BANKS GONE BAD

54 George Street, East Gosford, NSW, 2250

Committee Secretary
Senate Legal and Constitutional Affairs Committee
PO Box 6100
Parliament House
Canberra ACT 2600

Dear Secretary,

Resolution of disputes with financial service providers within the justice system

Banks Gone Bad is a group of 33 victims of banking misconduct. Our goal is the creation of a fair and just system for resolving banking disputes to ensure that what has happened to our members does not happen to others. Such a fair and just system should include compensation for banking victims, permanent improvements to the procedures of banks and legal sanctions for banking executives guilty of criminal behaviour.

Please consider the following:

Part 1: Code of Banking Practice and Banking Regulation

The Code of Banking Practice 2004 at 35.1(b) and *ASIC Regulatory Guide RG165 Licensing: Internal and External Dispute Resolution*, at clause RG165.78 required banks to implement the international quality standard known as *AS10002:2004* (now *AS/NZ 10002:2014*). This is a comprehensive quality system for accepting, processing, resolving, providing redress and auditing banking complaints within clearly defined time frames. It further provides a system for banks to correct the underlying cause of the complaint, which may relate to internal operational, supervisory, or compensation practices.

The banks' failure to implement this standard has impacted the banking sector in 2 ways:

1. Complainants have not received a fair handling or resolution to their complaint; and
2. Banks have failed to reap the rewards of improved internal systems and the accompanying improvement in customer satisfaction, loyalty and reputation that result from that.

We now make the following recommendations:

1. Implement AS/NZ 10002:2014 quality standard across Australian banking within a 12 month period;
2. Allow customers that lodged complaints since 2004, who should have had that complaint dealt with under the Standard to refile their complaint now so they can in fact receive the fair treatment promised in 2004. This may include complaints that were denied or are still in process. It does not include complaints where the resolution was accepted by both parties;
3. A legislative provision that no such claim should be dismissed as out of time;
4. Inclusion of the Banking Code of Practice into legislation as a Legislative Instrument with Parliamentary scrutiny. This should include penalties for non-compliance. We suggest these may include removal of the federal banking deposit guarantee and restrictions on or removal of a delinquent bank's banking license.

Part 2: Amnesty and prosecution

The issue of criminal behaviour by banking executives was left out of the final report of the Banking Royal Commission despite evidence being given during witness testimony that clearly indicated criminality. This is an omission that should no stand. Accordingly we make the following recommendations:

5. Bankers have 3 months to advise the Director of Public Prosecutions of any behaviour they personally made that may be criminal in nature. An amnesty is offered for such offences where the offender fully co-operates with authorities. Secrecy may be provided at the DPP's discretion.
6. 3 months hence the DPP shall implement a criminal task force charged with identifying and prosecuting criminal behaviour by banking executives and their representatives.

Part 3: AFCA

The Australian Financial Complaints Authority enabling legislation, titled *Treasury Laws Amendment (Putting Consumers First—Establishment of the Australian Financial Complaints Authority) Bill 2017* contained excellent provisions that reflected the intention of the Parliament to give AFCA real power to adjudicate complaints. When the Australian Bankers Association produced the final Constitution for the AFCA, these were stripped out. Specifically the clauses that **required** the AFCA to refer delinquent bankers or complainants for criminal prosecution:

"1052E Referring matters to appropriate authorities: If AFCA becomes aware, in connection with a complaint under the AFCA scheme, that:
(a) a serious contravention of any law may have occurred; or
(d) a party to the complaint may have refused or failed to give effect to a determination made by AFCA;
*AFCA **must** give particulars of the contravention, breach, refusal or failure to one or more of APRA, ASIC or the Commissioner of Taxation."*

Secondly the enabling legislation classed the AFCA as a Notifiable Instrument *(S18.1)*. This was a sleight of hand by the Government. An authority set up in response to legislation of this type is normally a Legislative Instrument, meaning that the Constitution had to be presented to Parliament for approval. Further it means Parliament can provide oversight of the body. As a Notifiable Instrument the AFCA is beyond Parliamentary scrutiny and that will not end well for banking victims. Accordingly we recommend:

7. A legislative statement that the AFCA is a Legislative Instrument not a Notifiable Instrument;
8. A review of the constitution of the AFCA to bring the operation of the AFCA into line with the enabling legislation, especially in respect of prosecution of criminal behaviour;

Part 4: Banking Executive Accountability Regimen (BEAR)

This scheme is run by the Australian Bankers Association and allows the ABA to fine banking executives a percentage of their bonuses should they be found guilty of systemic abuse of the Code of Banking Conduct or other relevant legislation. In operation for 8 months now, so far zero actions have resulted. Clear evidence exists that the ABA have pursued action to contain damage to the Banking Industry over many years, as is their stated mission. Therefore placing the dingo in charge of the crèche is patently foolhardy.

