

Independent Decision Review

Executive Summary

Introduction

As part of our Independent Review Response Program, AFCA engaged former Federal Court Judge Ms Julie Dodds-Streeton KC and barrister Mr Ahmed Terzic to review 30 randomly selected AFCA complaints.

The audit was commissioned as part of the work to respond to:

- **Recommendation 2** which requires AFCA in making its decisions, to consider what is 'fair in all the circumstances' having primary regard to the four factors identified in its Rules, being legal principles, industry codes, good industry practice and previous decisions; and
- **Recommendation 3** which requires AFCA to ensure decisions are impartial and unbiased.

The primary purpose of this Review was to assess the randomly selected sample of 30 AFCA complaints that proceeded to decision across all product areas, against criteria indicative of fairness and impartiality.

The results of the Review are positive, with the Reviewers impressed with the overall quality and standard of decision writing, AFCA's ability to deliver fair process and outcomes and our overall service delivery to the parties, including people living in vulnerable circumstances.

The Report made 12 recommendations. All accepted by AFCA with the majority of them being to continue our processes. The remaining recommendations will be implemented under existing programs of work.

Scope and methodology

The 30 complaint files reviewed by the auditors were representative of the complaint volumes received in the preceding 12 months. The Review assessed whether, amongst other things:

- The outcomes reached in the determinations were fair in all the circumstances, having regard to certain matters
- The decision-making process was fair, taking into account the special needs of the parties

- The determination was written in a way that was clear and persuasive, and
- There was any indication that any AFCA employee involved in the outcome advocated for a party or did not act impartially throughout the decision-making process.

AFCA also invited the Reviewers to highlight any concerns, challenges or practices observed in case handling, or insights or recommendations which might assist in improving AFCA's operations, including our engagement with people in vulnerable circumstances.

Key findings

The Reviewers were given access to and reviewed the whole of each file when undertaking their assessment. Their key findings were as follows:

- 90% (27) of the cases were rated as excellent to good
- 77% (23) of the complaints reviewed were rated excellent to very good
- No file was rated as poor
- AFCA staff were alert to special needs or vulnerabilities of parties, AFCA staff generally, at all levels, observed the requirements of procedural fairness, and
- The teamwork and culture between decision-makers and case officers was commended.

Overall, outcomes reached in the cases reviewed were found to be fair in all the circumstances, with the Reviewers favourably impressed by the logical, thoughtful and evidence-based approach adopted by decision makers.

AFCA will continue with its current ongoing program of work to:

- Ensure the bases of its reasoning for decisions and compensation awarded are clearly expressed on all occasions
- Develop initiatives to reduce delay in complaints handling
- Leverage our new portals and other communication processes to provide more regular updates and estimates for the timing of a decision, and
- Review and refine how AFCA sets and enforces reasonable compliance with requests for information.

AFCA REVIEW 2023-2024 – AN OVERVIEW

INTRODUCTION

Appointment and Instructions

1. In August 2023, AFCA¹ appointed us to conduct an independent review of decisions based on an assessment of 30 complaints that proceeded to determination in the AFCA process.
2. According to our instructions, the essential purpose of the review, in summary, was to determine whether the outcomes reached in the determinations were fair in all the circumstances, having regard to certain matters, whether the decision-making process was fair, and whether there was any indication that any AFCA employee or decision-maker advocated for a party or did not act impartially throughout the decision-making process. In the course of discussions with our instructors, we were advised that AFCA also sought feedback about any perceptions, of problems, and any insights or recommendations, challenges or practices acquired in the course of our examination which might assist in improving AFCA's operations. In addition to the individual case analyses, we were requested to submit a report setting out our overview, which was to identify any areas requiring improvement and our related recommendations.

