Senate Economics References Committee

Inquiry: Consumer protection in the banking, insurance and financial sector

Submission

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Terms of Reference

a. any failures that are evident in the:
   i. current laws and regulatory framework, and
   ii. enforcement of the current laws and regulatory framework, including those arising from resourcing and administration;
b. the impact of misconduct in the sector on victims and on consumers;
c. the impact on consumer outcomes of:
   i. executive and non-executive remuneration,
   ii. incentive-based commission structures, and
   iii. fee-for-no-service or recurring fee structures;
d. the culture and chain of responsibility in relation to misconduct within entities within the sector;
e. the availability and adequacy of:
   i. redress and compensation to victims of misconduct, including options for a retrospective compensation scheme of last resort, and
   ii. legal advice and representation for consumers and victims of misconduct, including their standing in the conduct of bankruptcy and insolvency processes;
f. the social impacts of consumer protection failures in the sector, including through increased reliance of victims on community and government services;
g. options to support the prioritisation of consumer protection and associated practices within the sector; and
h. any related matters.

I. Introduction

Many of the issues within the Terms of Reference of this inquiry have been covered by previous inquiries. That in itself is a scandal.

This impasse highlights that the problem is systemic. Finance provider malpractice generally enjoys impunity. The impunity arises from a comprehensive failure (indeed, complicity) of the regulatory apparatus, in conjunction with the court system, to address functionally and

systematically this malpractice, and of the failure of those in politics to do anything significant about this regulatory failure and legal/judicial bias.

As I note in my submission to the Senate Economics Committee ASIC inquiry (late 2013):

> Successive innumerable Parliamentary inquiries (beginning with the 1991 Martin Inquiry and including the most recent Post-GFC Banking Inquiry of this Committee) into relevant domains have ended with either further obfuscation or marginalisation of the problem … The regulators, with rare exceptions, have been missing in action. ASIC's manifest failure is thus merely representative of a larger failure – pervasive in the financial regulatory system and ultimately in the political sphere itself. …
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> The CBA [as with all providers] feels itself above the law because the law is not enforced. A law that is not enforced becomes *de facto* a law that operates to the advantage of the law-breaker and to the disadvantage of the victim.

In particular, the Post-GFC Banking Inquiry was strategically set up to fail to produce a meaningful outcome. The inquiry was initially mooted following pressure from Bankwest victims of the CBA takeover, but the early modification of the inquiry's orientation swamped the Bankwest issue and, in spite of multiple submissions and appearance of selective victims before that inquiry, the Bankwest saga was conveniently ignored. Hence the pressure by victims for another inquiry, which became The Impairment of Customer Loans inquiry.

Every banking-related inquiry receives myriad submissions from victims that document the gory detail of the latter's treatment. Given that so little has been achieved in this domain it is pertinent to ask whether anybody reads those submissions. Clearly, Committee members are busy people, but do they read any victim submissions? What percentage of victim submissions would be read, on average, by members of the Committee Secretariat? Is the flesh and blood that goes into the making of victim submissions, reliving their horrors, in vain?

My own experience is salutary. I have regularly made submissions over many years to banking-related inquiries, and also to inquiries regarding the treatment of unconscionability *sui generis* & market power in the (then) Trade Practices Act.

I have made submissions, amongst others, to the following inquiries:

- Australia's judicial system and the role of judges 2009 (no.16)
- Aspects of bank mergers 2009
- Competition within the Australian banking sector 2010
- The post-GFC banking sector 2012 (no.10, held in camera)
- The performance of the Australian Securities and Investments Commission 2013 (no.295)
- The Murray Financial System Inquiry 2014

- Treasury review of extending unfair contract term protections to small businesses 2014
- The impairment of customer loans 2015 (no.83)
- Penalties for white collar crime 2016 (no.73)

My submission to the 2013 ASIC inquiry is pivotal.

On banking matters, I am one of a handful of submitters to these inquiries who is neither victim nor has a vested interest (i.e. is a part of the problem).

Moreover, I have been in the rare position of being a recipient of inquiries and information from bank victims over an extended period – this since 2000.[1] I have subsequently written many detailed articles on the topic, and then receive contacts from further victims. These people contact me, as an outsider, as a last resort because they have been thrown overboard by the institutions in the regulatory apparatus. Thus I have something tangible to say on this matter, by contrast to the typical academic perspective (of which I am well familiar) that dwells in the stratosphere with grand abstractions, knowing little or nothing of the facts on the ground.

