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Committee Secretary
Senate Legal and Constitutional Affairs Committee
PO Box 6100
Parliament House
Canberra ACT 2600
Email: legcon.sen@aph.gov.au

Dear Committee Secretary

RESOLUTION OF DISPUTES WITH FINANCIAL SERVICE PROVIDERS WITHIN THE JUSTICE SYSTEM

As per the referral by the Senate to your Committee, this submission concerns my personal ability as a consumer to exercise my legal rights through the justice system and my experience as a user of the current external dispute resolution (EDR) system of the Australian Financial Complaints Authority (AFCA). The AFCA process and current rights to appeal to the federal court mechanism is redundant for vulnerable consumers. For vulnerable consumers with no money a high risk of court litigation/redress is simply not an option. Therefore, many consumers feel aggrieved and do not pursue justice and are left broken by the banking system. This system is unfair and unaffordable for consumers. It is an inappropriate resolution process to resolve disputes with financial service providers, in particular the big four banks and superannuation trustees over the last 11 years up to February 2019. The main causes stem from regulatory capture and the court appeals process which is out of reach for wronged consumers. I will address a summary of the main issues.

Whether banks and other financial service providers have used the legal system to pressure customers into accepting settlements that did not reflect their legal rights

Banks, superannuation and insurance companies have routinely pressured vulnerable consumers to sign non-disclosure documents preventing them from speaking out about corrupt, dishonest, misrepresented, misleading or fraudulent conduct perpetrated against them. This effectively buries the statistical evidence of financial services misconduct forever. Until the findings of the Hayne Royal Commission revealed systemic dishonesty in banking and financial services, misconduct was perpetrated but not subject to any of the available statutory criminal and civil penalties which exist in ss 1041G, 180, 181, 182, 183, 184 of the *Corporations Act 2001* (Cth).

Access to Justice - 2013-2018

Up to the start of the Royal Commission into banking misconduct, my experience has been to attempt to resolve complaints with banks and superannuation trustees using external dispute resolution (EDR) through the Financial Ombudsman Service (FOS) and Superannuation Complaints Tribunal (SCT). These two mechanisms lacked the requisite financial technical expertise and financial legal intelligence required to negotiate the dispute resolution between a large well-resourced bank/superannuation trustee or insurance corporation versus an unrepresented, un-resourced, vulnerable, usually damaged, naïve complainant. Both FOS and SCT have previously been criticised in parliamentary committee submissions for their ineffective responses to complaints, enabled by the damaging culture of regulatory capture. The broken system has been operating for the past 11 years.

Financial and Legal Complexity - Unfair Result for Consumers

The financial complexity of banking and superannuation products including high risk derivatives prior to the legislative consumer protections in 2011 and thereafter, have left vulnerable consumers without redress. Accessing legal redress through the myriad and existing legislative provisions of Australian law covering privacy, corporations, ASIC, insurance, competition, superannuation, banking and insurance codes have all been ignored by the EDR schemes - FOS and the SCT. Instead, FOS confined their inquiries to an unrealistic and narrowly focused Terms of Reference prism and the SCT confined their inquiry to the narrow lens of the *Superannuation (Resolution of Complaints) Act 1993* which make determinations not in accordance with legal precedent but based on lay men and women trying, but failing, to understand the legal complexity of financial services' disputes. The only recourse for consumers is court litigation which EDR schemes have routinely told consumers they are free to pursue. This is high risk and a high cost strategy for most vulnerable consumers. Therefore, in most cases justice is not pursued or served.

No Coercive Powers to Disclose Material Evidence - Unfair Result for Consumers

The previous EDR schemes did not have the legal power to properly compel or coerce large and well-resourced corporations to disclose material evidence which could help consumers exercise their true legal rights. Denying access to all the facts denies access to justice. The only recourse is court litigation which EDR schemes have routinely told consumers they are free to pursue. This is high risk and a high cost strategy for most vulnerable consumers. Therefore, in most cases justice is not pursued or served.

