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Submission

Review of the Australian Financial Complaints Authority

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Preamble:

Over a period of twenty years since 2000, I have been a witness and consultant (gratis, no vested interest) to a long succession of defaulted bank borrowers (small business, farmers, mortgagors) who consider themselves victims of banking malpractice.

I have no professional standing as a consultant in this arena, and I have neither legal training nor banking experience.

Nevertheless, I have been the recipient of considerable material during this extended period which has allowed me atypical insight into a significant dimension (the credit relation) of the workings of the Australian banking sector that rarely sees the light. And it is not pretty. The Hayne Royal Commission barely scratched the surface of this ugly dimension, and this latter has continued to be manifest behind the scenes since the milquetoast Hayne Commission passed into history. My professional career as a political economist has provided me with the tools to understand the context of the perennial generation of unsavoury bank borrower defaults – the use and abuse of a profound asymmetry of power in the contractual relationship and the use and abuse of a profound asymmetry of power in the context of a bank seeking ready foreclosure and an aggrieved borrower seeking satisfaction through the political/regulatory/mediation/judicial apparatus.

I have written countless articles on the issue and have made myriad submissions to various official inquiries on banking, regulatory and related matters. As a consequence, I have become known to bank customers seeking justice for their plight and have established a reputation as someone whose writings are consistent with their own experience.

Of crucial import, aggrieved bank borrowers come to me because they have been spat out of the entire regulatory apparatus (which includes the political system responsible for that apparatus). I am their last resort.

These people are all in shock. They all live in a state of despair mixed with fury that they have been treated thus. This despair and fury is exacerbated by the fact that their experience

is very rarely brought to the attention of the general public by the media and/or by any official acknowledgement and announcements/reports by anyone in authority. The odd vignette that does make it onto television in particular is seen as an anomaly, is not pursued in depth to provide context and broader implications because of broadcast time constraints, and is then typically quickly forgotten. Of related significance, myriad submissions to Parliamentary inquiries by victims recounting their experience have been universally ignored by those in authority.

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AFCA, like FOS before it, has comprehensively failed its statutory objectives

Delivering against statutory objectives

1. Is AFCA meeting its statutory objective of resolving complaints in a way that is fair, efficient, timely and independent?

Of the cases that I have been privy to, AFCA's processes are not efficient and timely, nor the outcomes fair or seemingly independent. AFCA is *not fit for purpose*.

Some cases drag on interminably, especially when applicants persist against hostile AFCA staff and demand to have their complaints treated intelligently and honestly (c/f [redacted] v CBA, [redacted] v Bank of Queensland). Some cases disappear into a black hole.

The Conciliation Conference diversion

One aspect worth noting is the tool of the 'Conciliation Conference'. I listened in on one of these conference calls in late 2020 as a 'friend' of an aggrieved customer (victim of predatory asset-based lending) with representatives of the NAB and AFCA staff. It was very badly run, with no demonstrable expertise in the technicalities (it lasted twice as long as it should have). AFCA at this point had not yet heard of Zoom. The most that could be said of it is that it allowed parties their say contemporaneously.

The AFCA material on Conciliation Conferences offers the following optimistic scenario:

> 'The aim of a conciliation conference is to try to resolve the complaint by agreement on the day. This doesn't always happen, but we find a conciliation conference can be an effective way for everyone to gain a better understanding of the issues and circumstances.'

This claim is ludicrously jejune. There are trivial issues, no doubt mostly linked to retail customer concerns. But there are serious complicated issues, not least with business/farming loans involving significant sums and complex issues, where a conference call, at best, might facilitate some clarification of the understanding on both sides. It will never 'resolve the complaint by agreement on the day', and it is offensive for a complainant to confront in AFCA material such glib nonsense.