Have my efforts over the decades, done entirely altruistically, made any difference? Not a jot. Many of my submissions have been held in camera and thus not accessible to the public. In particular, [redacted], highlighted that the Commonwealth Bank of Australia had had a history of unconscionable and fraudulent acts, facilitated by comprehensive post Campbell Report deregulation of the sector and beginning even when still entirely publicly owned. [redacted] highlighted that the CBA's post-deregulation history was exceedingly relevant in the interpretation of the foreclosure of close to 1000 Bankwest customers after its takeover over Bankwest in December 2008 – providing substance to the inference that this was a fraudulent operation on large scale, taken under cover of the claimed adverse impact of the GFC on the Australian economy.

My submissions have occasionally been cited in inquiry reports but, in general, the substance of my submissions has been ignored.

Is this inquiry going to produce more of the same – that is, going through the motions following which nothing of substance eventuates?

II. ToR (a) Laws and Regulatory Framework and their Enforcement

My submission to the ASIC inquiry refers extensively to the failures of the current regulatory framework and its (lack of) enforcement.

Two elements deserve emphasis.

[1] This affair has its accidental origins in academic work I wrote on rural finance for the family farmer.

One. ASIC has singularly ignored its obligations under its Act with respect to s.12 (imported from the Trade Practices Act), regarding unconscionable conduct, enhanced in the 2001 amendment to the Act.

ASIC personnel appeared at a hearing of the Impairment of Customer Loans inquiry on 23 November 2015 (I was present). They misrepresented the character of the complaints that it regularly receives from small business/farmer victims of bank malpractice, and misrepresented its responsibilities and powers to act in those victims' interests. ASIC consistently lies to the victim complainants regarding its power and the processes it undertakes to deal with victim complaints. I have representative copies of such correspondence.

At this hearing, ASIC personnel acknowledged ASIC's inaction regarding its powers under s.12 but defended that inaction by claiming that the courts set too high a bar in the determination of unconscionable conduct. Now this claim has substance. However, their claim that it has pressured governments to alleviate this impasse is not supported by any publicly available evidence, and it has committed no resources to outlining in detail the supposed hurdles that it faces in taking actions under s.12.

That disclosure was in November 2015. Nothing has happened in this domain since that time.

The lack of action by ASIC is not a matter of inadequate resources. It is a matter of competence, culture and will. The government should put on notice to ASIC's Chairman that if he is not prepared to take his obligations seriously under s.12 then he will be replaced.

Two. The matter of the Financial Ombudsman Service. I outlined in my ASIC inquiry submission the ongoing problems with FOS, its manifest failure to assist small business/farmer complainants, and its duplicity in its public representations of its operations.

FOS personnel might assist in the resolution of bread and butter disputes. But with respect to small business/farmer disputes, its involvement is not merely not productive but positively harmful. From the sample of cases brought to my attention, it appears that FOS personnel have persistently acted in the interests of the bank that is the subject of complaint. More, their dysfunctional bureaucratic procedures drive the already desperate bank victim to deeper despair.

It doesn't help that FOS cutoff limits for involvement and compensation recommendations are entirely arbitrary, and fundamentally dysfunctional with respect to handling complaints from small business/farmer victims.

I have previously mentioned the parlous experience with FOS of Bankwest victim NSW developer Ken Winton. Comparable dysfunctionality occurred with Melbourne property owner Milton Wilde with respect to Bankwest. There is a Queensland NAB case, whose details must remain confidential, in which FOS personnel merely compounded NAB's criminal intransigence in not resolving a dispute whose origins lay in lending officer corruption. There is the case of Goldie Marketing, that went to court (Goldie Marketing v FOS, VSC 292, June 2015) which

involved a FOS case officer altering material produced as evidence – yet the judge bizarrely decided for FOS. Recent disclosure of the CBA foreclosures on properties of Tasmanian small businessperson Suzi Burge highlight FOS complicity with the bank, in which the same FOS officer as in Goldie Marketing is implicated.

FOS is simply corrupt. Its ongoing complicity with bank lenders (coupled with the ongoing window dressing that is the Code of Banking Practice) demonstrates conclusively that self-regulation of the banking sector (elevated as a guiding principle by the then Hawke/Keating governments surrounding the whitewash 1991 Martin inquiry) is a comprehensive failure.

