirements as specified above are overruled by a High Court judgement that has nothing to do with most clients and puts them a complete disadvantage if they fail to read **every single page.** And of course they don't but let's not waste an opportunity to extrapolate something to the nth degree if it means we can wriggle out of our responsibilities.

According to [redacted] now all the SOA has to do is say what the advice is. How cool is that? Almost responsibility free financial planning. More damage to the clients because someone thinks by drowning people in volumes of detail, it is going to provide a better outcome, for them! The methodology, as outlined by the legislation was clearly trying to make it easy for the clients to be aware of what they were getting into. Gone. Replaced by Toll and the absurd requirement that every page has to be read by the clients; most of whom are NOT capable which is why they go to get advice.

The extension of the manipulation, is the failure of FSPs to clearly disclosure the risk factors in the relevant section of the SOA, is how many FSPs are in breach of the Conflict of Interest disclosure rules. Huh, I hear you say! As you will see a wee bit further down, AFCA through the misguided use of Toll, believes it is not a requirement for the adviser to fully understand the product or to read the PDS. Nope. Just a basic knowledge is acceptable. Wow.

So where is the Conflict disclosure in the SOAs that points out to clients, how they are totally responsible for the advice and yet, as their adviser you will still get paid the full level of fees for knowing not much and for what is, now a product flog? There is none. Sure, a couple of short sentences about reading the PDS or whatever but nothing about how the adviser is under no such obligation to read the PDS and still getting their full fee. Don't even really have to that much knowledge about the product, according to AFCA. But if the client fails to read the PDS, it's all their fault!

Ingenious! Flog the product, leave out vital information, quote Toll and hey, presto, no responsibility! Beautiful.

This in another serious issue for AFCA. What? The appalling level of discrimination which is systemic in their processes but that is a tale for the next submission. How does any person get into [redacted] position and not understand that not everyone can digest quantities of information that is in a language (Jargon) they don't understand? How? I shake my head in amazement at the narrow little world in which AFCA staff live.

[redacted] statement about page 10 of the SOA about reading the PDS, is missing an important sentence, which should read "because I don't have to do that, you do". The adviser or the investment committee is not expected to read the document but the client is. Seriously?

A couple more quick points and then we're done.

To minimise the impact [redacted] highlights how the listing fee is a trivial matter; insignificant and not only that, subject to conditions which the directors may not have been able to meet.

I must be honest; I laughed out loud when I read that comment. Naïve, stupid, innocent or all three? Gee, so what if there were conditions; let's call them hurdles? Seriously? It's called human nature. It was blindingly obvious that the Trust was going to list. No question!

Why? Because whether it was or Mary Poppins, by the time it reached the point where it was as large as it was and growing, the Listing Fee was too big to just let it slip away. There was no way in a pink fit that or anyone of us, having done the hard yards to get the Fund to the listing point, would walk away from $20 mil, $30 mil and certainly not $33,763,000. Not a chance.

That's just Human Nature. Sit quietly and ask yourself what would you do if you'd pulled together a great package of properties that are ready to list on the ASX and when it does, you'll scoop up an absolute bucket of cash? Seriously! You'd go for the cash! We all would. Well, maybe not

Why would they have provided details of a Listing Fee it there was any doubt about the Listing? It makes no sense??
They provided the information so they **could get** the Listing Fee. Simple.

In relation to the "2.5% insignificant value" of sucking $33mil out of the fund! Now think about , that's $33 **large**.
Serious dollars and yet it is trivialised to insignificant. Bold move. Weird but bold.
Trouble is that it is also rubbish. Ask a farmer about the value of their assets when most of the assets are illiquid.
Business is about cashflow. The mantra is "Cashflow, cashflow, cashflow". Ignore that at your peril.

Ok, so now let's do a calculation that is realistic instead of some smoke and mirrors trick.

As a value against the total asset base the 2.5% is meaningless as this was a property based fund and thus, as mentioned above, most of it illiquid. Whilst that does help Ms Pirone appear to make sense in her spurious argument about the insignificance of the Listing Fee, it is just silly.

If we now take the audited figures as shown in the 07 PDS. The withdrawal of the $33 **large** makes it a 72% withdrawal of the cash held, in percentage terms. Now, I would call that a "significant risk factor".
One probably worth mentioning in a SOA, don't you think?
I realise used the projected figures, which include the injection of the Listing cash, for her calcs and this is surprising, given her naivety as to whether the listing would proceed.
Even if we use the projected cash based figures which includes the cash injection from the Listing, it is still 20% of the cash.
To use the total fund value when almost all of it is illiquid is, hmm, questionable. Cherry picking?

