Lawyers for the People

AUSTRALIAN LAWYERS ALLIANCE

Treasury Review of the Australian Financial Complaints Authority: Terms of Reference

Treasury AFCA Review Secretariat

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Protecting and promoting justice, freedom and the rights of the individual.

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Who we are

The Australian Lawyers Alliance (ALA) is a national association of lawyers, academics and other professionals dedicated to protecting and promoting justice, freedom and the rights of the individual.

We estimate that our 1,500 members represent up to 200,000 people each year in Australia. We promote access to justice and equality before the law for all individuals regardless of their wealth, position, gender, age, race or religious belief.

The ALA is represented in every state and territory in Australia. More information about us is available on our website.[1]

The ALA office is located on the land of the Gadigal of the Eora Nation.

[1] www.lawyersalliance.com.au.

Introduction

1. We welcome the opportunity to provide feedback in relation to Treasury's Review of the Australian Financial Complaints Authority - Terms of Reference.

2. Our responses to the questions in the Terms of Reference and Guidance for Submissions document appear below.

Responses to the Terms of Reference

Part 1 - Delivering against statutory objectives

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

3. The ALA believes, from our experience, that in the majority of cases AFCA does meet its statutory objective of resolving complaints in a way that is fair, efficient, timely and independent.

4. There are, however, a number of complaint types where this is not always the case. We provide the following examples of issues that our members have experienced, which we bring to Treasury's attention in the hope that they may contribute to the analysis of how AFCA handles such cases, through this review process.

i. In relation to professional indemnity insurers

5. It is a common experience that financial service providers (FSPs) that are members of AFCA often become deregistered or insolvent before a complainant seeks to exercise their rights to claim compensation. Once an FSP becomes deregistered or insolvent, it results in the cessation of their AFCA membership. As a consequence, any determination by AFCA in such cases would be against a non-member and thereby becomes largely unenforceable.

6. Attempts by the complainant to seek redress via the insolvent FSP's professional indemnity insurer is similarly thwarted due to the insurer also not being bound by AFCA's determinations.

7. The ALA noted this as an issue in our submission to Treasury's inquiry into the enforceability of financial services industry codes – taking action on recommendation 1.15 of the Banking,

Superannuation and Financial Services Royal Commission[2]. The context for this submission was that professional indemnity insurers are not bound by financial service industry codes of practice – but the outcome for the complainant is the same. We wrote:

> There have been many victims, particularly in relation to negligent financial advice, who have lost significant sums of money and often their retirement savings, and who then have to deal with the professional indemnity insurer of a financial services entity.
>
> The professional indemnity insurer is not a signatory to any code of practice and in our experience conduct themselves in a manner designed only to minimise claims. This is contrary to the whole purpose of professional indemnity insurance. That is, when a financial services provider makes a mistake that causes a consumer to suffer loss, the professional indemnity insurer is supposed to exist so as to ensure that the consumer is put right.
>
> In our experience that is rarely the case, and professional indemnity insurers, who aren't subject to the relevant code of practice, act as hard-nosed defendants.

8. The ALA argues that, in a similar way, professional indemnity insurers should be required to be party to AFCA determinations, as a means for claimants to achieve justice.

9. We note that this was also a recommendation made by the Senate Select Committee on Legal and Constitutional Affairs in its report into its inquiry into the resolution of disputes with financial service providers within the justice system.[3]

10. In Maurice Blackburn's submission to that inquiry (and as cited in paragraph 2.71 of the Committee's report),[4] they wrote that:

> …professional indemnity insurers [for financial service providers] should be members of AFCA so as to be subject to its determinations. That would be consistent the common

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[2] Australian Lawyers Alliance, Submission to Financial Services Reform Taskforce, The Treasury, *Enforceability of financial services industry codes – Taking action on recommendation 1.15 of the Banking, Superannuation and Financial Services Royal Commission* (12 April 2019) para 11 <www.lawyersalliance.com.au/documents/item/1546>.

[3] Senate Legal and Constitutional Affairs Committee, Resolution of disputes with financial service providers within the justice system (Web Page, 2019) <www.aph.gov.au/Parliamentary_Business/Committees/Senate/Legal_and_Constitutional_Affairs/banksandlegalsystem>.