Selection of cases

3. We are instructed that AFCA selected 30 complaints across all of its product areas that it considered to be broadly representative of decisions issued in the period between 1 June 2022 and 30 May 2023. It selected a small number of complaints from Investments and Advice, Life Insurance and Superannuation (being product areas in which it issued the fewest determinations). For the Banking and Finance product area, it selected a proportionate sample of its three product lines (Credit, Deposit-taking, and Payment Systems).
4. AFCA identified common issues in each product area and randomly selected determinations to match the proportion in which these issues led to a published determination. It selected six complaints that were assigned to its Fast Track stream (involving one issue where the complainant claims a low amount of compensation), with the remaining 24 complaints being classified as either standard (involving more than one issue, or one issue where the complainant claims a high amount of compensation) or complex (involving more than one issue and where the complainant claimed a high amount of compensation).
5. Our reviews relate to a small subset of AFCA's cases, which have not necessarily provoked dissatisfaction or complaint. This necessarily qualifies any general conclusions. We also note the

¹ As part of its response to Treasury's Independent Review and Recommendations 2 and 3.

limited scale of our study, which comprises only 30 cases in a jurisdiction where over 90,000 complaints are lodged annually.

6. Based on our detailed examination of the cases, we were favourably impressed by the quality of the process and the decision-making. AFCA's personnel were consistently concerned to afford, and its routine practices were directed to ensure, procedural fairness, both in substance and appearance. The recorded communications with all parties, ranging from vulnerable complainants to sophisticated financial firms, were uniformly courteous and helpful. None of the cases we examined indicated that AFCA personnel or decision-makers were biased, partial or lacked independence. AFCA's organisational culture, as evidenced in the files, bespeaks a strong commitment to procedural fairness and accessibility. The preliminary assessments and determinations were generally of a high quality, clearly written and logically reasoned.

Background

7. AFCA is governed by a set of Rules, which are approved by ASIC, in accordance with the *Corporations Act 2001* (Cth). AFCA is required to operate in a way that is accessible, independent, fair, accountable, efficient and effective. Its decisions, if accepted by a complainant, are binding on the financial firm involved in the complaint. AFCA may also award compensation for loss suffered by a complainant, and it may grant other remedies in superannuation complaints.
8. AFCA's operations have grown considerably since its establishment in 2018. It currently receives over 90,000 complaints annually. Many of the complaints do not proceed to a determination, but are resolved at a relatively early stage.

METHODOLOGY

9. Our review took the form of a detailed assessment of each of the 30 complaints from the point of initial lodgement up to closure of the AFCA file. We were provided with the electronic case files for each complaint. Each file contained comprehensive correspondence between AFCA and the parties; the parties' materials, expert evidence, statements and submissions; internal file notes recording AFCA's telephone conversations with the parties; records of conciliation conferences; advices passing between AFCA personnel; drafts and final versions of the preliminary assessment and determination; the reasoning table; and a summary of all steps taken in the proceeding, including all the written and oral communications between AFCA and the parties. We also were provided with a decision review template which, in addition to assigning the file a qualitative rating (i.e. excellent, good, fair or poor), specified a brief comment on the following questions:
 - a. whether AFCA's process was fair, taking into account any special needs of the parties;

- b. whether there was any indication that any AFCA employee or decision-maker advocated for either party or did not act impartially in the decision-making process;
 - c. whether AFCA achieved a fair outcome, taking into account the facts and circumstances of the specific dispute;
 - d. whether the determination was written in a way that was clear and persuasive for the complainant, the financial firm and a third party reader;
 - e. whether there were any learnings or identified opportunities for improvement;
 - f. whether there were any particular strengths in the decision-making process.
10. As we had only 30 files, we were able to assess each one in great depth and detail. To the extent feasible given the voluminous materials and time constraints, we read through each file comprehensively. This approach enabled us to get a good sense of the fundamental issues at stake in the dispute, the circumstances and vulnerabilities of the complainant (and, where relevant, the financial firm), and the materials submitted by the parties in chronological order. This equipped us better to address the questions posed in the decision review template. A comprehensive examination of a number of files also gave us some insight into AFCA's organisational culture and day-to-day workings. We completed a detailed report on each case. Thirty reviews have now been provided to our instructors.
11. As to whether AFCA's process was fair, we considered whether each party was given a fair opportunity and a reasonable time to respond to information provided by the other, whether any parties with special needs were assisted throughout the process, and whether AFCA afforded the parties procedural fairness.
12. As to whether there was any indication that any AFCA employee or decision-maker advocated for either party or did not act impartially in the decision-making process, we considered whether there was evidence of actual or apprehended bias on the part of the employee or decision-maker, including in the form of conferring an unfair advantage on one party.
13. As to whether AFCA achieved a fair outcome, we considered whether the decision-maker properly identified and addressed the key issues in the complaint and whether the outcome was consistent with fairness, having regard to legal principles, regulatory guidelines, industry codes, good practice and previous determinations (where it was possible to discern such matters).
14. As to whether the determination was written in a clear and persuasive way, we considered whether it clearly set out the facts, how it dealt with contested factual allegations, whether it accurately and clearly set out relevant legal principles, regulatory guidelines, industry codes and good practice and