After the conclusion of the 'conference' I was sent a questionnaire asking for my response on the experience. Ridiculous. AFCA is not merchandising a product. AFCA personnel, if they have any brains and maturity, would know very well how it went – in this case, effectively a waste of half a day not least because of the bank's predictable intransigence and because

AFCA had failed to follow up the victim's insistent demand for adequate discovery from the bank.

The asymmetry of power ignored, reinforced

The fundamental backdrop is the asymmetry of power between the parties – financial institution and customer. The reason why a financial ombudsman exists (at least, the *formal* reason, of which more below) is because of the demonstrable asymmetry of power between the parties when the conflict is played out in the court system.

The problem, *never publicly acknowledged*, is that the power asymmetry is not dissolved in the relative treatment of the parties by the political class, the financial regulators or when the parties enter the Ombudsman's precinct. The power asymmetry is merely replicated. This asymmetry should be at the centre of how the Ombudsman's procedures are constructed and operated. But there is a comprehensive collegial head in the sand, with the implicit mentality (in guidelines and in AFCA operations) that the conflicting parties are on relatively equal terms. Has there just been a misunderstanding, readily resolvable? On the contrary.

By virtue of its (implicit) mandate, the financial ombudsman exists to *offset* this power asymmetry. But AFCA is in total denial regarding its essential role. AFCA thus acts, as with the complementary financial regulators, to *reinforce* the power asymmetry between bank lender and borrower.

I put this issue to AFCA Chairman David Locke in an email dated 8 April 2019 (i.e., almost two years ago). The email, truncated to delete details of a particular case (a person who owned two mortgaged suburban houses investment properties for retirement purposes, corruptly foreclosed by Westpac and perversely condoned by FOS and AFCA), is available here. There I note:

> 'EDR, by its nature, is formally supposed to offset the asymmetry of power of bank against its customer. A priori, then, the bank has a case to answer. The vast number of complaints that come into EDR bodies are a tangible reflection of the abuse of that asymmetry of power.
>
> 'Worse, as noted above, the banks, taking advantage of the comprehensive deregulation of the financial sector in the 1980s, have instituted a matrix of corrupt practices that regularly moves into criminality, using to full effect the intrinsic capacity for abuse that is embedded in the asymmetric banking contracts with their customers.
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> 'It should be imperative that AFCA personnel are educated into the nature of the beast behind the complaints that is their bread and butter and in the mentality that they bring to the handling of those complaints.'

I did not receive a reply from Locke. No matter; what matters is that AFCA personnel and operations should embody and demonstrate in practice an awareness of this imperative. It doesn't exist. My email fell on deaf ears.

To return to the 'Conciliation Conference' to which I was privy. This power asymmetry was clearly manifest during the exchange. NAB staff (three) were adamant that the bank was blameless for the financial distress in which the borrower found herself. The bank knew of

her complaints, not least of its consistent failure to discover key customer documentation. It was making no concessions. Conciliation indeed – a misnomer par excellence.

One minor matter is worth raising here. One of the NAB staff present at the exchange had presided for a period over the customer's account and had restructured the loan – clearly relevant personnel. However, the bank staffer leading the bank's position turned out to be a very young person, barely out of her teens. She would have known nothing regarding the customer's case but would have been instructed as to what position to dictate during the meeting – which instructions she carried out. She would have had no independent role in the matter. The bank's website discloses her to be an indigenous trainee. I personally consider that the bank's placement of this young inexperienced trainee in this difficult and confrontational role was entirely inappropriate. It reflects badly on NAB Head Office's attitude both to the nurturing of its apprentice staff and to AFCA's 'conciliation' process.

<u>In practice, FOS/AFCA acts to reinforce the status of the conflictual situation that led to complaints in the first place</u>

I am aware of a variety of cases taken to FOS and AFCA, *all* of which have resulted in rejections (with occasionally a substance-less agreement) by FOS/AFCA. No doubt I face a biased sample, as it is only the disaffected who tend to contact me. Nevertheless, in all the cases I am familiar with, to the detached observer the details submitted to FOS/AFCA point transparently to malpractice (whether originating from incompetence or poorly structured bank guidelines/incentives or malintent or all three) by the bank lender. How could FOS/AFCA staff so consistently defy the evidence to the benefit of the bank lender?