[4] Maurice Blackburn Lawyers, Submission No 47 to Senate Legal and Constitutional Affairs Committee, Inquiry into the Resolution of Disputes with Financial Service Providers within the Justice System (March 2019) p.13 <www.aph.gov.au/DocumentStore.ashx?id=81892c25-9849-43fd-8bf3-37c62487d119&subId=667124>.

law doctrine of 'direct recourse' and the statutory regimes which enable a claimant to look beyond the insured wrongdoer and seek recovery directly from the relevant professional indemnity insurer.

11. Recommendation 8 of the report from that inquiry reads:

> The committee recommends that the Australian Government extend the membership of the Australian Financial Complaints Authority to:
>
> - debt management firms;
> - registered Debt Agreement Administrators;
> - 'buy now pay later' providers;
> - FinTechs and emerging players;
> - small business lenders; and
> - professional indemnity insurers of financial service providers.

12. We submit that, in this way, AFCA is not meeting its statutory objective of resolving complaints in a way that is fair, efficient, timely and independent. It is too easy for an FSP to rescind its membership of AFCA, leaving consumers without redress. The potential for the FSP to engage in subsequent phoenix type behaviour is very real.

13. This practical issue of recovery might be ameliorated by the eventual introduction of a compensation scheme of last resort (CSLR):

    - according to AFCA, ‘the need for a CSLR is separate to considerations of professional indemnity’;[5]

    - also according to AFCA ‘there is a need for a CSLR to cover loss where PI will not respond’.[6] These circumstances include fraud, amounts above PI limits and other situations where PI does not provide coverage or is not available;

[5] Australian Financial Complaints Authority, *Submission to Treasury: Discussion Paper - Establishing a Compensation Scheme of Last Resort* (Discussion Paper, February 2020) 4 <www.afca.org.au/media/707/download>.

[6] Ibid.

- until such long awaited reforms are actually implemented, there remains (in the words of AFCA[7]) ‘a major gap in protection for consumers of financial services’.

14. Hence before looking to any CSLR, the professional indemnity insurer should be held responsible for payment, just as it would be if the insured FSP had claimed under its professional indemnity policy. If that fails, which may occur for example because the claim would not have been covered, then any CSLR should be enlivened.

15. Without access to recourse via the defunct FSP’s professional indemnity insurer, AFCA cannot fulfil its statutory objective.

ii. In relation to business interruption insurance

16. The ALA is concerned that the general insurance industry is seeking to delay the payment of Business Interruption insurance claims for as long as possible, pending the outcomes of test cases. Part of this delaying process includes taking a litigious approach to any and all relevant issues.

17. We note that the industry has recently announced a further test case,[8] separate to their unsuccessful test case in the NSW Court of Appeal in relation to issues related to the *Quarantine Act 1908* [9] which found in favour of insureds.

18. In our view, AFCA should fulfil its mandate by administering decisions based on the law of the day, even if test cases are foreshadowed or pending. To effectively say: ‘We’re responding this way because we’re expecting the law to change’ is not, in our opinion, an exemplar of resolving complaints in a way that is fair, efficient or timely.

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[7] Australian Financial Complaints Authority, ‘AFCA responds to compensation scheme of last resort consultation’ (Media Release, 5 February 2020) <https://www.afca.org.au/news/media-releases/afca-responds-to-compensation-scheme-of-last-resort-consultation>.

[8] See for example: Insurance Council of Australia, ‘Business Interruption Update’, *BI Test Case* (Web Page, 16 March 2021) <www.insurancecouncil.com.au/issues-submissions/bi-test-case>.

[9] See for example: Marsh, ‘COVID-19 Australian Business Interruption Test Case Ruling’, *Research & Briefings* (Web Page, 2021) <www.marsh.com/au/insights/research/covid19-business-interruption-test-case-australia.html>.

19. In that regard, there is no guarantee that:

- these further purported test cases will be resolved in any particular timeframe and will likely be subject to a further Appeals process as is the case for the *Quarantine Act* case. Indeed, at this stage, they will not be resolved until the second half of 2021 at the earliest given the next 'case management hearing' will be held after 18 June 2021;[10]

- all Australian General Insurers will agree to be bound by these test case outcomes where they are not parties to the proceedings and have differing policy language to the language being adjudicated on.

20. If it is AFCA's practice to delay business interruption insurance cases due to pending outcomes of test cases, we are not aware of any provision in the rules which requires such an approach.

21. We are concerned that, as a result, a number of insureds with meritorious claims will simply walk away and decide not to pursue their entitlements.

