From:	Steve Palyga
To:	AFCA Review
Cc:	[redacted]
Subject:	Submission to "Review of the Australian Financial Complaints Authority - Terms of Reference"
Date:	Monday, 1 March 2021 4:18:35 PM

The Director
AFCA Review Secretariat
Financial System Division
Treasury
Langton Cres
Parkes ACT 2600

Dear Director

I am a director of a finance company, and have been for over 35 years. However, I am lodging this submission in my personal capacity, and the views expressed in this submission are personal views.

I would like to address the key question raised in the above Review, namely: "Is AFCA meeting its statutory objective of resolving complaints in a way that is fair, efficient, timely and independent?"

In my submission, in one respect, it is not meeting that objective.

AFCA charges significant fees to financial firms involved in complaints, and whether they win, lose or draw.

AFCA does so even if it dismisses a meritless complaint at an early stage. That is plainly unfair to the financial firm.

Example:

The financial firm of which I am a director was recently the subject of an AFCA complaint. [Full details of the case, including the names of the complainant and the financial firm, and the number of the AFCA complaint, as well as a copy of the AFCA ruling, are available on request. The amount of the complainant's debt still outstanding at the time of the complaint was about $1,100.00].

The complaint was that the financial firm had "debited our debit card without any of our consent & permission." The complainant not only claimed this was done without consent, but also without his knowledge, elsewhere stating that XY had "obtained and used my debit/credit card details without my knowledge & consent". You will appreciate that that is a most serious accusation, namely the illegal use of credit card details.

Fortunately, the financial firm could disprove this brazenly false claim outright by producing an email from the complainant to his broker, which he sent in response to the broker providing him with the premium funding contract. In that email, the complainant provided his credit card details and stated: "Pls process first and all ongoing payments through this credit card".

Inevitably, AFCA's assessment was in favour of the financial firm, ruling that the complainant had provided his credit card details with the specific intention that it be debited with payments to the financial firm.

The financial firm was then charged $2,130.00 by AFCA for its handling of this complaint.

The financial firm then submitted to AFCA:

> *We request that AFCA's charges be waived in this case because the complainant knew the complaint to be dishonest, hopeless and spurious, but lodged it solely for the purpose of "gaming" the AFCA process, that is, to force [the financial firm] to "give up", and walk away from the complainant's debt on the basis that it*

would cost more to oppose the complaint.

[The financial firm] in fact did consider doing that, i.e. walking away and writing off the complainant's debt, for that very reason of the costs associated with opposing the complaint, but ultimately decided that the complainant's conduct was so blatantly fraudulent and egregious that [the financial firm] must necessarily disprove it.

The complainant knowingly fraudulently represented that he had not given permission for [the financial firm] to debit his credit card, which was completely debunked because, fortunately, [the financial firm] was able to produce incontrovertible evidence that that claim was fabricated, namely an email which the complainant himself sent providing his credit card details and specifically authorising [the financial firm] in writing to debit that credit card with payments due.

In those circumstances, it is appropriate for AFCA to waive the AFCA charges.

AFCA refused to do so in a ruling which simply focused on whether the technical requirements for a complaint lodgment had been met. It responded:

Your email was forwarded to me for review of whether the fee applicable to the above case was applied correctly and in line with AFCA's process. While I note that it is your opinion that the complainant knew the complaint was "dishonest, hopeless and spurious", the complaint was deemed to fall within AFCA's Rules and this was communicated to [the financial firm] on 10 November 2020 (attached)

I have reviewed AFCA's records and note that the Preliminary Assessment fee applicable to this complaint is correct. The complaint fee for a particular complaint is based on the stage in the process at which the complaint is resolved and the complexity of the complaint if it progresses beyond the initial investigation stage.

The complaint progressed to Case Management Level 1 (CM1) status on 28 October 2020. As AFCA was satisfied that the complaint was within our rules to investigate as detailed above, the complaint ultimately remained unresolved and progressed to Preliminary View status on 24 December 2020 and was closed on 25 January 2021 after AFCA provided its assessment of the complaint to both parties. While I acknowledge that AFCA's assessment of the complaint was in [the financial firm]'s favour, this has no bearing on the case fees.

AFCA's process is designed to provide a fair outcome to all parties and a part of this process includes the need for AFCA to form an assessment or issue a determination on a complaint where the parties are unable to reach an agreed resolution.

Based on my review of AFCA's records, the complaint correctly progressed through AFCA's process after it remained unresolved.

It is simply not fair to a financial firm that it should be charged a large fee by AFCA in the case of a plainly meritless complaint. Indeed, true "fairness" would demand that the complainant pay, not only AFCA's costs, but also the costs of the financial firm in defending the allegations in such a complaint.

