

Dear Ms Morgan

Letter dated 20th March 2018 to Treasury Select Committee from Caroline Wayman

I write to you as Chair of the Treasury Select Committee, and refer to the above letter sent to you by Ms Caroline Wayman, Chief Executive of the Financial Ombudsman Service ('FOS').

I was a contributor to the relevant *Dispatches* programme and the "consultant" referred to in her letter. My firm undertook the analysis which demonstrated that approximately half-a-million people¹ had been denied redress by unlawful decision-making at FOS. I should accordingly be grateful if this letter were published alongside hers.

In trying to refute (or, in fact, simply deny) our analysis, Ms Wayman merely provides evidence in support of it. There is no doubt that PPI was mis-sold in all, or virtually all, the cases rejected by FOS. This is clear not because of what we say but because of what FOS says. The "detailed decision", attached by Ms Wayman, illustrates this perfectly.

Its essence is found in the "summary" in paragraph 6 on page 2:

- *MBNA did not act fairly and reasonably in its dealings with Mr E. MBNA did not provide Mr E with sufficient information about the costs, benefits, exclusions and limitations affecting the cover in a clear, fair and not misleading way to enable Mr E to make an informed choice about whether to take out the policy.*
- *Mr E made his decision to take out the policy based on incomplete and inaccurate information. But if things had happened as they should, on the evidence available in this case, it is more likely than not Mr E would still have taken out the policy.*
- *It would not be fair in these circumstances to make an award of compensation...*

Most FOS rejections in PPI cases are a great deal shorter; but virtually all are decided on a materially identical basis. (We have examined random samples from the 20,000 cases referred to in footnote 1 above and from over 37,000 published on the FOS decisions database. This appears to be the basis of the rejection in, conservatively, 90-95% cases².)

¹There are more than Ms Wayman suggests. Apart from the 495,877 cases to which she refers there are another c.20,000 from one claims manager alone (that referred to by Ms Wayman: "We Fight Any Claim Limited") which have been subject to "provisional" rejection on the same basis. FOS will not make final decisions in relation to these because of the fear of legal challenge (which would make clear that the relevant decision making was both unlawful and entirely industrial). Furthermore, the number is still going up, day-on-day. In fact, because current uphold rates are startlingly low, it is worsening rapidly. I shall return to this at pages 2 and 4 below.

²We have excluded cases which do not relate to liability (for example disputes about redress calculations) and the very small number where FOS had no, or limited, jurisdiction.

The evidence is readily available. Every member has a substantial number of constituents in the "pool" of 20,000 cases to which we have referred and copies of the relevant decisions can be provided. The FOS decisions database is publicly available and can be inspected by anyone at <http://www.ombudsman-decisions.org.uk/>.

The problem is absolutely endemic, but, in fairness, no consumer should be treated unfairly or unlawfully; and far lower volumes than this would require explanation and remedial action.

In every such case, there is no evidence the consumer has been treated properly or fairly or been told about the product's high price, onerous exclusions, or extremely poor value. But FOS has then said this did not matter, speculated that the consumer would have bought the PPI even if the sale had been made fairly and properly, and accordingly, determined that it would be unfair to award redress.

This was what I said on *Dispatches*. It has happened around half-a-million times.

This is staggering. The typical cost of loan PPI was 20-25% of the loan, paid for with borrowed money. For credit and store-cards, the typical cost was 9-10% a year added to the card debt and thus subject to interest at credit card rates. Claims arising from stress and/or mental illness, bad backs, and pre-existing conditions (the three most common reasons for absence from work) were commonly excluded (or savagely limited). Self-employed people generally could not claim if their work stopped or reduced. For cards and mortgages, PPI cover was generally subject to a waiting period at the beginning; and was then limited to a year's payments - meaning cover would stop just when it was most desperately needed³.

The most telling point of all is that of every £ (of generally borrowed money) spent on PPI, an average of 85p was taken in commission, overhead and profit with only 15p used to pay for insurance. (For some firms – Lloyds and MBNA for instance – the proportion used for insurance went below 10p in the £.)

But FOS have said, historically, that a third of those mis-sold the product would nevertheless have gone ahead if they had been properly informed: so the firms can keep money taken by means which FOS itself has concluded were not fair.