22. Delaying decisions causes unnecessary stress and anxiety for insureds, especially for small business owners who have suffered badly during the COVID-19 pandemic.

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

23. The ALA draws Treasury's attention to two specific parts of AFCA's current processes in which they do not provide predictable and quality outcomes.

i. In relation to interpretation of s.1055 of the Corporations Act

24. We draw Treasury's attention to s.1055 of the *Corporations Act 2001* ('the CA'), specifically section 7 (limitations on determinations). We believe that AFCA has misinterpreted s.7(c).

25. Section 7 reads as follows:

> (7) AFCA must not make a determination of a superannuation complaint that would be contrary to:

[10] Insurance Council of Australia, 'Frequently Asked Questions, *BI Test Case FAQs* (Web Page, 16 March 2021) <www.insurancecouncil.com.au/issues-submissions/bi-test-case/bi-test-case-faqs>.

(a) law; or
(b) subject to paragraph (6)(c), the governing rules of a regulated superannuation fund or an approved deposit fund to which the complaint relates; or
(c) subject to paragraph (6)(d), the terms and conditions of an annuity policy, contract of insurance or RSA to which the complaint relates.

26. The *Insurance Contracts Act 1984* ('the ICA') provides consumer protections that in some instances make it unlawful for a superannuation fund or insurer to apply the express and literal language in a policy of insurance.

27. For example, s.14 of the ICA makes it unlawful for an insurer to rely on a clause where it would be a breach of the duty of Utmost Good Faith to do so.

28. A further example, s.54 of the ICA makes it unlawful for an insurer to refuse a claim on the basis of an act or omission by the insured or a third party that did not contribute to the loss claimed. Rather, in these circumstances, the insurer's remedy is limited to the prejudice it has suffered due to the act or omission.

29. AFCA seems to refuse to apply the consumer protections enshrined in the ICA (ie, the law) when dealing with the terms of a superannuation insurance policy. In our experience, they will only apply it in its literal form.

30. We submit the following case study, provided by one of our members, as an example of this practice:[11]

> Our client – the complainant - has held a superannuation account with the trustee since 1 May 2017.
>
> His account includes default insurance cover for death and total and permanent disability assist (TPDA). He also successfully added income protection (IP) cover when he joined the fund. The complainant's insurance cover started on 21 June 2017 when the trustee received his first employer contribution.
>
> The complainant lodged TPDA and IP claims for neck pains due to a musculoskeletal injury following an accident on 25 March 2017.

[11] Case No. 748581, 755065.

The trustee and insurer declined these claims on the basis that he held ‘limited cover’ excluding pre-existing conditions, because his find membership did not commence within 120 days of starting work.

The complainant argued that the delay in the first employer contribution was an omission by the employer that enlivens s.54 of the ICA in that it did not contribute to the loss or prejudice the insurer.

In its Recommendation, AFCA decided in favour of the insurer and trustee, stating that Section 54 of the ICA is not applicable in the complainant’s circumstances pursuant to s.1055(7)(c) of the CA. It specifically stated that:

> ‘Noting that AFCA cannot make a determination contrary to the contract of insurance, I am satisfied section 54 of the ICA does not assist the complainant.’

31. The ALA submits that this represents a flawed approach, and is indeed inconsistent with s.1055(7)(a). Given that subsection (a) (the ‘law’) comes before subsection (c) (the ‘terms and conditions of a contract of insurance’), it should be given legal priority by AFCA.

32. In other words, we submit that if AFCA makes a determination which involves a strict application of the terms and conditions of the policy, but which offends or ignores a statutory provision of the ICA (such as s. 14 or s. 54) or another statute (such as anti-discrimination legislation), then that Determination has been made contrary to law. This cannot have been the intent of Parliament when enacting s. 1055(7).

33. The ALA urges Treasury to recommend that regulatory guidance be produced on the interpretation of s.1055, to prevent what we believe is a clear misapplication of that section by AFCA. It would appear that it is impossible for AFCA to produce consistent, predictable and quality outcomes in such cases without such formal guidance.

ii. In relation to awarding capital losses in lending matters

34. Dispute resolution processes are currently inconsistent in the treatment of damages for capital losses experienced as a result of poor lending processes.

35. We strongly endorse the implementation of the ‘but for’ approach – that beneficial assumptions should aim to return the consumer to a position that they would be in ‘but for’ the inappropriate actions of the FSP.