III. ToR (b) The impact of misconduct in the sector on victims and on consumers

In my ASIC inquiry submission, I concluded with the statement:

> The carnage wrought by major banks on small business and the family farm sectors in this country has been widespread and persistent. Thriving or sustainable businesses, product of risk-taking initiative, have been destroyed or stolen. Family homes have been stolen. Couples, once independent, have become dependent on the parsimonious goodwill of social services. Family relationships have been destroyed or imperilled. The mental and/or physical health of the victims has suffered, sometimes resulting in premature death.

I also noted, in a speech to bank victims held in Canberra, 21 November 2016:

> We have this amazing disparity between the public relations activity – small business, family farmer, small property investor are the backbone of the nation. They are the entrepreneurs who generate all this activity. We love you, etc etc. In the small business sections of the financial press, it's all a good news story, blah blah blah. It's all bullshit.
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> The harsh realities – as you know – you have devoted your life in building up a business. The banks then default you, it sends in the receivers, it forecloses you, it takes your family home first, takes all your assets. As a consequence you're living in a caravan or shed in your child's yard, and living on a pension if you're lucky. You only have one lifetime. How many times can you pick yourself up?
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> And who cares in authority? Nobody cares.

The media is generally reluctant to report on the character and scale of this phenomenon because any such detailed reporting results in media management being harassed by bank spokespersons. The offending journalists are then disciplined, with such material henceforth declared off the agenda.

It is noteworthy that Kate Carnell, head of the ASBFEO investigation into small business loans has recently also highlighted this plight of post-foreclosure small business/farmer victims.

Carnell, previously a capital L Liberal rather than a bleeding heart liberal, has courageously reported on the information presented to her – a subject on which she had no previous experience.

The brutality behind this end outcome of despair is a product of numerous factors. The ethics-free culture of the post-deregulation banking sector is important. The massive asymmetry of power between bank lender and borrower is important – of which more below. An indifferent and complicit legal and judicial culture underlying bank litigation is important – of which more below.

IV. ToR (c) the impact on consumer outcomes of [in particular] ii. incentive-based commission structures

All incentive-linked salary components of a bank officer's remuneration should be banished from the sector post-haste. The devastating consequences of this practice became transparent in the reportage of the Commonwealth Financial Planning scandal, yet the practice continues unabated.

The hybridisation of functions (banking, wealth management) is one malodorous consequence of unbridled deregulation of the sector. This hybridisation has provided a key base and motivation for bank senior executives to extend incentive-linked remuneration for aggressive cross-selling by bank staff. But who in authority has the courage to confront that those who proposed and those who implemented comprehensive financial deregulation got it wrong?

V. ToR (d) The culture and chain of responsibility in relation to misconduct within entities within the sector

Misconduct originates at all levels of a bank's hierarchy.

The large-scale fraudulent operation perpetrated upon hundreds of Bankwest customers (mostly developers/publicans) immediately following the CBA's takeover of Bankwest in 2008 clearly issued from the top.

Much misconduct regarding borrowers originates with front-line lending officers. Partly this phenomenon is linked to incentive-linked remuneration; partly the causes lie deeper. Even before incentive-linked remuneration, there existed incentive-linked promotion structures.

Bank lending officers have long falsified documentation of loan applicants in order to expand their loan book and enhance their status.

Of significance here is that disputes arising from misconduct by individual loan officers appears to near universally result in the bank hierarchy choosing to protect the loan officer and vanquish the borrower victim.[2]

This phenomenon has been going on for decades. Exhibit A is the case of Somerset/Kabwand v NAB, late 1980s, in which a corrupt branch manager (in league with his regional manager) fraudulently mis-sold a worthless property (owned by the manager's friend, and who was about to be foreclosed) to the naïve Somersets. The malpractice was defended in court by the NAB via lies and bank document reconstruction, and the lives of the previously successful Somersets were henceforth destroyed.

Signatures are perennially forged either by or knowingly in the company of bank loan officers. I know of several cases in which a wife or female partner's signature has been forged and the husband/male partner, in league with the complicit bank officer, has been able to appropriate jointly-owned assets. The women involved in these cases have not received redress for the crimes against them. The former CEO of Australian icon Billabong received a gaol sentence for just this form of fraud. What about the others?