It appears that FOS/AFCA staff lack training appropriate to their role. It is apparent that front line staff know nothing about banking procedures. What is the nature of FOS/AFCA training? What background and skills does FOS/AFCA look for in its hiring practices. Some staff have been ex-bank hacks – insider experience is in principle desirable, but the shedding of allegiance to previous employers is a must. That hasn't happened. Some staff are very green behind the ears – with no relevant experience, no courage to learn from material before them and no independence from superiors dictating the 'correct' treatment of complaints. It is possible (indeed, probable from the evidence) that FOS/AFCA staff are acculturated to accept, *a priori*, bank lender innocence in these failed credit relationships.

<u>The character of bank lender malpractice</u>

Let us recall the essence of the power asymmetry between the parties in the credit relationship with business/farmer borrowers (investment property mortgagors are also not immune from skulduggery). Contracts are perennially written to facilitate the bank lender's prerogative to call in loans regardless of whether the borrower is in default. Such contracts are intrinsically 'unfair', indeed unconscionable. Lukewarm moves to prohibit unfair contracts have had no impact on the practice. The overdraft, fundamental credit facility for small business/farmers, has long been recallable at will, and nobody in authority gives a toss.

A centrepiece of bank malpractice is the perennial tendency to lend on customer assets, rather than on customer ability to repay the loan, whether business or property investor. That is, the loan is *predatory* – asset-based lending. Tying loan officer rewards (whether monetary remuneration or status) to loan quantum made dramatically enhances the tendency. More, there is a bizarre aspect of 'competition' in this sector that will see a loans officer destroy a

customer through entrapment rather than have them borrow from or transfer to another lender (as happened to the property investor borrower with Westpac mentioned above).

The typical potential borrower to date has been a babe in the woods, because they have come to the bank with a trust in bank personnel, expecting competence and integrity. They have been decades behind the times because nobody has educated them that the professional banker disappeared at the dawn of financial deregulation. Trust and its absence has been the perennial cause of bank borrowers' undoing.

The most basic reflection of power asymmetry in the credit relation for small business/farmer loans (and often for property investors) is that the bank lender takes security over the family residence (automatic, of course, with farmer lending), and security over whatever other customer or family assets it can grab. Business proprietor 'all money' guarantees are still being employed. The bank lender thus has the power to destroy not merely the borrower's livelihood but her/his way of life and reduce them to destitution. Which it does, on a regular basis.

At worst, this process is just a legitimised racket for property theft, intentional from the start the potential customer walks in the door. At other times, a credit relationship won't start out this way, but loan officer incompetence and/or loan officer remuneration pressures will lead to a comparable outcome.

Moreover, foreclosed customer assets (including the family residence) are perennially sold under value, so the residual debt is manufactured and places the borrower in a more financially straitened position than otherwise.

Throw in a cabal of 'reputable' law firms (Gadens currently the top of the chart), valuers, receivers, and (to a lesser extent) real estate agents, and public officials (sheriffs, bankruptcy trustees) all on the bank teat, do the dirty leg work to destroy a defaulted customer so that they are reduced to penury, typically rendered homeless and dependent on social welfare to survive.

FOS/AFCA staff are evidently in complete denial of the banking sector's *modus operandi* regarding the credit relationship. Simply, following comprehensive financial deregulation in the 1980s, the professional banker turned into the ethics-free money lender.

<u>Systemic issues</u>

Delivering against statutory objectives

1.1. Are AFCA's processes for the identification and appropriate response to systemic issues arising from complaints effective?