The position is, moreover, worsening rapidly, as I shall demonstrate at page 4 below.

The normal FOS decision does not run to Mr E's 34 pages. FOS's industrial norm is around 3 pages - with the finding that the consumer would have bought the product anyway usually to be found on page 2. There is generally no explanation of why, save that the PPI would have had "some value" or "could prove valuable" or something similar. Mr E's decision contains a good deal of extraneous verbiage. It seems specially designed to suggest there has been careful assessment of a range of factors, perhaps to try to insulate FOS against Judicial Review. However, examination reveals it to be longer than the usual, but not better. (I summarize it in Appendix 1, relying on the Ombudsman's own findings of fact. They make my point for me.)

Ms Wayman's other point is that not every PPI was mis-sold and this is "reflected in the complaints led approach taken by the regulator".

The purpose of this note is not to criticize FCA, who are not, at present, before the Treasury Select Committee; but some brief comment seems inevitable.

Approximately 70% of complaints have been upheld by firms, and, historically, 65% of the cases referred to FOS have been upheld there⁴. This implies, even before looking at the half-a-million rejected complaints, that almost 90% of policies were mis-sold⁵. Our analysis simply indicates the rest were mis-sold too. Set in that context, our conclusion is not especially surprising. In any case, we have simply followed the evidence.

³ This is not exhaustive. There might also, for example, be a seriously limited definition of disability (as in Mr E's case). The cat (or consumer) could be skinned in all sorts of ways, but the point was to make it difficult to claim – which, combined with high cost, resulted in the generally, and extremely, poor value of the product.

⁴Ms Wayman's numbers: 923,656 is 65.1% of the total. **But this is certainly not at the case present: see my concluding paragraphs.**

⁵70% + (65% x 30%) = 89.5%

The alternative to a complaint driven approach was a pro-active industry review. More consumers would have got their money back (fewer than half of those who could do so have yet complained⁶) and there would have been no need for a Claims Management Industry. FOS too was clear about the right answer (at least in 2008). On 1 July 2008, Sir Christopher Kelly, then Chairman of FOS, wrote to Hector Sants, then Chairman of FSA, to say that given the “widespread and regular” nature of PPI mis-selling:

It is of course for FSA, together if appropriate with HM Treasury, to decide exactly what regulatory tools should be used to bring about the desired outcome. But my board is in no doubt that simply allowing consumers individually to bring complaints is not the right way to tackle what is a systemic problem...⁷

The regulator nevertheless decided that a complaint driven approach was the more proportionate response. I will not speculate about their reasons here. However, it is fair to say that this position would have been impossible to justify if they had accepted that the mis-selling of PPI had been more or less universal. FCA have since asserted, from time to time, that “not all PPI was mis-sold”. I do not doubt this belief has been sincere, if convenient. But FCA have never said how much was not mis-sold; or identified any relevant groups of cases and adduced them as evidence. With all due respect to Ms Wayman, these regulatory assertions therefore provide her with no worthwhile support in challenging inconvenient facts; and bad evidence gets no better with repetition.

The central thesis of *Dispatches* was that in order to get rid of cases faster, using less skilled people, FOS was now making worse decisions than had been the case in the past. It was easier to reject complaints than uphold them, so they were being improperly rejected.

As I have said, the evidence indicates that half-a-million PPI complainants have been unlawfully denied redress by FOS. This did not begin when FOS got into an administrative mess in 2015/16. The speculation that the victim would have proceeded anyway has been used to reject complaints from an early stage.

However, this kind of decision making could certainly be useful if one was in a hurry, or wanted to simplify things: because one just needs to conclude the client would have proceeded anyway and move on. It is also easy to industrialize, using a system, or a set of corporate policy decisions, presumptions, or simple rules.

⁶According to FCA, 60 million policies were sold after 1990, and the product was being sold for some time before that.

⁷http://www.financial-ombudsman.org.uk/publications/technical_notes/ppi/ppi-FSAreferral-Jul08.pdf

The following is FOS's own data⁸:

Apr-Jun 2015	Jul-Sept 2015	Oct- Dec 2015	Jan-Mar 2016	Apr- Jun 2016	Jul-Sept 2016	Oct- Dec 2016	Jan- Mar 2017	Apr-Jun 2017	Jul-Sept 2017
73%	72%	67%	-	57%	-	44%	40%	39%	35%

(We have been unable to find discrete quarterly data for January-March and July-September 2016 but the overall average for April 2015-March 2016 was 66%; and that for April-December 2016 was 54%. It accordingly looks as though the decline in uphold rates was accelerating throughout 2016.)

