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Dear Mr Ridgway

This letter is in response to the letter under your name of 8 April 2005, which in turn was a response to my letter to John Martin, Small Business Commissioner, of the 13 January 2005. My letter to Martin was a consequence of not receiving any response to my dossier and covering letter addressed to ACCC Chairman Graeme Samuel on 6 April 2004. The silence on my part following your April 2005 letter reflected a demanding workload rather than agreement with and an acceptance of the substance of your response. Retirement from teaching has now allowed me to return to the issue.

My April 2004 dossier summarised eight cases of adverse experience of (all but one) small business/farming customers with the National Australia Bank. (I note in passing that your 8 April letter, presumably on behalf of Commissioner John Martin, dealt with the dossier but did not respond to the broader issue raised in my Martin letter of the parlous state of legal and regulatory protection for small business in Australia.)

Your letter contained a response involving both detailed treatment of each of the eight cases and broad generalisations. The response to the cases could be characterised as falling into a number of categories – the cases did not involve unconscionable conduct; the cases (potentially) involved unconscionable conduct, but occurred before s.51AC (or even s.51AA) had been legislated; the cases involved (potential) fraud but the appropriate jurisdiction in such cases is criminal rather than civil.

The convenient by-product of such classification is that there is nothing in my dossier that warrants any action, or indeed any thought, from the ACCC. Indeed, your letter bears all the hallmarks of a ‘Yes Minister’ response.

There is the curious comment 'In each case where the ACCC declined to pursue an unconscionable conduct action it did so because it was assessed that the conduct did not amount to unconscionable conduct'. I am unaware that the ACCC has actively considered the application of the unconscionable conduct provisions to banks; one could count action by the TPC/ACCC against banks on the fingers of one hand. The correspondence between complainants and the ACCC that I have sighted indicate that the ACCC has declined to involve itself in the substance of the complainant's case as a prelude to advising them to take the matters into their own hands.

The classification of cases into non-actionable categories is complemented by a variety of generalizations, two of which I proceed to query below.

Banking malpractice not merely existent but a systemic problem for small business

Representative is a paragraph in response to the issue of 'cumulative conduct by one party' (page 2). The paragraph points to variations in detail across different complainants, and the varying location in time of the complaints. These concerns might be relevant to a class action (whether there is a difference in banking that differs qualitatively from tobacco cases that renders litigation in one industry more readily successful than in the other is a moot point). But this issue is not the one that I brought up. To quote my 6 May 2004 letter 'The merit of treating these individual cases collectively is that interpretation of the sources of these conflicts is more naturally confronted as a systemic problem, rather than the failings of a particular small business.'

In raising the concern about variations of detail and in time your letter diverts from the prospect of malpractice amongst bank lenders, the NAB in particular, as a systemic problem.

In my view, bank malpractice against small business problems is systemic; it is therefore a problem to be treated systemically by the authorities. My view is shared by my collaborator in these matters, Brisbane-based retired NAB branch manager and longtime banking malpractice consultant John Salmon.

In your noting that my eight cases 'span a period of 17 years', there is the implicit notion that these are sporadic affairs, even if they were to be taken seriously. On the contrary, they are the tip of the iceberg; and only the three score and ten years allocated to one's time on earth delimit the time and energy available for a lone individual with no resources to document the extent of the iceberg.

I point you to the foreign currency loan saga of the 1980s, certainly one of the great financial sector scandals in Australian history. What started out as greed mixed with incompetence in a new environment of deregulation led three of our four major banks (Westpac, the CBA and the ANZ) into corrupt practices as they attempted to displace entire responsibility on hapless small business borrowers. Here was transparent evidence of a *systemic* problem in banking practices, ably documented in the minutiae by contemporary journalists but, alas, ignored by experts and deflected by officialdom. The deflection of the foreign currency loan scandal by officialdom is an

important story in itself, but elaboration on that theme would detract from the emphasis here.

The common variety bank malpractice was also alive and well in the 1980s. Indeed, it was the cumulation of individual cases brought to the attention of the then Democrat Senator Paul McLean that led him to champion the cause of bank victims in Parliament. Then, as now, Parliament was little interested.

The publicly-owned Commonwealth Bank figured prominently in the cases brought to the attention of Senator McLean. These days, the National Australia Bank has the distinction of topping the malpractice tables, by a considerable margin.