Now, on from the view of the Listing Fee being insignificant and makes another bold statement:
"Furthermore, the trust went into liquidation four years after listing, without conclusive evidence that the listing fee was a major reason why [the trust] failed."

So let's just ignore the facts and make a grand statement as the perfect companion for the silly assertion about the Listing Fee being "insignificant". Sadly the story turned again, pretty well straight away.
The listing was in Aug 07 and the GFC hit a couple of months later. Cash was tight (I wonder why?) and income to clients was reduced. In mid-08 after a distribution of $0.01 per unit, distributions were stopped completely. Why? No money!

This caused the unit price to tumble and as so astutely notes, Prime limped into liquidation.
A quick look at the chart for Prime will make it very clear that the fund was in trouble from the Get-go.
Whilst it could be argued it was due to the GFC, there would be no doubt that the removal of $33 **big ones** would have been a major factor due to the sizeable bite it made into the fund's available cash.

In summary, the determination was poor because such a substantial fee should have been disclosed in the SOA in the section specifically designated by ASIC for disclosing such important significant risks; the massaging of the figures to make $33 big ones seem pfff; a nothing and the shabby and inexcusable use of Toll to hide behind as validation, for such an appalling judgement. **The real questions are why didn't the FSP know of the listing fee?**
We have no idea.

And as I understand it, the case manager had advised the Complainants that the Ombudsman was not persuaded by the views presented to AFCA but they went ahead anyway. It was as if it was pre-judged. Interesting.

And then this comment by the lawyer in their letter:

"We understand that AFCA will be investigating whether the advice to invest in Prime Trust was appropriate. Whilst Infocus considers the advice provided to the Applicants was appropriate, it is concerned as to why AFCA has determined to investigate that issue when it is not an allegation raised by the Applicants."

So why did AFCA take the case?

Perhaps the persistent nature of the Complainants was an irritation to AFCA and particularly their challenge that Toll was irrelevant. It seemed obvious that the complainants were going to keep chipping away.

So, it does make you wonder, was the whole exercise just a way to shut them up?

Why? There is no appeal or redress of any kind with regards a determination, irrespective of the quality of that determination.

As the covering letter from AFCA stated so eloquently:

"Please note that our decision is final.

We have now closed our file."

As mentioned above I am also attaching the interchange of documents from the Complainants (obviously with a little help from friends; one of the benefits of living in a smallish town) to comments made by AFCA during the process. Interesting reading and completely ignored. Of course.

Things really do need to change.

Yours Sincerely,

Dean

Review of the Australian Financial Complaints Authority: Part 2 of what the FOS is going on at AFCA!!

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Concerned private citizen observing from the sidelines how AFCA manipulates the process, frequently to the detriment of the complainants. No Accountability for their actions, no matter how unreasonable they may be. Uses information which is both inappropriate and damaging as it allows the FSPs to use the same information (now deemed acceptable because AFCA/FOS have done so) to shift blame and intimidate.

26 March 2021

Dear Sir/Madam,

This submission deals with a broad range of subject matter affecting the average person.

It is my view, however, the matters raised are significant as they go to the very core of what AFCA represents and the level of justice it delivers; not just the level but more importantly, the sense of justice it is seen to be delivering to the wider community.

I need to make the comment that despite the fact that I find some of the following behaviour distasteful, I do not believe it is fair to completely blame the staff. We all want to keep our job and if Management have implemented these rules, then I understand that the staff need to comply. I am sure the staff are generally honest, hardworking and decent people

1. **Diversity**

_While AFCA considers itself a "diversified" institution, it is not. Yes, it is employs people from different cultures and, I assume, sexuality but not with different mind skillsets. It is very obvious when dealing with the case managers, they all have the same skillset. Able to read and digest volumes of information, University educated and so all have the same outlook. Same skills and experience.

No capacity to fully understand people who don't. Discrimination! Huh!? Why?

Intolerant. Incapable of believing that people don't think like them. True. And believe that they should.

You should have, you could have, why didn't you?

Human intelligence is a remarkable thing. I know people who can only just read and write and yet show them a piece of intricate furniture and several days later, you will receive a beautiful piece of furniture. No IKEA directions. I have worked with people who are brilliant and can digest complex matters in minutes; multiples of data; complex data. But they can barely hang a picture or do up their shoelaces. People who can barely read and write but confronted with a mechanical issue can it solve in in seconds and when you ask how, they just say the answer was in a picture in their head.

Problem with AFCA is they have a lot of one type of brain and, it seems, little experience in any other.

