Financial complaints umpire AFCA is part of the problem

There is an overwhelming asymmetry of power between banks and their customers. Victims of financial crime have limited options to access true justice. Court action is usually not a realistic option —the complainant is up against the legal firepower and immense resources of the banks. For many bank victims, the only avenue to attempt dispute resolution or to receive compensation is the Australian Financial Complaints Authority (AFCA). However, there are deeply troubling questions over AFCA's independence and competence.

AFCA reproduces failings of predecessors

AFCA is the latest incarnation of an External Dispute Resolution (EDR) scheme which was founded in the wake of the financial deregulation of the 1980s-90s. Industry misconduct and rising customer dissatisfaction with the banks led to calls for an independent ombudsman. Presumably to head off any re-regulation, the Australian Banking Association created its own industry-funded Banking and Financial Services Ombudsman (BFSO), a corporation limited by guarantee which became operational in 1990.

In 2008, the BFSO was absorbed into the new Financial Ombudsman Service (FOS). FOS was criticised in numerous submissions to various parliamentary inquiries, in which complainants slammed the organisation's lack of independence from the financial firms it was supposed to mediate, unsatisfactory performance and callous treatment of complainants. Ultimately, the organisation was widely discredited by complainants and bank victim advocates.

In November 2018, the Australian Financial Complaints Authority (AFCA) became operational as a new "one-stop shop" for the mediation of financial complaints. AFCA absorbed FOS and two other industry ombudsman schemes: the Credit Investments Ombudsman and the Superannuation Complaints Tribunal, entities which had also been the subject of complaints from the public.

When AFCA's first government-appointed Chair, former Liberal Senator Helen Coonan, was on the job, she was also on JP Morgan's advisory council, chair of scandal-wracked Crown Resorts and chair of a PR firm representing clients implicated in money laundering! Photo: Wikipedia

The sincerity of AFCA's promised mandate of "fairness" was dubious from the entity's inception. AFCA's first government-appointed Chair, former Liberal Party Senator Helen Coonan, served until May 2021. While Chair of AFCA, Coonan was concurrently on JP Morgan's advisory council; chair of scandal-wracked Crown Resorts; and chair of a PR firm which represented clients who had been implicated in money laundering, and who were also members of AFCA.

AFCA was evidently just a re-branded FOS: six months before AFCA became operational, 367 staff were transferred over from FOS, followed by staff from AFCA's other predecessor organisations. Of AFCA's 42 Ombudsmen, 25 (59 per cent) came from FOS or one of AFCA's other predecessor organisations. Only one of AFCA's 13 adjudicators did not come from FOS or another predecessor organisation.

Submissions to numerous parliamentary inquiries have expressed serious concerns over AFCA's industry capture. Almost 24 per cent of AFCA's Ombudsmen joined the organisation directly from positions in the financial services industry, including from one of the major banks. AFCA's Lead Ombudsman for Small Business is a poacher-turned-gamekeeper, joining AFCA immediately from working as a lawyer heading Westpac's business lending division.

Although it acknowledged concerns, the 2021 Treasury Review of AFCA asserted that it had not substantiated that there was any "systemic issue in regard to procedural fairness" of AFCA's decisions. Treasury relied on the findings of a review it had commissioned from "independent experts"

which examined only 20 case studies, which were handpicked by Treasury.

Bank victims lose out

AFCA's 2020-2021 Annual Review reports that AFCA resolved 73,928 complaints that year. Around half of these were closed at the initial "Registration and Referral" stage, which involves communication between the firm and complainant, and does not directly involve AFCA.

Although AFCA records the majority of complaints as resolved by agreement, there is no indication as to whether complainants were satisfied with the outcome. In its 2016 Inquiry into small business loans, the Australian Small Business and Family Enterprise Ombudsman observed that in an AFCA-style dispute resolution process banks were at an advantage because they are familiar with the mediation process, and "small business lenders are aware that if agreements cannot be reached, banks will likely enforce their legal rights (for example, by taking possession of a property or appointing a receiver) … The practical effect of this is that many small businesses accept 'settlements' that they may not have accepted if the threat of enforcement by the banks had not been there."