Channel 7's Today Tonight program ran an episode on the 5th April 2006 dealing with three NAB casualties. The program was put together by Today Tonight's Adelaide producer, Frank Pangallo, after he was approached by a South Australian builder against whom NAB had reneged on an insurance contract after an injury to the builder. Pangallo sensed an injustice, and used a program that has a reputation for trivia to handle an issue that is neglected by more respectable outlets.

The program went to air in April, but only in South Australia. Curiously, the program did not go to air, as scheduled, in the other States, not least because the other two cases on the program emanated from Queensland. One of these cases was the McMinn child care centre case, documented in my dossier. Nothing that should concern us here, says your letter. Yet the McMinns received an offer of $1,700,000 for the centre, which the Bank prevented the McMinns from accepting, and the receiver/Bank subsequently sold the property for $1,180,000, leaving a residual debt that conveniently swallowed up the McMinn family home along the way. It is this kind of detail that should alert inquiring minds as to the nature of this conflict.

The third case on the Today Tonight program was that of the Troianis. Sante Troiani ran a highly successful brick business out of Bundaberg, building up substantial business and property assets of many millions of dollars. The evidence points to not your garden variety malpractice but a strategic 'sting' operation (to use the expression of my collaborator John Salmon), in which the NAB induced Troiani to shift his business to the NAB (in late 1993), after which Troiani's business was systematically defrauded.

Belatedly, the April 2006 Today Tonight program, albeit edited, appeared in the Eastern States and Western Australia on 4 January of this year. In the ensuing couple of weeks, Pangallo was inundated with phone calls and emails from people who considered themselves victims of bank malpractice, all by NAB except for a Westpac case. The number is well over one hundred.

On the Today Tonight program, NAB executive Ahmed Fahour acknowledged that there were problems that needed attention. That mild contrition was not to last. The NAB had published in the Melbourne *Age* under Fahour's name on the 23 January a panegyric to the company, citing its brilliant socially aware contribution to community support. The NAB then wheeled out its public relations flak to pronounce that 'NAB has a very good relationship with millions of Australian customers and it is in the bank's interest to see those customers and their businesses succeed. On rare

occasions businesses regrettably fail and disputes do sometimes arise, however, NAB works hard to resolve those situations to the satisfaction of all parties.' In short, pure spin. Business as usual.

The Commonwealth Bank is not to be outdone by the NAB's 'competitive advantage' in malpractice. Cases in the last ten years, some of which have dragged on until recently, include Muirhead in Queensland (primary producer), Cooke in Queensland (medical centres), Timms in New South Wales (negligent advice in business purchase) and Heinrich in South Australia (primary producer). Muirhead and Cooke shared the same corrupt lending manager. The CBA was particularly active in maltreatment of customers of its small business subsidiary Commonwealth Development Bank in the mid 1990s in the course of restructuring then closing down the CDB – Traztea in New South Wales (horticulture) and Cassegrain in New South Wales (property development) are notable cases of transparent skullduggery.

Even the relative small fries St. George and Bendigo Bank are now aping the big boys on the block, the latter having acquired a lending manager from NAB in Queensland who has carried over an unsavoury culture with him.

How many cases of alleged victimisation does one need before one confronts the possibility that there is systemic malpractice against small business borrowers in the banking sector? One first has to be willing to confront the accumulating evidence.

One also needs to learn to read the signs regarding what is readily attributable to incompetence, possible malfeasance, on the part of borrowers, and what seems like a calculated default by the bank lender. Recently, I came across a case reported in the financial press of a builder, Stuart Bros Pty Ltd, which had collapsed in 1994/95. The press reported the collapse cursorily, but it had all the elements of a calculated default by the NAB. Stuart Bros had been a long established and reputable firm, readily discarded as collateral damage.

Bank culture

How many cases does one need to sit up and take notice? Large numbers carry important implications, but ultimately the character of even one or two cases ought to be decisive in ringing alarm bells. Kabwand/Somerset (NAB) and Heinrich (CBA) are two such cases. The common element is that two hard-working and successful farming families are deceived by corrupt lending managers. The key issue for us, however, is that the bank hierarchy then steps in and enacts a process dedicated to the destruction of the deceived borrowers. The CBA has even had Heinrich declared a 'vexatious litigant' – this in the pursuit of justice!

