

SENATE COMMITTEE INQUIRY: SCRUTINY OF FINANCIAL ADVICE

Dear Senators,

Thank you for the opportunity to put forward my concerns regarding (a) the current level of consumer protection and (b) the role and oversight of regulatory agencies in preventing the provision of misleading financial advice.

(a) The Current Level of Consumer Protection.

There has been a spectacular failure of financial products and advice that has devastated tens of thousands of Australians. These include such scandals as CBA financial advice, Storm Financial, Opes Prime, Timbercorp, Great Southern and Colonial First State, as well as countless cases of individuals suffering as a result of predatory banking practices. It is alarmingly apparent therefore that this situation has been brought about by failure of consumer protection, leaving people exposed to malfeasant, corrupt and predatory banking conduct.

This situation has not arisen because of an absence of appropriate and effective legislation to protect consumers, as Mr Medcraft would want you to believe. We are already well served with legislation: ASIC Act, National Consumer Credit Protection Act, National Credit Code, Competition and Consumer Act, The Corporations Act, Crimes Act 1900 (NSW) and similar in other states. The root cause of the failure of consumer protection is the failure of regulation. The very people charged with implementing, overseeing and enforcing the rules are not only missing in action, but worryingly, becoming enablers of the very conduct that has devastated so many.

(b) The Role and Oversight of Regulatory Agencies

The regulators are not regulating. The willful blindness displayed by ASIC and FOS when confronted with evidence of industrial scale wrong-doing, can be explained by their complete capture by the agencies they are supposed to be regulating. ASIC has not used the consumer protection provisions in either the ASIC Act or the NCCP Act against any of the big Banks since it took charge. Not one prosecution, ever. Instead ASIC will reel-in the occasional minnow in a confected display of its “tough” stance against financial fraudsters, yet the big banking sharks are allowed to continue their predation with impunity.

In our own case, where the Bank flagrantly breached the terms of the NCCP and ASIC Acts, our complaint was dismissed primarily on the basis that ASIC “does not act for individuals” and we were advised to seek redress elsewhere. ASIC blatantly shirks its responsibility to regulate based on the false premise (or con) that it is only obliged to act when the behaviour complained of is “systemic”. A reading of the Legislation makes it clear that both Acts address bank behaviour as it affects individuals, and does not require evidence of systemic behaviour at all. Whilst ASIC maintains this absurdity in order to fob off complainants, you can count on there being no prosecutions of Banks. The Banks do not fear this captive regulator and are free to continue their corrupt behaviour unfettered, safe in the knowledge no one will be coming after them.

In any event, it is deeply concerning that ASIC can continue to maintain the fiction that there is no evidence of “systemic” malfeasance in banking behaviour, given the grand scale of wrong doing that has been uncovered and which continues to be revealed. Blaming individual financial advisors while ignoring the Banks’ role and suggesting the remedy for so much corruption and fraud is simply better education, is contemptible. The need for a Royal commission into the financial services industry and the regulators is now urgent.

In relation to ASIC’s advice to us to seek redress elsewhere- what in reality are the options available to a consumer when confronted with the predatory actions of a monolithic bank? Certainly there is no protection offered by the Financial Ombudsman Service. FOS is equally culpable of willful blindness and bias. Even if it did forget momentarily who its masters were and acted as an impartial regulator, its terms of reference and compensation limits are so woefully inadequate as to render it, in most cases, as a pointless exercise.

The remaining option of litigation is frankly no option at all for most consumers left financially devastated by a Bank’s predation. Even if you do pursue this course your task is made all the more difficult not only by the deep pockets and resources of your opponent, but also by the fact that the banks have ensured that no inconvenient precedents are set which could assist you. Banks are very diligent in settling any case likely to succeed, complete with impenetrable confidentiality clauses.

What can be done?

It is not enough to try and fix what is already broken and frankly beyond repair.

We need a new regulatory framework with new regulators who do not have a bedrock belief in self- regulation. We have in Mr Medcraft a former banker, a regulator who on his own admission does not see himself as a regulator. This is pythonesque. His desire to obtain a plum job within the industry he is supposed to be regulating, once his term is up, is not an aberration. I suggest this is something that occupies the minds of many working in the regulatory field. There should be a total preclusion of personnel moving between the regulators and the agencies being regulated. We can not have any confidence in the integrity of the system, particularly whether or not the law is being applied appropriately, when it is staffed by people who have an eye on a future career in the industry they are regulating. Regulators should also be precluded from “seconding” bank employees, as was exposed by James Wheeldon during the Senate inquiry into ASIC.

Finally, regulators who deliberately, willfully or recklessly refuse to carry out the role they have undertaken should be subject to a charge of misfeasance in public office. Provision should be made for this in the statutory framework.

Conclusion:

*Establishing a new regulatory framework is imperative.

*We need regulators who see themselves as regulators. ASIC has failed in its duty monumentally.

* Determinations by regulators should be reviewable by independent bodies.

* Bankers and financial planners who engage in predatory and unconscionable conduct should face serious penalties including gaol. Imposing a monetary fine on the Bank is not enough.

* Proper restitution and compensation of victims is essential.

* Past decisions of FOS and ASIC regarding predatory and unconscionable behaviour where no appropriate action was taken, need to be reviewed by a truly independent tribunal.

* A wide ranging Royal Commission is critical.

Lynne Kreutzer
4 December 2014