This is deeply alarming. It appears to support the *Dispatches* thesis. It also means that rather than two thirds of PPI complaints being upheld, two thirds are currently being rejected – and, at risk of being repetitive, when there is no doubt the relevant policies were mis-sold. At a reasonable estimate, the number of affected consumers is rising, and will continue to rise, at a rate of 7,000-10,000 per month.

It is easy to see why FOS might want to take some time over this; and would prefer political interest and media attention to wane. But very large numbers of real people have suffered serious, and unjust, financial harm. Their number is going up all the time. Every member of the Treasury Select Committee has constituents amongst them. I therefore hope you will not find it presumptuous that I have sent copies to all members of the Committee. Since this is also a matter of access to justice, I have copied in Robert Buckland (my own MP as well as Solicitor General) and Nick Thomas Symonds (MP for the claims manager referred to above, and Shadow Solicitor General).

Yours Sincerely

Mark Davies
Director
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⁸Taken from the relevant editions of "FOS News".

Appendix 1 – Mr E’s Case

All references are to FOS’s own findings in the attached letter.

Mr E was an HGV Driver (para 15). As was usual, the PPI seriously limited cover for stress, mental health and bad backs (para 26). (Bad backs are of course especially problematic for HGV drivers.)

Mr E could not claim for the first 30 days of disability/unemployment (para 74). Cover was then limited to 12 months (para 21) (although, misleadingly, MBNA’s literature said 24 months (para 74)).

The cost was c.9% per year (68p per £100 of balance per month) (para 23) (which of course was added to the credit card balance, with compound interest being charged accordingly).

The monthly benefit was only 3% of the balance. This meant that after a year the claim would stop, but the vast bulk of the debt would still be outstanding (para 25). This problem was worsened because, unusually, PPI premiums continued to be taken even during a claim (also para 25).

Mr E could not claim if he was too sick to do his own job, but the insurer decided he was able to do another (para 21). (This is problematic, because as a 56 year old HGV driver he might, for example, be unable to do his job because of a problem with his eyesight, but might be able to do other manual work. He would not want to resign his current job to look for such work, but could still be prevented from claiming on his PPI.)

FOS do not dispute that 85p in every £ was taken in commissions, costs and profits (in fact, as I have said above, MBNA sometimes took over 90%).

The basis for saying that Mr E would have proceeded anyway is that the policy provided cover that “could prove valuable to him” (para 138, and although deep in the text, the same as that for the other industrial decisions). Any policy might provide some benefit in some circumstances, but that is not a reason to buy an expensive, limited, poor value product. But the Ombudsman then says, at para 140: *“I think it is reasonable to conclude that from Mr E’s perspective he saw considerable benefit in having the insurance...”* because Mr E’s *“view was that he would have had a problem in making payments in the circumstances the policy appeared to cover...”*.

However, the decision contains no evidence that this was Mr E’s state of mind. And the conclusion that he would have proceeded had he been properly informed is, by definition, entirely speculative, because he was not properly informed.

Finally, it is worth noting that Mr E has stated, in terms, that if he had been told the truth about the product he would **not** have wanted it (para 152). The Ombudsman concludes that Mr E said this only because his representative explained the exclusions and poor value to him – which the Ombudsman says MBNA did not have to do - and then appears to cast doubt on the veracity of this evidence by stating that the formulation looks fairly standard and the “representations” are “in support of a claim for compensation” (paras 154 and 155). (This is true, of course; but would be a reason to discount all statements on all sides. The question is surely whether “I would not have bought a bad product if I had been told how bad it was” is a credible assertion. One would think so.)

Perhaps worst of all, there is another clear implication: the more vulnerable the customer, the less likely he or she is to be redressed. Vulnerable customers are less likely to understand the product even if they are, according to FOS, properly informed; and hence it is easier for FOS to speculate that proper information would not have affected their decision to buy the policy. It thus becomes fairest to deny redress to the most vulnerable. The logic appears inexorable. The conclusion looks surreal and deplorable.