

Business to business unconscionability – ASIC missing in action

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The Australian Securities & Investments Commission has been getting bad press recently. Adverse publicity includes supposed failure to root out dodgy insolvency practitioners; impeding a class action against banks regarding penalty and late fees; claims of suppressing documents relevant to ASIC's court pursuit of collapsed property group Westpoint; and lethargy in addressing the fiasco arising from the Storm Financial / Commonwealth Bank margin lending operation.

The federal government has dramatically enhanced ASIC's responsibilities as an aftermath of the 'global financial crisis'. In particular, ASIC claims to be now embarking on a 'new responsible lending regime' for retail customers.

However, one arena that ASIC has left fallow is business to business unconscionability. ASIC was allocated responsibility for this arena with respect to financial services beginning March 2002. Given that bank malpractice against small business and family farmer borrowers is ongoing, this neglect by ASIC is curious.

Business to business unconscionability struggled into the statute books as late as 1998, after the Trade Practices Act was amended to incorporate s.51AC. The Australian Competition & Consumer Commission has taken some action under this section (mostly involving relative minnows) but none involving credit providers. It is not as if there has been no raw material.

On 3 January 2001, an ACCC staffer wrote to Sante Troiani, whose Bundaberg brickmaking business had been foreclosed by the National Australia Bank in 2000:

... while I understand your concerns and acknowledge the distress that the forced sale of your business must have caused you and your family, the alleged conduct does not appear to indicate a breach of the Trade Practices Act. ... I note that your complaint has been reviewed on a number of occasions ... I trust that you will accept the above as the ACCC's final position on this matter.

On 17 April 2001, an ACCC staffer wrote to Carmen Walter, whose Albury-Wodonga family restaurant/brewery was foreclosed by the NAB in 2000:

... the Australian Competition and Consumer Commission ("the Commission") is unable to pursue all matters that are brought to its attention. Its efforts are aimed more towards achieving compliance with the Act for the benefit of the public as a whole, than towards achieving resolution of particular complaints. The Commission's selection criteria for matters which it will pursue include the following;

(i) an apparent blatant disregard of the law;

- (ii) significant public detriment;*
- (iii) the potential for action to have a worthwhile educative or deterrent effect;*
- (iv) a significant new market issue; or*
- (v) an opportunity to test the reach of the Act in appropriate circumstances.*

On even the most casual inspection, the default and foreclosure of Troiani's brickworks exudes more than a whiff of high grade chicanery, a case that would seem to readily satisfy all the ACCC's "selection criteria". The ACCC thought otherwise, for Troiani and for every other case coming within its purview. This culture of active passivity has been bequeathed to ASIC, which has also chosen to pursue not a single case against credit providers under the equivalent (s.12CC) of s.51AC incorporated in the amended ASIC Act.

Paul Buckman, with a partner, ran a Gippsland-based instrument calibration company which was foreclosed by the NAB in 1999. Buckman, persistent because of incredulity over his treatment, has voluminous (and inconsistent) 'go away, try the other mob' correspondence from the regulatory agencies. This from ASIC, 31 March 2003:

ASIC conducts an assessment of every complaint we receive. In determining which matters we will select for further action consideration is given to a range of factors, including the likely regulatory effect of any available action. ... The matters you raise in your complaint appear to concern to (sic) the bank in question, and the banking industry as a whole. The issue is, however, not a matter ASIC is able to effectively pursue as securities and financial product regulator.

Again, on 2 October 2003:

[Your concerns do] not appear to offend any legislation administered by ASIC. As a result, there is no basis for any regulatory intervention by ASIC here.

On 14 October 2004:

The issues you have raised will receive careful consideration ... Please find enclosed a brochure 'Your Complaint Counts' ...

On 6 December 2004:

ASIC has jurisdiction in relation to these forms of [your] alleged misconduct insofar as they relate to the provision of a financial service. In your circumstances, it may be arguable that the relevant loan agreement constituted the provision of a 'credit facility' under the ASIC Act 2001. However, as the relevant conduct occurred prior to ASIC gaining jurisdiction over credit in 2002, ASIC is unable to take further action in this regard. Rather, it is suggested that the [ACCC] may be the most appropriate regulatory body to consider this issue.

Craig Harwood and his father ran a game meat exporting company in Queensland; it was shut down by their Westpac lenders in 2004. ASIC to Harwood, 21 November 2003:

With respect to your complaint we can advise that all the information and documentation you provided was carefully considered and preliminary enquiries were conducted before the

decision was made not to commence a formal investigation in relation to your complaint. ... Given the volume of complaints received each year ... ASIC weighs every complaint against four basic questions:

- *What action can we take?*
- *Is the evidence likely to be sufficient*
- *How urgent and serious is the complaint?*
- *If we succeed, will people behave better in the future?*

The answer to the first question is that ASIC should enforce s.12 of the ASIC Act. The Harwood case offered ready positive answers to the remaining questions. The ASIC letter to Harwood continues:

... we believe that such action [taking up and acting on Harwood's complaint] would significantly prejudice current and future ASIC investigations and the proper administration of the law.

What? One infers that enforcement of ASIC's charter would seriously prejudice ASIC's track record of inaction and its disdain for the proper administration of the law.