previous determinations (where relevant), whether the reasoning was logical and whether the determination addressed the parties' key submissions.

THEMES AND FINDINGS

15. Informed by the template questions, we identified four key themes in the course of our review: procedural fairness, substantive fairness, timeliness and quality of determinations.

(i) *Procedural fairness*

16. Procedural fairness involves a duty to observe fair procedures when making decisions that affect a person's rights or interests in a direct and immediate way. The rules of procedural fairness are traditionally reduced to "the hearing rule", and "the rule against bias".

17. The hearing rule entitles a person whose interests are liable to be affected to be given notice of relevant matters and a reasonable opportunity to present their case. The rule against bias seeks to ensure the objective appearance of impartiality and the absence of prejudgment. The question is whether a "fair-minded lay observer" might reasonably apprehend that the decision-maker might not bring an impartial and unprejudiced mind to the resolution of the question that they are required to decide. There are various behaviours of decision-makers that may or may not amount to grounds for apprehended bias. For example, ordinarily, merely expressing a provisional view, putting a testing question, or having an interventionist style, would not give grounds for apprehended bias. In some cases, however, such conduct could combine with other factors to cross a line.

18. There is an obvious potential for tension between, on the one hand, the requirements of procedural fairness, and on the other hand, efficiency and economy in the conduct of cases. On the one hand, granting adjournments and extensions and allowing a party to add or alter their submissions to improve their case may promote a fair hearing in the sense that this affords the party the fullest possible opportunity to put their best case. However, it is also likely to increase the time for determining the dispute, the costs to the opposing party (especially if they have some form of representation) and the cost to AFCA itself. These accommodations may also be very burdensome and unfair to the opponent. The need to balance such factors is a very important consideration for a high volume dispute resolution scheme committed to a timely, low-cost process.

19. AFCA has some unique or unusual features that might be important in this context. It is founded on accessibility, and no fees are charged. Its users include vulnerable people with limited resources, who have no recourse to professional advice. AFCA contributes in the most basic sense to the fair opportunity to put a case, as many users would not be able to make their complaint at all in the absence of such a forum.

20. AFCA personnel are charged with assisting and responding to vulnerable users, but they must also avoid taking sides or indicating bias. Their role must sometimes be finely balanced, because although an AFCA employee or decision-maker must not become a complainant's de facto lawyer or advocate, some users may not be able to state their case or ascertain what evidence they may need to secure redress. In some cases the personal circumstances of a party (typically but not exclusively the complainant) may be dire or distressing, requiring a particular accommodation, such as expedition, spending more time with the person to explain matters or alerting the other party to a circumstance which should be addressed.
21. In the course of our review, we observed AFCA personnel to be alert to the particular circumstances or vulnerabilities of some parties. For example, a very ill complainant with an insurance claim in relation to her damaged residence was identified as requiring expedition and some temporary accommodation. A helpful response to a vulnerable party in these contexts is not bias, and AFCA appears to be consistent in offering this humane and facilitative approach to the people who need it. In the cases we have examined, AFCA personnel were skilled at striking an appropriate balance, listening to complainants' narratives, providing guidance on what elements of their story are relevant to a claim and providing the necessary framework, without becoming an advocate or making their case for them.
22. More generally, in the complaints we have reviewed, AFCA personnel at all levels have, with very few possible exceptions, observed the requirements of procedural fairness. This includes in the obvious sense of being even-handed, providing full information and explanations to both parties, providing information relevant to some complainants' circumstances (such as the right to appoint a representative or to seek an extension of time), providing enough time to allow parties to respond and to prepare submissions, putting arguments to parties and overseeing the exchange of information. AFCA has also (with a couple of exceptions, identified below) given the parties notice of issues that might be important to the final decision, together with an adequate opportunity to address those issues.
23. We did not find anything to suggest that AFCA personnel have favoured one party over another or appeared to do so. The files indicate civil, even-handed communication with the complainant and the financial firm. In one case, we found that AFCA personnel contributed to a delay and did not forward information received by one party to the other. However, this case was an anomaly in what was otherwise a fair and diligent approach across the board.
24. One routine and prevalent practice of AFCA which does not occur at all in courts (because of the need to avoid a charge of an appearance of bias) is one-on-one telephone conversations with the parties. In curial settings, personnel who have anything to do with the decision-making avoid meeting the parties (or even their legal representatives) out of court and certainly never have one-on-one unwitnessed communications.

