

Review of the Australian Financial Complaints Authority

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Case Study: 620057 and 647775

15 The Outcomes of AFCA's resolution of complaints

Terms of Reference question:

20 1.1. *Is AFCA's dispute resolution approach and capability producing consistent, predictable and quality outcomes?*

25 The AFCA Scheme Authorisation 2018 **was of the minister under the Corporations Act 2001** and that notifiable instrument dated 23rd of April 2018 stated:

30 *I Kelly O'Dwyer, Minister for Revenue and Financial Services, Minister for Women and Minister Assisting the Prime Minister for the Public Service, being satisfied that the mandatory requirements in section 1051 of the Corporations Act 2001 will be met, and after taking into account the general considerations for an external dispute resolution scheme under section 1051A of the Corporations Act 2001, hereby make the following notifiable instrument.*

35 Contrary to the Ministers satisfaction the **mandatory requirements** in section 1051(4)(b) and also 1051A (c) of the Corporations Act 2001 have not been met, AFCA is in breach of the Act.

1051 Mandatory requirements

40 (4) *The operational requirements are that:*

(b) *complaints against members of the scheme are resolved (including by making determinations relating to such complaints) in a way that is fair, efficient, timely and independent; and*

45 AFCA outcomes are not fair, efficient, timely or independent, nor does AFCA have the appropriate expertise to ensure that s1051 (4) (b) of the AFCA Act which are

Mandatory Requirements of the Act and also 1051A of the Corporations Act 2001, are met. AFCA is in breach of the Minister satisfaction and trust specified in the notifiable instrument dated 23rd of April 2018.

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For details of these and other issues please refer to my submissions:

01 - Submission AFCA Review – Timeliness

02 - Submission AFCA Review – Independence

55 03 - Submission AFCA Review – Efficient

04 - Submission AFCA Review - Fairness

60 **Case Study of 620057 and 647775**

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

65 Yes, AFCA is capable of producing **consistent and predictable** outcomes.

At the Financial Reviews Wealth and Banking Summit, the Consumer Action Law Centre's (CALC) CEO Gerard Brody found that of all home lending complaints made to the Australian Financial Complaints Authority (AFCA) this year (2020) there were none that favored the consumer. Below is a link to the short video extract:

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<https://www.youtube.com/watch?v=FNRQYaxPN-E>

75 Outcomes that are 100% in favor of AFCA members is **consistent and predictable**, even to the most skeptical. It would seem that in the eyes of AFCA, their 100% industry members can do little wrong.

I am personally unaware of any substantial claim made by the many fellow complainants that I personally know that favored the consumer, again 100% **consistent and predictable**.

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As for **quality** outcomes, that is subjective. Consumers would say no, but I suspect AFCA members would say yes.

85 **Case Study Example:**

One of the AFCA strategies is to deliberately misinterpret C.1.3 of their rules to protect the banks and penalise the consumers.

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C.1.3 AFCA must exclude:

- a) *A complaint about the Financial Firm's assessment of the credit risk posed by a borrower or the security to be required for a loan*

unless the complaint is about:

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- (i) *Maladministration in lending, loan management or security matters;*

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In my personal cases I alleged maladministration in lending, loan management and security matters in relation to what I claimed to be an overvaluation of my property by the Bank of Queensland (BOQ) when the Business Term Loan (BTL) was issued.

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To support my allegation one document I relied on was an unsolicited industry expert report that was commissioned by the Australian Small Business and Family Enterprise Ombudsman (ASBFEO) that reviewed five valuations over a seven year period.

It was the ASBFEO that instructed the expert and both BOQ and I were able to make submissions; it was impartial as is possible.

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The case manager in the preliminary assessment states:

"...AFCA cannot consider a complaint that relates solely to a bank's assessment of the borrower's credit risk, or the security to be required for a loan..."

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AFCA Invoked rule C.1.3 and stated:

"...The bank only had to assess whether the loan was affordable. It did not have to assess whether it or the complainants were protected by ensuring the value of the security covered the loan debt nor the investment risk..."

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Not once was the word "maladministration" mentioned or discussed in the preliminary assessment. It would seem that rule C.1.3 (a) (i) is not included in the rules that AFCA Case Managers refer to.

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To illustrate this categorically I will detail one of many examples as concisely as I can.

In the AFCA preliminary assessment the case manager verbatim states:

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*Based on this report, while it did reveal some shortcomings in the valuation, **it appears the review concluded** the 2007 valuation of \$900,000 was:*

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- completed after the Development Consent for a nine-lot subdivision by the relevant Council (which lasts for four years from the date approval takes effect)*
- completed as instructed (i.e. in certificate form), and*
- supported with the evidence drawn from a wide range of sales.*

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As you can see no red flags were raised in this statement. Below are the actual conclusions of the independent expert exactly as they were written [Bold added] they were:

145 5.5.1 Having read the Valuers report I conclude as follows:

- the report is in accordance with the instructions
- **the use of the Property Pro report format limits the communication of risks relevant to such a large parcel of land. The Property Pro reporting format is more appropriate to urban residential property which in the main is sold more readily. It is considered an inappropriate use of the reporting format.**
- **the adoption of an en globo valuation assessment is outside the parameters of the reporting format and can lead to under reporting of market risks.**
- as the Valuer has stated correctly, the original purchase price of the property as \$375,000 and with a current market value of \$900,000 — **an increase in value of \$525,000 in about 14 months.**
- The valuation was completed after the Development Consent for a 9 lot subdivision made by Isis River Council.
- **The risk analysis by BoQ and the extended parties including mortgage insurers, did not respond at an early stage to this mainly unexplained increase in value and the way in which it was assessed.**

On the 27th of March 2020 other Bank victims and I had a Zoom meeting with AFCA CEO David Locke, June Smith, Justin Untersteiner and Silvia Renda where a document was tabled detailing the inconsistency between the Case Managers made up conclusions and the actual conclusions detailed above. With approval of those at the meeting I also forwarded each a copy of my 'Response to the Preliminary Assessment'. With this knowledge the AFCA CEO and AFCA senior management cannot isolate themselves from the ultimate determination, they have proximity.

180 Notwithstanding, lawful valuations must be based on a point-in-time assessment of property values, not potential value. The 2007 Propell National Valuers overvaluation stated:

185 *"...The subject property is a large rural allotment to the southeast of the Childers township. The property has **potential** to be subdivided into 9 allotments subject to council approval and recommendations. **We have not been supplied with costings***

for this project, however based on it's potential we consider the subject has a market value of \$900,000..."

190 By its own admission BOQ's valuer, Propell National Valuers admit the valuation was
unlawful in that they failed to "...arrive at the value of the land at that date..." (*Spencer v
The Commonwealth*). Propell National Valuers has failed to demonstrate or justify any
rationale that could justify even a **potential** market value in the absence of cost or
feasibility. Propell in their valuation has failed to identify the zoning change and/or limited
195 nature of the DA and the fact that it would irretrievably lapse in less than four years and
before the expiry of the first term of the BTL.

The final panel determination was received on the 29th of October 2020, an untimely
630 days after filing the first complaint. That determination supported the preliminary
200 assessment stating:

*"...This determination is substantially in favour of the bank. The Panel agrees
with the outcomes in the recommendation..."*

205 And:

*"...While the complainants have reiterated their position, they have not
provided any documentation to support their position that the bank breached
any obligation it owed to them when it accepted the valuation. There is no
210 information to show that, by accepting the valuation, the bank engaged in loan
maladministration. The extensive submissions from the complainants on the
valuation do not progress their claim, as the bank was entitled to rely upon its
own valuation to assess its own risk. Therefore, while the complainants say the
bank and valuer were either involved or had knowledge of '**price gouging**',
215 their claim remains unsubstantiated and has not been considered further. ..."*

It should be noted that the term '**price gouging**' was never used or implied in the
complaints or responses from the complainants, this is an example of the AFCA Panel
'Gaslighting'. The panel uses denial, misdirection, contradiction, and falsity, in an
220 attempt to destabilize the complaint and delegitimize valid facts that are supported by
contemporaneous documentation.

The determination also stated:

225 *"...In resolving complaints of this nature, AFCA will do what it considers to be
fair in all the circumstances, having regard to the relevant law, good industry
practice, codes of practice..."*

My 'response to the Preliminary Assessment' in addition to other references,
230 highlighted in detail the following:

- **Law** - 1907 the High Court of Australia in *Spencer v The Commonwealth*
that underpins the four principles for market value.

235 • **Codes of practice** - *The Australian Bankers' Association (ABA) submission to the impairment of customer loans joint parliamentary committee that it is standard industry practice for banks to use preferred lists or expert panels of independent external valuers to undertake mortgage valuations under strict industry standards.*

240 • **Good industry practice** - *APRA Prudential Standard APS 220 Credit Risk Management that defines best practice.*

245 The determination did not consider these arguments as it was not mentioned in the final determination. AFCA failed to give explanation in the Determination as required by the rules in writing with reasons. Rule A.14.4 states:

A Determination must be in writing with reasons. Any remedy must be within AFCA's jurisdiction as set out in Section D.

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A summary of Valuation related issues are:

The 'Fundamental Issue' of the AFCA complaints is the 2007 'overvaluation' of the security property on which the Business Term Loan (BTL) was based. AFCA failed to consider:

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- Maladministration in lending, loan management and security matters.
- A contemporaneous document between the BOQ officer and the broker that preempted the overvaluation months earlier and asked that a certain valuer not be used.
- That the valuation was unlawful as it was based on potential value not 'the value of the land at that date'.
- Based on the banks overvaluation the borrower was enticed to borrow additional funds over and above what was originally sort. AFCA cannot say: *"...the bank only had to assess whether the loan was affordable. It did not have to assess whether it or the complainants were protected by ensuring the value of the security covered the loan debt nor the investment risk..."*. **The overvaluation was used by BOQ to solicit additional borrowing, which made it impossible to meet LVR requirements to refinance with another lender when the value collapsed at rollover.**

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- The conclusions of an independent expert report commissioned by the 'Australian Small Business and Family Enterprise Ombudsman' (ASBFEO), AFCA did verbal and misrepresent those conclusions as detailed above.

