



## Submission to the Parliament of Australia Senate Standing Committee on Legal and Constitutional Affairs Resolution of Disputes with Financial Service providers within the Justice System

Dear Senate Committee members,

Our submission relates primarily to section C:

the accessibility and appropriateness of the Australian Financial Complaints Authority (AFCA) as an alternative forum for resolving disputes including:

- i. whether the eligibility criteria and compensation thresholds for AFCA warrant change,
- ii. whether AFCA has the powers and resources it needs,
- iii. whether AFCA faces proper accountability measures, and
- iv. whether enhancement to their test case procedures, or other expansions to AFCA's role in law reform, is warranted;

### **Background**

We are a Mortgage Manager and access products provided by second-tier lenders, such as Adelaide bank and Origin which we can brand as our own and provide to our Credit Representatives and brokers with an Australian Credit Licence.

We provide a similar customer service to a normal lender in that we look after customer support (in most areas) including balance enquiries, account transfers, statements, loan variations, discharges and some arrears management up to 90 days. Another aspect of our business is that we have purchased the mortgage books of both brokers and mortgage managers over the past 10 years.

We also look after complaints raised by clients up to a certain level and then hand it back to the ultimate funder and AFCA. We liaise with AFCA and the customer until it reaches a level where the complaint requires the lender to become involved.

We are not a large business but the number of customers and loan files is in the tens of thousands. Generally, the number of complaints dealt with anyone time may be less than a handful and in most cases these are resolved fairly quickly or handed to the lender.

### **The complaint process**

Some customers will lodge their complaint directly with AFCA or will lodge the complaint with our Internal Disputes Resolution (IDR) officer.

If the complaint is made via AFCA they will request us to respond and provide relevant documentation. They will then liaise with the customer and if the customer is not happy with the outcome/response then they are given the option to continue the complaint with AFCA.

For those customers that lodge their complaint with our IDR then we will respond after researching the file and try to resolve the complaint. Should the client not accept our response they have the option to progress the complaint via AFCA.



If the complaint is in relation to the interest rate, for example, we would respond and assert that the complaint should be referred to the ultimate funder/lender as it is out of our control.

## **AFCA concerns**

We believe there are some important points to consider concerning the new AFCA dispute process.

The first relates to the environment we occupy as a Mortgage Manager. During the past few years we have seen a trend of more conservative credit policy and simultaneously a trend of consumers demonising brokers/financial service providers.

The Royal Commission certainly highlighted the poor conduct of many in the finance sector and has in many ways legitimised the poor opinion and negative perception of lenders by borrowers and the general public.

The combination of these two factors will, without question, lead to more borrower complaints – rightly or wrongly.

This leads to four main concerns:

1. The cost of administering a complaint to determination (through AFCA) is considerable (AFCA Early Investigation Stage charge is \$1800 and charged to the mortgage manager/funder and further charges at every stage, up to \$6k or more per complaint)
2. Quite often a complaint is either vexatious or lacks substance and providing the background information as well as legal response to letters from Legal Aid before it is handed to AFCA may cost several thousand dollars
3. Having a complaint dealt with by AFCA and sufficiently proving that a complaint lacks substance can be problematic due to poor document retention by some brokers with older loans and often only “provable to the client” after a determination is given by AFCA,
4. An AFCA determination cannot be used as a precedent in a court of law, should the client decide to pursue the complaint through the courts.

More often than not, a complaint which is brought to AFCA, that is – has made it past our IDR to External Dispute Resolution (EDR) - normally relates to a borrower’s claim that a broker has been misleading, fraudulent or had misrepresented the features or structure of a loan.

In most of these cases, we are able to prove, through documentation, that a borrower had signed the relevant consents, disclosures and waivers to formalise that they understood what was going on at the time of writing a loan (and normally, of importance, under a Funder’s credit policy at the time of writing). The complainant’s evidence is normally 100% based on their recollection of the process.

Our proof, however, is never fully realised at the beginning of the complaint as a borrower will make multiple claims throughout the complaint process, which requires multiple rounds of assessment by the ombudsmen and therefore increasing costs.

AFCA states on page 171 of the Operational Guidelines that “it is efficient for all parties for us to identify [that a complaint is frivolous or vexatious] at an early stage and thereby spare the parties the time and effort of responding to our requests for information and making submissions”.

I interpret this to mean that AFCA administration costs are a sunk cost (which our industry contributes to via the Levy) and therefore an AFCA investigation and final determination in favour of



a Financial Service Provider (FSP) does not retrospectively mean that a complaint is considered frivolous or lacking in substance.

Therefore, as an FSP, we are not able to clawback these sunk costs from an unsuccessful complainant. This situation does not leave us, as a mortgage manager, in a financially good place.

We believe that it is very likely that we will have to administer considerably more complaints from borrowers who feel aggrieved about their loan writing experience, we are going to wear the significant costs of administering these complaints and be left with determinations which are literally useless in a court of law.

### **Recommendation**

We therefore suggest that there be a fee payable by the complainant when they lodge a complaint which could be refunded if their complaint is upheld. The amount may be as small as \$150 but it would certainly dissuade those from making unsubstantiated complaints.

As AFCA costs are already sunk and paid for by the industry this “Complaint Fee” should be passed back to the party that conducted the investigation in an effort to defray some of the non-recoverable expense.

In addition, if the complaint is found to be unsubstantiated or not upheld then AFCA should be required to refund the amounts already paid to AFCA. You will recall that we would have already expended an amount in external legal and internal resource costs.

We would therefore consider that we are not only covering AFCA costs but also our own and believe this to be unfair and puts us at a financial disadvantage in defending ourselves.

Thank you for your time and consideration of the submission.

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