25. In contrast, at AFCA quite important telephone exchanges not infrequently occur between AFCA case officers (not only at an early stage after lodgement but also where the officer may be involved in giving preliminary views or recommendations). These contacts are where AFCA officers often obtain an initial understanding of the complaint and convey information about the process, what to expect, and what kind of evidence might be required. The AFCA officer at a relatively early stage may disclose their view on significant issues, hear the party's response and indicate what additional evidence might be necessary to address a problem with their claim.
26. From our review, it appears that this practice works well, and we have not observed it to lead to accusations of bias and misapprehensions or misrepresentations of what was said.² This may be partly because calls are backed up by records and confirmatory emails. That practice is a valuable safeguard in a context of routine unwitnessed encounters with parties, some of whom may be distressed or unfamiliar with legal principles and formal procedures.
27. The aspect of procedural fairness in which AFCA appears to us most vulnerable to slip is the requirement to give notice of, and an opportunity to make submissions on, an as yet unflagged point on which the case will ultimately be decided. This aspect of procedural fairness overlaps with the requirements for the quality of the determination itself, which include the need to recognise that the parties' arguments have been heard and to sufficiently explain why a party did not succeed. A common context for such slippage may be when a determination either reverses or significantly varies the outcome recommended in a preliminary assessment. The determination is independent of any preliminary assessment. Nevertheless, in such a case, if the ultimate decision-maker does not explain why they differed, the affected party may not be able to understand why they lost and may apprehend that an element of their case was not taken into account. Similarly, the ultimate decision-maker may have differed on a ground that previously did not seem important, as reflected in the preliminary assessment, and unless the ultimate decision-maker alerted the parties and sought input, the requirements of procedural fairness would not be satisfied. In one case reviewed, the deviation from the preliminary assessment was not acknowledged or explained in the determination.

(ii) *Substantive fairness*

28. When determining complaints other than superannuation complaints, AFCA must do what is fair in all the circumstances, and have regard to legal principles, applicable industry codes or guidance, good industry practice and previous relevant determinations of AFCA or predecessor schemes. AFCA is not limited to considering what is legally permissible, although it does take legal principles into account.

² In a couple of cases, a complainant directly accused AFCA or a particular officer of bias in the course of a telephone discussion, but the conversation was simply the setting for the accusation and not its cause.

29. Reasonable minds may differ on the construction of terms, the finding of facts, the application of legal principles to facts and above all, the question of what is fair in all the circumstances. In conducting our review, we did not approach the question of fairness by looking with a critical eye for some error or deficiency in reasoning. We were not acting as an appeal court or trying to substitute our own decision for that of the decision-maker, who necessarily had a higher level of familiarity with the facts and the evidence submitted by the parties. However, we did consider whether the determination was reasonable, even-handed and open in the circumstances on the materials before the decision-maker. That included assessing whether there was a reasonable application of logic, principle or guidelines to the facts, whether any fact-finding was open on the evidence, and whether there was an obvious error.
30. Based on these criteria, we have generally found the outcomes reached by AFCA to be fair in all the circumstances. As a starting point, each determination we reviewed correctly identified the source or sources that were relevant to the decision, particularly where the dispute turned on the application of a provision in a written instrument (such as an insurance policy or a Code).
31. In a small number of determinations, we observed that the decision-maker could have benefited from taking a more logical approach to the problem, thereby avoiding working an unfairness on one of the parties. In one of those cases, the basis for a conclusion as to the appropriate amount of compensation was neither made explicit nor grounded in the evidence. In another case involving an insurance dispute, there is a reasonable argument that the decision-maker took into account an irrelevant consideration and gave undue weight to certain evidence that may have resulted in unfairness to the complainant. We stress, however, that these cases represent a minority, and that on the whole we were favourably impressed by the logical, thoughtful and evidence-based approach adopted by decision-makers.