One would expect that FOS/AFCA staff at supervisory and managerial level would be observant and cognisant of patterns in the complainants' experiences. That is, one would presume that senior staff would be looking for systemic issues to address and to pass on to other players in the regulatory apparatus, not least the organisation's titular overseer ASIC. Thus might the authorities available themselves of the opportunity, indeed the imperative, to address the problem of malpractice closer to its sources. No – it isn't happening. And why

not? FOS/AFCA's studied ignorance of bank practices would be interrupted, but that blissful state has to be carefully maintained.

Monetary limits arbitrary, thus discriminatory

Monetary jurisdiction in relation to primary production businesses

2. Do the monetary limits on claims that may be made to, and remedies that may be determined by, AFCA in relation to disputes about credit facilities provided to primary production businesses, including agriculture, fisheries and forestry businesses remain adequate?

If AFCA is going to handle small business/farmer complaints, one reform is desirable and overdue. The current financial limits (claims, remedies) on access to AFCA consideration and possible compensation ordered are arbitrary and discriminatory and need to be abolished. Small businesses and farming families have been defrauded by lenders to the tune of many millions. Any mediation scheme with an ounce of nous has to acknowledge the character and magnitude of the crime and make the punishment fit that crime. Open access to aggrieved small business/farmers will expose AFCA to the full character and extent of bank malpractice against Australian entrepreneurs. No doubt AFCA won't be able to cope with the load without additional staff, but it isn't coping now. However, the dimensions of the failings of the current scheme will be brought to the foreground.

One wonders why primary production businesses alone are highlighted regarding the significant matter of financial limits. Non-primary small businesses demand equal attention. This discrimination is redolent of the Hayne Royal Commission report, which gave imbalanced attention (even then marginal) to rural over non-rural small/family businesses – a discriminatory treatment evidently politically driven (and by the odd media exposure of desperate farmers driven to suicide).

AFCA merely reproduces FOS' failings

AFCA was created on a wish and a promise. Amalgamation of various entities was irrelevant to their functionality.

What the progenitors of AFCA didn't do, remarkably, was to confront the deep failings of AFCA's predominant predecessor FOS. FOS was a disaster for bank victims (myriad Members of Parliament would have heard from their constituents on this matter); AFCA has merely replicated this parlous scenario.

Representative is the situation of FOS lead ombudsman ex-CBA employee [redacted]. [redacted] was deemed by some complainants to FOS that, in handling their case, it appeared to them that [redacted] was too close to the bank regarding the character of the dispute – severely prejudicing their case and even to the point of having it rejected. [redacted] achieved rare public recognition at a Hayne Royal Commission hearing in May 2018 where he admitted that FOS had got it wrong with the Low family loan in the face of belligerent lender Suncorp. Was the Low family 'mistake' representative?

CBA farmer victim [redacted] has made his concern public regarding Field in his submission (#141) to the 'Resolution of disputes with financial service providers within the

justice system' conducted by the Senate Legal and Constitutional Affairs Committee in early 2019. (This post-Royal Commission inquiry, short, opportunistic and of no long-term significance, had the singular merit of bringing together submissions from a significant number of outspoken bank victims outlining their plight and their beef with the failed regulatory system, as well as a succinct pithy submission, #53, from yours truly.)

[redacted] was also involved in trying to damp down a NAB victim known to me who the NAB claimed had signed a guarantee (and thus liable) for a dodgy loan gone bad. Said guarantee simply did not exist. The NAB couldn't produce the guarantee document (of course) but claimed that the contracted Iron Mountain records management company had lost it! Sure, pull the other one. Like so many bank victim stories, a *lay down misère* for the victim, but FOS couldn't see it. Field was belatedly let go, but AFCA failed to consider the implications of Field's role at FOS with respect to the nature of appointments, of training and of acculturation within FOS/AFCAs walls.