Time Delays – Unfair Result for Consumers

The previous EDR schemes have had fatal bureaucratic leadership flaws and improbable timeframes which have deleteriously biased consumers and their right to exercise justice. The SCT for example was without a head for a long period of time. This caused delays, unjust outcomes and biased results for vulnerable consumers. The banks and superannuation corporations within their IDR practices used the improbably long and unfair timeframes to delay responding to claims and then gamed the system by extending the claims process. They did this by asking for unreasonable time extensions which routinely led to more extensions and less access for consumer justice. Delayed justice is denied justice. This system is fed through to the next level of EDR which also had unrealistic and unfairly lenient timeframes favouring corporations who had the power to limit the facts they chose to disclose. Again, this caused compounding damage to the original damage caused by the banking/superannuation misconduct. The consumer is the only one to suffer the deleterious, unjust result of this egregious exploitation.

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Regulatory Capture - Unfair Result for Consumers

The permissive relationship between the banks and the regulators has caused unconscious bias, inequity and unjust outcomes for consumers. This deleterious, broken system of not policing criminal offences and civil misconduct by banks and superannuation companies caused harm and damage for which consumers are unlikely to ever have redressed in the current system. The only recourse is court litigation which EDR schemes routinely tell consumers to pursue. This is high risk and a high cost strategy for most vulnerable consumers. Therefore, in most cases justice is not pursued or served.

AFCA Extra-Judicial Discretion - Unfair Result for Consumers

The previous EDR schemes and AFCA use a wide margin of discretion to decline/withdraw complaints unfairly based on so-called jurisdictional rules. Without fail, AFCA tell consumers they will not review, re-open de novo or discuss complaints already dealt with in a predecessor scheme such as FOS or SCT. This unfairly discounts and skirts the legal issue of unresolved criminal offences and civil misconduct unearthed at the Hayne Royal Commission. The only recourse is court litigation which EDR schemes and now AFCA tell consumers they are free to pursue. This is fantasy. Litigation is a high risk and a high cost strategy for most vulnerable consumers. Therefore, in most cases justice is not pursued or served.

New Evidence – Hayne Royal Commission

New evidence arising from the final report of the Royal Commission into financial services misconduct has identified admissions of dishonest conduct from the banks and superannuation companies which amounts to both criminal liability and/or civil redress under ss 1041G, 180, 181, 182, 183, 184 of the *Corporations Act 2001* (Cth). As already outlined, AFCA routinely disqualifies complaints instead of opening complaints from predecessor EDR schemes despite now knowing the conduct in question was likely to be dishonest. AFCA lack the sophisticated legal inquiry skills to address these complex financial legal disputes. Instead, AFCA advises damaged consumers to take recourse through court litigation. This is unrealistic and a fantasy. It is high risk and a high cost strategy for most vulnerable consumers. Therefore, in most cases justice is not pursued or served.

Systemic Issues Never Identified or Reported to ASIC

ASIC repeatedly declined, despite a legal requirement to do so, to address systemic illegal misconduct by banks and superannuation firms reported to them by consumers. This conduct was personally reported to ASIC by me over four years, particularised by addressing specific breaches of the insurance, superannuation, privacy, ASIC and corporations' laws. In every single incidence, ASIC's failure to engage with me as a legitimate whistleblower abrogates justice not just for me but for the wider community.

Case Law Authority & Obligation to Follow Precedents

Within the court hierarchy, FOS and SCT as tribunals are obligated to follow authoritative judicial precedents made by any courts above them. The SCT and FOS and now AFCA must look to the rule of law in determining their own cases.

When there are precedential decisions available in the court hierarchy which answer relevant, complex questions of law in financial services, banking and insurance, they must look at the facts and follow the law. At no time did the adjudicators of FOS or SCT consider the legal precedents available in the court hierarchy above them or consider new admissions of failings and dishonesty admitted by the banks, insurers and superannuation trustees themselves before, during and after the Hayne Royal Commission. The dishonest conduct admitted to by the banks, insurers and superannuation corporations must now be considered and reviewed by an independent EDR scheme. This means that criminal or civil misconduct must be treated as new evidence for all cases that were previously submitted to FOS and SCT. Currently the rule of law is abrogated by AFCA's discretion to disqualify any decision or determination already made by a predecessor scheme. AFCA, in effect use their discretionary powers extrajudicially which abrogates the rule of law for Australian consumers. Thus, consumers are prevented from access to justice. This is wrong and grievous. This cannot be left to stand in a country which prizes adherence to the rule of law.