In the case of Thirup v NAB, for example, the Thirups were victims of a Sydney-based criminal sting that involved one party working from within the NAB itself, writing false mortgage documentation. The NAB compounded the crime by appropriating the Thirup residence through court action on the strength of the doctored mortgage documentation. The criminal syndicate is currently under police investigation, but it appears that the NAB is not contributing to the investigation.

In a not dissimilar affair, Queensland property developer Patrick Hayes was victim of a Gold Coast based criminal sting that involved parties working from within Westpac itself. These parties had previously operated from within other banks. Rather than working with police to clean up the sting operation, Westpac has been suing Hayes for its losses incurred.

Bank default of SME/farmer borrowers may go beyond mere foreclosure and a tidying of the books. It can also involve hounding the victim (and perhaps also the victim's family) in a fashion that only be described as sadistic and which goes beyond the pecuniary bottom line. This thrust is evident in the CBA's treatment of Bankwest borrowers Rory O'Brien and Trevor Eriksson. It is also evident in the CBA's treatment of small businessperson Suzi Burge. Why this egregious behaviour? Because they can.

Who is to be held responsible? The procedural defence and entrenchment of misconduct in bank hierarchies may be centred in unlikely places – possibly within the branch of a bank's legal staff or in the hardline asset recovery branch to which is sent customer accounts selected for foreclosure. The location of *de facto* responsibility is relevant because it is clear that bank CEOs

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2 The only occasions in which a loan officer's misconduct will be disowned by the bank employer is if the object of that officer's crime is against the bank itself.

come and go without any impact whatsoever on a corporate culture institutionally committed to misconduct.

Regardless, formal responsibility for misconduct, at whatever level it originates, ultimately lies with the CEO and senior management team, especially the Chief General Counsel.

But at the present moment no responsibility for misconduct is allocated by the regulators or the courts to any level or person in a bank's hierarchy. Nothing will change until the law facilitates the bringing of charges against individuals within a corporation – both those who originated the misconduct and those formally responsible as senior managers within that organisation.

VIi. ToR (e) The availability and adequacy of: i. redress and compensation to victims of misconduct, including options for a retrospective compensation scheme of last resort

In July 2010, I wrote to NAB CEO Cameron Clyne, noting the ongoing malpractice by the bank over which he presided in the small business/farming arena (the NAB being that sector's largest lender). I offered the opinion that it would be profitable for Clyne to offer meaningful compensation to then present and past victims of NAB malpractice, for him to clean up NAB practices and culture in this field, following which his bank could cement its place indefinitely in that sector's preference for doing business. Even if a large scale sum was involved, it would be a win-win situation. Clyne replied, via a flunkey, that everything was in perfect working order. There is a new team at the NAB, and a new public relations campaign, but nothing has changed on the inside.

The experience of victims in attempting to obtain meaningful compensation from the CBA's indirect, though dominant, role in the Storm Financial scam and its direct role in the Commonwealth Financial Planning scam is salutary. The CBA has comprehensively dragged its heels on any compensation scheme under its control.

No compensation scheme run by the implicated financial provider itself is ever going to be meaningful.

VIii. ToR (e) The availability and adequacy of: ii. legal advice and representation for consumers and victims of misconduct, including their standing in the conduct of bankruptcy and insolvency processes

This arena is grim indeed. Even if a bank victim retains some funds after foreclosure, the legal fraternity is overwhelmingly oriented to serving banks in any dispute, as that's where the money is, and on an ongoing basis. Bank law firm panels secure the most important firms. Bank victims perennially appoint legal personnel, outside the bank panel apparatus, who either lack competence or lack commitment to the victim's cause. Worse, there are occasions in which legal personnel acting for a victim will be warned off or bought off by the bank as litigant.

Then there are the victims lacking any funds, a natural consequence of bank foreclosure. Legal aid is generally not available to small business/farmer victims because legal aid funding has traditionally not been conceived as a vehicle to assist in the resolution of 'commercial' disputes.

Bank victims who, by default (and they are many), seek to represent themselves in court while lacking knowledge of the law and of court culture, get crucified in the courts.