So people are constantly being blamed for not reading documents or understanding information or who FOS/AFCA are. Or not understanding the why and when they were in a loss situation; you should have known. Forget that the adviser was saying the opposite. It's just a short term loss or only a paper loss. The market always comes back up.

So what they get is the "You should have, you could have, why didn't you know, you should have known, you should have told the adviser what to do, so why didn't you?

I phoned the Human Rights Commission and asked about this issue. The dear lady was initially quite bewildered by my view. Understandable.

Well I remember that perspective in a different time. It was offensive then and it is now.

The 50's and earlier were tough if you were gay!

The swinging 60's provided the 1st signs of light. Glimmers. The 70's a tad more open as evidenced by the Sydney Mardi Gras and then life started to get easier from then on. Inch by inch. Rocky Horror Picture Show! Yes!

Despite the gains, what I remember is the "You should have, you could have, why aren't you, you need to become like us, you need to be normal."

When I compared those earlier times to the AFCA experience, I hear the same talk and I cringe.

And this is what I hear when AFCA speaks. YOU COULD HAVE, YOU SHOULD KNOW, YOU HAVE TO BE LIKE US.

Loud, discriminatory and offensive. "You're a poof" or "you're not normal" got swapped for "you're stupid. You should understand, you should know or you should have known. Why didn't you know? Read the information or what's wrong with you? All the information was in the documents you were given"

Obviously, said in more polite terms but the message is the same.

The lady at HRC told me that in that context, she agreed with me and the HRC would look at such a complaint.

I hate the negative attitude towards simple honest folk and how it disadvantages them.

This behaviour is discriminatory, unreasonable (the view of the FSP is often seen as more relevant than that of the Process Worker aka Labourer) and most importantly, outdated.

It is also very Eastern centric which is discriminatory. As far as I can see, all recruitment is done for jobs in Melbourne and Sydney. Why?

I suspect it's part of the phobic condition in that we want people like us working with us. Just guessing but you do have to wonder?

I do accept that the staff do not do this intentionally but it is just part of the culture. AFCA recruits people with a certain skillset as they need people who can deal with volumes of information, paper. I get that and I also accept that this creates a commonality in the culture. It also seems many of the staff have similar life experiences and so this inhibits their understanding of how others live, work and play. Many people do not have a skillset that allows them to process volumes of information; they just don't. End of story.

There needs to be an understanding of this reality by the staff. A degree of empathy.

I am aware of a complainant who, at the conciliation phone conference was told by the FSP lawyer how she had not followed the strategy properly and so the losses were their fault. The complainant tried to say they had followed the strategy and the lawyer just talked over her and kept repeating the things they should have done.

The complainant became intimidated and very nervous and so it all went pear shaped. I believe the moderator worked her bum off to protect the individual but people are already nervous so doesn't take much to unhinge them.

Problem was the lawyer was wrong and clearly didn't understand the strategy. The comments were silly. The case manager sat in on the call and sadly, believed the lawyer. So, despite providing a substantial amount of documentation proving the lawyer was wrong, the case manager kept repeating the "mistakes" the complainants had made.

This is not a case of a person being bad but more a case of inexperience backed by a certain background and skillset where it is easier to believe a hotshot lawyer than a nurse.

I can bore you with numerous other stories but I think the point has been made.

Employ some older people who have worked in different places, doing a variety of work and owning a mountain of different life experiences. They are out there. It might surprise AFCA to learn that there are people who have the capacity to handle paper and also think mechanically. We do exist. Young and older. These people understand that a Labourer does not get paper and needs to have concepts broken down into the simplest language.

This mono skillset culture with limited understanding of how others think or think differently, is an ugly stain on AFCA's credibility.

2. Process Management

It appears as there is none and no oversight of the information from the FSP. This means that horrible lies get told about the Complainants but there is no accountability from AFCA, when this happens

There have numerous situations where the FSP will make a statement about something a client has done "wrong" often to weaken the case being put forward, or so it would appear. No proof, of course. The accusation is false and the complainant provides evidence to refute the claim and nothing happens.

The FSP keeps repeating the story and the complainant has to spend time and energy repeatedly denying any wrong doing. It also seems that the case managers often don't read much of the material being put forward by the complainant. In some cases, the case manager takes the story on board and this becomes part of their assessment of the situation, as described above. This false story situation happens quite often and it needs to be stopped. It intimidates and/or frustrates the complainants making what is already an overwhelming situation, even scarier.