(iii) *Timeliness*

32. The importance of timeliness in legal proceedings is underscored by its impact on the overall fairness of the decision-making process. Delays in the course of a complaint can lead to frustration, anxiety and potentially a denial of justice for one or both parties. A timely determination not only contributes to the swift resolution of a complaint, but it also enhances public trust in AFCA as an accessible decision-making body. There is a delicate balance between timeliness and procedural fairness: while expeditious determinations are desirable, it is imperative to maintain the integrity of the decision-making process and ensure that all parties have adequate time to present their cases.
33. We have found some cases in which the decision-making process appeared to be unreasonably prolonged. It was not always possible for us to determine the precise cause of the delay. In most cases, however the delay was through no fault of AFCA but rather was due to the conduct of the parties or unfortunate circumstances.

34. The delays in which we have attributed some responsibility to AFCA appear to have been caused predominantly by the time taken to assign new case managers or decision-makers to a complaint or a general slowdown in activity following a holiday period. In one case, even where the need for expedition was clearly identified, the process was unreasonably protracted. It may be that additional monitoring of time-sensitive complaints would assist with minimising delays, and AFCA could allocate such complaints to its Fast Track stream although they may not normally be suitable for this stream. AFCA could also consider introducing more flexible criteria for Fast Track. Further, where time is of the essence, there may be scope for AFCA to provide parties with more regular updates, or at least an estimate as to when AFCA expects to provide its recommendation or determination. Such an estimate would likely manage the parties' expectations as to timing and motivate the case manager or decision-maker to work on the complaint within the estimated timeframe without allowing a backlog to develop.

(iv) *Quality of determinations*

35. The elements of a high-quality written decision vary according to context, but there is a universal core. In courts, inadequate reasons are a ground to set aside a decision. Such inadequacy includes failing to consider a submission or evidence or failing sufficiently to explain its treatment. Such failures could amount to a denial of natural justice. Consequently, in the courts, decisions are often nowadays very lengthy, complex and technical. Decision-makers are concerned to address all material arguments. The prevalence of appeals results in lengthy first instance judgments that take a long time to prepare.

36. AFCA stands in a different position from a court. Its determinations are generally not subject to appeal, and it is focused on accessibility and efficiency. That is, not only does it strive to reach a fair and principled result, but it also seeks to reach the crucial audience, including the parties, and particularly the unsuccessful party.

37. In addition, as stated above, the quality of the determination bears on procedural fairness. The decision-maker should demonstrate that they have taken into account the parties' principal submissions and their evidence, even if they do not accept them. In this context, it is also important to avoid a conclusory style. That is, it does not suffice merely to record conclusions without indicating the decision-maker's mental pathway. Decision-makers should explain what facts they have accepted and especially, where it is disputed, why they prefer one account over another. In the AFCA context, it can be brief, but to the point. Similarly, if there is a dispute about construction of a clause or which is the correct principle to govern a dispute, brief reasons should be given.

38. The determinations we reviewed were, with a few minor exceptions, of a high standard. They summarised the factual background and the evidence on which the parties relied, set out the terms of the applicable written instrument, and addressed the parties' submissions clearly and succinctly. One

practice, which is to be commended, is the use of subheadings, an executive summary and, where the factual background is complex, a chronology.