36. At present, we are aware of a number of major banks whose approach to responsible lending breaches under the *National Consumer Credit Protection Act 2009* (the NCCP), including through their remediation programs, do not operate under this approach.

37. In our experience, banks generally limit quantified losses for proven lending breaches to a repayment of the interest paid (less any benefit received such as rental income). Their compensation methodology does not include any capital losses suffered by the forced or voluntary sale of the security property, being a property that would not have been purchased 'but for' the responsible lending breach.

38. This is especially significant for consumers who purchased properties using irresponsibly loaned funds in locations where property values have decreased due to factors outside their control, such as the end of the mining boom.

39. ALA members have had clients whose property value has decreased during the course of a review. In such circumstances, for those consumers to achieve an outcome based on 'but for' assumptions, they should be compensated for the decrease in capital value. Without such compensation, consumers are left to meet the capital losses, often leading to bankruptcy.

40. The approach we advocate is entirely consistent with the remedies available under s.178 of the NCCP which allows for the payment of compensation for loss or damage which has resulted from the contravention of a civil penalty provision or offence.

41. It is also consistent with the Common Law where courts have interpreted similar provisions in other Acts[12] to mean that the loss or damage which is caused by the contravening conduct can be recovered, and that the contravention of an Act only needs to be a cause of the loss or damage sustained, not the sole cause of the loss or damage[13]. It is sufficient to show that the contravening conduct materially contributed to the loss or damage.[14]

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[12] *Corporations Act 2001* (Cth) s 1041I; *Competition and Consumer Act 2010* (Cth) s 82, Schedule 2 s 236; *Australian Securities and Investments Commission Act 2001* (Cth) s12GF.

[13] *Wardley Australia Ltd v Western Australia* (1992) 109 ALR 247; *I & L Securities Pty Ltd v HTW Valuers (Brisbane) Pty Ltd* (2002) 210 CLR 109 at [57].

[14] *Henville v Walker* (2001) 206 CLR 459.

42. In our experience, it is likely that a court will make an order in favour of wronged consumers for at least the amount of compensation for the capital loss suffered on the property, due to the FSP's contravention of the NCCP.

43. We believe that this will become more important for consumers as we head into a period of significant debt hardship that will correspond with COVID debt holidays ending, combined with the maturation of years of accumulated interest only loans.[15]

44. ALA members have advocated for ASIC to be prescriptive about this in RG 256.

45. We submit that AFCA also plays an important role in ensuring that the inclusion of beneficial assumptions which take capital loss into account in the compensation methodology would help satisfy this principle.

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

46. An essential part of AFCA's role is to identify systemic issues, by recognising and articulating trends in the complaints it receives with the relevant FSP.

47. Section A.17 of the AFCA Rules[16] clearly articulates this process. Rule A.17.3 tells us that:

> If AFCA identifies a systemic issue as a result of its investigation, it will:
>
> a) refer the issue to the relevant Financial Firm for remedial action;
>
> b) obtain a report from the Financial Firm as to the remedial action undertaken; and
>
> c) continue to monitor the matter until a resolution has been achieved that is acceptable to AFCA

48. Rule A.17.5 goes on to say:

> In accordance with the Corporations Act, the Privacy Act and any other relevant obligations, after identifying a systemic issue AFCA must report the issue to:

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[15] Tony Ibrahim, 'As deferrals end for 450,000 mortgages, APRA sends banks a warning', *RateCity* (Web Page, 23 September 2020) <https://www.ratecity.com.au/home-loans/mortgage-news/deferrals-end-450-000-mortgages-apra-sends-banks-warning>.

[16] Australian Financial Complaints Authority, *Complaint Resolution Scheme Rules* (Document, 13 January 2021) 20 <https://www.afca.org.au/media/1111/download>.

a) ASIC,

b) the Australian Prudential Regulation Authority,

c) the Commissioner of Taxation,

d) the Office of the Australian Information Commissioner, or,

e) any other appropriate body

49. AFCA's capacity to know if there has been a serious/reportable contravention/systemic issue so as to report it as per Rule A.18 is predicated by its jurisdiction over complaints involving its members. Put simply, without jurisdiction to see what an FSP member is up to, AFCA cannot fulfil its oversight and reporting mandates.