Receivers/insolvency practitioners operate under the direction of the bank (and often at their own discretion to their own benefit) that sends them into a defaulted business, even though the law (uniformly ignored and condone by the courts) has it that a receiver is the agent of the mortgagor. And this affair even though the receiver's expenses (regularly totally discretionary) are allocated to the bank customer's account. It's a racket.

The authorities have consistently neglected the rampant dysfunctionality (and corruption) within the receiver/insolvency sector (a perfunctory Parliamentary inquiry had no follow-up), and the victim has no redress. The treatment by Korda Mentha of its administration of the foreclosed CBA Bankwest victim Rory O'Brien's massive resort development at Airlie Beach is representative.

The banks have long used bankruptcy strategically as a vehicle to inhibit their victims from pursuing legal action against them. A residual debt is manufactured by the bank (perennially by means of sale of customer assets under value, and near universally by the imposition of extravagant default penalty interest rates) by which bankruptcy is pursued. The judiciary, lacking an understanding of the bank-customer relationship (although those who acted for the banks on their way to the bench would know a thing or two), perennially accede to a bank's suit for bankruptcy.

Moreover, it appears that the bankruptcy trustee network is passive regarding its oversight of bankruptcies engineered by bank lenders. The trustee network does not in the first instance represent those in bankruptcy.

VII. ToR (f) The social impacts of consumer protection failures in the sector, including through increased reliance of victims on community and government services

As above, under ToR (b).

Many of the costs of bank sector malpractice are socialised. The scale of the bill to the welfare budget of foreclosed small businesses and farmers, many of whom were not unviable with a properly nurtured co-operative relationship between lender and borrower, is uncharted.

There is another hefty socialisation of the costs of bank malpractice in the court system being clogged with bank litigation. Much of the costs of this litigation, save for legal expenses born by the losing party, is worn by the public purse.

VIII. ToR (g) Options to support the prioritisation of consumer protection and associated practices within the sector

1. All incentive-linked salary components of a bank officer's remuneration should be banished from the sector post-haste. It's a no-brainer.

2. Governments on a bipartisan basis should work towards the total divestment from the banking sector of its ownership or and involvement in what is misleadingly labeled as 'wealth management'.

3. By whatever means possible, ASIC must be forced to actively litigate bank to business unconscionable conduct under s.12. Failing progress in that direction, as a fallback stance, litigation of finance sector unconscionable conduct should be returned to the ACCC.

4. The Financial Ombudsman Service's charter should be restricted post-haste to retail customer complaints (as for its original predecessor, the banking ombudsman). Small Business and farmer victim complaints need a functional mechanism, publicly funded, necessarily staffed with informed personnel, and powers to achieve results.

5. A specialist unit needs to be created within the police service, either at federal level or replicated across the States and Territories, competent and committed to handle complaints of fraud perpetrated by bank officers.

6. Diligent consideration needs to be given by authorities to how corporate law can be reformed so that individuals either directly committing fraud or those ultimately responsible for fraud perpetrated within a publicly listed corporation can be indicted and potentially face a gaol sentence if found guilty.

One is well aware of the great difficulties, conceptual and moral, in putting such an agenda into effect. Legal scholars globally have racked their brains on the issue. But the issue needs to be more conscientiously examined in Australia.

As I note in my submission to the White Collar Crime inquiry, those found guilty of insider trading receive gaol sentences. Yet the crimes of these people are of far less social significance than the crimes committed daily within the banks. Without the threat of significant penalties for crime enacted within the banks, is the dominant culture likely to be improved for the better in the near future?

7. Prospective small business and farmer borrowers from financial institutions need institutions, personnel, facilities and procedures functional to ensure that borrower financing in this sector facilitates as much as is possible the viability of such enterprises. Of which more below.

The thoughtless privatisation of all publicly-owned financial institutions during the 1980s and 1990s, following the partisan and ignorant declamations of the 1981 Campbell Report, present a greater hurdle to progress than otherwise.

How this ambition is to be achieved I have no idea, but at least the issue needs to be elevated to the consciousness of policy makers in this arena.

8. The culture of the legal system, the judiciary in particular, needs to be transformed to facilitate the greater chance of justice being achieved by bank victims in bank litigation. Of which more below. Of course, this must necessarily be a long-term ambition, but the sooner it is begun the better.

At the least, the law school syllabus in banking law needs ready re-consideration. But what maverick will be given this responsibility? No doubt a close relative of the maverick necessary to preside over a meaningful Royal Commission into banking.

