SUBMISSION TO THE TREASURY REVIEW OF THE AUSTRALIAN FINANCIAL COMPLAINTS AUTHORITY (AFCA)

Introduction

Thank you for the opportunity to make a submission. I offer a snapshot of my experience of the AFCA complaint process for your consideration. The complaint will focus on the following Terms of Reference.

TERM OF REFERENCE 1 : Is AFCA meeting its statutory objective of resolving complaints in a way that is fair, efficient, timely and independent ?

TERM OF REFERENCE 1.2 : Are AFCA's processes for the identification and appropriate response to systemic issues arising from complaints effective ?

Initiation of the Complaint

On 21 January 2019, an omnibus complaint (the complaint), outlining perceived failures of by a the financial services arm of a major Australian bank was submitted. The complaint involved a superannuation fund. The complaint raised issues that potentially crossed a number of jurisdictions including the Corporations Act, the Privacy Act and Australian Consumer Law. On receipt of the complaint - before the complaint was investigated - the financial institution initiated a number of actions that could be characterised as a 'rush to remediate.' AFCA were immediately alerted to the financial institutions preemptive action via AFCA's online complaint site. In the same timeframe the Australian newspapers reported that ASIC had directed another major Australian Bank (not the subject of the complaint) to cease any action that had the potential to push customers, affected by issues raised in the Hayne review, toward new financial products without the benefit of proper advice.

Takeaway *AFCA ignored the complainants warning that the bank subject to the complaint was 'rushing to remediate' despite ASIC's very public preemptive action against another Australian Bank . AFCA let the complaint run its mandated 45 days within the banks*

IDR processes before initiating any action with respect to the bank under complaint effectively allowing the bank time to 'muddy the water'.

Internal Dispute Resolution (IDR) with the Financial Institution

The complaint was not written, or reviewed, by a lawyer. The complainant had some experience with complaint handling in the public sector but no legal training. The complaint was completely transparent and included unreacted correspondence supporting the potential cross jurisdictional issues raised by the complaint.[1] While the complaint was moving through the banks IDR process, ASIC was publicly criticising the quality of the Australian banks complaint handling processes in newspaper articles contemporaneous with the complaint.

On 27 March 2019 Mr Shipton outlined ASIC's new approach to fairness[2]. On 5 April 2019 Mr Daniel Crennan QC was quoted in the Australian Financial Review discussing ASIC's new approach to 'fairness' in legal terms[3]. In other articles Mr Crennan criticised the financial institutions over reliance on legal protections and 'black letter law' when dealing with customer complaints. Nevertheless, the actions of the bank dealing with this complaint were characterised by legal game playing including a lack of transparency, a possible lack of procedural fairness, legal jargon and the long silences and delays deliberately deployed by lawyers as part of their toolbox of negotiating tactics designed to destabilise an 'opponent' in an adversarial legal system.

Takeaway *While ASIC was on record that action would be taken against banks who deployed legal tactics, such as delay, in dealing with complaints the complainants contemporaneous representations to AFCA on the nature of negotiations underway were dismissed by AFCA. The IDR process continued to run under the command of the banks legal department for the period designated in the AFCA rules and AFCA subsequently waived away incidents of delays and legal game playing raised by the complainant as 'inefficiency'.*

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[1] The Complaint was 7 pages long and included 21 pages of original unreacted documents that were cross referenced the complaint by flags.

[2] A Speech by James Shipton ASIC Chair, Conduct Regulators Address The AFR Banking Wealth Summit (Sydney Australia) 27 March 2019

[3] *ASIC faces Fairness prosecution hurdle AFR 5 April 2019 p. 37*

AFCA Management of the Complaint

AFCA was initially reluctant to accept offers of contemporaneous documentation from the complainant. AFCA's position was that it was 'more usual' and 'easier on the complainant', if AFCA obtained documentation from the bank directly. AFCA accepted documentation from the complainant on the complainants insistence. When the bank eventually provided a copy of the complaint to AFCA, key elements of the complaint were redacted.

Despite AFCA rules permitting determinations to be made on the *balance of probabilities* AFCA consistently pressed the complainant for more documentary information, or for formal responses to the banks legal documentation, in order to reach *proof beyond reasonable doubt.* This approach was pursued despite contemporaneous public statements from the ASIC Deputy Karen Chester that *disclosure of itself does not provide fair outcomes for consumers.* [4] AFCA insistence on the primacy of legal disclosure documents throughout its assessment process ignored the academic literature, publicly endorsed by Ms Chester, demonstrating that financial disclosure was counterintuitive in respect of clients without legal or financial training[5].