The experience of the Somerset and Heinrich families provide a window into the *culture* of business practice in banking. Business culture is a phenomenon unknown to the economics profession that pervades the bureaucracy and regulatory agencies, and we have had to draw on the low-status sociologists and management writers for insight. The March 2004 APRA report, *Report into Irregular Currency Options Trading at the National Trading Bank*, embodied a rare official recognition of banking business culture and the potential for the entrenchment of unsavoury elements. The APRA report focused narrowly on the NAB's trading desk, but even

casual readers of the financial press would know that the NAB has generated a series of debacles, product of a dysfunctional culture that has been evidently more widespread than the trading desk of late. Nevertheless, the APRA report has offered legitimacy to the recognition of banking culture, of the possibility of elements of that culture being a product not merely of incompetence but of a lack of ethics, and thus the prospect that unsavoury business practice will become entrenched.

In short, a dysfunctional business culture generates *systemically* undesirable business practices. There is that word again, that one is not allowed to speak, and the concept behind it, that one is not allowed to conceive.

The evidence indicates that the Asset Structuring unit of the NAB has possessed an unsavoury culture for some time. One would have expected the new broom at the top to address this inheritance. Certainly, the new broom has restored the NAB to magnificent profitability, but it has curiously chosen not merely to tolerate but to reinforce this cowboy element in the business. Rumours have passed in business circles that former NAB CEO Cicutto was forced to fall on his sword not because he failed to stem incompetence or corruption but because he failed to stem adverse publicity. (One might add in passing that Westpac has devoted considerable resources to advertising its corporate social responsibility, seemingly risen above the pack, but Westpac has as yet declined to clean out its own cultural closet regarding treatment of small business.)

Legitimate business interests?

Your letter (bottom page 2) considers the possibility that many of the cases that I described in my dossier may be the consequence of the NAB 'implement[ing] and review[ing] its procedures to manage its lending risk, and are therefore a product of 'legitimate business interests'.

One shouldn't have to point out that there is wide latitude for a bank to manage its lending risk without resorting to oppressive practices. Adherence to first principles in managing risk would point to the necessity for appropriate training of relevant staff, for appropriate management structures for deliberation, communication, information and documentation flows, for appropriate audit procedures on lending managers' books, for functioning human resources management procedures in the credit hierarchy, for relative stability in personnel placement both for customer relations and corporate memory, and so on. This is bread and butter stuff. It was not in evidence in the NAB's ill-considered cleanout of its loan book in 2002 (some say inspired by exert insider fear of a global downturn post-September 11!). It is not in evidence in the Walter and McMinn cases (as per my dossier) where the customers faced high turnover of branch lending managers as a prelude to foreclosure. A lateral thinker would infer from high staff turnover that there are other explicit priorities regarding staffing and procedures that displace sound risk management, including the reproduction of incompetence as a practiced art but not restricted to that time-honoured imperative of large organisations.

More dramatically, the same paragraph in your letter canvases the possibility that oppressive conduct may be graced with the tag of legitimacy, that s.51AC allows such a judgment, and that ACCC culture is prepared to absorb such a judgment. Quoting

your letter: ‘certain conduct, or a course of conduct, might be detrimental to the interests of the small business concerned, however if it is referable to the stronger party’s legitimate business interests, this may indicate that the conduct is less likely to contravene section 51AC’. Similarly, the details of the McMinn case (bottom page 4) are considered ‘unlikely to be construed as going beyond tough business practices or hard bargaining to breach section 51AC’.

Frankly, I find this line of reasoning disturbing. It is not in the spirit of the exemplary 1997 Reid Report, *Finding a Balance*, which finally put small business concerns against corporate business predation on the political map, and which is supposed to have generated an ACCC administration more understanding of and sympathetic to the small business environment. One expects the support of ‘tough business practices’ to emanate from the Business Council of Australia (and its Law Council of Australia minders), which has been strident in its opposition to reform of s.46 or s.51AC, but from such a source the view is transparently recognised as self-interest.

It is pertinent to highlight that small business bank victims have perennially succumbed to a permanent state of shock after confronting the dishonesty and duplicity of their bank and its personnel, and the realisation that their business practices to that date had been based on a flawed because overly generous understanding of human nature. Some of these victims had had a relationship extending over decades, indeed over generations. The key word here is ‘trust’.