No less long term is the need to implant some ethical standards within the culture of the 'respectable' law firms corruptly serving the banks' corrupt interests.

In the short term, certain requirements of the judiciary and of court procedures could be pursued by the authorities. In particular (drawing from my 2009 submission to the inquiry into 'Australia's judicial system and the role of judges'.

- The banking connections (in all dimensions) of judges should be publicly declared and available on record. No judge should be permitted to preside over litigation involving any bank with which s/he has or has had any connection.
- The bench must demand that bank litigants provides full discovery of all documentation raised by the bank in relation to the customer involved in litigation.
- The bench must demand that bank claims regarding the quantum of residual debt be fully documented and sourced, and that such documentation be early available to the subject of such claims and be subject to the right of counter-claim.
- The summary judgment mechanism should be rendered inadmissible for use in bank litigation cases.
- Tampering with court transcripts, other than corrections mutually agreed by all parties, should be a criminal offense.
- The denial of access by litigants to court transcripts should be a criminal offense.

IXi. ToR (h) Any related matters: functional finance for the small business/farmer sector

With all the myriad inquiries into the banking sector, there has been no inquiry into the nature of the bank – small business/farmer borrower relationship. The Carnell ASBFEO inquiry was casually thrown a bone here without proper consideration, not least regarding how ill-informed inquiry members are to be enlightened by qualified advisors.

The 1937 Napier Royal Commission recognised the finance gap (then known as 'the Macmillan gap') with respect to small business finance. That Commission's findings contributed to the

momentum that led to the Curtin/Chifley Labor Governments' creation of the rural-oriented Mortgage Bank Department (1944) and the Industrial Finance Department (1945) of the Commonwealth Bank, which operated independently and then formed the components of the Commonwealth Development Bank created in 1959, as a specialist lender to small business and the family farmer.

The Campbell Report, driven by ideology, vested interests and ignorance, recommended the dismantling of all publicly-owned banking institutions. Thus the CDB was dismantled in 1996 immediately following the full privatisation of the CBA, but already under attack by its antagonistic CEO David Murray.

The Senate Economics Committee's 2010 report Access of Small Business to Finance is extremely instructive and indicative. Several submissions highlighted knowledgeably the significant role that the CDB had played in Australia and the significant role that roughly comparable institutions continue to play overseas (especially the German KfW bank). Ideology, vested interests and ignorance continued in force as the Committee dismissed those submissions out of hand. The Committee report absurdly labelled the call for specialist public institutions a recipe for re-introducing 'market distortions' into the economy.[3] This is Grade A farce, The absence of an understanding of history amongst current generations of the political class is astonishing.

Several useful recommendations were made in this 'Access' report regarding the strengthening of competition law so as to inhibit the banks' furthering their market power and ability to abuse that power. But, in general, the inquiry and the report merely served to entrench the fundamental problems that remain and to perpetuate an environment in which the banking sector treats the small business/farmer sector as ready pickings for predation.

Unfortunately, the competition horse has already bolted. Westpac's illegitimate takeover of St George was the last straw. The feeble second tier has seen what the Big Four get away with and have followed their lead. As I have written elsewhere, no bank has chosen to compete on the basis of competence and integrity. On any bank's right to engage in unconscionability or fraud, the bank sector operates as a *de facto* cartel.

The relationship between bank lender and small business/farmer borrower demands close examination. As I keep repeating, this is one of the most asymmetric of all commercial relationships. The terms of the typical contract are all in the bank lender's favour.

The density of the contract ensures that it will never be properly understood by the borrower, whatever external advice (typically poorly informed) the latter pursues. In any event, the borrower has no choice, because the banks make comparable offerings.

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[3] Tell that to the Germans, whose own 'market distortions' have not prevented their economy from becoming and remaining one of the most robust in the global economy.

The conventional loan facilities offered in this sector are not fit for purpose. There is of course the unavoidable overdraft, payable at call.

The SME/farmer borrower needs medium to long term finance, and support in rocky times (especially in farming), coupled with informed advice. The bank lender, dependent overwhelmingly on short-term deposits and short-term borrowings, prefers short term loans. The banking sector's operations are after all, a legacy of the core institutions now underpinning the broader finance sector – trading banks, short term liabilities (deposits) matching short term assets (the overdraft facility) for short-term commercial needs. That is, the *allfinanz* institutions that now dominate the entire economy through mergers and financialisation are themselves not fit for purpose.