Such is not only "fair", but also the fundamental policy applied in judicially resolved disputes in the English law world for centuries. It has also been re-endorsed not long ago by the High Court of Australia. See *Oshlack v Richmond River Council* (1998) 193 CLR 72 at [67], where it was noted that "fairness" dictated that the unsuccessful party to litigation bears the liability for the costs of

the litigation, and reiterated that this was an "important principle".
In terms of AFCA's processes, there is of course a competing consideration, namely the very clear and very important policy of the enabling legislation that the AFCA scheme be free to consumers.
Nevertheless, that principle does not preclude AFCA from waiving its fees in an appropriate case. Indeed, that is required even more so as a matter of fairness to a financial firm subjected to a meritless complaint if it is to bear the burden of its own costs associated with dealing with that complaint.
Accordingly, there should be a discretionary power given to AFCA to waive the fees to be paid by a financial firm in the case where it is appropriate to do so, such as a meritless, trivial, oppressive, spurious or dishonest complaint, or one which is an abuse of process, such as where the complaint is instigated for the ulterior purpose of coercing a financial firm to write off a legitimate debt and/or remove a properly lodged credit reporting default.
That is a matter of "fairness" for the reasons explained above and, for so long as AFCA does not believe it has that discretion, or declines to act on it in an appropriate case, it is not "meeting its statutory objective of resolving complaints in a way that is fair".

Debt management service providers

In the case of debt management service providers who assist consumers to make AFCA complaints, the principle that the AFCA scheme be free to consumers has no application, and thus the AFCA power advocated for above should go further, particularly as such persons or organisations assist consumers for fee or reward.
Fairness demands that AFCA also have a power to make such providers liable to pay the costs of both AFCA and a financial firm where AFCA finds that a complaint is made to AFCA by, or at the instigation of, those providing debt management services, and the complaint is found by AFCA to be meritless, trivial, spurious, oppressive or dishonest.
It is noted that, in separate reforms, the Government proposes to require licensing of debt management service providers. See the separate proposed *National Consumer Credit Protection Amendment (Debt Management Services) Regulations 2021*, and the relevant consultation page at https://treasury.gov.au/consultation/c2021-139564.
The dubious and unethical profit-motivated practices of some debt management service providers was acknowledged by the Treasurer when he announced those reforms on 25th September last year, and referred to their "predatory practices". See https://ministers.treasury.gov.au/ministers/josh-frydenberg-2018/media-releases/simplifying-access-credit-consumers-and-small.
These reprehensible practices do not just adversely affect consumers, they also seriously adversely affect financial firms, and also the integrity of AFCA processes and thus AFCA itself, because of what has now become a widespread problem, namely the lodging of an AFCA complaint, or the making of a threat to lodge an AFCA complaint by a debtor, at the instigation of such "debt repairers", and for the improper purpose of coercing the financial firm to write off a legitimate debt and/or remove a properly and correctly lodged credit reporting default.
This typically happens in relation to outstanding debts of a small amount. It is simply completely uncommercial for a financial firm to contest an AFCA complaint in relation to a small outstanding amount of a few thousand dollars, requiring significant (and all out-of-proportion) management resources, knowing AFCA's fees may well exceed that amount even if it dismisses the complaint as unmeritorious at the earliest opportunity. Debt repairers are aware of this commercial imperative, and use it to improperly threaten AFCA complaints well knowing that their clients properly owe monies, or defaults have been properly listed.
In a very obvious verification that that is an underlying cause of many unmeritorious complaints,

the problem identified has been exacerbated significantly since AFCA took over from the Financial Ombudsman Service (FOS), and AFCA's fees, even to reject a complaint, have been set at figures which are many times those charged by FOS. FOS's fees were usually in the hundreds of dollars, but with AFCA fees now in the thousands of dollars, we are seeing a significant rise in the number of these improper threats of AFCA complaints.

Example:

To illustrate the problem of which I speak, here are the details of a typical example case. [Full details of the case, including the names of the complainant and the financial firm, and the number of the AFCA complaint, as well as a copy of the AFCA ruling, are available on request. The amount of the complainant's debt still outstanding at the time of the complaint was about $2,000.00].

A financial firm was contacted by "Chris" from "iCreditRepair". That business could not be located by online searches, and Chris refused to provide a full name, and the business phone number he gave was found to be disconnected. His mobile voicemail was a personal message. The office address given was a residential apartment. The ABN he gave referred to a company which, according to ASIC, had been deregistered 7 years earlier.