39. Almost all of the cases we examined were well-written and well-structured. They were clearly expressed, in terms that were as uncomplicated and untechnical as possible, without being inaccurate. They identified the central issues at the outset and discussed the important evidence. They were typically quite short. This is a positive attribute in the AFCA context, ironically requiring more discipline and clear thinking to achieve. The determinations were usually written in a style that would be readily comprehended by the parties and would satisfactorily explain to the unsuccessful party why they lost.
40. The few determinations we assessed as falling short of this high standard suffered from defects that are easily remediable. For example, we found it difficult to ascertain the factual background in one complaint because the determination interwove that background with the parties' submissions, such that it was difficult to discern which facts were contested and which were uncontested. The determination could have benefited from separate sections dealing with the factual background and the submissions or, alternatively, a chronology setting out the factual background. In another complaint, the determination stated that it only dealt with those issues and arguments that the decision-maker considered to be relevant to the outcome. We consider that it would have been desirable for the determination to set out, even in summary form, the submissions raised by the parties and not addressed in detail in the determination. This approach would ensure procedural fairness by making the parties aware that AFCA gave due consideration to their submissions and satisfied itself that those submissions were not relevant to the outcome. In yet another case, the AFCA Panel, while apparently reaching a fair outcome, set out the complex facts and arguments in an unduly abbreviated form and adopted a conclusory style, which did not expose the reasons for preferring one party's position over the other's.
41. Another aspect of procedural fairness in the determination phase is that a case should not be decided on the basis of an issue or evidence that has not been clearly identified as a matter which could be relevant to the decision, and has not been put to the parties.
42. If, at the stage of decision-making, an ombudsman realised that there was a potentially influential issue that had not yet been put, the proper course would be to contact the parties and invite their input. This is difficult to do in the more cumbersome curial context, but would be facilitated by AFCA's less formal process.
43. In this respect, there was scope for improvement in a couple of the determinations we examined.
44. In one case, a determination reached a very different result from the preceding recommendation. There was no recognition or explanation of this in the determination. The unsuccessful party may have been

left wondering about its reversal of fortune. In another case, the preliminary assessment recommended that the complainant receive an amount for indirect financial loss, but the determination awarded him (without explanation for differing from the preliminary assessment) a considerably smaller amount for non-financial loss. We suggest that when this kind of departure occurs, the reasons for changing or disagreeing be addressed.

45. In another case, the determination probably reached a fair result, but it was cursory and very conclusory in style. It set out what conclusions it had reached but did not show why it had preferred one view, or one body of evidence, over another. The parties' arguments or positions were not dealt with in sufficient detail. Again, they may have wondered whether some of their submissions were in fact taken on board by the decision-maker.
46. By and large, we are impressed by the quality of the determinations, which seem to us to be serving AFCA's users and the community well.

OTHER ISSUES

(i) *Undue latitude may be counter productive*

47. One question that arises in a no-costs jurisdiction is whether because AFCA users do not face a costs sanction, they could, on occasion, be unduly prolonging the process, by not complying with deadlines, not cooperating with scheduled processes, and so forth. Similarly, because AFCA personnel are approachable and try to minimise formalities, some distressed or angry users may abuse the process by incivilities to officers or unreasonable and time-consuming demands for attention. There are risks of inroads in efficiency, of a personal toll on AFCA staff and, ironically, unfairness to other parties.
48. Our impression is that sometimes there may be too much latitude and it is difficult to impose compliance and time discipline on some users. Ironically, this potential may be the 'double edge' of AFCA's accessibility and user-friendly ethos. Some parties may not sufficiently recognise the authority of directions and schedules, or the professional status of AFCA staff.
49. It may be that, in some contexts, AFCA could more firmly enforce reasonable compliance without sacrificing its laudable approachable culture and service to the vulnerable. That is, AFCA personnel could make circumspect and limited use of a 'guillotine' (eg declining to receive submissions or evidence after a certain date) to address non-compliance or tardiness for which no adequate explanation is advanced.
50. In some cases, we observed that AFCA personnel have already implemented a subtle form of that approach. For example, in one case, both parties, but particularly the complainant, were uncooperative about the timely provision of requested information. The case officer at a certain point informed them that she would shortly proceed to write her preliminary assessment with the limited material available.

