Resolution of disputes with financial service providers within the justice system

Committee Secretary

Senate Legal and Constitutional Affairs Committee

PO Box 6100

Parliament House

Canberra ACT 2600

By email: legcon.sen@aph.gov.au

Dear Committee Secretary,

This following submission is made jointly by myself (Anita Shannon) and my husband, Chris Shannon.

The ability of consumers and small businesses to exercise their legal rights through the justice system, and whether there are fair, affordable and appropriate resolution processes to resolve disputes with financial service providers, in particular the big four banks considering:

A) whether the way in which banks and other financial service providers have used the legal system to resolve disputes with consumers and small businesses has reflected fairness and proportionality, including:

1) 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,

2) whether banks and other financial service providers have pursued legal claims against customers despite being aware of misconduct by their own officers or employees that may mitigate those claims, and

From my own experience it would appear in reality a consumer under a loan agreement and mortgage with trustee Credit Provider under a non-bank / securitisation scheme has limited (if any) legal rights with regard to the relationship with the trustee Credit Provider, even when the loan agreement and mortgage fell under the previous Consumer Credit Codes (UCCC), now the National Credit Code (NCC) and is therefore disadvantaged further than a borrower who went to a Bank.

The trustee Credit Provider contracts with others to originate loans and mortgages on its behalf and refuses to take any form of responsibility for those entities misconduct in the origination of the loan despite the non-contracting out provisions of the Consumer Credit Codes (now S.191 of the NCC).

In a case in New Zealand, Bartle V GE Custodians Ltd CA627/2009; NZCA 174, the Court held:

1. A lender could organise its business affairs as it wished and contract out functions associated with those activities. However, the lender could not delegate its responsibility under the CCCF Act to another party in order to avoid the lender's responsibility under that Act. If the lender chose to rely upon another party to ensure that no oppression under the CCCF Act occurred, it had to take the associated risks of that party not undertaking that role adequately.

However:

In Australia, the Court has said …
http://classic.austlii.edu.au/cgi-bin/sinodisp/au/cases/wa/WASC/2018/295.html

PERMANENT CUSTODIANS LTD -v- SHANNON [No 2] [2018] WASC 295 (21 September 2018)

[285] The principal wrongdoing was the fraud of YHL in filling in and submitting the various forms and information to AFIG. This brought about the agreements which would not have been entered into without the false information. There was no misleading conduct, trickery or predatory conduct by GEL Custodians. The defendants' entry into the Loan Agreement and the Mortgage was not facilitated by GEL Custodians or AFIG failing to require appropriate information, it came about because of the fraudulent conduct of YHL. YHL was not the agent of GEL Custodians or AFIG in making the loan application, it was operating its own business.

As a non-bank lending customer, we discovered in 2012 that the Mortgage Manager who originated our loan (and who had always maintained it was to be our lender) forged our loan application form (without our knowledge or consent) [205 of the above judgment] after we signed it, used it for the sole purpose of obtaining a LMI Policy from Genworth Financial for and on behalf of the trustee Credit Provider. Further the trustee Credit Provider had expressly directed the Mortgage Manager not to send it a copy of the loan application form if its exposure was less than $500,000 which ours was.

Upon the discovery of the fraud, we notified the trustee Credit Provider's successor, being the Company which had purchased the original mortgage loan book (**FSP2**) that there was fraud in the origination of our loan by said Mortgage Manager. FSP2 denied we could be a victim of forgery and fraud while we lived on the property. The fraudulent Mortgage Manager was at that time still acting as an agent for FSP and FSP2.

FSP2 also maintained that it was not responsible for the fraud as the Mortgage Manager was not its agent, and stated the Mortgage Manager was our broker and therefore we were responsible for its misconduct.

FSP2 took suit against us in the WA Supreme Court to obtain possession of the property, with full knowledge that:

1. The Mortgage Manager had engaged in fraud, and,

2. The Mortgage Manager was known to have engaged in this type of misconduct on a least 11 occasions (as at 2007), and,

3. The trustee Credit Provider has expressly instructed the Mortgage Manager not to send it a copy of our loan application nor any supporting documents (such as bank statements and proof of employment and income) (recklessness and wilful blindness), and,

4. Knew we would be seeking relief under S.76 and S.77 of the National Credit Code (inter alia), and,

5. Knew the trustee Credit Provider had obtained an indemnity agreement with the Mortgage Manager in 2008 which 'may' have included compensation for all past, present and future damage for its breaches of its contractual obligations.

Even with all this knowledge, the FSP2 refused to enter into any form of mediation with us that acknowledged our loss and damage (including the equity in the property by way of the 20% deposit we paid, the $166,000 payments we had made towards the loan and the $144,000 we had invested in property improvements) and instead wanted possession of the property, at full interest and all its legal costs associated with enforcement (including Court related costs).

Therefore there no meaningful negotiations nor offers of settlement made by FSP2 that reflected our loss and damage.

Instead, it maintained its claim in the Supreme Court of Western Australia and refused to counter-claim against the Mortgage Manager for its fraud.

See also:

Westpac Banking Corporation v Howard [2015] QDC 76 (10 April 2015)
http://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/qld/QDC/2015/76.html

Former Westpac banker David St Pierre jailed over $4 million fraud
https://www.news.com.au/finance/business/banking/former-westpac-banker-david-st-pierre-jailed-over-4-million-fraud/news-story/dc30d78447481c36a9d389c09ccbb26b?fbclid=IwAR1im2v5TqTUyNqjyu01EczeEiJwGbPvM8Mged37pQGvyvl9YAm6wyY8M4Y

3) whether banks generally have behaved in a way that meets community standards when dealing with consumers trying to exercise their legal rights;

The answer is a resounding no they do not.

From my own experience and the experience of numerous other consumers I have spoken to regarding their experience with FSP's the FSP conduct, in the event of a dispute, rarely meets community standards.

They deliberately:

1. withhold pertinent documents from you, such as a copy of your loan application form and supporting documents.

2. withhold documents from you until the statute of limitation is exhausted

3. deny your consumer credit protection rights.