Closure of AFCA Complaints Submitted

Personally, I have had AFCA use their extrajudicial discretion to withdraw, then close my complaints without ever reviewing new evidence arising out of Commissioner Hayne's Royal Commission findings:

AFCA Case - 602373
AFCA Case - 604431
AFCA Case - 610295
AFCA Case - 610151
AFCA Case - 602374
AFCA Case - 616838
AFCA Case - 602286
AFCA Case - 602299
AFCA Case - 616893
AFCA Case - 619145

AFCA Accountability

AFCA is not subject to a credible, independent process of reviewing accountability of their conduct, processes or whether they have applied extrajudicial discretion adverse to consumers' legal rights in financial disputes. I have asked AFCA several times to have a reasonable review of my complaints especially since the publication of the Hayne Royal Commission exposed dishonest conduct. In every other sphere of Australian law, dishonest conduct is subject to criminal and/or civil sanctions, available through current legislative provisions. Upon raising such matters, without fail, I am met with dismissal by AFCA's executive management who are not at arm's length from the processes and discretions used by their own adjudicators. I do not have an independent appeal process other than court litigation to address this unfairness. Litigation is not an option for vulnerable consumers. This process does not promote access to justice, instead, breeds strong resentment and cynicism because the dearth of legitimate AFCA accountability is seen as an example of the 'business as usual' mentality experience in existence prior to the findings of the Hayne Royal Commission.

Back then, the regulatory capture enjoyed by the banks, superannuation and insurance corporations was extended under the inefficiency and soft touch approach adopted by the predecessor EDR schemes. Subsequently the inept conduct of APRA and ASIC has been exposed and harshly criticised by the Hayne Royal Commission. Consumers have borne the brunt of this systemic failure. It has caused inequity and damage to vulnerable consumers.

How can unconstitutional withdrawals and/or closures of complaints made under the guise of AFCA's extrajudicial discretion be an equitable, just outcome for vulnerable consumers? AFCA must be required to review all complaints de novo when new evidence, new judicial findings and/or where new precedential authority in the court hierarchy is made. This would help resolve matters according to procedural fairness, bias and the rule of law principles which are presumed to exist for all members of the Australian community.

The Fix – AFCA & Court Redress

AFAC must review all complaints determined in predecessor schemes, de novo, where a complaint review is requested by a consumer, especially now that the Hayne Royal Commission has published its findings of dishonesty which amount to criminal offences or civil breaches of existing law.

In litigation, adverse costs orders are a significant barrier to equitable redress for consumers. In a financial dispute, there should be no adverse costs orders against vulnerable consumers. Each party should be liable for their own legal costs, no matter the outcome. Further, beyond the reach of all ASIC and APRA regulatory jurisdiction, there should be an independent statutory trust set up for the receipt of levies from banks, superannuation and insurance corporations to fund consumer financial dispute litigation. It is unfair and unjust for consumers to pay the costs of well-resourced banks, superannuation or insurance corporations if a consumer financial dispute is taken to court on factual or legal questions of law. Some of these disputes realistically remain outstanding for the past 11 years. How is this just or equitable? Vulnerable consumers have been exploited by regulatory capture and gaming of the system up to now. This is unacceptable legal landscape for all Australians. Big corporations have so far held the balance of power and have used shareholder resources to routinely game the legal system which the vulnerable consumer is ill-equipped to compete in. It is not appropriate for consumers to face litigation unrepresented. Therefore, realistic access to justice must be a priority for consumers.

Previous non-disclosure agreements signed over the past 11 years up to the Hayne Royal Commission final report publication should be set aside and consumers protected from legal consequences of pursuing redress for signing inequitable, unconscionable agreements that did not reflect their legal rights under Australian law.

Yours faithfully