If a dispute is not resolved in AFCA's first stage, it progresses to "case management", which includes informal mediation processes, such as negotiation and conciliation. If the complaint remains unresolved, it progresses to AFCA's final decision stage (last year only 8 per cent of all complaints got this far). If a complaint manages to reach the decision stage where it is heard by one of AFCA's Ombudsman or Adjudicators, it is unlikely to be favourable for the complainant— last year AFCA decided in the firm's favour 78 per cent of the time. If the matter involved a bank, the result was even more skewed—80 per cent of the time AFCA ruled in the bank's favour.

Financial firms can also win by default when AFCA uses its wide discretionary powers to close cases it deems out of its jurisdiction, which was a frequent complaint levelled against its predecessor, FOS. In 2020-21, AFCA decided not to consider 6,022 (17 per cent) of cases which were "resolved" at the case management stage, deeming them outside of its rules. Complaints to AFCA are also subject to mandatory exclusion provisions. The most commonly enforced rule is that a complaint must be excluded if it has already been considered by one of AFCA's predecessor organisations. Although FOS was widely criticised by complainants for its bias in favour of firms which were later exposed as systemically corrupt in the 2018 Financial Services Royal Commission, previous complainants to FOS have no right to have their case re-examined by AFCA.

Treasury's 2021 Review of AFCA reports that in its first two years of operation, the majority of complaints to AFCA were lodged by consumers (94 per cent). Although only 6 per cent of complaints were small businesses (including primary producers), the Review observed that these complainants often had very large amounts of money at stake. Additionally, AFCA's compensation cap of $1 million for small businesses and $2 million for primary producers is woefully inadequate for these complainants.

AFCA not a genuine alternative to courts

AFCA is not a regulator or a government agency. Similarly to its banker-designed predecessors, AFCA is a not-for-profit company limited by guarantee, which has been authorised to operate an External Dispute Resolution scheme (EDR) under the *Corporations Act 2001*.

Financial firms are required to be members of AFCA, and the scheme is industry-funded through levies and case fees. AFCA's decisions are contractually binding on members, but not complainants. Curiously, AFCA's Constitution allows for members' voting rights on a poll to be calculated as one vote per each dollar paid by the member. It appears that a member firm could achieve maximum voting rights by having maximum complaints against it. Notably, although AFCA has over 40,000 member firms, the big four banks alone represented over 26 per cent of all complaints (17,593) in the 2020-21 financial year.

AFCA says it is designed to be an "informal and low-cost resolution scheme" and is promoted as an alternative to tribunals and courts. However, AFCA is not a genuine avenue for a complainant to access true justice. Although 90 per cent of AFCA's Ombudsman are lawyers, cases are only treated as disputes because AFCA operates extra-judicially—outside the court system. Complainants do not receive the same legal protections which are afforded by the courts. AFCA has confirmed that "AFCA is not a court of law, it is not bound by the rules of evidence and it cannot compel the provision of testimony or documents. AFCA does not determine the legal rights of the parties to a complaint."[1]

AFCA's Rules and Operational Guidelines confirm that AFCA will only provide complainants with information that AFCA considers "relevant", and AFCA can decide to withhold information it has received. A firm can refuse AFCA's request for information if AFCA is satisfied that the information "cannot reasonably be obtained".

No appeal, oversight, accountability

In its first three years of operation, AFCA received 216,000 complaints against financial firms. If a complainant was not satisfied with AFCA's decision, too bad—it is not possible to appeal an AFCA determination, except through the courts (which are not a realistic option for small businesses and consumers). Numerous submissions to parliamentary inquiries have claimed that AFCA's determinations are biased and unfair, however the lack of oversight over AFCA means that its decision-makers are largely unaccountable.

AFCA is a company, not a government department or regulator, therefore it does not have to appear before Senate Estimates for routine questioning from parliamentarians. It is not subject to Freedom of Information laws. The Administrative Appeals Tribunal ruled in May 2021 that it does not have jurisdiction to review AFCA decisions. AFCA's Rules state that all AFCA employees are immune from liability.

AFCA itself is highly resistant to further review of the merits or substance of its decision-making. In its submission to the 2021 Treasury Review, AFCA opposed additional review mechanisms, arguing that its existing internal processes, such as the routine review of a Preliminary Assessment by AFCA's decision-makers, were sufficient. AFCA argued that it had previously commissioned "independent external reviews" of its decisions; however these reviews only examined cases which were selected by AFCA.

Although AFCA has appointed an "Independent Assessor", this individual only has the power to review complaints about service (i.e. the length of time taken to resolve complaints). AFCA strongly opposed expanding the Assessor's role to be able to consider the merits or substance of AFCA decisions. In addition, there have been questions raised over the independence of the Independent Assessor, who is appointed by and reports to the AFCA Board, which can reject any recommendations.