4. argue in Court that you have no rights, or at least the FSP had no legal obligation to assess the affordability of the loan before making an offer of credit to you, in light of the Explanatory Memorandum to the UCCC and NCC which says:

Explanatory Memorandum to the Consumer Credit (Western Australia) bill, Second Reading, Tuesday 21 November 1995. at page 11079 – 11081

"The code does not require credit providers to make inquiries ***beyond those ordinarily made by prudent lenders****. Nor is it intended to place obstacles in the way of those lenders. It is intended to deal with credit providers* ***who lend without making proper inquiries into the debtor's ability to pay".***

"For consumers, its essential features are disclosure of useful information and the controls on the ability of credit providers to take advantage of their position to the unjustified detriment of consumers. In his second reading speech, the responsible Minister in Queensland observed that from ***the credit provider's point of view this legislation is not just a consumer credit code but a code of good business practice.*** *I endorse that view. It contains provisions which, if followed,* ***should reflect good lending practice****. At the same time, it is flexible enough and contemporary enough to ensure that it will will not detract from the establishment of good lender and borrower relationships, product innovations, competition or sensible pricing decisions.*

5. set-up a system with multiple entities involved, including hidden contractual agreements and terms between entities (independent contractor rather than agent) so that FSP can not be held liable for the misconduct of its intermediaries.

6. refuse to disclose and worse deliberately conceal known systemic misconduct of their intermediaries

7. refuse to provide compensation to effected customers

8. refuse to have the intermediary 're-purchase' fraudulently originated loans (as per their contractual agreements) and prefer to take the borrower to Court rather than utilise the re-purchasing provisions

9. blame the customer for the misconduct, and,

10. use the 'black letter of the law' rather than the spirit of the law and parliamentary intention (as per the explanatory memorandums under the Consumer Credit framework – see table above). This opinion regarding 'black letter of the law' is also be supported by Consumer Credit Legal Service WA in their submission to the inquiry.

Community standards require that when a customer makes a complaint of serious misconduct to their FSP regarding the fraud of its Mortgage Manager in the origination of their loan and mortgage, particularly when the FSP was aware that the Mortgage Manager had been found to have engaged in this type of misconduct on at least 11 occasions*, a meaningful discussion should occur between the FSP and its customer to reach an amicable and fair resolution to the complaint.

*** See: Yes Home Loans Pty Ltd & Anor v AFIG Wholesale Pty Ltd & Anor [2008] NSWSC 1017 (26 September 2008)** http://classic.austlii.edu.au/cgi-bin/sinodisp/au/cases/nsw/NSWSC/2008/1017.html

Community expectation would dictate that the FSP would try to ensure that its customer was not adversely affected by the deliberate contractual breaches of its Mortgage Manager and its Mortgage Manager's failure to make 'reasonable inquires' into a customer's ability to repay the loan under the terms of the contract.

Community expectation would suggest that when the Customer seeks redress from the Court regarding this type of fraudulent misconduct the Court would frown upon it and ensure the Customer is not unjustly dis-enriched by the fraud of the FSP's Mortgage Manager and recklessness and wilful blindness of the FSP.

Not so in Western Australia.

See **PERMANENT CUSTODIANS LTD -v- SHANNON [No 2] [2018] WASC 295 (21 September 2018)** http://classic.austlii.edu.au/cgi-bin/sinodisp/au/cases/wa/WASC/2018/295.html

The Court found the Mortgage Manager engaged in fraud.

[241] Having outlined the defendants' contentions I consider that there are three matters relied upon by the defendants which have substance. The **first** is the fraudulent conduct of YHL in fabricating

the loan application form, falsely informing AFIG that the loan application and verification processes required by the Operations Manual had been complied with and submitting the false loan application form to Genworth Financial as part of a mortgage loan insurance application. The **second** is that YHL did not comply with, and the Loan was not in accordance with, the loan submission process in the Operations Manual and the representations and warranties in the Correspondent Deed. The **third** is that at the time it submitted the loan application to AFIG, YHL could not be satisfied that the defendants would be able to meet their obligations under the loan contract in accordance with its terms without substantial hardship and as a matter of fact it is likely the defendants would not be able to do so.

The Judge has erred in fact finding the YHL had provided a copy of the loan application form to AFIG. This was brought to his attention in trial and not disputed by the plaintiff. The loan application form was not sent to AFIG at all in 2006 as AFIG expressly instructed YHL not to send it to them if its exposure was less than $500k, which in our case the loan was for $452,000.

The Court found the FSP was taken to have known of the fraud by the Mortgage Manager,

[243] YHL was the agent of GEL Custodians for the purpose of the mortgage loan insurance application and YHL's knowledge that the information in the loan application form was false is to be attributed to GEL Custodians. However, YHL did not complete the loan application form or undertake the loan application process as agent of GEL Custodians. The knowledge attributed to GEL Custodians for the purpose of the mortgage loan insurance is not sufficient to meet the real degree of moral obloquy required for a finding of unconscionable conduct. The conduct of AFIG and GEL Custodians did not fall below acceptable norms, standards or values such as to warrant it being determined to be unconscionable. YHL's dishonest conduct was directed at GEL Custodians rather than the defendants.

However,

[245] If, contrary to my finding, the consequence of the attribution to AFIG or GEL Custodians of the knowledge that the information in the loan application forms submitted to Genworth Financial was false amounts to unconscionable conduct by GEL Custodians, it is not appropriate to grant to the defendants relief that discharges the Loan or Mortgage or reduces the amount owing under the Loan or Mortgage.

So, the answer to the above question is, so long as Australian Courts refuse to condemn fraud in the origination of loans and mortgage in this Country, the FSP will continue to use and abuse the legal system to take possession of families home and be rewarded for:

1. it’s Mortgage Managers fraud,

2. fraud against a Lenders Mortgage Insurer (and in breach of the ‘upmost good faith’ requirements under the Insurance Contracts Act (Cwth))

3. it's successful, however unlawful 'contracting-out' of tasks with no liability for the Mortgage Managers misconduct (S.191 of the NCC), and,

4. its own recklessness and wilful blindness.

5. its own unconscionable conduct in 'turning a blind eye to inconsistencies in a loan application'

Not only does the conduct of this FSP fall well below community expectation, unfortunately so does the Supreme Court of Western Australia's.