This is also made worse by the use of the Toll case. FSPs love it and use it every chance they get. It is a magic "get out of jail free" card as far as they are concerned. Forget that it is totally inappropriate in this situation as the preamble to the case clearly highlights. Using Toll means it all becomes the complainant's fault because they didn't read every page of the documents provided. Capacity to read and understand doesn't count. I have been told many times over the years that reading documents with lots of jargon, is like reading a French novel.

It is another ugly, ugly stain on the credibility of AFCA that nothing is being done to address this situation.

AFCA also needs to address the issue of how they assess the client's compensation. In a recent situation the FSP and the complainant had done their calculations basically using the same methodology. There was a difference of around $100k being the "But For" figure. AFCA did their calculation using a totally different method which no one could follow. The amount? Around 70% less based on the FSP amount and nearly 90% less when based on the complainant's figures. Yep. You read that right. No one at AFCA stopped to think, hmm, this is a bit too big a difference. Nope just rolled it out, errors and all.

How can an organisation which has been dealing with so many complaints over so many years get it so wrong? How can they not have a consistent, tested, fair and credible method of calculating a loss figure? How hard is it?

The FSP is obviously jumping for joy, the complainant is gutted and no one has a clue as to how AFCA worked out the end figure. There were add ins which made no sense and several costs were left out and to really add fuel to the fire it was the nurse's complaint. Yep, it was her case and AFCA included items provided, courtesy of the lawyer, in their calculations. True! Let's just completely ignore the documented information proving the lawyer didn't have a clue. If you want to mess with someone's head, that's the way to do it. The hours wasted in providing the information clearly discrediting the lawyer but no one read it, apparently! Way to go, AFCA.

AFCA needs to improve its methodology when assessing the losses a complainant has suffered, get the staff to read and/or listen to the complainants when they put forward information about the misinformation being provided by a FSP. Never use Toll or allow the FSP to do so. It is unethical.

3. Just Plain Unethical

There have been numerous occasions when a complainant would be rejected due to the time limits. They would get a letter telling them that they were outside the time limits and as there was no exceptional circumstances, nothing could be done.

In one case, the complainants wrote back to FOS to say they weren't aware of FOS so thus the delay in making the complaint. Also they had retired and were on the road, travelling around Up North. Back then there was only dial up Internet and as there are few towns and vast empty spaces, mobile communication is limited.

The adviser had kept saying they would get their money or most of it back when the market improved or when a class action settled. Not being very savvy and being on the road, they didn't think there was anything they could do. Just hope the adviser was right and it would all get sorted. He had been a Process Worker aka Labourer and she had worked in a Craft shop.

FOS replied saying that not knowing about FOS was not a valid reason. So they got a friend to knock up a letter asking a list of questions as to the basis of this decision, which are shown below:

"Please explain to me why we should have known about FOS?

How was the "not knowing" reason decided as a factor to be considered in the application of the 6 year rule?

What criteria was used to decide that "not knowing" was a valid reason to disallow a complaint?

What date was this decision made to apply this reason when assessing the 6 year rule?

Does FOS run information sessions to help the public understand your role?

If so, how many have been run in the past 5 years?

Where were they run? How many sessions were held in Remote and Rural regions across Australia?

What about advertising? Have any advertising / marketing campaigns been run in the past 5 years?

In or on what media? Newspapers? Radio? TV? Social media? What parts of Australia were included in these campaigns, if any?

If there have been no awareness programs provided to the public in the past 5 years, why not? How were the public expected to know about your organisation and what FOS did?

If there haven't been any information sessions or marketing programs provided in the past 5 years, who decided that it was fair and reasonable to have "not knowing about FOS" as a valid reason to dismiss a claim? Why?

FOS will do what in its opinion is fair in all the circumstances

To fairly determine the public's awareness of FOS and its role, was any research undertaken? Market surveys or any other kind of consumer polling?

If no polling was done, how was it determined that "not knowing about FOS" was a legitimate reason to dismiss a complaint under the 6 year rule? Surely there had to be some understanding as to how well known FOS was, as an organisation / service, out there in the real world?

Please don't tell us that no one had any idea of the level of knowledge by consumers about FOS in the marketplace. Please no.

How did such a decision fit with the stated objective by FOS of being fair, reasonable and impartial in its dealings?

Was any consideration given to the reality that, for most clients their source of information about FOS would come from the very person, their adviser, who is likely be reluctant to provide much detail about FOS given they are the potential target for a complaint?

It is this type of conflict of interest that has been a major concern of the Royal Commission!

Did FOS consider the impact on a client's potential to clearly know their options if the main source of information is the adviser?

If this matter was considered, how was it then seen as reasonable to implement the "not know is not an excuse" rule given the limited opportunities that clients seem to have in this matter, if the adviser is the main source of information?