50. Under the heading 'Exclusions applying specifically to investment complaints including Superannuation Complaints', Rule C.1.5[17] tells us that:

> AFCA must exclude:
>
> a) A complaint solely about the investment performance of a financial investment, other than a complaint concerning non-disclosure or misrepresentation.
>
> b) A complaint relating to the management of a fund or scheme as a whole.
>
> c) A complaint against the trustee of a Self Managed Superannuation Fund in respect of their conduct as trustee of that fund.
>
> d) A complaint relating to the management as a whole of a RSA Provider or insurer, the RSA Provider's or insurer's business or the RSA Provider's or insurer's investments.
>
> For the avoidance of doubt, rules C.1.5 (a), (b), and (d) apply to a Superannuation Complaint.

51. The existence of Rule C.1.5(b) creates a jurisdictional hurdle. This rule excludes some complaints that would indicate a reportable systemic problem.

52. Consider the following case study, supplied by one of ALA's members:

> Our client made a successful claim for TPD against the insurance product within her superannuation fund. The insurer, without the permission of our client, paid the benefit into a market linked superannuation product.

[17] Ibid, 34 (our emphasis).

> In normal practice, TPD claims are usually paid into a cash option until specific advice is received from the client. By the very nature of total and permanent disability, the TPD payment is likely to be the only source of funds available to the client into the future. It is therefore not something you are likely to subject to risky investment strategies, at least not without first obtaining strategic personal investment advice.
>
> The AFCA process case manager assigned to the case indicated that they might consider excluding the complaint on the basis of Rule C 2.2, reasoning that the fund says it acted in accordance with its business practice.

53. The ALA argues that this is an inappropriate application of the rule.

54. If AFCA is going to have exclusionary provisions directed towards general member policy and process, then its role as the eyes and ears of the corporate regulators in detecting systemic issues is hobbled.

55. The ALA submits that the grounds for AFCA to exclude a claim are currently too broad. Its mandate should be focused on all complaints – even where those complaints relate to a policy or process that impacts multiple members.

56. This is in keeping with the Common Law position.

57. In the above case study, while the Trustee's policy does not apply exclusively to that individual, that dispute does exclusively concern its application to that client. The Courts have clearly held that such complaints do not stray into the realms of complaining about the fund as a whole.

58. For example, *in Merkel v Superannuation Complaints Tribunal*:[18]

> As Young J pointed out in Vision Super, the fact that a complaint is about how the particular account of a member was dealt with is of the greatest significance in ascertaining whether that complaint relates to the management of the fund as a whole. **The fact that a trustee has dealt with other members in a similar way is of no significance. It must follow from this that the fact that a trustee has a rule or policy applying to a class of members, or perhaps even to all members, and has acted in accordance with that rule or policy, could not be relied on to establish that an individual complaint relates to the management of the fund as a whole.** The notion that a rule or policy of general application may be unfair and unreasonable in its application to a particular case is commonplace. Ms Merkel's case provides a prime example of a case in which the Tribunal could find that the operation of a universal rule

[18] [2010] FCA 564.

> or policy was unfair or unreasonable. Even if it be accepted that the rationale of the rule or policy was to prevent loss to a member's benefits after the member's death, because of a downturn in investment returns, that rationale was clearly absent in the present case. Because the rule or policy had not been applied at an early date after his death, the amount standing to Mr Merkel's credit in his account appreciated substantially up to the point at which the rule or policy was applied. The result of its application was to deprive Ms Merkel of much of that appreciation, and to provide a windfall to other members that would not have accrued to them if Mr Merkel had remained alive. In those circumstances, the complaint that the application of a rule or policy to the particular case was unfair or unreasonable was manifestly one relating to the interests of the individual member, and not to the management of the fund as a whole.[19]

59. Reports made by AFCA to the regulators are not published for consumer information. AFCA Annual Reports note the number of systemic issues reported to regulators, but not the nature of those matters.[20]

60. The ALA submits that Treasury should consider the above issues in determining the effectiveness of AFCA's processes for the identification and appropriate response to systemic issues arising from complaints.

1.3. 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? Please provide specific examples or case studies to support your responses.

61. The ALA makes no specific recommendations in relation to funding and fee structures. We believe that others are better placed to respond to such matters.

62. We do note, however, that transparency is of paramount importance in consumer protection. We urge Treasury to satisfy itself that access to fee level information is appropriate.

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[19] *Merkel v Superannuation Complaints Tribunal* [2010] FCA 564 [58] (our emphasis).

