
REPORT REVIEWS

TREASURY'S REVIEW OF THE AUSTRALIAN FINANCIAL COMPLAINTS AUTHORITY

Evan Jones

The Australian Financial Complaints Authority (AFCA) is the ombudsman for the banking sector, financed by the industry itself. It has a huge number of staff – equivalent to 755 full-time employees as of October 2020. Handling the complaints from customers of banks and other financial institutions is evidently a massive task. Indeed, it is telling for the so-called virtues of ‘the free market’ that this sector’s operations generate so much dissatisfaction to require an ombudsman of this scale.

A major public interest is at stake, requiring periodic review by the Federal Treasury.¹ The review was tabled in Parliament on 24 November 2021, attracting little media interest other than a brief article in the *Australian* on 25 November that reported AFCA’s Chief Ombudsman and the Financial Services Minister as claiming it as a positive report card.

Probably the best thing that can be said of the Review is that its content implicitly exposes some of AFCA’s failures, while hiding others. The statistics on the compensation awarded to complainants, for example, show a total of \$447 million, including \$202 million for remediation on ‘systemic issues’ in 2019-20. Much of this presumably relates to relatively

¹ The Treasury had formally invited public submissions to the Review but did not publish the submissions on its website, as has become customary for Parliamentary inquiries.

straightforward retail customers of banking, financial advisory, superannuation and insurance service providers.

As someone who has responded to requests for help from many bank victims over the years (especially small businesses, amateur property investors or simple home mortgagors), I can attest to the very different experience they had with AFCA and its predecessor, the Financial Ombudsman Service (FOS).

Limiting complainants

The Review states the numbers and types of complainants (p.23). Over 2019-20, '94 per cent of complaints were made by consumers (144,256) and 6 per cent by small businesses [SMEs] (8,910)'. Primary producers (included in the small business category) lodged a mere 125 complaints.

The numbers are limited by design, particularly by setting a monetary limit. For SMEs, including primary producers, the limit (ie. the maximum credit exposure set for those businesses) is \$5.425 million. The limit for compensation claims is a mere \$1.085 million and for primary producers \$2.170 million (these unusual figures being the product of indexing for inflation). In a rare display of frankness, the report noted that the reported numbers of complaints 'may not accurately reflect the volume of demand for AFCA dispute resolution above the current limits', given 'primary production and small businesses may have decided against contacting AFCA in the first place for matters that clearly exceeded the limit'.

Both the Australian Small Business and Family Enterprise Ombudsman (ASBFEO) and the National Farmers Federation recommend that the monetary limits for SMEs and family farmers should be lifted, but the recommendation has been ignored. Treasury claims that the existing limits had already been raised from earlier levels – but the earlier levels were absurdly low. Supporting its claim that there is no 'widespread problem with the current limit', two paragraphs in the report are telling (p.56):

5.14 Like most ombudsman schemes, AFCA was established to resolve smaller, lower-value disputes and provide claimants with a relatively simple process, negating the need for legal representation.

5.15 Complaints that involve very large monetary amounts, for example a \$10 million credit facility as recommended to the Review, would generally involve a high degree of complexity. Given the potential complexity of such matters, AFCA's broader fairness jurisdiction and

the fact that AFCA decisions are binding on financial firms, the Review considers that such matters are most appropriately dealt with by existing legal mechanisms.

The first of these two claims, regarding the intended scope of AFCA, is wrong and pernicious. While the embryonic banking ombudsman, beginning in the late 1980s, was such an animal, the subsequent pressure to include small business/farmers has been persistent and inevitable. The second claim reveals Treasury's attempt to minimise AFCA's exposure to the more grievous abuses and to minimise the prospect of financial entities having to pay sizeable compensation.

The claim that 'such matters are most appropriately dealt with by existing legal mechanisms' also highlights Treasury's partisanship. Reliance on 'freedom of the market place', supplemented by courts to deal with occasional malpractice, indicates a mindset shaped by orthodox economics that ignores the systemic presence and abuse of power in the marketplace.

There is a telling statistic in the report concerning the distribution of outcomes. For the first two years of AFCA's existence, 71 percent of its determinations were in the financial firm's favour and 29 percent favouring complainants (p.29). *A priori*, one would have expected the distribution to disproportionately favour complainants, because the *raison d'être* of an ombudsman is inequality between the parties to an exchange in their capacity to influence the nature of that exchange and its aftermath.²

Regarding the sectoral breakdown of complaints, for AFCA's first two years, 59 percent of complaints (89,660) related to banking and finance. Complaints regarding credit constituted 73.1 percent of banking/finance complaints, thus comprising 42.8 percent of all complaints (p.25). These are telling figures. The report ignores the credit relationship, 43 percent of its 'business', and the sources of this disproportionate cause for complaint.

Of the \$477.6 million total awarded in compensation (2019-20), small business complainants received \$47.9 million, including \$2.25 million to primary producers. The average compensation for all complaints was \$4,100, for small business \$8,300 and for farmers \$56,200 (p.24). It is not clear if the small business compensation total includes that for farmers: if so, average non-farmer SME compensation is even smaller.

² I emphasised this point in an email letter to AFCA's CEO David Locke in April 2019. Locke did not reply to that letter and he evidently ignored its contents.