As seen in the Royal Commission, this type of misconduct was rampant throughout the industry and rewarding FSP for 'contracting out' tasks to other entities and refusing to hold them accountable under the Consumer Credit Protection framework is a travesty of justice for all consumers.

Further, if a FSP is aware of systemic misconduct of its Mortgage Manager as was our FSP in 2008, the law should ensure that the FSP must undertake a process to:

1. Inform its customers of the fact, and,

2. Invite its customers to have the FSP re-look at the origination of their loan, and,

3. Provide redress for customers, including, compensation and / or a debt waiver, and,

4. Obtain indemnity for the compensation provided to its Customers directly from the Mortgage Manager as per its own contractual arrangements with it Mortgage Manager, not from the Customer under the loan agreement and mortgage.

It is my understanding that under S.912A and 912B of the Corporations Act (Cwth) these sorts of compensation schemes were mandatory to be put in place. If I am correct, then the FSP's are not utilising the mandatory compensation schemes and tend to take action against their customers rather than the fraudster. This again would not be inline with Community expectations, nor the law.

This also would not be inline with community standards to act fairly, efficiently and honestly (S.912A of the Corporations Act (Cwth) and S.47 of the National Consumer Credit Protection Act (Cwth))

2) The accessibility and appropriateness of the court system as a forum to resolve these disputes fairly, including:

A court, particularly a Supreme Court is not an appropriate forum for financial complaints to be dealt with, particularly when a complaint is based upon a Consumer seeking for the contract to be reopened as unjust under S.76 and S.77 of the NCC.

Supreme Courts are run on the assumption that all litigants will be represented by lawyers and yet clearly this is not the case.

Before the enactment of the NCC becoming a part of the Commonwealth law, a person could take their complaints under the old State based Consumer codes to the State Administrative Tribunal, wherein the process was more inquisitorial rather than adversarial.

The enactment of the NCC into Commonwealth law remove access for self represented litigants to use the SAT and did not replace it with a like kind of forum which is equivalently inquisitorial rather then the more adversarial than the Supreme Court.

It is almost impossible for a Consumer to win in the Supreme Court without legal representation.

Even when you are able to obtain assistance, the Court refuses to address any of the misconduct by the FSP and will only focus their attention on to the Consumer.

This is why the FSP would prefer take the matter to Court rather than mediate properly with a Customer.

They know a Court will almost always side with them and provide them with judgment, along with the Consumer having to pay for their inordinate legal fees, which is a slap in the face when you have to fight alone with no legal representation of your own only to have to pay for the FSP's lawyers.

I may sound completely jaded by the entire Australian judicial system, but from my own experience, it is a very one-sided system and not to be trusted. Even when the Parliament has provided consumers with protective legislation against financial misconduct the Courts refuse to uphold them.

See **PERMANENT CUSTODIANS LTD -v- SHANNON [No 2] [2018] WASC 295 (21 September 2018)** http://classic.austlii.edu.au/cgi-bin/sinodisp/au/cases/wa/WASC/2018/295.html

An example of this is in our case, the law states:

S.76 (2) (l) whether at the time the contract, mortgage or guarantee was entered into or changed, the credit provider knew, or could have ascertained by reasonable inquiry at the time, that the debtor could not pay in accordance with its terms or not without substantial hardship;

However the Court refused to consider the legal 'definition of 'reasonable enquiries' and stated in its judgment:

The tenth s 76(2) matter relied upon by the defendants is:

> (l) whether at the time the contract, mortgage ... was entered into ..., the credit provider knew, or could have ascertained by reasonable enquiry at the time, that the debtor could not pay in accordance with its terms or without substantial hardship.

[271] The defendants say that YHL (and thus GEL Custodians) and from 2012 GEL Custodians or the plaintiff itself knew that the defendants did not and could not meet the ARMS programme parameters that is why YHL fabricated the loan application and application for mortgage insurance in the first place. The defendants further say that any reasonable enquiry or checking in 2006 and again from 2012 onwards would have determined that the defendants could not pay in accordance with the terms of the Loan Agreement at all, let alone without substantial hardship.

[272] The knowledge of YHL that may be attributed to GEL Custodians **is that the defendants had not provided any details of their income, assets or liabilities**. There is no evidence that the defendants gave to YHL any information that, or from which it could be inferred, that they could not meet the mortgage repayments or not without substantial hardship. Mrs Shannon's evidence is that at the time the defendants had no financial statements available for their business. Reasonable enquiry would not have disclosed that the defendants were not able to make the repayments without substantial hardship but it would have disclosed that the defendants did not have financial statements available to substantiate their belief that they could make the repayments without substantial hardship.

But then says at:

[285] The defendants' entry into the Loan Agreement and the Mortgage was not facilitated by GEL Custodians or AFIG failing to require appropriate information, it came about because of the fraudulent conduct of YHL.

The term ‘Reasonable Inquires’ are clearly articulated by his Honour in ***Australian Securities and Investments Commission v Cash Store Pty Ltd (in liquidation)*** **[2014] FCA 926**
http://classic.austlii.edu.au/cgi-bin/sinodisp/au/cases/cth/FCA/2014/926.html

At [42] Assessing whether there is a real chance of a person being able to comply with his or her financial obligations under the contract requires, at the very least, a sufficient understanding of the person’s income and expenditure. It is **axiomatic** that “reasonable inquiries” about a customer’s financial situation must include inquiries about the customer’s **current income and living expenses.** The extent to which further information and additional inquiries may be needed in order to assess the consumer’s financial capacity to service and repay the proposed loan and determine loan suitability will be a matter of degree in each particular case.

I’m not sure why there are so many inconsistencies when Court deal with financial misconduct. We had explained to the Mortgage Manager that we were self-employed and did not have our tax returns up to date. At the time we thought our loan was being dealt with as a low-doc loan, however in 2012 we discovered we had been approved for a full documentation home loan, which lead to further enquiries as to how this happened.

The Court was made aware of all this however, in my mind, the institutional integrity of the Western Australian Supreme Court is grossly impaired.

After reading judgment after judgment wherein the Courts consistently allow FSP's to break the law with little or no consequences, I am of the belief that the entire Australian Court system's institutionally integrity is impaired when dealing with FSP and its customers.