Treasury's 2021 Review concurred with AFCA's views and recommended that the organisation should continue to not be subject to further merits review or processes that would re-open decisions.

Gatekeeper for financial crime?

AFCA, as the only avenue available for many bank victims to try to resolve disputes with powerful financial firms, is in a position to be privy to evidence of serious financial crimes. AFCA is required to report to the regulator, the Australian Securities and Investments Commission (ASIC), if it receives information that indicates a serious contravention has occurred. However, numerous complainants have reported that AFCA simply ignores evidence of financial crime (see Case studies).

AFCA is supposed to report "systemic issues" to regulators; however, AFCA's processes leave laughably wide wriggle-room for the banks to simply carry on with misconduct. If AFCA suspects a systemic issue, it writes to the financial firm involved, and relies on the firm's response to decide whether the issue is "definitely systemic in nature", which triggers the threshold to report to regulatory authorities. Treasury's 2021 review reported that in AFCA's first two years of operation, 2,287 possible systemic issues were identified, 78 per cent of which were closed by AFCA without further investigation. AFCA classifies a systemic issue as resolved "if the financial firm engages with AFCA and agrees on remedial action to fix the systemic issue". Of the 193 issues AFCA decided were definitely systemic, 166 were "resolved" with the financial firms involved.

From inception, AFCA's fundamental structure has enabled the organisation's extreme secrecy, industry capture and lack of accountability. However, AFCA's dysfunction is by design—it is no surprise that AFCA's predecessor was created by the banking industry. As the Citizen's Party has documented, Australia's financial system was designed to enable plunder from everyday people, and AFCA aids and abets this predation.

Footnotes:

1. AFCA Submission to AFCA Independent Review, (afca.org.au), 26 March 2021

Case study: No right to appeal or review

Complainants to AFCA have no right to appeal AFCA's determinations. The adverse experience of numerous complainants raises serious questions about the competence, accountability and independence of AFCA's decision-makers.

In 2008, Michael Sanderson's farm secured a $462,500 Business Term Loan with the

Bank of Queensland (BoQ). Although Michael had never missed a loan repayment, when the initial five-year term was up BoQ suddenly backtracked from its letter of offer, refusing to rollover the loan as originally promised. Representatives of BoQ deceitfully manipulated property valuations to impose a non-monetary default clause and repossess Michael's farm. This resulted in Michael's family experiencing a cascading series of losses, which a forensic accountant has estimated to be at least $12 million.


Bank of Queensland, Bendigo and Adelaide Bank sued by ASIC over 'unfair' contracts

By business reporter David Chau

Posted Wed 4 Sep 2019 at 3:10pm

Michael Sanderson never missed a repayment, but BoQ repossessed his farm. (ABC News: Paul Donoughue)

Michael, as shown in ABC coverage of his story. Photo: Screenshot

Michael initially took his case to AFCA's predecessor, FOS, which "played hardball" and refused to consider Michael's complaint, claiming it was outside of their jurisdiction. In 2019 Michael took his complaint to FOS' successor, AFCA.

AFCA took two years to finally decide in the bank's favour, despite serious evidence of misconduct and maladministration.

Michael responded to AFCA's assessment with a 77- page point-by-point rebuttal, exposing AFCA's "extreme bias" in favour of BoQ. Michael asserts that AFCA's case manager cherry-picked information; ignored key documents which supported Michael's case, such as BoQ's letter of offer to rollover the loan; showed "wilful blindness" to evidence of misconduct or maladministration, such as loan documents which were blank or obviously altered; and blithely accepted the bank's story without questioning its dubious credibility, such as loan-signing meetings that BoQ claimed had occurred, but which phone records show could not have happened. AFCA's case manager ignored previous unrelated court action which had involved BoQ and the same valuer which had over-valued Michael's property.

Michael's rebuttal raises deeply troubling questions over AFCA's competence and conduct. For example, AFCA's assessment contains significant numerical errors regarding the most basic facts of the case. AFCA's Preliminary Assessment states that BoQ's affidavit describes an event where loan documents were signed in the presence of two bank officers. However, this is a fabricated story—BoQ's affidavit does not say this; and when Michael asked the case manager to identify the two bank officers, she was unable to. Additionally, AFCA's case manager also referred to non-existent documents to support her Preliminary Assessment.