Regardless, for small business and farmers, these average compensation figures are miniscule. SME/farmer borrowers have lost millions of dollars to their lenders' incompetence and unconscionable conduct, subsequently rendering them destitute.³

Systemic issues

AFCA is supposed to track 'systemic issues' arising across complaints and report serious ones to its overseer ASIC. AFCA claims to have found, in two years, over 2,200 possible systemic issues (p.31)! But the review gives us no examples.

ASIC's 'regulatory guidance' tells us where to find a systemic issue (p.83): '[it] affects more than one complainant; involve many complaints that are similar in nature; affect all current or potential complainants of a particular firm; affect more than one firm'. These are appropriate categories, but no instances are provided.

Predatory lending and default should be the hot systemic issue. It typically involves bank fabrication of customer figures and is innately fraudulent in its character. But there is no mention of it in the Review.

Atypically though, one case study in the Review's coverage of small business complaints (p.65) does relate to and condemns predatory lending without labelling it. In that instance, acknowledgement and compensation was granted for top-up loans when the business (a franchise) was transparently in trouble, but not for the original loan itself. If AFCA can recognise a problem here, though half-heartedly, why not elsewhere?

AFCA has a 'systemic issues' committee and is compelled to send the most significant ones to the Australian Securities and Investments Commission (ASIC). The AFCA Annual Review notes that (p.19): '36 serious contraventions and other breaches [were] referred to regulators [in the 16 months since] 1 July 2020'. No instances are given. Moreover, ASIC has not enlightened us on such referrals. There is no evidence that ASIC takes any action with respect for referrals from AFCA.

³ There's more statistical sloppiness, relegated to a footnote – 'All complaints are factored into the averages, including those for which there was no compensation awarded or recorded'. This conflation is misguided. The reader is not told the average compensation for those awarded compensation.

Independent case assessment

The Treasury Review ‘engaged an independent expert’ to examine a small sample of AFCA-determined cases in conjunction with the related submissions. The Hon. Julie Dodds-Streton QC was appointed (p.4). Her opinions on the 20 cases she was given are detailed in the report (Apps A & B, pp.93ff.). Yet none of the cases evidently relate to the provision of credit. Most relate not to customer complaints but to financial provider complaints. This appears to be a stitched-up exercise on the part of the Review.

AFCA staff ‘qualifications’

Submissions that I and others made to the AFCA Review point out that case managers often don’t understand the nature of the credit relationship – or perhaps they know but don’t want to pursue its implications. The AFCA report crudely bats away these complaints while conveniently ignoring their substance. It emphasises AFCA staff’s formal qualifications and industry experience (p.20), blandly concluding that (p.89): ‘AFCA’s staff are appropriately qualified’.

AFCA boasts: ‘Over 96 per cent of AFCA ombudsmen hold a law degree’. Yet having a law degree is no necessary advantage, given the usual lack of sympathy for the weaker party to asymmetric contractual relations within a legal education. Industry experience is another matter. While desirable to have such experience, it is necessary to recognise its downsides within the industry. We know that some AFCA employees with prior industry experience act to support the industry against complainants. In short, Treasury has no evident concern for skills appropriate for the job.

A personal experience is illustrative. In October 2021, I sent David Locke an 8000-word letter regarding a particular complainant, putting AFCA’s myopia in this case into the context of AFCA’s broader myopia. I claimed that the complainant’s case manager did not understand ‘the nature of the beast’. The bank involved is the National Australia Bank, with a long history of malpractice against borrowers. The case manager had no apparent understanding of the meaning and significance of various bank documents. He was indifferent to the NAB’s reluctance to tender relevant documents and dishonest claim that key documents had been destroyed. The key initial loan document was withheld by the bank.

The case was a clear case of predatory lending, where NAB personnel had dramatically misrepresented the borrowers' financial situation and their property investment competence – with long-term disastrous implications. Fortunately for AFCA, the initial loan package was taken out and, within several years, modified during the period before the arbitrary cut-off limit written into AFCA's rules. Even though remaining current, the loan's limit ensured that AFCA personnel could blindly ignore its egregious character to determine that the complainant had no case.

A 'Service Case Manager', designated to reply to my lengthy expression of concern, did so in mid-December 2021, claiming the appropriateness of the particular case manager's qualifications to be proved by the fact that his superiors agreed with him!

Making malpractice invisible

The cover of the AFCA Review shows a happy-as-larry farming family, which is certainly not representative of the typical farming family's relationship with their bank lender since financial deregulation in the 1980s. The Review also includes myriad 'quote bubbles' from seemingly well-satisfied complainants but none from unsatisfied complainants. The only concession to the extended self-congratulation is a throwaway line (crocodile tears) in the Review's preface: 'The Review also acknowledges the many individuals who have devoted considerable effort to share, via submissions, their stories of often distressing circumstances.'

The functioning of a financial ombudsman is crucial to the 'legitimacy' of the entire financial system, as the Review acknowledges (p.1). It therefore has to be pretended that AFCA is functioning appropriately, but this is an expensive and elaborate charade. Presumably the big players, especially the Big Four banks, are prepared to wear the expense to keep their freedom to engage in ongoing malpractice against their customers. The Government response to the Treasury AFCA Review supported all recommendations of the report. It is to be business as usual.

Evan Jones is a Research Associate in the Department of Political Economy at the University of Sydney.

evan.jones@sydney.edu.au