1) the ability of people in conflict with a large financial institution to attain affordable, quality legal advice and representation,

Having to respond to a Writ and Statement of Claim in the Supreme Court is a harrowing experience. We had to self-represent from 2012 until mid 2017 when we were successfully granted money through the Commonwealth Attorney General's office to run the matter as a Public Interest / Test case.

Between 2012 until 2017 we constantly sought legal assistance from organisations such as:

- Consumer Credit Legal Services WA (CCLSWA)
- Law Access WA
- Legal Aid WA
- ASIC
- Homeless Law WA
- WACOSS

All organisations we approached advised us they either:

1. Didn't have funding to represent in Court, and / or
2. The matter was too complex for them to assist.

ASIC advised us that 'it didn't take action on behalf of individuals', but 'wished us well in our Court case and to let them know how we went'.

Even when we were granted the money from the Commonwealth Attorney General's Department in 2017 we were turned down by several large 'Consumer Focused' law firms, as well as several smaller firms. Most of the large firms were 'conflicted'. Some did not want to take on a case against a FSP.

We really had to 'take what we could get' with regard to representation and felt that we couldn't make the best decision based upon the skill set and quality of knowledge of the law firm regarding the Consumer Protection Law. Our was based upon who was willing to take the matter on and represent us regardless of competance, unlike the FSP's who have the large top tier law firms at their finger tips, some of who had assisted the Government in drafting the National Consumer Credit Protection Act (Cwth).

Suggestions:
I agree with Mike Sanderon's submission regarding Equality of Arms.

The Government needs to ensure that the FSP industry contributes heavily to the funding of the numerous Consumer Credit Legal Services and other Community Law Centres, however, these

organisations will need to more proactive in providing Consumers with proper **legal representation** in Courts.

I am concerned that if more funding is provided to these organisations they will continue to only provide telephone support rather than assist with court preparation and representation.

I am grateful for these organisations and they do a fantastic job with the little funding they receive, it's just that there is a void in real Court representation services as we have consistently found.

2) the cost of legal representation and court fees,

It has cost the Australian tax payers over $120,000 for us to pay our lawyers for just over 6 months of work and this was based upon a reduced rate, not a commercial rate. This was because we were granted funding under the Commonwealth Attorney General's Public Interest / Test Case scheme.

In particular, we were seeking adjudication from the Court as to how the operation of the NCC reopening provisions (along with the non-contracting out provisions under the Code) would operate in light of the NSWSC Tonto Case, an authoritative judgement of 'Agency'.

Most of the lawyers we spoke to said their hourly rate was between $400 - $600 per hour.

Court fees were not too prohibitive for us, however that is because both myself and my husband were unfortunately reduced to relying upon Centrelink payments and the Court provides reduced Court fees for Health Care holders.

The cost of filing the original counter-claim (before being reduce to Centrelink assistance) was around $1200.00.

Each Application filed was around $400.00

3) costs risks of unsuccessful litigation, and

As we have lost our case in the Supreme Court, I can advise the Commission that the adverse cost order against us is in the vicinity of $600,000 however, due to the fact that this amount was not articulated in the final judgment by way of a breakdown between principle, interest, fees, charges and legal fees I can only estimate. The order made was:

[288] The defendants have not made out any of their claims in their defence or counterclaim. Judgment should be entered for the plaintiff for $1,301,131.80 together with interest from 4 December 2017 and for possession of the Land. The counterclaim must be dismissed.

The amount we borrowed was $452,000.

The payments made towards principal and / or interest was $166.105 paid from July 2006 – August 2011.

We now are looking to Appeal and face further adverse costs orders against us if the Court upholds the original judgment. While I feel we have grounds to successfully appeal the decision, the costs are always on a consumers mind when dealing with Courts.

3) the experience of participants in a court process who appear unrepresented;

Self-representing in Supreme Court of Western Australia for over 5 1/2 years, and now for the Appeal, has been the most stressful and traumatic experience of our lives.

Both my husband and I have been diagnosed with post traumatic stress caused by the rigours of litigation and a response to the way in which we have been treated by both the Court and the FSP.

When we were originally served with a Writ and Statement of Claim (April 2012) we had no idea of what we had to do. We filed the appearance and spent weeks trying to draft a defence for which we had no experience of. Our general defence was the FSP was seeking possession on a default that had remedied on time and in full 12 months before hand, we had been advised by the FSP that the 'lender of record' was no longer the FSP contained on the writ and the fact that no terms and conditions were provided to us before signing the loan documents and granting a mortgage.

In June 2012, we were called to the Court for a directions hearing. We advised the Court that we would like to amend the defence however, advised the Registrar that the default the FSP was relying upon had been remedied within the grace period (even though no default notice was received by us) and therefore the FSP could not accelerate the loan.

Extra time was granted to amend the defence and we then spoke to the FSP lawyer outside the Court to discuss the 'default' issue. The lawyer asked us to email him proof the money had been paid. We suggested he go back to his client for the proof as the payment was recorded on the loan statements.

At the same time (starting from February 2012) we started seeking copies of documents, including a copy of the loan application form which the FSP relied upon for the assessment of the loan. All requests were denied by the FSP.

Between June – November 2012, with full knowledge that the default had been remedied the FSP kept its claim in the Supreme Court like a sword over our heads. It knew we didn't want to have to go to Court however refused to dismiss its claim against us.

In June 2012, we made an offer to settle, which was refused. The FSP counter-offered, but its offer to us was refused on the basis that we had not received all the documents we were entitled to in order to ensure we were making the right decision based upon our rights.

On 5 July 2012, after voluminous requests from us seeking a copy of the loan application (inter alia), we received a letter from the FSP's solicitors stating …

Notwithstanding our client is not obliged to provide you with the documents and information you have requested, they are willing to provide you with the following …

Loan statements, Identification documents, Direct Debit request, Pay anyone authority, Loan Agreement, and one page of my bank statement from 2006. None of these documents were documents we were requesting.

It knew we were seeking a copy of the loan application form and unlawfully refused to provide it to us nor provided us with a lawful excuse as to why it could not be provided (as per the Privacy Act (Cwth)).