Michael's story was selected as a case study for the Australian Small Business and Family Enterprise Ombudsman's (ASBFEO) 2016 "Inquiry into small business lending". As part of the inquiry process, the ASBFEO engaged an independent expert to assess Michael's case. ASBFEO's expert flagged several serious issues around BoQ's actions and concluded that BoQ's inflated valuations (a 240 per cent increase in only 14 months) were "mainly unexplained", a serious indication of possible maladministration in lending. Shockingly, Michael asserts that AFCA's case manager "distorted and misrepresented" the ASBFEO report, selectively cherry-picking from the body of the report to make up her own "fictitious conclusions", ignoring the actual conclusions of the ASBFEO's expert.

Michael has demanded that AFCA question and investigate the case manager's motivation and competence, without result. AFCA's final decision-maker concurred with the case manager's determination, which ruled in favour of the bank. Michael has no right to appeal AFCA's determination, and there are no mechanisms for a further merits review of AFCA's decision.

Case study: No access to true justice

AFCA's jurisdictional limits and wide discretion to disregard complaints means that it is not a genuine alternative to tribunals and courts.

In 2005, the finance broker of Goran Latinovich's family

construction business stole and forged eight company cheques, siphoning over $1.2 million from the business accounts in just over a week. Westpac refused to recognise that any fraud or theft had occurred, ignored the family's complaints and requests for information, and refused to provide the original cheques for forensic examination. Westpac refused to explain why it allowed special fast clearance of the cheques, which had numerous red flags over uncharacteristic handwriting and signing style.

No peace in 15-year battle over forged cheques

By JOYCE MOULLAKIS 10:32AM OCTOBER 23, 2021

Milka Graovac and her family have been fighting Westpac over alleged fraud for 15 years. Picture: Simon Bullard / The Australian

For Milka Graovac and her family a bitter 15-year battle with Westpac over alleged forged cheques paid out from her business account has taken its toll.

Goran's mother in coverage from The Australian. Photo: Screenshot

The theft had a catastrophic cascading effect, which caused the loss of the family's business and assets, at an estimated loss of $20 million. The family's battle for compensation from Westpac has dragged on for fifteen years, but the bank continues to deny any liability.

The NSW Police eventually charged the finance broker with multiple offences, including stealing and cashing the cheques, and forgery. The lead detective for the case, who is an expert in complex fraud matters, presented the evidence from the police investigation at a pivotal December 2019 meeting with Goran's family and Westpac's "customer advocates" (who are Westpac lawyers). In a formal letter to Westpac's CEO, the detective documented the meeting, including the verbal admission from Westpac's customer advocates that an obvious fraud had taken place. However, according to Goran, Westpac's CEO responded dismissively, writing that the bank did not agree with the "opinion"(!) of the police. Goran's family are outraged that Westpac's CEO can receive official communication from the police that fraud has occurred, yet "is 'allowed' to simply close the claim, disregard, and ignore the Law".

For the next year, Goran wrote regularly to the Prime Minister and Treasury to inform them of the matter. Finally, Treasury responded, stating that the government was watching the case closely and was keen to see the matter resolved. A representative from Treasury, who was the division head of the Financial Services Reform Taskforce, a group responsible for ensuring that the government's post-Financial Services Royal Commission reforms were effectively implemented, contacted Westpac to request that they re-open Goran's case; however Westpac simply refused.

Westpac advised Goran that he could go to AFCA if he did not agree with Westpac's decision. However, in a later phone call with an AFCA staffer, Goran was informed that Westpac had called AFCA to instruct them that the complaint was outside AFCA's jurisdiction. AFCA simply accepted the bank's instruction, and refused to consider Goran's case. Goran asked the AFCA staffer to put this in writing, but they declined. Years earlier, AFCA's predecessor, FOS, had also refused to consider Goran's complaint because they deemed it to be outside of their jurisdiction. Goran has shown AFCA the police letter and has tried to lodge a complaint about the Westpac CEO's recent conduct, but AFCA has refused to consider it.

Goran says that no one has the power to fight the banks who are "mafia" who "do things we couldn't even dream of … They are above the law … No one is watching. No one will help victims." Goran and his family assert that the CEO of Westpac is concealing financial crime and enabling a culture of fraud and dishonesty at the bank, but is unaccountable for his misconduct and breach of the banking code.

By Melissa Harrison, Australian Alert Service, 26 January 2022