[20] See for example: Australian Financial Complaints Authority, *Annual Report 2019-20: Working with consumers, small businesses and industry to resolve and reduce financial disputes* (Report, November 2020) 69 <https://www.afca.org.au/sites/default/files/2020-11/Annual%20review%202019-20%20.pdf>.

Part 2 - 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? Internal review mechanism

63. ALA members do not regularly practice in the areas of primary production, agriculture, fisheries or forestry. However, we offer the following insights as general commentary on the issue of jurisdictional limits.

64. AFCA Rules section D.421 sets out the monetary limits for complaints other than Superannuation Complaints. The tables set out two limitations placed on AFCA:

- Maximum compensation payable per claim
- Monetary restriction on AFCA's jurisdiction

65. It is difficult to understand the logic of this approach. We question why there should be a second-tier monetary restriction cap at all, and encourage Treasury to do so as well.

66. The monetary cap may encourage consumers to reduce their claim in order to have it processed via AFCA. We question why consumers should be encouraged to limit their compensable amount to the cap, and why the system should not encourage them to go for the real/actual/entitled amount? To us, this seems unnecessary and unfair. It merely forces consumers into litigation if they want to enforce their rights.

67. AFCA's compensation limit for indirect financial loss and non-financial loss is currently capped at $5,400.[22] The ALA submits that this cap is too low to provide any meaningful compensation to consumers who have suffered as a result of misconduct or illegality by FSPs, and may also create a disincentive for a consumer to pursue their claim through AFCA rather than issuing court proceedings.

68. We know that courts can and do award compensation for indirect financial loss (see paragraphs 41 to 43 above) and, in particular cases, will also award damages for non-financial

[21] Ibid, 40 and 41.

[22] Australian Financial Complaints Authority (n 16) para. D4.1.

damage suffered by a consumer, such as stress, anxiety, mental anguish, personal insecurity and distress.

69. For example, in the case of *Newman v Financial Wisdom Ltd* [2004] VSC 216 Mandie J noted:

> As to stress and anxiety, Mr Duncan said in his witness statement: 208. The stress that my involvement with Sentinel and Pamacorp has created has been enormous. At the time that I first went to meet with Mr Healy and Mr Quarrell, I had a good job, earning a high wage, an excellent credit rating and I was well on the way to setting myself up financially for retirement. Now at the age of 61, I am under a Part X arrangement pursuant to the Bankruptcy Act ... 218. Since that time, I have spent every bit of my spare time seeking to prove my innocence to the ATO and to seek compensation for my losses through Corrs Chambers Westgarth. This included every day that I was not flying my trips at Ansett, holidays from Ansett, and all public holiday periods. Mr Duncan has been subjected to enormous stress and anxiety… In my view, Mr Duncan is entitled to an award in the circumstances of $15,000 as against Financial Wisdom which I have held to be liable for virtually all of his investment losses.

70. The ALA believes that empowering AFCA to award adequate compensation for non-financial damage is important for two reasons:

    a. It provides an acknowledgement to the consumer that the full scope of the consequences suffered by them as a result of the actions of the FSP have been recognised by AFCA when considering the most appropriate way to compensate them, and that an award in their favour is not just a pure 'accounting exercise' intended to only compensate them for their measurable financial loss whilst ignoring the very real and often profound emotional impacts of that conduct; and
    b. It can contribute to the overall deterrent effect to FSPs and their professional indemnity insurers (particularly now that, under the AFCA Rules, AFCA can name FSPs in its Determinations) against engaging in misconduct or refusing to meaningfully engage with complaints made by consumers well before they reach an AFCA Determination.

71. This topic was also discussed at length in the report of the Senate Select Committee on Legal and Constitutional Affairs' inquiry into the resolution of disputes with financial service providers within the justice system.[23]

72. Recommendation 7 of that report reads:

[23] Senate Legal and Constitutional Affairs Committee (n 3) paras 2.77 to 2.87 <https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Legal_and_Constitutional_Affairs/banksandlegalsystem>.

Recommendation 7

The committee recommends that the Australian Government:

- increase the current compensation cap available to consumers through the Australian Financial Complaints Authority (AFCA) to $2 million, including for credit, insurance and financial advice disputes; and
- remove the sub-limit on compensation available to consumers through AFCA for indirect financial loss and for non-financial loss.