In August 2012, after several more letters and phone calls to both the Mortgage Manager and the FSP2, we were finally provided a copy of the loan application form. The FSP2 did not have a copy of the document on file although the Mortgage Manager had made contact with Genworth Financial (LMI Insurer) and was sent a copy of the loan application the Mortgage Manager had provided to it in 2006.

This is when we discovered the fraud.

We retained the original loan application form which was faxed to the Mortgage Manager in April 2006 which stated we were self-employed.

The loan application form we were provided by the Mortgage Manager (obtained through Genworth) fraudulently stated that:

My husband was employed by a mining recruitment company.
I was responsible for 'home duties'.
We had $124,000 in superannuation
$184,000 in savings
$50,000 worth of artwork

None of this information was true, and was never provided to the Mortgage Manager by ourselves.

In September 2012 we reported the fraud to FSP2 and its solicitors.

In 2013 / 2014 we reported the fraud to the WA Major Fraud Squad, SAPOL Fraud division and ASIC. No action was taken at that time by any of the aforementioned law enforcement agencies.

We received a letter from FSP2 solicitors saying 'your portrayal of yourselves as victims of forgery and fraud can not be accepted'.

In November 2012, we received a new default notice in the mail. We were confused because the matter was still before the Court. We contacted the Court only to find that the original matter was discontinued although the FSP failed to inform us of the fact (in breach of the Court rules).

In early 2013, with actual knowledge of the Mortgage Manager's fraud FSP2 served us with a new writ and statement of claim, now relying upon the new default notice.

What we didn't know at the time, and what we believe is the reason the matter was discontinued by FSP2 was because if we had filed a defence and counterclaim to the original action regarding the fraud we would not have been statute barred on some, if not all of our claims.

At that time, the fraudulent Mortgage Manager was still acting as an agent of the FSP, as it had been provided with delegation of all rights, powers and functions of the FSP when we signed the loan agreement and granted a mortgage in 2006.

In early 2013, we initiated a COSL complaint against both the Mortgage Manager and the FSP2.

We had spoken to many other consumers who had dealt with COSL and they were all of the opinion that COSL worked for the lenders and their experience was COSL was a waste of time.

COSL refused to provide us copies of the contractual agreements between FSP and Mortgage Manager, so we had no clear understanding of our legal rights. We were of the understanding that the Mortgage Manager had at all material times acted as an agent of the FSP.

After months of dealing with COSL, we were so frustrated with the process that we decided not to further pursue the complaint in COSL and decided it would be better for us to go to Court where we thought we would be provided proper redress.

What we did discover however was that in 2006, the FSP had not received a loan application form from the Mortgage Manager at all. It was relying upon the Mortgage Manager to make the lending assessment, and all the Mortgage Manager had to do was sign a 'Mortgage Purchase Application' form saying it was compliant and not in breach of the Correspondent Deed and Operations Manual and the offer of a loan would be made. The Mortgage Manager was expressly directed by the FSP not to send it a copy of the loan application form from a borrower if its exposure was less than $500,000, which in our case it was $452,000.

So in fact, the original FSP never received, nor relied upon a loan application form.

In late 2013, we sought pro-bono legal advice from a WA Barrister regarding the FSP's claim. We were advised that the Supreme Court of Western Australia was a highly disadvantageous forum to hear consumer complaints as it was known amongst Barristers as the 'Banks Court' and 'Consumers will never win in there'. We were advised that the Master of the Court was the gate keeper and we had very little chance of getting past summary judgment.

This advice did not provide us with a very good impression on the way in which the Supreme Court operated and perhaps put us in a mind set that the Court was 'corrupt' and would not uphold Consumer Protection legislation.

In late 2013, the matter was listed for a direction hearing before the Master of the Supreme Court of Western Australia, and later listed for directions before a Registrar.

We sought an application to strike out, it was not listed or programmed for a hearing.

I recall ringing the Supreme Court on one particular day, and speaking to a woman called Ms X. I was attempting to find out what was happening with the Application we had filed. The conversation began quite friendly, then 'Ms X' asked me which law firm I was calling from? When I explained to her that I was self-representing her attitude quickly changed to harshness and abruptness.

We sought 'further and better particulars' before the Master, particularly surrounding paragraph 3 of the FSP's claim which stated "At the request of the defendants, the Plaintiff agreed to loan money ..."

We sought further particulars as to how the request was made. We knew the FSP had not been provided with a loan application form from us. Our requests were denied by the Court.

We sought subpoenas to the issued, again denied, with a comment from the Registrar "You can't do this to a Plaintiff'.

The FSP then sought a Summary Judgment application (which at that time had not been filed) which was then programmed to hearing by the Registrar and given priority over our previously filed (and paid for) application.

Summary Judgment was listed before the Master to be heard on the 14 April 2014.

Contractual Arrangements between FSP and Mortgage Manager

In the affidavits filed by the FSP, we were finally provided a copy of the Correspondent Deed, being the contractual agreement between the FSP and the Mortgage Manager.

Here we discovered clauses which stated if the FSP discovered the Mortgage Manager had engaged in misconduct, including if the Representations and Warranties the Mortgage Manager made to the FSP in the origination of the loan and mortgage were unture the FSP would require the Mortgage Manager to **re-purchase** the loan and mortgage (that is pay the FSP the amount owing under the loan) and the FSP would "deliver the relevant mortgage documents to the Mortgage Manager required to transfer the entire beneficial and legal interest in the loan and mortgage to the Mortgage Manager".

In other words, if the Mortgage Manager had been fraudulent, the FSP would insist the Mortgage Manager become the mortgagee and the Mortgage Manager would be required to take the legal steps itself if it wanted to take repossession action against the borrowers.

As we knew that we were going to have a difficult legal argument on 'Agency' we wrote to the then CEO of the FSP2, referring him to the relevant clauses of the Correspondent Deed and asked why his organisation was not utilising those specific clauses of the Correspondent Deed to make the fraudulent Mortgage Manager repurchase the loan? We stated, "*if this was to occur the dispute between you and ourselves would be over, and if the fraudulent Mortgage Manager wanted to take the necessary legal steps for possession we were happy to met that claim in Court*"

The FSP2 response was, it's position was that it was to seek summary judgment against us and therefore would not respond to our request. We were also told by the FSP2' solicitors to stop communication directly with its client. So therefore, needless to say, the re-purchase clause of the Correspondent Deed was simply ignored.