Consider the case of [redacted], small businessperson victim of CBA predatory lending and brutal foreclosure. Building on the initial CBA crime, [redacted] has been a victim of a cabal of the CBA (Tasmanian administration and Head Office), the Tasmanian legal profession, the Tasmanian judiciary (centred on Blow AO CJ) and the Tasmanian police force. Charming. She has been reduced to financial destitution, suffering from family break up, PTSD and physical maladies. FOS, in the person of [redacted], after a two-year process (2012-14), decides that the CBA has been guilty of maladministration but couples that verdict with significant distortions of the story and a 'get out of jail' card, with the bank home free. This while even the CBA has admitted wrongdoing and that the key loan at stake shouldn't have been made, albeit refusing to make restitution. Confronted by Burge with the anomalies, [redacted] confesses to being worn out from [redacted] case and, more, there just isn't the staff at FOS to deal with it. So please buzz off. Competence and commitment to the job writ large, I don't think so.

This is the same [redacted] who played a dynamic role as supporting cast in Goldie Marketing v FOS & ANZ, 2014-15. In a telephone exchange (again 2014), [redacted] told Goldie Marketing's advisor [redacted] that the simple single reason why FOS couldn't deal with the case was because it was short-staffed. Short-staffed? Again? How so? [redacted] subsequently reconstructed (fabricated) her diary notes regarding the telephone exchange to make it appear that she had given multiple reasons for dismissal of the complaint. The issue achieved rare publicity on a ABC *7.30 Report* segment, 'Calls for financial ombudsman to be disbanded after discovery of inaccurate file notes', 16 March 2016, and a follow-up opinion piece by the 7.30 Report journalist Stephen Long on *The Drum*, 'The questions the Financial Ombudsman needs to answer', 1 April 2016. FOS answered no questions regarding the matter, and let the episode go straight through to the keeper. Business as usual.

Most fundamentally, FOS was transparently rotting from the top down. This evaluation is represented by the numerous submissions made by FOS to Parliamentary inquiries when requested by Committee secretariats to respond to victim submissions in which FOS was criticised as in league with the financial service provider. These FOS submissions (against which the victims had no right of reply) prattled on with the provision of irrelevant general statistics implying FOS' busy preoccupation with its wide mandate and completely avoided

the substance and implications of victim criticisms of their treatment by FOS. The submissions, under the signature of Chief Ombudsman Shane Tregillas, were a disgrace and the manifest strategy of FOS to divert attention from its transparent partisanry contemptible. Curiously, no Inquiry committee member or Parliamentarian ever noticed and drew attention to this shame-faced dereliction of responsibility and absence of institutional integrity.

Yet the failed FOS has been resurrected, Lazarus-like, under the new label of AFCA.

A little longer-term background

A banking ombudsman was first created in late 1980s. After a decade of banking sector deregulation and resultant excesses, crimes and misdemeanours, with publicity given to this new environment afforded by victim-supporting Democrat Senator Paul McLean, the Labor Government attempted to head off McLean and the criticisms at the pass by ordering a Parliamentary inquiry into the sector under ALP Party man, MP Stephen Martin. The 1991 Martin Inquiry was a whitewash. The banks, now including the CBA in process of privatisation under David Murray, read the wind and decided that it was to be business as usual – and it was.

The Labor Government, dominated by Treasurer Paul Keating, wanted to head off pressure for some form of re-regulation of the financial sector, in spite of the evidence of widespread dysfunctionality of the deregulated regime. The resolution *de jour* was to be found in sector self-regulation!

Thus was born the banking ombudsman and, in tandem (albeit delayed until 1996 after the banks had wrested total control from officialdom), the Banking Code of Conduct. Both had initially small coverage, with emphasis on retail customers. The Code of Conduct was always intended to be a non-functioning PR exercise, and this it has been (in spite of ever-expanding revisions) to this day. The sector-funded ombudsman service was never intended to deal with complex and big money cases. The problem is that both the Code (since 2003) and the Ombudsman service now formally incorporate small business concerns. The Code merely ignores the problem (indeed, the 2003 Code, behind the scenes, cynically ensured that the Code was neutered for small business/farmer borrowers). The guarantor's victory in NAB v Rice & Rose, both at Trial and on Appeal, where his treatment had contravened the Code's provisions, has made no difference to the Code's inoperability on banking practices.