73. The ALA encourages Treasury to endorse those recommendations.

Part 3 - 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?

74. The ALA perceives the role of Independent Assessors as equivalent to an Internal Dispute Resolution (IDR) process.

75. Rule A.16.2 tells us:

> Where a party to a complaint expresses dissatisfaction to AFCA about its complaints service, AFCA must respond to the person within a reasonable timeframe. If that person remains dissatisfied after receiving that response, they may refer their concerns to the Independent Assessor within the timeframe specified in the Independent Assessor's Terms of Reference

76. The onus, therefore, is on the consumer to make the referral.

77. The ALA submits that it should be sufficient for the consumer to express dissatisfaction, for AFCA to then be required to make the referral to an Independent Assessor.

78. We note that ASIC's Internal Dispute Resolution Guide (RG 271)[24] broadly defines 'complaint':

[24] Australian Securities & Investments Commission, *Internal dispute resolution* (Regulatory Guide, July 2020) <https://download.asic.gov.au/media/5720607/rg271-published-30-july-2020.pdf>.

> [An expression] of dissatisfaction made to or about an organization, related to its products, services, staff or the handling of a complaint, where a response or resolution is explicitly or implicitly expected or legally required.[25]

79. The ALA submits that the test for referral by AFCA to an Independent Assessor should be similarly broad.

80. It should not be expected that consumers know and recite back to AFCA the language required to request that a matter be referred to an Independent Assessor. A lay consumer not armed with the required referral language should not be denied procedural fairness.

Part 4 - 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?

i. The starting point for a Determination

81. Under current arrangements, a case manager will write a Recommendation. That Recommendation only applies if both parties accept it. If not, the matter is referred to an Ombudsman who writes a Determination.

82. In our experience, in making Determinations, AFCA has as its starting point asked itself whether the Recommendation was inadequate, and should be overturned. That is, whether it should confirm or change its first decision, rather than to look at the matter afresh.

83. See for example the Determination in Case Number 530878 which annexed a copy of the Recommendation and stated: *"The findings and the reasons set out in the recommendation are correct and are adopted in this determination"*[26].

84. We believe that this is an inappropriate procedural starting point. The AFCA decision maker is not acting as an appellate judge conducting a merit review of the Recommendation.

[25] Ibid, 13, para 271.27.

[26] Australian Financial Complaints Authority, *Determination – Case number: 530878* (Document, 29 May 2019) <https://service02.afca.org.au/CaseFiles/FOSSIC/530878.pdf>.

85. Instead, a Determination should reflect a genuinely open minded and objective de novo decision by AFCA, not one where the complainant is required to move AFCA from the position it had taken in the first decision.

86. The ALA urges Treasury to consider statutory or other measures to ensure the independence of Determinations from earlier case management opinions.

ii. In relation to the addition of an internal mechanism where the substance of its decision can be reviewed

87. The ALA does not believe that adding a further layer of review within the AFCA system is either necessary or appropriate.

88. We believe that instead what is needed is greater accountability at the judicial review level, which currently only exists in very limited circumstances, for non-superannuation matters.

89. Prior to the introduction of AFCA, the Superannuation Complaints Tribunal (SCT) model was the most accountable model as its decisions could be appealed for review by the Federal Court on a question of law, and there were many examples of successful appeals by consumers where the Court found that the decision maker had erred and then either remitted the matter back for redetermination or decided it anew.

90. Against this background, AFCA Determinations of Superannuation Complaints (as set out in s.1053 of the CA) remain appealable on a question of law. We broadly support that model as it is critical for fairness and comparability of outcomes.

91. However all other disputes have extremely limited possibilities for judicial review, which we argue is a cause for great concern.

92. Indeed, even where it can be clearly established that the Determination was in error, a Court may be unable to intervene.

93. Pre AFCA, courts had held that the only grounds on which claimants can generally appeal from a FOS determination is where there is bias, bad faith, or where the decision was so unreasonable that no reasonable decision maker could make it ("Wednesbury" unreasonableness).

94. All grounds are onerous and difficult for claimants to demonstrate, evidenced by the leading cases on the issue:

(1) *Mickovski v FOS Ltd & Anor*.[27]

The Applicant had lodged a Dispute with FOS against a decision made by the FSP, a life insurer, to cease paying him income protection benefits. The insurer had unilaterally altered the contract to provide that if an insured was eligible for payment of TPD, their IP entitlement would cease. They then accepted the Applicant TPD claim without notifying him first of the alteration to the policy.