> In 2017, what we did discover was that the FSP and the fraudulent Mortgage Manager had entered into a Settlement Deed in 2008 regarding the previous misconduct of the Mortgage Manager, and this may have included indemnity for all past, present and future liabilities.
>
> None of this had been pleaded by the FSP nor disclosed to us in discovery and a request for further discovery regarding this indemnity agreement was refused by the FSP.

Before Summary Judgment we were frantic to file as many documents as we would could to demonstrate to the Court that we had a defence.

We had heard from many other litigants who went before us, and also WA Barristers that is was almost impossible to get past Summary Judgment in front of the Master. He seemed ignorant of the

Consumer Credit Protection legislation. On 14 April 2014, the Summary Judgment application was dismissed (no published reasons) and the matter was to proceed to trial.

I really couldn't take the commission through the entire horrific experience we had as self-represented litigants within this document as it was a 5 ½ year experience, however I would be happy to appear before the Committee to answer any questions it may have regarding the specifics.

As a self-represented litigant, we began our journey with respect for the Court and the Court process. We believed that there are laws in place to protect your rights and you have a right seek assistance from the Court in exercising them.

However ...

Our respect for the Court and the Court process was very quickly eroded due to way in which we were treated by both the Court and by the FSP's lawyers, which was with utter contempt.

It appears to us that the Supreme Court of Western Australia thinks that a self-represented person should not be able to access justice, nor to be treated with respect when trying to assert their consumer protection rights.

The mental trauma we experienced when we started to understand and experience that the Australian Judicial System we thought was set up to ensure compliance with laws, fairness and equity and to provide redress for financial misconduct is in fact an illusion.

We started to see that the 'Bankers Court' is only ever interested in providing redress for FSP's and believes that any Consumer Protection legislation (framework) is overridden by the common law and a consumer should be left to pay for the misconduct of the FSP's and their contractually bound intermediaries.

We would ask for documents not discovered, although mentioned in documents which were discovered including the Operations Manual, phone records etc and when they were refused, we would object only to be mocked by the FSP's Barrister by saying "Your problems are not my problems'

In our atrocious judgment (not just atrocious for us personally, but for ALL consumers and their advocates) the trial Judge:

http://classic.austlii.edu.au/cgi-bin/sinodisp/au/cases/wa/WASC/2018/295.html
PERMANENT CUSTODIANS LTD -v- SHANNON [No 2] [2018] WASC 295 (21 September 2018)

1. Berated us for not knowing how to write affidavits (as self-represented litigants) calling us disingenuous even though the previous Judge who case managed the matter for 3 ½ years accepted them as they were filed and never mentioned anything 'technically wrong with them'

2. Berated us for relying upon documents (from 2006) rather than our own recollection of events, while on the other hand the FSP case was based entirely upon documents.

3. Called us liars when we argued that the Mortgage Manager had told us in 2006 that it was to be our Lender and had called itself a non-bank lender, also known as a Mortgage Manager.

See attached 'Annexure A'… Submission 24 to the House of Representatives Standing Committee on Economics inquiry into competition in the banking and non banking sectors – Submission by the Council of Mortgage Lenders (CML), of which Yes Home Loans was a member.

> ***Page 2***
> *The Council of Mortgage Lenders (CML) is pleased to respond to the House of Representatives inquiry into the competitive landscape between the banking and non-banking sectors.*
>
> > *CML represents the interests of Australian **mortgage lenders** who offer non-bank loans based on prime financing. Prime non-bank lenders include: Resi, **Yes Home Loans**, Australian First Mortgage, First Folio, Onyx Finance, Club Finance and Wizard.*
> >
> > ***And***
> >
> > ***Prime non-bank lenders** should now be referred to as mortgage managers to avoid confusion between themselves and mortgage brokers.*

4. Found we were careless and facilitated the fraud of the Mortgage Manager. However refused to find the FSP reckless and wilfully blind to the actions of the Mortgage Manager.

5. Found that even though the FSP was taken to have known the Mortgage Manager forged our loan application (without our knowledge) that was not enough for a finding of unconscionable conduct nor enough to satisfy him that the loan agreement should be reopened as unjust under S.76 and S.77 of the National Credit Code.

6. Made inflammatory remarks by saying the FSP was 'not an arm of social services' …. even though the precedent he relied upon was from a case wherein the FSP had been provided with a copy of the loan application, whereas in our case it was not. No one believes FSP's are an arm of social services, we simply want the law applied correctly and redress provided to effected consumers.

7. Found the a Mortgage Manager really is just another name for a broker and therefore must act as an agent for a borrower (even though the Correspondent Deed states the Mortgage Manager is forbidden to act as an agent for the borrower).

Both my husband and I are so exhausted from this whole experience and yet we must continue the fight by way of an Appeal. We feel that we can't leave such a one sided, completely biased judgment to stand, not just for us but for the thousands of consumers who will come behind us when trying to get justice for financial misconduct.

The whole experience in and out of Court has adversely affected us on so many levels including:

Our mental and physical health.

Our ability to trust.

The loss of faith in the Judicial and Legal System in this Country.

The loss of our business so that we are now reliant on Centrelink payments, which we are mortified about.

The relationship between each other has been irreparable damaged.

The loss of $455,000 of our own (and my mother in laws) money which was used towards the purchase of the property, property improvements and repayments.

And to top it all off … the Court has rewarded the FSP with over $1,300.000 judgment (now over $1,500,000) and further rewarded them with the right to possession of our home.

We are now facing homelessness … all over the fraudulent misconduct of the FSP's Mortgage Manager in 2006, the FSP's recklessness and wilful blindness and the FSP's refusal to make the fraudulent Mortgage Manager re-purchase the mortgage from it in 2012 when we all discovered the fraud.

There should have been criminal prosecutions against the perpetrators as a result not a family made destitute and homeless.

I'm not sure what Country this is anymore. It's certainly is not the one that I thought I lived in which valued fairness and integrity.