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- The fact that in 2011 BOQ pursued the same valuer Propell National Valuers in the courts for unrelated overvaluations which were carried out in the same period.

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- That following BOQ's court action against their valuer, the bank failed to advise customers subject to valuations by Propell National Valuers that they may be subject to 'Loan to Valuation Ratio' (LVR) breaches. Had we been aware of potential LVR issues in 2011 we

would have 2 had years to adjust.

- 285 • The borrower never missed a payment, had the ability to continue to pay and had sufficient
stock on hand to retire the BTL without selling assets. When the valuation collapsed at BTL
rollover the complainants, through no fault of their own, were unwittingly trapped by a non-
monetary LVR breach. A direct consequence of this was, the borrower had no options
external to BOQ. This fact alone makes a nonsense of AFCA's position that "...the bank only
290 had to assess whether the loan was affordable. It did not have to assess whether it or the
complainants were protected by ensuring the value of the security covered the loan debt nor
the investment risk..."
- 295 • An offer to refinance the BTL from the borrower at rollover, that was equivalent to BOQ's
most likely net realisation assessment of a sale, was ignored. The offer was consistent with
BOQ's internal assessment of likely net return from a sale and double of what BOQ
ultimately netted.
- 300 • BOQ as power of attorney for the borrower approved a valuation carried out for the receiver
BDO for \$200k which was less than the unimproved capital value. This valuation was carried
out by Propell National Valuers, the same valuer that did the \$900k valuation and who BOQ
took to court for overvaluations.

Secondary Issues

305 The issues that follow would not have eventuated or would have remained hidden if it
was not for the fundamental issue of overvaluation.

- 310 1. AFCA failed to consider the lack of credibility of the BOQ officer and their agent
the broker, which is supported by contemporaneous documents.
- 315 2. AFCA initially failed to consider and then summarily dismissed in the
determination contemporaneous documents that show meetings at Hoffies
Store where the BOQ officer and the broker claim that **blank documents** were
signed, could not have taken place. It appears that AFCA deliberately ignores
or sets aside the meeting with the BOQ officer that took place at the Hervey
Bay BOQ branch where documents were signed. BOQ offered no
contemporaneous documentation to support their claims or AFCA's
conclusions.
- 320 3. AFCA accepts BOQ's officers assurance, despite the complete lack of any
contemporaneous document that support BOQ's claim that documents were
supplied at least a day before signing and copies after signing.
- 325 4. AFCA states that '*there is nothing which would cause one recollection to be
preferred over the other and as such, the review will focus on the
contemporaneous documents provided by the parties*'. In making this
statement AFCA ignores contemporaneous documents that demonstrate
categorically there are contemporaneous documents that would cause one
recollection to be preferred over the other.

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5. Unbeknown to the complainants, AFCA accepted the incorrect and unlawful inclusion of another entity to justify serviceability, which had no commercial or banking relationship real or implied and was not a borrower or a guarantor. This was in spite of AFCA's own internal assessment stating:

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"...However, in my view, the bank failed to display the care and skill of a prudent and diligent banker by not linking the profits of S Pty Ltd by taking a guarantee from S Pty Ltd to secure the loan to the company..."

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6. AFCA failed to consider the value of harvested and other stock and its omission from the last three valuations, as well as BOQ's and the receivers BDO's consideration.

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7. AFCA fails to consider the lack of any contemporary documentation that demonstrates BOQ supplied documentation at least a day prior to signing, copies after signing or demands on guarantors prior to their claim. In contrast AFCA sets aside and/or applies liberal latitude in favor of the bank regarding blank and inconsistent documentation, and the false affidavit of the BOQ officer and false witness summary of the banks agent, the broker.

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The above do not represent all the issues contained in the complaints; it does however enable the reader too get a handle on some of the key issues.

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Conclusion

So yes, as demonstrated above, AFCA's dispute resolution approach has the capability of producing consistent, predictable and quality outcomes for their members.

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And yes as demonstrated above, AFCA's dispute resolution approach has the capability of producing consistent, predictable and poor quality outcomes for FSP consumers.

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I do not say this lightly or without considerable thought or supporting evidence, nor do I say that AFCA does this deliberately, although in many instances this cannot be ruled out.

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AFCA is 100% industry centric; there is no **real and meaningful** consumer input or participation at any level of the AFCA structure. This opens AFCA to bias in favour of industry, be it conscious or unconscious

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AFCA spin creates an illusion and it does so with impunity, because AFCA know that their determinations are final and there are no accessible mechanisms for a consumer to appeal and have a dodgy determination corrected or overturned.

Complainants come to AFCA because the Courts are unaffordable and out of reach, it

is disingenuous of AFCA to suggest that remedy for their dodgy determinations should be sort via those same unaffordable and out of reach courts.

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An unfair industry centric culture of acting with impunity has been allowed to be rolled over from FOS and/or develop which is in breach of AFCA's mandatory requirements and the Ministers satisfaction.

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It will be interesting to see if this AFCA review will have the same consistent, predictable and quality outcomes?