In short, the Ombudsman scheme provides an additional safeguard against the aggrieved borrowing public making any significant inroads into the banking sector's discretion to operate.

AFCA's leadership out to lunch

In effect, AFCA leadership is headless.

AFCA Chairman Helen Coonan has been up to her neck in the shark-infested waters of Crown Resorts. It is a clear anomaly that Coonan sits astride that anti-social corporate cesspit and a formally pro-social ombudsman scheme. As longtime finance journalist Karen Maley advised late last year ('Why Helen Coonan must step down as AFCA Chairman', *AFR*, 26 October 2020). Coonan has to go.

Then there is AFCA Chief Ombudsman David Locke. Locke hails from the NGO sector, formally socially-oriented. He would have had no experience of the character of the financial sector and particularly of its dark side. No doubt, as befits his background, Locke is well meaning. In 2019 (after Locke had appeared before the 'Resolution of disputes … inquiry, 24 March 2019), Locke took the trouble to travel to Tasmania to meet Suzi Burge and hear her story. Burge gave him full barrels. And he, reputedly, was shocked. Locke had come face to face with a full-blooded case study of the dark side of banking. And what happened after that? Absolutely nothing. Is it possible that Locke was explicitly chosen by banking heavies so that AFCA would be as ineffective as was FOS? Sorry, but Locke has to go.

And the AFCA Board? Does it get feedback on the near universal negativity of AFCA's front line regarding complex disputes where big bikkies are involved and people's lives and dignity is on the line? What are 'Consumer' Directors doing on the Board if they don't represent 'consumers' of AFCA's services?

AFCA not alone in dysfunctionality

Inability to handle aggrieved customers of financial service providers is not unique to AFCA alone. The entire regulatory apparatus is the problem. Inquiries, restructuring, legislation – nothing makes an essential difference to the malaise. The pressure on AFCA is greater because no other institution in the apparatus is functioning appropriately.

APRA remains arrogant, aloof, fiercely committed to its seemingly narrow brief of maintaining sectoral stability, which means support for the institutions (i.e., their profit bottom line) at any cost, regardless of outcomes for the customer.

ASIC remains the centrepiece of the problem. In its previous incarnation as ASC, it had a proscribed role of facilitating more effective investment market exchanges via mandating full information disclosure – and it even struggled with that role. As ASIC after 1998 it acquired from the ACCC responsibility for retail financial services and after 2001 it acquired from the ACCC responsibility for small business financial services.

A barrister acquaintance of mine conveyed to me what he had heard on the grapevine that the banking sector (aka the ABA) had strategically and cynically directed this transfer of responsibility so that customers of financial services would be henceforth powerless against ongoing bank predation. As conspiratorial as that claim sounds, the evidence of ASIC's operations supports the 'conspiracy'.

In particular, the important 'business to business unconscionability' provision, installed as s51AC in the Trade Practices Act in 1998 (following the 1997 *Finding a Balance* report) was installed into the amended ASIC Act in s12CB & s12CC. ASIC *has not taken a single case* against a bank (or a receiver installed by a bank) with respect to small business/farmer predation since the amendment became operative in March 2002. That's 19 precious years of a significant regulatory black hole. Rather, it tells aggrieved bank borrowers who come to ASIC to buggar off, lying that it lacks jurisdiction, doesn't deal with individual cases, etc. I have copies of correspondence from ASIC to business/farmer victims to that effect. They are material evidence of regulator capture. This is a scandal of significant proportions, yet it seems that I am the only individual (apart from the disabused victims themselves) who has tried to bring this matter to public attention. I have written to three successive ASIC

Chairmen regarding this matter and they all dissembled in their responses (the current Chair, Shipton, didn't bother to reply).