The bill facility, the bank's preferred facility for the last several decades, has been sold as giving the borrower greater control over their borrowings. On the contrary. Few SME/farmer borrowers understand them, and the necessity for their perennial turnover gives the lender the opportunity to make the terms more onerous or to default at will the customer.

All banks in Australia lend not on business prospects (the *modus operandi* of the CDB, for example) but on security. That is, banks in this sector have the mentality of money lenders. There is no professionalism involved, even though the typical SME/farmer borrower comes to the relationship with an implicit attitude of trust, and a dependence on professionalism – i.e. competence and integrity. This misunderstanding, perpetuated naturally by the lenders, is the fundamental lie, and a ripe basis for customer defaults that follow.

The SME/farmer residence is the first and foremost asset taken by the lender as security. The bank will, through the demand for guarantees, take as much security as possible over borrower assets, and over borrower family and relatives' assets through guarantees.[4]

With default under such arrangements, the borrower residence naturally is appropriated by the bank.

But surely, an outsider (or a busy Parliamentary Committee member of a banking inquiry) might say – if a borrower is defaulted it is surely a consequence of his/her own failure.

Not so. In my submission to the 2009 'Australia's judicial system and the role of judges' inquiry, I noted three related dimensions that reflect the profound asymmetry of the lender – SME/farmer borrower relation.

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4 Could SME lending, even farmer lending, be conceivable without taking the key asset of the borrower as security? That scenario would require a transformation of a bank's modus operandi in this sector, a transformation involving a long term enhancement of cost ratios (as was the case with the CDB) in staff training and commitment to customers. This is not a pleasant prospect for the Big Four, now used to being able to dictate their own profit rates.

One. The contract may be formally above board but binds the parties unequally *whose relationship is rooted in asymmetry*.[5] The bank can then use its structured power *systemically* to profitable effect. This has been *de facto* condoned both in general culture and at law because there is an implicit presumption that all parties to commercial relationships have their wits about them and act rationally to pursue their own self-interest. More, the market is where 'the law of the jungle' must prevail. The concept of 'fair trading' is thus for wimps, and a contradiction in terms.

Two (effectively a subset of the above). There are lender – borrower contracts, or elements of same, that are intrinsically unconscionable. Example 1: the overdraft, that basic facility, is payable at all. Example 2: the 'suspension clause' in the conventional contract, dictating that all debt claimed by the lender must be repaid before a counter-claim by the borrower against bank malpractice can be pursued.

Three. The bank as the most powerful party can choose to break the terms of a contract at will. And, in most cases, it can get away with it. The sanctity of contract turns out to be only for the weaker party.

The evidence indicates that the CBA's takedown of hundreds of Bankwest customers after its takeover was facilitated by widespread devaluation of its securities – i.e. borrower assets. Unacceptable loan to valuation ratios then automatically click in, and the borrower is subject to default. Here is a classic reflection of a relationship structurally rooted in asymmetry.

As I noted in my submission to the Impairment of Customer Loans inquiry, other means of 'constructive default' include:

- changing unilaterally the terms of the contract;
- verbal commitments by bank officers that are not kept;
- changing the terms of facilities, especially bill facilities, upon rollover;
- imposing less than optimal facilities in the first place, which prove to be dysfunctional;
- tying all facilities to the borrower's overdraft, repayable at call, and thus a means to comprehensive default;
- claiming as additional security further assets of the borrower or related parties (especially guarantees for the latter) that have no contractual basis;
- the siphoning off of funds from borrower accounts;
- the discretionary imposition of fees on the borrower;
- the imposition of unwarranted 'consultant' investigations into the borrower's business, both at borrower expense and calculated to downgrade the borrower's business prospects;

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[5] Small business faces this asymmetry in most aspects of its commercial relationships, not just in finance, but not of relevant here. The exemplary House Industry, Science & Technology Committee report, Finding a Balance: towards fair trading in Australia, May 1997, disclosed a variety of these aspects. In passing, it was this bipartisan report that led to the passage of business to business unconscionable conduct provisions into law.