51. In relation to aggressive parties, in the instances we have seen, the AFCA officers subject to challenging conduct coped very professionally. They did not surrender to the provocation, but calmly and patiently reiterated the relevant issues and deflected the offensive behaviour to the extent possible. Importantly, they also firmly enforced clear boundaries by, for example, informing the aggressive party that they must lower their voice if they wished to continue the conversation. The case officers also made a detailed memorandum of the conversation. It is not possible to eliminate all combative or challenging conduct. AFCA personnel may already receive training on managing demanding or difficult parties, and on coping with their impact. Such training would clearly assist in some contexts.

(ii) *Parties who pursue the full AFCA process through to determination although advised at an early stage that their case appears destined to fail*

52. We noted that in several cases a party had a weak or even hopeless case and was advised by AFCA accordingly from an early stage. Despite that detailed advice, the parties insisted on proceeding with the full AFCA process through to determination.

53. As we have discussed in several of the individual reviews, it may be questionable whether AFCA should always progress a matter through all stages of the usual process where a party's position has been carefully assessed but is clearly without merit and prospects of success. A costs/benefit analysis may be helpful in this context. Relevant considerations would include the criteria for identifying clearly hopeless cases, the number of such matters, the likely cost and impact on resources of affording them assessment through to determination, the cost to the opposing party, the value to the party insisting on progression to determination and the value to the administration of justice of routinely providing an exhaustive service to all participants. Clearly, the mere fact of an adverse preliminary assessment would be an insufficient basis for declining to progress a matter to a determination. As even the present limited review demonstrates, determinations in some cases radically depart from, and even more frequently somewhat adjust, the previously recommended outcomes.

(iii) *AFCA's role after case closed*

54. A feature which caused frustration and dissatisfaction in at least one matter we reviewed was AFCA's lack of power to enforce a settlement. After a long drawn out dispute with a financial firm whose practices drew very trenchant criticism from the AFCA Panel, the complainants maintained that the financial firm did not comply with the award in their favour but instead delayed and thwarted the settlement. AFCA engaged with both parties, urging patience and cooperation. It is not possible to draw firm conclusions about the merits of the post-closure dispute in the particular case, but ultimately the complainants apprehended that their only available avenue was to lodge a fresh complaint. It may be valuable for AFCA to identify the frequency of material non-compliance with its determinations. If this appears to be a prevalent problem, it may significantly impede the effective accomplishment of AFCA's mission. In that case, ways of addressing the problem could be examined. It may be that use

of some sanction available within the existing framework, such as forewarning the non-compliant financial firm of AFCA's obligation to report non-compliance to ASIC, would be effective.

(iv) Team-work

55. In this regard, we have found very little to criticise and much to commend. We think the case officers and decision-makers are typically conscientious and skilful. We are also impressed by the cooperation, team-work and internal support systems that are evident in the files.
56. Case officers may have their preliminary views, recommendations and written work checked for expression, content and structure. Determinations may also be checked.
57. Our examination of the cases revealed a sense of systematic team work and consistent cross checking. AFCA's expert and specialist resources and advices were routinely called on. Case officers could request and promptly receive internal advice on challenging matters. These included but were not limited to: what aspects of this complaint can be dealt with? Can the matter be fast tracked? Was the loan at issue in the complaint affordable? The availability of such internal resources reduces both the risk of error and the potential for a matter to 'spin out' due to a difficult issue.
58. Our above observations on teamwork and collaboration were not based on any instance of close collaboration or interaction between a preliminary assessor and ombudsman working on the same matter. In *Notesco Pty Ltd v AFCA* [2022] NSWSC 285, the Supreme Court of New South Wales considered that continuing interaction, collaboration and advice between the preliminary assessor and ombudsman beginning prior to the preliminary assessment did not comply with the requirement under AFCA's Rules that decision-makers act separately when making their determination. The Court did not determine whether such interaction could undermine impartiality, independence and fairness (as generally understood) within the AFCA process.
59. In our view, it is arguable that the inflexible maintenance of a strict information barrier between preliminary assessors and ombudsmen handling the same case is not necessary to ensure the impartiality, independence and fairness of the AFCA process.
60. Particular features of AFCA's organisation and process indicate that it does not apply all the restrictions used in curial contexts to ensure procedural fairness in appearance and substance. For example, AFCA case managers commonly take part in telephone conversations with individual parties, decision-makers are involved in conciliation conferences, and AFCA often makes preliminary assessments and recommendations before issuing a final determination (if one or both parties opt to proceed to the determination stage).
61. We are informed that the necessity to restrict interaction between preliminary assessors and decision-makers places a strain on AFCA resources. Clearly, given a curial determination that such interactions

