It is clear - politicians are protecting bankers

Summary:
The Hayne RC and the Senate Access To Justice inquiry have dropped the ball. The only way banks can engage with clients in the heavy handed, deceptive, unconscionable and often criminal way that they do is thanks to a "justice" system that enables and allows them to get away with serious abuses. Any other business or individual that treated clients in the way the banks regularly do would see perpetrators fined and jailed. Yes - the abuses we have researched are that serious. Politicians and multiple inquires have been informed. So clearly the other protection required by banks is political. Therefore until people take political action to reform the system nothing will be achieved. Election 2019 is the time to take action.

Here we look at the weak recommendations from the Senate Access to Justice inquiry with contributions from the BRN Advisory Panel.

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Serious Reform Opportunity Missed

Recommendations of the - Resolution of disputes with financial service providers within the justice system Senate Inquiry - Released 8.4.19 by the Senate Standing Committees on Legal and Constitutional Affairs

Recommendation 1
3.7 The committee recommends that the Australian Government **establish an industry levy**, to apply to the largest financial institutions on the ASX, that would raise funds for the legal assistance and financial counselling sectors to enable these sectors to provide assistance to consumers and small businesses that have disputes with financial service providers.

Recommendation 2
3.9 The committee recommends that the Australian Government **improve access to legal assistance services for small businesses.**

Recommendation 3
3.13 The committee recommends that the Australian Government require Australian Credit Licence holders to **comply with model litigant obligations throughout the internal and external dispute resolution processes, as well as any proceedings in the courts.**

Recommendation 4
3.17 The committee recommends that the Australian Government immediately **implement recommendation 4.11 of the Royal Commission** into Misconduct in the Banking, Superannuation and Financial Services Industry.

Recommendation 5
3.20 The committee recommends that the Australian Government **amend the Bankruptcy Act 1966 to prevent causes of action relating to consumer credit protections from vesting in the trustee in bankruptcy.**

Recommendation 6
3.24 The committee recommends that the Australian Government **improve home repossession processes by requiring that creditors engage with customers at an earlier stage.** This could involve:

(a) establishing a new mediation section at the Australian Financial Complaints Authority (AFCA) to conduct farm debt mediations, and a new bank-initiated mediation stream for consumer and small business loans;

(b) requiring banks to initiate a mediation through this new AFCA process before bringing repossession proceedings against a family home; and

(c) requiring banks to give preference and due consideration to reasonable proposals put forward by customers to restructure debts, pay down parts of debts and/or trade out of temporary financial difficulty when a customer is in financial difficulty and a loan secured by or guaranteed by a family home is in default.

Recommendation 7
3.33 The committee recommends that the Australian Government:
• **increase the current compensation cap available to consumers through the Australian Financial Complaints Authority (AFCA) to $2 million,** including for credit, insurance and financial advice disputes; and
• **remove the sub-limit on compensation available to consumers through AFCA for indirect financial loss and for non-financial loss.**

Recommendation 8
3.37 The committee recommends that the Australian Government **extend the membership of the Australian Financial Complaints Authority to:**
• debt management firms;
• registered Debt Agreement Administrators;

• 'buy now pay later' providers;
• FinTechs and emerging players;
• small business lenders; and
• professional indemnity insurers of financial service providers.

Recommendation 9
3.41 The committee recommends that the Australian Government **consider extending the loan facility limits for small businesses and farmers who wish to make a claim through the Australian Financial Complaints Authority (AFCA), in consultation with AFCA and other relevant stakeholders.**

Recommendation 10
3.45 The committee recommends the **establishment of a retrospective compensation scheme independent of the Australian Financial Complaints Authority to allow victims of alleged misconduct by banks who received a past external dispute resolution determination or court judgment that was manifestly unjust to apply to the scheme to have the matter reviewed with the consent of the bank.**

BRN Advisory Panel Members Respond

Dr Evan Jones -

The Senate Legal Committee report ('Resolution of disputes with financial service providers within the justice system') skims the surface on all fundamental problems. It takes for granted that the court system is in the too hard basket for bank victims (correct) but declines to inquire why that is the case. It takes this parlous situation as a fact of life and thus leaves the court system out of the equation for the achievement of justice.

The inquiry and the report ignores ASIC's obligation (under s12C) to act for victims of unconscionable conduct by financial service providers and that regulator's comprehensive failure to take action to offset the relative powerlessness of such victims. Ditto APRA's exclusive concern for system stability (i.e. bank profits) at the expense of bank victims.

By default, all the weight of dispute resolution is put on External Dispute Resolution (EDR) bodies, notably AFCA. AFCA can't support the weight. The amalgamation of three distinct ombudsman schemes was itself a mistake. The report supports the amalgamation, which follows from the Ramsay review of EDR, which itself ignored the pre-existing incapacity and complicity of FOS in particular.