FOS decided that his Dispute was out of time having been lodged more than 6 years after the Panel said he ought to have been aware of his loss, and therefore excluded it.

The Court found that the Panel chair erred in law in his construction of clause 14.1(p) of the Terms of Reference as it existed then, which specified that FOS could not deal with Disputes lodged more than 6 years after the Applicant was aware of the loss, however that did not vitiate FOS�someone"s decision.

The Panel Chair believed that the Applicant could not succeed in his claim because of the wording of the policy, therefore FOS did not have jurisdiction to determine whether it could succeed. The Court held as follows:

> In one sense, the Panel Chair's error may be described a jurisdictional error in that it went to the question of whether FOS had jurisdiction under clause 14.1(p) to determine the dispute in the circumstances which obtained. In the sense which matters for the purposes of clause 15.3 [which provides that the decision of the Panel Chair is final], however, it was not a jurisdictional error but rather an error made in the exercise of jurisdiction or more accurately within the ambit of decision-making power conferred on the Panel Chair by clause 15. That is to say, the Panel Chair was not guilty of fraud or lack of good faith; he was not prejudiced; and he did not misconceive the task which he was required to undertake. He simply made an error in the process of reasoning which he adopted in the execution of his decision making responsibility.

The Court accordingly held that error, although it was an error of law, was not reviewable, and the Applicant failed.

[27] *Mickovski v Financial Ombudsman Service Limited & Anor* [2012] VSCA 185.

(2) *Goldie Marketing Pty Ltd & Ors v FOS Ltd & Australian and New Zealand Banking Group Ltd*.[28]

In this case, the First Plaintiff was a manufacturing company that had lodged a dispute with FOS regarding the provision of financial facilities by the Second Defendant to it, totalling over $8,000,000.

The other Plaintiffs, directors of the company, were guarantors. The Dispute was lodged because the Plaintiffs defaulted on the loans and the Second Defendant cancelled the facilities.

FOS made two decisions to exclude the Dispute:

1. in April 2014, because the Dispute was outside the Terms of Reference because the First Plaintiff was not a small business in the terms of Terms of Reference; and

2. in November 2014, that a Court was a more appropriate forum, pursuant to Terms of Reference clause 5.2(a).

The Plaintiffs challenged the decision made in November 2014 in view of a conversation they had with one of FOS's Ombudsmen, on 22 October 2014. The Plaintiffs recorded that conversation in which the Ombudsman said that FOS had a temporary staff shortage which meant it did not have the resources to deal with the Dispute and that was why it was excluded.

That was contrary to a file note and written reasons provided by the Ombudsman, which provided a number of other reasons including a lack of in-house expertise, that FOS could not take statements from witnesses nor require third parties to produce documentation, that the Plaintiffs had legal representation so could be assisted through Court, and because of the compensation cap. The Ombudsman did not deny that the file note did not accurately reflect the conversation.

Despite these factual circumstances, the Court found that the reasons provided by FOS or even simply staff shortages were sufficient for it to exercise its jurisdiction to exclude the dispute because FOS's discretion was very wide.

The Court concluded that a decision of FOS could only be disturbed if FOS acted in bad faith, was biased, or the decision was so unreasonable that no other decision make could have come to that decision.

[28] [2015] VSC 292.

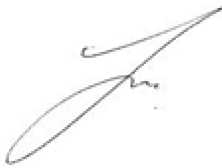
95. Because AFCA inherited the FOS process, this jurisprudence remains relevant, and the difficulties still exist for consumers. In fact, this limited scope for judicial review of AFCA Determinations was recently confirmed by his Honour Justice Applegarth of the Supreme Court of Queensland in the matter of *Investors Exchange Ltd v AFCA & Anor* [2020] QSC 74.

96. The ALA urges Treasury to consider legislating for broader, more uniform access to judicial review of AFCA decisions.

Conclusion

97. The Australian Lawyers Alliance (ALA) welcomes the opportunity to provide feedback in relation to Treasury's Review of the Australian Financial Complaints Authority - Terms of Reference.

98. We would be delighted to discuss the matters raised in this submission in more detail with the Treasury team, if that would be beneficial to the review.



Josh Mennen

On behalf of the Australian Lawyers Alliance Superannuation and Insurance Special Interest Group