C) the accessibility and appropriateness of the Australian Financial Complaints Authority (AFCA) as an alternative forum for resolving disputes including:

i. whether the eligibility criteria and compensation thresholds for AFCA warrant change,

ii. whether AFCA has the powers and resources it needs,

iii. whether AFCA faces proper accountability measures, and

whether enhancement to their test case procedures, or other expansions to AFCA''s role in law reform, is warranted;

I can not comment on AFCA as I have not used their services, save that I made a complaint regarding the conflicts on interest between our FSP ourselves and the fraudulent Mortgage Manager, and the failings of the FSP to have adequate compensation mechanisms in place to deal with its mortgage managers misconduct.

The complaint was closed by the Rules committee for reasons I need to explore further.

D) the accessibility of community legal centre advice relating to financial matters; and

Refer to the ability of people in conflict with a large financial institution to attain affordable, quality legal advice and representation,

E) any other related matters.

Financial Hardship

S.74 and S.89A of the NCC deals with hardship applications however the process can be complicated and flawed.

If you took out a loan before March 2013 your threshold for hardship can be found at the following link

https://www.moneysmart.gov.au/managing-your-money/managing-debts/trouble-with-debt/hardship-threshold

However, there is nothing in the NCC which would lead a person to this table contained on the Money Smart website.

My understanding was the Government was attempting to make the Hardship threshold $500,000 on all loans (so that it became universal) but it was lobbied by the FSP against that outcome. Now the law is just tedious and cumbersome and misleading, particularly to vulnerable people who are genuinely in hardship.

If the Commission reviews this Hardship process and the legal rights of Consumers I'm sure you will be as confused as most of us are. It is difficult to understand your rights, and whether the FSP **must** or **may** respond to your requests.

Suggestions:
1. Make a single hardship regime for all FSP and for all loan amounts which fall under the NCC.

2. Regulate how FSP handle all hardship applications, including investigating complaints of 'irresponsible lending' and mandatory reductions to amount owed if this occurred.

3. Publish an agreed set of rules on how all FSP must deal with all hardship applications so that Customers have a clear understanding of the process (transparency), including who will be making the hardship application decision, and what the Consumer can expect.

Further Comment
In 2011, we were advised that:

1. our FSP could not make the hardship application decision, it was to be made by its Mortgage Insurer, and,

2. the FSP also could not agree to allow us to sell the property until its insurer assessed the situation.

AMICUS CURIE

In the US, rather than the SEC being responsible for Consumer Protection, an entity called the Consumer Financial Protection Bureau (CFPB) is responsible.

https://www.consumerfinance.gov/policy-compliance/amicus/

According to its website:

> The CFPB is responsible for implementing many federal laws that relate to consumer finance. Courts sometimes apply those same laws to resolve disputes between private parties.
>
> In some cases, we believe a court would benefit from hearing our views on what the law says. The amicus program is how we share our views with to the court. ("Amicus" is shorthand for "Amicus curiae", Latin for "friend of the court.") Our amicus briefs provide the courts with the CFPB's views on significant consumer financial protection issues and help ensure that consumer financial protection statutes and regulations are correctly and consistently interpreted.

Either ASIC or preferably a similar body to the CFPB should be set up to act as an Amicus Curie (friend of the Court) in order to explain the complexities of the Consumer Protection laws to the Judges, particularity when a person is having to self represent in an adversarial court system.

From my experience, Judges tend not to listen to a Consumer's interpretation of the law and will inevitably seek clarification from the Barrister representing the FSP, who then frames the situation in a way that is beneficial to its client, not the consumer.

We struggled with trying to articulate to the Court the intention of the UCCC (now the NCC) which included ensuring the FSP engaged in good business and lending practices, including making 'reasonable inquiries' (as per the Queensland (and later other States) Explanatory Memorandum to the UCCC, and the reopening provisions of S.76 and S.77 of the NCC if they failed to do so – see page 4 of this submission.

> *"The code does not require credit providers to make inquiries* ***beyond those ordinarily made by prudent lenders****. Nor is it intended to place obstacles in the way of those lenders. It is intended to deal with credit providers* ***who lend without making proper inquiries into the debtor's ability to pay".***

Many Judges would rather hold a consumer responsible for the failings and misconduct of the FSP – which in my opinion, goes no where close in providing justice between the parties and only serves as further incentive for FSP's to engage in misconduct and then use the Court System against you.

Suggestions:
1. Create a new entity similar to the CFPB.
2. Remove the Consumer Protection authority from ASIC and give it to the CFPB.
3. Enable the Court to allow an Amicus Curie upon its own volition or on the application of a consumer, including to present the history and intent of the parliament when passing consumer protection legislation.

Insurance

As a part of the FSP's protection in the case of default by a borrower, most FSP's will obtain Lenders Mortgage Insurance (LMI). Usually if the borrower borrows more than 80% of the property value, the borrower will be required to cover the cost of this insurance.

Suggestion: Consumer Protection Insurance
As the borrower is required to pay for the Lenders insurance (LMI), the Lender should be made to pay for an insurance policy which, inter alia, would protect the borrower and cover the costs of litigation in the event of a dispute. This policy should also cover the borrower in the event that a mortgage broker or Mortgage Manager engages in fraudulent misconduct, whether or not the intermediary continues to trade. The contribution by the mortgage broker or mortgage manager to the insurance policy would need to be negotiated or regulated to ensure all parties are contributing fairly to the cost of borrowers insurance.

Intermediaries
Legislate that all Mortgage Manager are agents of trustee Credit Providers regardless of their contractual agreements.

'Managed Contract' and 'Mortgage Manager' are currently defined in NATIONAL CONSUMER CREDIT PROTECTION REGULATIONS 2010 - REG 26 Definitions

"managed contract " means a credit contract or consumer lease entered into as a result of credit assistance provided by a mortgage manager under the terms of an agreement the mortgage manager has with a credit provider, lessor or third party to manage the contract or lease.

"mortgage manager " means a licensee who has a written agreement with:

(a) a credit provider or lessor; or

(b) a third party who is authorised to act for a credit provider or lessor (under a written agreement with the credit provider or lessor); and

under the terms of which:

(c) the licensee is required to manage the relationship with the consumer on a day-to-day basis for the credit provider or lessor in accordance with the credit provider's, lessor's or third party's policies and procedures; and

(d) the credit contracts, consumer leases and associated documentation used by the licensee are branded or co-branded with the name of the licensee.