- the discretionary imposition of usurious ‘penalty’ interest rates;
- the abuse of farm debt mediation procedures, trapping the farm borrower into inevitable default and foreclosure;
- predatory lending (often accompanied by inaccurate or forged documentation), involving a built-in likelihood of borrower failure;
- the ready default of a customer with no pretext whatsoever.

To repeat, the fine details of the lender – borrower relationship have never been subject to public scrutiny, in spite of myriad inquiries into the banking sector. The authorities, it appears, have been reluctant to look under the rock for fear of what nasty things lurk there. The countless submissions by SME/farmer bank victims to those inquiries provide a clue and plenty of raw material.

IXii. ToR (h) Any related matters: the courts and consumer protection in the banking sector

The court system is formally the ultimate means of redress for those who feel aggrieved by their experiences in commercial matters.

The regulatory agencies are supposed to provide an alternative means of dispute resolution. But when those agencies (ASIC) tell the aggrieved that they can’t help them and that they should pursue litigation in an individual capacity, or act transparently in favour of the other party (FOS), the courts return to be of fundamental significance.

The court system is, however, biased against the claims of aggrieved bank borrowers. The bias is deeply entrenched.

Any attempt to work towards meaningful consumer protection in banking in the SME/farmer sector must confront the court system head-on. It is the elephant in the room. Any inquiry or set of inquiries that has as its/their object the sidelining of a Royal Commission into banking must necessarily confront explicitly the court system and bank litigation history.

To date, the role of asymmetry in bank litigation has been completely absent from public discussion, including official discourse, and also media exposure regarding means of improving consumer protection. It is a curious absence; it is an inexcusable and indefensible absence.

There is the matter of the profoundly asymmetric access to resources to fund bank litigation, as noted above. But this factor remains incidental.

The fundamental problem is the fundamental tenet of the law of contract, which each generation of legals imbibes in their cradle – a contract is a contract is a contract. Notions of fairness, unconscionability, duress, duty of care, etc. are for wimps, to be kept on a ruthlessly short lease. The judiciary derisorily plays around with these latter concepts, holding its collective nose.

Victories in court for the borrower are uncommon.

By way of exception, there have been a string of victories for the borrower guarantor, establishing strong precedents (Amadio, Nobile, Garcia, Petit Breuilh et al, Ashton), the NAB being the most persistent offender. Albeit that arena is still being fought out in the courts, with many guarantors as losers.

There was a spate of court victories for foreign currency loan victims in the late 1980s and early 1990s. But, again, they were in the minority in the midst of what was transparently the first great post-deregulation banking scandal. And that era is now ancient history.

Recent victories for the borrower, to repeat, are uncommon. Notable are Kay v NAB (NSWSC, 2010) – even that requiring mediation – and NAB v Rice & Rose (VSC, 2015) – confirmed on appeal. The NAB, it appears, is a slow learner in what constitutes ethical banking. NAB v Rice & Rose is of enormous significance, because it confirms belatedly the contractual status of the Code of Banking Practice.

But the typical foreclosed bank customer faces another reality in court. Many judges evidently feel no qualms in handing over the family residence to the bank – and this often, via summary judgment, without hearing any evidence.

The issue of destitution of foreclosed SME operators and farmers, as in Terms of Reference (b) and (f), is integrally related to the insouciance of the judiciary in contributing to this process.

The bias is in the legal inheritance itself. But it is also a product of judicial practices and culture.

Bank litigation is the bread and butter of the courts. And yet it appears that no judge that presides over bank litigation ever bothers to inquiry more than superficially into the nature of the bank lender – borrower relationship.

There is a close fraternity between the elite of the bar and the bench (of course, the members of the latter are sourced from the former). Precedents used by judges to decide in a bank's favour are not universally imbued, to this observer, with an intelligence and a powerful consistency that might impose on the regular exercise an indubitable process approximating to objectivity. Judges continue to preside, sometimes by their own admittance, over litigation involving a bank with whom they enjoy a personal banking relationship. And there is no register of presiding judges' pecuniary interests.

Some current practices might be the subject of, in principle, ready attempts at reform, with the political will.

A legal tradition deeply antagonistic to the weaker party won't be changed the day after tomorrow. But it is prudent, indeed essential for the issue under examination in this inquiry, that it be put explicitly on the table for forensic examination by those who genuinely want to see genuine consumer protection in the banking, finance and insurance sector.