Or was the level of consumer knowledge and understanding of FOS and its role in the community so amazingly high that it was decided it was ok to use the "not know is not an excuse" as a valid reason because everyone know about FOS?

Was FOS a brand or household name like Coke perhaps?"

The FOS response.

Nothing.

The complainant also asked another series of questions about the date decided by FOS in relation to one of the investments which had gone into receivership. There was ongoing uncertainty about the outcome of this investment but FOS chose a date as the point when a client should have known, they were going to lose their money. Trouble was it was very early in the piece. For many years, there was a lot of shenanigans that went on and it wasn't until about 10 years later that the Receiver declared no funds were available to repay anyone. So the FOS decision closed the door on any redress despite the widespread belief that there would be some recovery of funds.

Another round of pertinent questions were asked in addition to the above.

The FOS response.

Nothing.

Just plain rude! Seemingly happy to decide on a date that culls any opportunity for justice. I would call that unethical!

Not much appears to have changed other than the name!

Then we have my favourite.

Complainant is rejected due to the time limit. Complainant was in a complex structure and went to the bank to re-finance to get out. Was made aware by the bank that they could make a complaint to try to recover their losses. Started to get their paperwork organised as there was only a few months left before the time limit was up. He had a serious stroke in May 2017 and was in hospital for several weeks and then returned home still heavily affected by the stroke. Submitted the complaint just a month after the time period had expired.

Rejected. " While we are sympathetic to your circumstances, your response to our decision has not changed our view because FOS cannot consider a dispute lodged outside of FOS time frames.
While we understand that Mr 's stroke affected your ability to lodge with FOS from May 2017, FOS considers you still had the prior five years to have lodged your dispute. Accordingly, FOS is not satisfied that compelling reasons have been provided for exceptional circumstances to apply and FOS consider the dispute outside of its time limits."

FOS also note: "further, you sold all of your investments **in August 2011**. It is the very latest date at which you should have reasonably become aware of your loss as the loss had crystallised at this point."

And "Both of the above dates are more than six years before you raised the complaint directly with FSP on **15 September 2017."**

A major stroke within the 6 year timeframe is not sufficient to be considered an exceptional circumstance because the complainant had 5 years prior!!! And despite the stroke, it was only one month out of the time limit. The 5 years prior comment is just bizarre. A time limit of 6 years is a time limit of 6 years and when the stoke occurs within that timeframe, the average person would consider that to be an exceptional circumstance. It is hard to actually define this decision. Wrong is probably a good option.

AFCA were no better " With regard to previous comments made regarding the prior five years to bring the dispute, this is with respect to the timing of 's stroke. We understand this was a difficult circumstance for you, however, it is not sufficient for us under exceptional circumstances to waive our six-year time frame."

What is truly galling and makes this so offensive/unethical is that other people making complaints, also rejected, due the time limits are told:

> Although not binding on later decisions guidance can be found in previous FOS determinations. They strongly indicate matters involving jurisdiction and exceptional circumstances, where applicants have not been able to act because of physical, very difficult personal, mental health or medical issues FOS has been inclined to find exceptional circumstances exist. No such reasons are provided in your dispute.

Oh really, so while denying one complainant with a serious illness access to justice because there is no exceptional circumstance, others are being told, had they suffered a serious illness "FOS has been inclined to find exceptional circumstances exist"

To further highlight the sheer hypocrisy that was FOS and is now AFCA and why reform is so, so necessary, here is another quote:

"It is necessary for there to be some exceptional and compelling reasons. This would mean where an Applicant has been prevented and unable to act, such as, for example, because of serious physical, very difficult personal, mental health or medical issues. No such reasons are provided in your dispute."

Wow! What can one say to that?

There is a lot more examples of this behaviour, either rejections because of time limits but had a serious illness occurred it would meet the exceptional circumstances criteria. Yet if any illness is mentioned, the rejection letter trots out the so sad line about their illness but we can't help due to the time limits. This is outrageously unethical. It is just plain lying to people to suit AFCA. And why? Cheating people out of their opportunity to justice is just so wrong!

Clearly, as there is no proper oversight or Accountability, AFCA gets away with treating people with such contempt.

I shake my head in disbelief. The Govt. needs to bring AFCA to heel and implement an oversight mechanism, perhaps ASIC to stop this shabby and unethical treatment of complainants. AFCA need to change their employment processes and improve the diversity of their staff to help those with limited capacity.

And get rid of Toll.

Thank you for the opportunity to raise these issues.

Yours faithfully

Dean