breach AFCA's Rules, until the Rules are amended, the separation must be maintained. However, further consideration could be given to whether and in what circumstances such interaction compromises impartiality, independence and fairness in the particular AFCA context. Depending on the outcome, an appropriate amendment to the Rules could be proposed.

PRELIMINARY ASSESSMENTS AND RECOMMENDATIONS ISSUED BY AFCA

62. We note that the preliminary assessments and written recommendations which precede a determination were frequently of a high standard. Many were thorough, well written and logical. They refined the issues, thus setting the stage or providing a springboard for the determination.

RECOMMENDATIONS

63. Although termed 'recommendations', we caution that the following observations are not based on a comprehensive examination of a sizeable number of cases or on instructions about AFCA's operations generally. Accordingly, their reach is limited by the relatively small, randomly selected body of cases which may, by chance, have disclosed features unrepresentative of the general body of AFCA cases or conversely, may not have revealed relatively common problems.

64. In some cases, the relevance of our observations would depend on general trends and prevalence, which we were not in a position to evaluate. However, to the extent that our observations are based on an in-depth study of particular cases, they may nevertheless raise questions that AFCA could usefully pursue.

- (1) AFCA should maintain and prioritise its current civil, facilitative and professional approach to dealing with its user base, including vulnerable parties or those with special needs.
- (2) AFCA should maintain and prioritise its current generally high standard of written determinations, in relation to both their quality of expression and fair and reasonable outcomes.
- (3) AFCA should consistently monitor and prioritise the goal of handling and determining complaints on a timely basis. It should systematically identify, evaluate and address any impediments to achieving timely dispositions.
- (4) AFCA probably does, and should continue to, strike a balance between fairness and efficiency in providing adequate time for parties (including vulnerable or disadvantaged users) to make submissions, respond and provide materials. While procedural fairness requires an adequate opportunity to put a case, undue latitude (evident in a small number of cases) in giving extensions or other accommodations in favour of one party can result in unfairness to the other party and an inefficient use of AFCA's resources.

- (5) AFCA should monitor complaints promptly to identify clearly unmeritorious or hopeless claims and ensure that they are dealt with efficiently and as soon as possible.
- (6) AFCA should provide appropriate training and support for staff who deal with or have been subjected to, distressing or abusive conduct by parties or other persons.
- (7) Where an ombudsman proposes to decide a case on an issue that has not previously been flagged to the parties, the ombudsman should first ensure that the parties have an opportunity to address and make submissions on the relevant issue.
- (8) Where a determination differs materially, or directs a different outcome (whether in relation to compensation or otherwise), from a preliminary assessment, the determination should acknowledge the departure and briefly explain it.
- (9) AFCA determinations should, in all cases, make clear the pathway of reasoning to the decision. They should also explain what facts, evidence and submissions they have accepted or rejected, giving reasons for preferring one version of events over another.
- (10) Where allocation of a case to a decision-maker is delayed, AFCA should provide timely updates to the parties. Urgent cases should be allocated as a priority. The progress of a case identified as urgent, or otherwise requiring expedition, should be monitored at regular intervals and appropriately actioned if necessary.
- (11) AFCA should review the criteria for entry into Fast Track at appropriate intervals and adjust them if appropriate, in the light of history and evolving circumstances.
- (12) AFCA may decide to assess whether non-compliance with its determinations is a prevalent or material problem. It should in any event ensure that it responds as effectively as possible within the existing framework to a financial firm's non-compliance with its directions.

The Hon Julie Dodds-Streeton KC

Ahmed Terzic of counsel

8 February 2024