Ron Coomer ran a significant commercial laundering service in regional Queensland, against which Suncorp sent in the receivers McGrath Nicol in 2005. Coomer contacted ASIC to complain about alleged depredation by the receivers of his business, with evident indifference by the bank. (Coomer later outlined at length his concerns in a submission (#52) to the recent Senate Economics Committee's Inquiry into Liquidators and Administrators. http://www.aph.gov.au/senate/committee/economics_ctte/liquidators_09/submissions.htm).

ASIC replied, 30 June 2006:

After careful consideration of all the issues you have raised with us this time and the numerous documentation which you have provided, ASIC has decided that we will not take any further action into the issues you have raised.

ASIC conducts an assessment of every complaint we receive. In determining which matters we will select for further action consideration is given to a range of factors, including the availability of any evidence to support the allegations and the likely regulatory effect of any available action.

With respect to possible receiver malfeasance, ASIC claimed that the Corporations Act is not prescriptive, that discretion exists for the regulator and the courts in interpretation, and that ultimately there is considerable latitude to interpret whatever a receiver does as within acceptable parameters of "commercial judgement". Said ASIC, the directors of the business under administration, being partisan in the matter, are not the best judges of the receiver's commercial judgement. Further correspondence from Coomer with ASIC in 2007 elicited the same response.

Having expended scarce funds in the courts only to discover that he as an individual could not directly seek redress against his receiver (s.1315 of the Corporations Act), Coomer again approached ASIC in late 2009. ASIC sequestered documentation otherwise inaccessible to Coomer, and a specialist Melbourne staffer agreed that something was seriously amiss. But then the shutters came down. ASIC to Coomer, 3 September 2010:

ASIC's decision to take action will be influenced by whether there is evidence of systemic concerns, whether it is in the public interest to take action and, whether action is likely to have a significant regulatory impact. ...

As ASIC does not comment on operational matters, we are unable to provide further details regarding what, if any, action we may or may not take in relation to the concerns you have raised. Please note that ASIC will only contact you again in relation to your complaint if we require further information or evidence to assist in our enquiries.

Who writes this stuff?

Rosie and Bill Cornell naively took up an ultimately unworkable loan from the NAB in 2006, approved on data contrived by local management and accompanied by unfulfilled promises of restructuring support; the bank started drawn-out proceedings against their two small Western Australian rural properties in 2008. Following a later complaint to ASIC, ASIC replied on 11 June 2010:

After careful consideration ASIC has decided that we will not take any further action into the issues you have raised at this time. ...

At this time credit is not a financial product for the purposes of the [Corporations Act] and ASIC does not regulate the conduct of credit providers.

On the contrary, ASIC's formal brief is to regulate the conduct of credit providers; bizarrely, a subsequent paragraph in the same letter proceeds to contradict the earlier denial.

A breach of s 12DA of the ASIC Act, misleading or deceptive conduct in relation to financial services, is not a criminal offence but s12GF of the ASIC Act states that a person who suffers loss or damages by conduct that breaches this and other sections of the ASIC Act may recover the amount of loss or damages by a court action.

Dario Pappalardo ran a small time building/developer operation in Western suburban Melbourne which was closed down by the NAB during 2009. ASIC responded to his complaints thus, 14 September 2010:

After careful consideration ASIC has decided that we will not take any further action into the issues you have raised at this time. ... ASIC conducts an assessment of every complaint we receive. [Etc.]

ASIC also noted, in passing:

We have recorded the information you have provided in our confidential internal database. This information will assist us if we receive further similar complaints.

One notes that ASIC has a readymade template that it dispatches (with minor variations) to complainants with minimum fuss under the rubber stamp signature of a regional officer.

In these formulaic replies, ASIC perennially counsels the complainant to seek alternative remedies – namely, to take their complaint to the banking ombudsman (now the Financial Ombudsman Service), or to pursue “any civil remedies otherwise available to you”.

ASIC staff would know that the FOS mandate (being industry-funded) is for retail customer complaints only, or for very small-scale business-related complaints. ASIC staff would also know that foreclosed business customers barely own the clothes on their backs (the family home has typically gone by this stage), and that the point of having a properly-resourced regulator is to offset the dramatic imbalance of power in the marketplace that produces the stream of complaints in the first place.

Moreover, the point of having an active regulator is to achieve a victory or victories in the courts against lender malpractice, establish legal precedents, and change the rules of the game for credit providers contemplating unsavoury behaviour.

Thus has ASIC dissembled and stonewalled – persistently denying, ignoring its responsibilities legislated by Parliament under its amended Act of August 2001. Evidently ASIC has neither the skills nor the culture to tackle business to business unconscionability in financial services.

In late September a miracle happened – an almost unprecedented victory in the courts of a bank customer against bank victimisation (Kay v National Australia Bank NSWSC 1116; <http://www.lawlink.nsw.gov.au/scjudgments/2010nswsc.nsf/6ccf7431c546464bca2570e6001a45d2/df6ffe947ad1c06fca2577ac0021ae2a?OpenDocument>). The victory was effected through the enduring assistance, remarkably, of a television producer. ASIC, which told Kay et. al. in 2004 that their case did not meet their criteria for assistance, was nowhere to be seen.