Excerpts from his correspondence to the financial firm included (the spelling and punctuation is as per the original emails):

> *Multiple discrepancy's have already been found [in proper lodgement of a default listing]. Opening an internal investigation will have the same outcome. We do not want A listed default that has been illegally obtained longer than 24 hours. Can you please advise That this default will be removed immediately today? If I do not hear back within the hour the request will be made to [your superior].*
>
> *I will be going to AFCA today would you like to sort this out first? I will lodge it at 11 if I don't hear back [This email was sent at 10:17am].*
>
> *These are some of the things AFCA will investigate amongst other things like if the client ever called to try and resolve ect and other things not listed [This email was sent 7 minutes later].*
>
> *We can talk about a payment proposal if the Default is agreed upon to be removed. If taken to AFCA and the default is removed there it is unlikely the offer will be here to resolve again [This email was sent 8 minutes later].*
>
> *we were very close to settling this but it seems you do not want to come to an agreement.. It is clear we cannot reach a resolution on behalf Of [debtor name redacted] and in light of this it will be lodged with AFCA today. You fail to lodge a section 88 amongst other things and on that basis we are instructed to take the matter up with AFCA. I think you are mistaken, what the ombudsman has spoken against is a finance company such as yourself using a default listing to bully a customer into paying an alleged debt.*

The credit repairer then lodged a complaint, but AFCA declined to hear it "because it was not accompanied by the information we need", and which had been previously requested of the credit repairer by AFCA.

In other words, when the crunch came and detailed information had to be lodged and verified, the credit repairer abandoned the complaint.

This problem of debt repairers "gaming" the complaints process has been acknowledged by AFCA's predecessor FOS. FOS had an express policy of waiving fees where it is found that credit repairers use the FOS process deliberately to negotiate a settle-for-less outcome (see https://www.afca.org.au/make-a-complaint/accessibility-and-support/agent/authorised-agents-

financial-difficulty) that is, threaten an unfounded complaint for an improper purpose. FOS has specifically referred to such agents as "gaming" the complaints system: See "A quick fix: Credit repair in Australia", by Paul Ali, Lucinda O'Brien and Ian Ramsay, (2015) 43 ABLR 179 at 188. Available at https://financialrights.org.au/wp-content/uploads/2015/06/Ali-OBrien-Ramsay-Credit-repair-in-Australia.pdf. It was reported in "Default listing and credit repair – some tips for two potentially troublesome areas" by Michael Hartman, Credit Management in Australia, March 2015, pages 36-37, that "FOS has very recently issued a statement about the actions of credit repairers as it seems they think that some credit repair companies attempt to "abuse" the system and bully you into removing a default listing. When this is determined, FOS will not charge their member for the case. You can find more detail here: http://www.fos.org.au/the-circular-20-home/fos-news/feechargingrepresentatives.jsp". The Credit Management in Australia article is available at https://aicm.com.au/files/4314/5526/1350/AICM_March_2015_Verison.pdf. The FOS link is now inactive due to the switch to AFCA.

The problem of which I speak has also been identified by ASIC, which says as follows on its MoneySmart website: "Beware of paying credit repair companies that claim they can 'clean' your credit report by having information removed. This may not be true. Information that is correct, even if you don't like it, can't be removed". See https://moneysmart.gov.au/managing-debt/credit-repair.

As stated above, the problem is not merely one of concern to financial firms, it affects AFCA itself. It is obvious that the integrity of the AFCA process is compromised whenever complainants' representatives use it to make an unfounded complaint for an improper purpose. It is submitted therefore that it is extremely important for the maintenance of the integrity of AFCA processes that there be deterrence measures for such unfounded complaints, because at present there are none, and that is the core reason that the problem persists. Even if AFCA had a policy similar to FOS not to charge a fee in cases where the financial firm elected to oppose a complaint which AFCA determines is unfounded, that will not stop credit repairers from lodging them, as they would still not be visited with any consequences for doing so.

Also, it is extremely important in order to uphold the integrity of AFCA's processes that financial firms be encouraged to oppose unfounded complaints, rather than take the easy way out of writing off the debt, and thus giving effect to the improper purpose of the complainant's representative. The AFCA process must not be allowed to be used as an instrument for such an improper purpose.

Hence the proposal that debt management service providers be liable to pay the costs of a financial firm where AFCA finds that a complaint is made to AFCA by, or at the instigation of, those providing debt management services, and the complaint is found by AFCA to be meritless, trivial, spurious, oppressive or dishonest. AFCA should be given the power to make debt management service providers pay such costs in such instances. It is submitted that, for the reasons given above, that power is necessary in order to allow AFCA to meet its statutory objective of resolving complaints in a way that is fair, and also in a way that is efficient, as it will have the effect of deterring debt management services providers from lodging meritless AFCA complaints.

Yours Faithfully,

Stephen Michael Palyga
[redacted]