Imagine my utter incredulity when I attended a Sydney hearing of the PJCCFS inquiry into 'The Impairment of Customer Loans' on Friday 13 November 2015. (This was the second inquiry into CBA's corrupt takedown of one thousand or so Bankwest commercial borrowers (who, by the way, are still seeking justice) after CBA took over Bankwest in December 2008, the first inquiry being judged by the victims as a whitewash – which it was.) Appearing before PJC Committee members were ASIC senior executives [redacted] and [redacted] [redacted] (and another). [redacted] and [redacted] misrepresented ASIC's legislated powers and obligations (consistent with the correspondence in my possession) and lied about the existence of myriad business/farmer complaints to the regulator. Then the account took a new direction. The real reason why ASIC was inactive was because its spokespersons felt it lacked the firepower to win such unconscionability cases in court against a hostile judicial culture and wasn't prepared to rectify that presumed weakness! In short, ASIC couldn't be bothered to carry out a most crucial element of its legislated responsibilities. I documented the exchanges during this inquiry hearing in March 2016, available here. The plot and the scandal deepen. So what has ASIC done about this self-constructed powerlessness? Nothing whatsoever, and it continues to misrepresent, dissemble and lie about its powers and obligations. Nobody in authority to date has bothered with this massive breach in the regulatory apparatus against bank malpractice.

It is true that the courts are antagonistic to the recognition of bank malpractice against borrowers. This antagonism is embedded in English legal history and precedent, and not something that can be remediated overnight. But the litigating bank borrower also faces, on the margin, straightforward complicity and corruption amongst some members of the Australian judiciary. Corrupt law firms acting for bank litigants complement the sorry picture.

Given APRA indifference, ASIC inaction and legal system hostility, all overlooked by political cowardice, naturally there is greater dependence on any EDR scheme to open the possibility of the provision of justice. All the more reason for questioning the successive failure of FOS and AFCA to do so.

Federal Treasury is implicated

The federal Treasury is itself implicated in this imbroglio.

The Treasury, from its elevated perch and physical spatial isolation, is far removed from the front line and can conveniently not see the blood on the floor. Yet Treasury has ultimate responsibility for the entire financial system. In spite of the unqualified praise of several academics (Ian Harper to the fore), 'expert' commentators and journalist hacks for the unstinted merits of comprehensive financial deregulation, and the collective head in the sand of the monetary authorities and political class in general, deregulation readily threw up new dysfunctionalities. The opening paragraph of the 1981 Campbell Report:

> 'The Committee starts from the view that the most efficiency way to organise economic activity is through a competitive market system which is subject to a minimum of regulation and government intervention.'

proved to be a monstrous and pernicious lie. The foreign currency loan debacle soon proved the lie and should have been a wakeup call. The deleterious environment has now been 35 years in the making.

The politicised Martin Committee Report repressed intelligence and dissent. The 1997 Financial System Inquiry (Wallis) and the 2014 Financial System Inquiry (Murray) both took the fundamentals for granted and declined to look under the rug. After all, one could hardly expect David Murray to do so, given that, as CEO of the CBA in process of privatisation and after, he spearheaded the brutal commercialisation of that once venerable institution (in the process killing off the specialist small business/farmer Commonwealth Development Bank) and facilitated the establishment of a criminal dimension in the CBA's operation (which remains to this day). The Commonwealth Bank has ceased to serve the commonweal.

At the Canberra hearings of the Post-GFC Banking Inquiry, 8 August 2012, we have [redacted] and at the pinnacle of the financial regulatory hierarchy, pronounce that the courts are ultimately the appropriate place to settle any disputes arising. A wilful abdication of responsibility and a shameful display of ignorance to boot.

Treasury senior bureaucrats [redacted], [redacted] and [redacted] all subsequently moved to senior positions in the banking sector without making any effort to change that sector's culture to serve the public interest – indeed they all served to entrench the existing unappetising culture which welcomed them.