Takeaway *AFCA accords priority to legal documentation obtained from the financial institutions. Offers by complainants to provide other documentary evidence - such as journal entries or records of conversations - are tacitly discouraged. Despite rules allowing assessment at a lower standard of proof, AFCA pursues a standard of beyond reasonable doubt and deliberately channels complainants toward the legal paradigm favoured by the financial institutions. AFCA is entirely comfortable that complainants, with no legal knowledge, deal , unassisted, with complex financial disclosure documentation in the course of their mediation process. This attitude, in the context of a significant power imbalance make AFCA's claims to fairness - as it is understood by ordinary Australians - moot.*

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[4] *Doing the Right Thing A Speech by Deputy Chair Karen Chester ASIC at Directors Colloquium Conversations for Corporate Board Members Sydney 30 July 2019*

[5] Professor Sah quoted by Karen Chester in *Doing The Right Thing.*

AFCA appeared to exercise no discipline with respect to requests for disclosure from the complainant. In the course of the complaint AFCA advised the complainant that a preliminary assessment on the complaint from AFCA was imminent. AFCA then transmitted a request for further disclosure to the complainant from the bank that was the subject of the complaint. The bank had total command of the complaint process for 45 days before elevation to AFCA, nevertheless the bank was still able to get AFCA to do its bidding at what should have been a summative stage of the complaint.

Takeaway *AFCA facilitates the financial institutions unfettered access to the complainant even when AFCA decision points are imminent. Academic literature dealing with regulatory capture routinely raise issues affecting disclosure as an argument against regulation. The literature argues that where regulatory capture has occurred, the consumer is better off in an unregulated environment because regulators - or in this case the regulators agent AFCA- are in a position to pressure the consumer for disclosure that it not in their legal interest.*

The complaint included potential breaches by other financial institutions in business with the bank as a result of financial product structures. AFCA was unable to process issues related to third parties involved in the complaint unless the complainant had independently tested the third party's IDR process. AFCA took the same approach to issues potentially affecting other jurisdictions. AFCA admitted that AFCA understanding of Australian Consumer Law was minimal, but offered reassurance that the omnibus complaint was within AFCA's jurisdiction despite possible cross jurisdictional issues.
The rule on third party complaints placed all of the burden of all potential avenues of reporting on the complainant - whether the complainant understood that a number of breaches has occurred across multiple agencies or jurisdictions or not. The recent determination with respect to D.H Flinders PTY V AFCA illustrates this issue. In this case the NSW court advised that the complainants only option was independent legal action making AFCA's claims to offer 'fairness' - beyond the strict legal definition - unachievable .

In the course of this complaint there were indications that the financial institution was communicating with the third party business partner on the progress of the complaint.

Takeaway *Expecting a complainant to resubmit complaints through multiple, tactical level, IDR processes across multiple agencies increases complainant stress and makes it less likely that complainants will pursue remediation. AFCA is no one stop shop. AFCA mediation facilitates linked financial institutions sharing complainant disclosures. Apart from general advice that complainant information is not to be shared, AFCA appears to have no rules (and no penalties) for situations where banks and subordinate entities share complaint information.*

Closure of the Complaint

AFCA's preliminary assessment relating to the complaint was received on 9 September 2019. After seven months mediation AFCA reproduced the financial remedy offered by the financial institution in March 2019, despite a widening the original complaint. Since the banks final offer was received in response to the complainants initial submission to the bank, AFCA's seven month process added no value.

The preliminary assessment by AFCA included no negative findings, of any sort, against the bank involved. AFCA's position during a follow up telephone discussion - initiated by AFCA - on 9 October 2019 was that a negative finding was 'implied' in the financial remedy. Consequently there was no financial compensation available without tacit agreement to 'whitewash' the bank involved. Faced with the banks fevered 'rush to remediate' and the banks opaque and legalistic dealing, the complainant, was concerned that an unreported breach of some sort had occurred. These observations were shared with AFCA. As the complainant elected not to respond to the preliminary assessment and the complaint was closed in accordance with current AFCA. No compensation was accepted.

Takeaway *Hayne was critical of ASIC settling for financial compensation while failing to call out bad behaviour by the banks but AFCA continues to process complaints with this mindset firmly in place. While the complainant was informed that systemic issues were identified by AFCA in the course of the complaint, AFCA was content to close down - what the offer of compensation confirmed - was a merited complaint. This suggests AFCA's culture,*

and current rules, are heavily focussed on performance indicators related to financial remedy and complaint closure rather than identifying, and calling out, the systemic failings of the banks or offering fairness to complainants.

Conclusion

This snapshot suggests AFCA is incapable of dealing with complaints in a fair, efficient, timely and independent manner. Based on this example, legal assistance is necessary for ordinary Australians to navigate the IDR processes of the banks. Legal assistance is also required to engage in AFCA's mediation processes for anything other than low value issues. As most ordinary Australians cannot afford protracted legal assistance the banks will continue to resort to 'lawfare' when customers complain because individual complainants cannot afford to return fire. Proposed legislation restricting class actions threatens to close off one of the few affordable legal routes to complainants. At the same time Australian newspapers are reporting stockbrokers and financial advisers failing new licensing tests in record numbers[6].

The Hayne Report characterised bank relationships with customers as a relationship between predator and prey. AFCA has done nothing to change this power dynamic. Complainants are entitled to far better protection than AFCA can provide.

[6] 'Failure Rate is going through the roof' SMH 13 Mar 21