We recommend:

9. The BEAR system be moved under the supervision of ASIC immediately;
10. The AFCA makes a quarterly report to BEAR relating to any systemic abuse detected in the complaints coming before them. Parliamentary scrutiny should keep everyone honest in this regard;

Part 5: Complainant access to legal proceedings

Certainly if the Quality Standard is implemented then the vast majority of both historical and current complaints will be dealt with at bank level in a fair and just manner. Any complaints that are unable to be resolved to either party's satisfaction can then be referred to the AFCA. This should dramatically reduce the work load at the AFCA and ensure their highest performance and effective Parliamentary oversight. If a dispute was not able to be resolved in this second round of dispute resolution then legal action would be the next step.

It is in this jurisdiction that banks are to the advantage. Their history of litigation reveals that the banks employ "lawfare" to advance their. This has been well documented by the Legal Aid Queensland in their submission to this enquiry. A code of conduct already exists for litigation that the Federal Government is required to follow that requires ethical behaviour, it is called "Model Litigants". Given the unique role and power of Australian banks, Banks Gone Bad believe that banks should also be bound by Model Litigant.

Model litigant[(1)] rules, or model litigant obligations, are guidelines for how a government body ought to behave before, during, and after litigation with another government body, a private company, or an individual.

These guidelines are integral to the rule of law, because there is sometimes a substantial imbalance of power in litigation with the government. Government bodies may have access to substantial resources, powers to investigate and compel people to provide information, and more experience and specialist expertise in dealing with complex and contentious legal matters.

It is vital that government bodies should not be 'out to get' people, but should be acting in the public interest, according to law. As a result, governments at a State and Federal level across Australia have produced a range of guidelines known as model litigant rules. At their heart, these guidelines focus on:

- Acting honestly, consistently, and fairly in the handling of claims and litigation;
- Dealing with claims promptly;
- Making an early assessment of the government's prospects of success;
- Paying legitimate claims without litigation;
- Not taking advantage of a claimant who lacks resources;
- Not relying on a merely technical defence against a claim; and

However, these guidelines are not designed to prevent the government body from "acting firmly and properly to protect their interests," taking "all legitimate steps" to pursue or defend claims, or even from "pursuing litigation in order to clarify a significant point of law even if the other party wishes to settle the dispute."

Accordingly we make the following recommendation:

11. The Code of Banking Conduct is amended to include the requirement that Banks act as Model Litigants in matters relating to banking complaints.

Part 6: An effective compensation fund paid for by the banks

This Banking Justice Plan includes provisions for complainants to revisit their case and be heard fairly this time. To facilitate compensation for those people a special fund should be established. The funds should come from the special dividend banks have been asked to contribute by the Federal Treasurer commencing in 2017. This is over and above their other taxation obligations and has been widely viewed as blood money to nobble the Royal Commission. This special dividend of 0.6% of bank assets is likely to create a fund of $6.2 billion over 4 years.

We propose redirecting this dividend in full to a compensation fund administered by the AFCA with suitable enabling legislation and Parliamentary scrutiny to ensure effective outcomes.

Victims will have a suitably large pool for compensation while banks will have a predictable and manageable financial obligation. It must be stated that stability and confidence in the banking sector is critically important in how we move forward in this regard.

To ensure banks treat this fund with respect, the 0.6% payment should be extended past 4 years should the $6.2 billion be insufficient. Accordingly:

12. A Compensation fund should be established for historical disputes administered by AFCA and provisioned by redirecting the 0.6% special dividend currently being paid by the banks but into General Revenue. This dividend may be extended past 4 years should funds prove insufficient.

Closing statement

We believe this Banking Justice Plan provides a suitable blueprint for compensating the historical victims of bad banking behaviour, while ensuring the complaints that are to come in the future will be dealt with fairly for all concerned.

Those banking executives who have violated the trust that the public have placed in them will be brought to justice.

Above all else investors and customers alike will have their confidence in the Australian Banking System restored.

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1. https://www.ruleoflaw.org.au/priorities/model-litigant-rules/