Simply, AFCA personnel are not equipped to handle the entrenched criminality within the financial sector. Apart from being funded directly by the finance sector whose abuses it is supposed to offset, AFCA personnel do not have the skills, experience or training to confront and offset the profound asymmetry of power that generates pervasive criminality.

The report centres on the views of various organisations while ignoring the submissions of the victims themselves. This 'conversation' between organisations exists in a parallel universe to that of the victims. There is some overlap and sympathy from the input of Consumer Law Centres but those admirable bodies deal mostly with retail banking problems. Small business and farmer victims, while acknowledged in passing, are omitted substantively from the picture.

Behind the scenes, the banks continue with business as usual, treating the Royal Commission (rightly) as an irrelevance. Victims, even though better organised and forceful than ever, still face individually drawn out negotiations in which their bank lenders aim to give them in compensation nothing or as little as possible.

Michael Sanderson -

The Senate Legal and Constitutional Affairs References Committee were tasked to investigate:

"...The ability of consumers and small businesses to exercise their legal rights through the justice system, and whether there is fair, affordable and appropriate resolution processes to resolve disputes with financial service providers..."

None of the committee's recommendations improve the ability of consumers and small businesses to exercise their legal rights through the justice system in any meaningful way. Because the committee has failed to address 'Equality of Arms' the justice system remains, unfair, unaffordable and an inappropriate resolution process to resolve disputes with financial service providers!

Equality of Arms was specifically mentioned in at least 27 of the submissions and the issue of inequity in this country's courts was articulated in many forms in the majority of submissions. The committee has ignored Equality of Arms in its report. Not one submission proclaimed that our justice system is a fair, affordable and appropriate resolution process to resolve disputes with financial service providers.

The committee's recommendations fail to address the substantive issues of the excellent terms of reference. There are some crumbs in the recommendations however the requirement of timely, proportional and equitable access to our (not the banks) courts and any associated justice remains elusive. The UN Human Rights Committee has found a violation of article 14(1) in a case in which a right of appeal was open to the prosecution but not to the accused.

The lack of meaningful recommendations will mean that FSP consumers and SME's will continue to be violated by not only the FSP, but also their agents and the justice system itself.

Craig Caulfield -

My general opinion of the final report is that the recommendations are inadequate in addressing the concerns raised in the Senate's original goals as well as the concerns raised in 150+ submissions. We have had fifty bank inquiries and this the one could have been the one that brought about real change. Unfortunately it largely hasn't. This is because every bank inquiry, including the Royal Commission, has had carve-outs and compromises in the Terms Of Reference.

The most disappointing aspect is that to address how victims have been failed by the justice system there was an almost total absence of bank victims and Bank Warriors appearing as witnesses. Such personal accounts of failures at every level of the justice system creates emotional connection and empathy far more than written statements.

The isolated exception being Bank Warrior, Selwyn Krepp's outstanding and heartfelt testimony.

The recommendations do not address all issues in this Senates remit. Wording is weak, even where the intent is evident. This is precisely what has happened at most preceding bank inquiries.

Recommendation 3 - affirming Model Litigant requirements was a major win. It is fortunate timing that all four major banks made verbal commitments to act as Model Litigants at the Four Major Banks inquiry at Parliament House, concurrent with this committee's timing.

While the majority of legacy cases remain largely unaddressed and uncompensated, I cannot see a wholesome way forward that is not a Royal Commission Mark 2 with wider TOR, over 3 years, with 3 specialist commissioners.

My intention is to engage in a co-operative spirit and educate the bankers to see that failures need to be properly, fairly (not just minimum legally) redressed and compensated. Same with educating the regulators and other accountable bodies. Model Litigant came out of co-operation between many bank warriors and many bankers. This co-operative reform is the start of further reform and resolution of outstanding issues. We have been largely excluded from the Royal Commission, we have been largely excluded from this Senate inquiry but we were not excluded by the banks on Model Litigant discussions. We can build on this success.

The large external legal firms are at the heart of much bank malfeasance. The banks have already instructed their external lawyers to comply and live up to the banks' new found standards of Model Litigant.

Model Litigant undertakings by the CEOs does not mean every banker or lawyer will uphold the promised standards. It is our responsibility, as Bank Warriors, to remind them at every interaction that where the bank fails they must immediately correct their response.

Some of the Model Litigant requirements can be made enforceable. Our task is to now ensure those are legislated, in clear and simple terms, with teeth, in our Parliament.

Also - see link below for Jeff Morris' powerful submission to the inquiry and BRN's preferred Model Litigant proposal.

Websites For More Information: Resolution of disputes with financial service providers within the justice system - Final Report 8.4.19
https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Legal_and_Constitutional_Affairs/banksandlegalsystem/Report

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