No mention of the word Agent

S.193 of the National Credit Code - Effect of noncompliance

193 Effect of noncompliance

(1) A credit contract, mortgage or guarantee or any other contract is not illegal, void or unenforceable because of a contravention of this Code unless this Code contains an express provision to that effect.

(2) Except as provided by this section, this Code does not derogate from rights and remedies that exist apart from this Code

This section has been successfully used by FSP lawyers to get around S.80 of the Code, which requires a FSP to provide a Default Notice to the Customer before initiating Court action.

See Bank of Queensland Ltd v Dutta [2010] NSWSC 574 (30 July 2010)

http://www7.austlii.edu.au/cgi-bin/viewdoc/au/cases/nsw/NSWSC/2010/574.html

[145] Secondly, sub-s (4)(c) provides that the Courts can authorise the credit provider to begin the enforcement proceedings. There is no requirement that this be done before they are commenced. Sub-section (4)(c) must allow the Court to authorise the credit provider nunc pro tunc.

[146] Thirdly, s 170 of the Code provides:

> A credit contract, mortgage or guarantee or any other contract is not illegal, void or unenforceable because of a contravention of this Code unless this Code contains an express provision to that effect.

All that s 80 does is to provide a penalty for commencing the proceedings without serving a notice. It contains no express provision that the credit contract or mortgage is unenforceable: *Dale v Nichols Constructions Pty Ltd* [2003] QDC 453 at [92]- [94].

147 In this regard, I respectfully disagree with the view of Smart AJ in *Benjamin* that s 170 is not directed to the institution of proceedings in meeting the requirements of s 80(2). Where s 80 is dealing with the proceedings to enforce a mortgage I should have thought that s 170(1) was very directly concerned with a section such as s 80 which expressly deals with a contravention of the Code.

Suggestion

1. Urgent attention and changes are required to the NCC.

2. A committee should be set up to review the entire NCC and to look at all the cases where the NCC has been relied upon and interpreted to ensure the NCC is consistent with Parliaments intentions, along with Community expectations.

ASIC ACT – 6 year statute of limitation

With regard to the Law of deception, misleading and unconscionable conduct (tort) this is covered by common law and also under the provisions of the ASIC Act (in banking and finance) .

What concerns me, which I am sure the Commission will agree, is that it appears under the ASIC Act there is a 6 year statute of limitation, which, prime face starts running down when the misconduct occurs, rather than the discovery of the act.

Deception, by its very nature is hard to detect.

If this is this law, I see the Cwth Parliament under the ASIC Act, creating a legal absurdity, that is if you are a really good deceiver (or fraudster) and are able to cover your tracks for 6 years (which they generally do) they are excused, by Commonwealth law, from their misconduct.

On the other hand, there is also the common law, which states that the time doesn't start running until the deception is discovered. That is until, you bring in the State limitation acts into play, which states that actions in torts (which deception and fraud falls under) can only be run from the date it occurred, or, the person can make an application to the court to extend the time period for another 3 years (S.38 of the WA Limitations Act under certain provisions).

I ask that the Commonwealth and the States (under COAG) revisits the limitations contained in the ASIC Act and State limitations acts (especially in light of the Royal Commission) and makes it clear that a cause of action in deceit (including fraud) should be able to be run upon the discovery of the deceit, not from the date the person acted illegally.

I bring to your attention the following case which may assist you in understanding my opinion. While this is a South Australian case, there is enough here to demonstrate the legal 'defenses' to this type of misconduct, which I am sure you would agree, does not constitute justice, in any sense.

ROSS v PERPETUAL TRUSTEES VICTORIA LTD & ORS [2017] SASC 61 (28 April 2017)
http://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/sa/SASC/2017/61.html

These FSP’s and their lawyers know the law, and know that a person looses rights to sue if the FSP withholds the information and evidence for long enough.

This happened to us. We started to seek a copy of our loan application in February 2012 which was within the statute of limitations. The document was withheld from us until around 12 August 2012. The cut off date of the Statute of Limitations was July 19, 2012. This included our right to sue under the UCCC and the ASIC Act.

Implementation of the LLOT Test

LLOT Test - Licensing and Loan Origination Test

Parliament needs to legislative that before taking action in Court the FSP must provide the Consumer with the following documents so that they may be able to obtain legal advice regarding whether or not they have a defence and or counter-claims / cross claims.

1. A copy of the FSP Credit Licence, including any Representatives licence.

2. A copy of the Loan Application Form relied upon by the FSP to assess the Consumer before making an offer of credit.

3. All supporting documents the FSP was provided including, Bank Statements, letters of employment, tax returns etc

4. Copies of all contractual agreements between the intermediaries involved in the origination of the loan.

5. If under the NCCP Act, copies all preliminary and final assessments.

Strong consequences must be included in the NCC and the NCCP Act if these documents are not provided, including an expressed direction to the Courts to disallow the FSP to take steps in the proceedings until such a time that the documents are provided, along with a $ penalty.

It should also be legislated that all of these documents **must** be submitted to a Court in affidavit when filing the Writ and Statement of Claim, and must be pleaded in the FSP's statement of claim.

This is to ensure that not only the Consumer is aware of the licensing obligations of the FSP and the Loan Origination methodology applied, but of equal importance, that the Judicial officer is made aware of both of these things and will be able to determine if the FSP has breached its licensing obligations for which there may be penalties and if it has breached its obligations under the NCC and NCCP Act to receive a loan application form and make reasonable enquires thereof.

I'm sure there are more brilliant minds then mine who could add to this list of documents which a FSP must be made to provide a Consumer before initiated Court action against them.

If these documents are provided in the preliminary stages of the dispute, Court action may be avoided all together. The more information provided to the Customer and the more transparency of the FSP, the more likelyhood a negotiated outcome could be reached that may be beneficial to both parties.

This would also decrease the work load on the Courts by up to 80%.

The remaining 20% could apply for Legal Aid assistance and this would make their resources more efficient.

I thank to Committee for reading my submissions and again would welcome the opportunity to speak to the Committee regarding my experience and suggestions contained within these submissions.

Anita and Chris Shannon