I outlined these elements (and the [redacted] confessions, as above) regarding Treasury's *de facto* complicity in my October 2018 submission (available here) to Treasury's ASIC enforcement review of white collar crime penalties. Nothing has changed in the interim.

One would think that Treasury could allocate some bright some sparks to do some lateral thinking against the grain of the conventional wisdom. They might, in the first instance, set their minds to why the considerable effort in 2018 devoted to increasing penalties for white collar crimes, overseen by Treasury, has not influenced the finance sector's behaviour and cultures. They might also, as a case study, inquire why no CBA executives (I have several in mind) have not been investigated and charged (and possibly gaoled) with the largescale fraudulent takedown of Bankwest commercial property borrowers after the 2008 Bankwest takeover. More, even more curiouser, why the Hayne Royal Commission, counsel assisting [redacted] QC starring in great theatrical flourish, should attempt to legitimise what was essentially a mafia operation.

What to do?

The Treasury AFCA review's terms of reference are written as if there might, at worst, be unexpected problems on the margin with the current operations of the revamped Ombudsman scheme. Tinkering and fine tuning following feedback will be all that's needed to move the scheme to as close to perfection as is humanly possible in an imperfect world. Unfortunately, no.

The most honest strategy would be to abolish AFCA.

Finding the right senior personnel with the appropriate skills (rare), skills that include a backbone against powerful opposition forces, training other staff to acquire the appropriate skills, reforming the culture from top to bottom, etc., is a hard ask.

Abolition would deal directly with the current high level hypocrisy. Everybody in authority claims that the financial regulatory system is in a near perfect working order – if you have a problem the system will sort it out to your satisfaction. That mentality makes those in authority feel very good indeed. Victims (and frontline victim support institutions like the Consumer Action Law Centre) know otherwise but they generally lack adequate forums and influence to contradict the official line. Victims come to the end of the line of seeking redress against malpractice without success and find themselves in (initially wholly unexpected) a very unhealthy state of mind which is likely to be long term, possibly permanent – combined despair and fury, as noted above.

Abolition of AFCA would clear the air. The fact that something is rotten in the provision of necessary financial services would be exposed to the light to the broader community. And not merely to the community at large but also to the ostriches in authority. Deep consideration of the problems at root would be unavoidable.

That scenario isn't going to happen of course. The existing dysfunctionality will continue, and marginal modifications won't fix it.

If one is committed to continuing with the charade, some possible pragmatic reforms come to mind.

One, turn to public funding of the Ombudsman scheme (as in the UK) instead of being on the financial sector's collective drip and subject to ready capture by its constituents. An evaluation of the experience of the British scheme would be *de rigueur* in any case.

Two, reduce AFCA's mandate to cover retail customers only, a coverage that might give it a better 'success' rate. Small business/farmers would be omitted (perhaps also at-risk individual small property investors), but they are currently treated with disdain anyway by AFCA so nothing of substance will change. That change would highlight prominently that the entrepreneurial class has no reasonable protection in Australia. The widespread and systematic predation by corporates against small business/farmers in Australia is a subject to which I have devoted some scholarly attention. The Commonwealth ASBFEO under CEO Kate Carnell has unexpectedly proved a robust organisation with its sympathetic investigative and information gathering role and publicity activities, but it lacks deliberative and enforcement powers in its domain. Removing AFCA's dysfunctional meddling in this domain might facilitate a better focused attention to this ongoing scandal of how business is done, mercilessly, in the Australian marketplace.

A cutdown low ambition AFCA could also be complemented by more assertive action in the regulatory pantheon. Two further suggestions:

Three, return 'business to business unconscionability' in financial services oversight to the ACCC. ASIC won't know it's gone.

Four, create a specialist unit somewhere in the police force apparatus to investigate and prosecute financial fraud, which is widespread. At present, victims of fraud have to go to their local cop shop, which is clearly unsuited to the task. Worse, on the odd possibility (it has happened) that the local police force earnestly desires to pursue the matter, the process is shut down higher up the chain.