The structured imbalance of power in banking relationships is a product of the intrinsic nature of the debt instrument itself, the occupational positions that carry a professional status, the attendant possession of knowledge and information not possessed by the borrower, and the discretion over the use and disclosure of knowledge and information and in the terms placed on the debt instrument.

All bank borrowers know implicitly that they are to place themselves in a dependent subordinate relationship, but they have also implicitly rebalanced the equation with the trust that bank personnel will act as ‘professionals’, that is, that bank personnel will fulfil their privileged role with integrity. Imagine if a person’s GP or recommended specialist had decided to leverage their professional status and its associated culture of trust by advising the client that their health was dependent upon the removal or an organ or limb or two, of course in a private hospital, with the prospect of the medicos gaining a tidy sum from the exercise. Unthinkable? Well we have the equivalent in banking, and nobody turns an eye.

Bank personnel have strategically leveraged the inherited culture of trust to engage in calculated fraud and defaults. They have abused the unspoken trust in the professional status of ‘banker’, and trust in the status of the institution itself. In the early 1980s, Westpac and CBA personnel, who threw their companies into the deep unknown waters of foreign currency loans in a floating rate regime, brought in unsophisticated small business borrowers on the reputations of, respectively, an institution almost synonymous with the history of White Australia and of a publicly owned institution, the People’s Bank. The borrowers, knowing nothing of the mechanics or perils of foreign currency denominated debt, were led into disaster on the basis of misplaced trust in long-established institutions and in the professionalism of their staff. That the banks advertised their non-existent skills in foreign currency

management and displayed their whiz-bang dealing rooms to prospective borrowers as symbols of a chimera further enhanced the deceit.

These days the National Australia Bank has perfected the art of the manipulation and cynical leverage of reputation. The NAB devotes resources to sponsoring high profile events/organizations (the Commonwealth Games, the National Press Club, the pre-season AFL competition, etc.), and to a variety of small-scale community projects. The Bank devotes considerable resources to disseminating the facts of its sponsorship. On the other hand, the Bank devotes equally considerable resources to deflecting adverse publicity, which inevitably keeps bubbling to the surface. Journalists who have raised concern about NAB practices have mysteriously disappeared from this line of work. Following the Today Tonight program's second showing in January, instead of addressing concerns, the Bank harasses the sources. This is combined with the Fahour article in the Melbourne *Age* on 23 January, extolling the NAB as a socially responsible corporation. The creation and abuse of reputation is thus an ongoing binary process – active and strategic.

A recent ready vehicle for calculated default is use of the 12-month facility. Promises, verbal, even written, are made that the facility will be rolled over. Then after 12 months a decision comes down that the facility will attract a significantly higher interest rate or that the facility will not be renewed. If security over the family home can be appended, then it's further money for jam for the bank. This arrangement was the case with the Walter family.

Another recent example of the abuse of the 12-month facility is that of Ozden Inak, who contacted me after the Today Tonight program appeared in the Eastern States in January. Mr Inak, with partners, borrowed from the NAB to embark on a small-scale investment in residential property, to supplement his building supplies small business. The NAB offered a very competitive rate of 5.65%, and the contract stated that the loan would be renewed on the same terms after 12 months. (Note that the NAB's advertised rates for the week at which the loan was arranged were 5.99% fixed rate tailored home loans 12 mths, and business mortgage instalment loan 6.80%, commercial mortgage instalment loan 7.75%, and the base rate 9.10%. A good deal for Mr Inak and partners!) A mere week into the loan the Bank increased the rate to 5.85%. At the end of the 12 months, the rate was increased to 19.65%; and when payments were not able to be made at this usurious rate, the rate was boosted to 21%. The Bank took possession of the properties, failed to sell them at auction. Meanwhile personnel apologise, claiming that they had lost the contracts, but have declined to restructure the terms. Inak and partners have no control over the properties which have now been partially destroyed, and an impasse has ensued. This is how 'tough business practices or had bargaining' operate on the ground.

Other means for calculated default have been available for a longer period. Such is the lowly overdraft, the bread and butter facility for business operation. The NAB's overdraft contract includes the following, Section 5:

> Despite 6 below [regarding review of the customer's operation of the facility], the *Bank* may cancel the facility at any time whether or not *you* are in breach of this agreement. Where the facility is cancelled:
>
> (a) the *Bank* will give you notice of the cancellation as soon as practical.

The Bank used this formal overarching and terrifying power as an excuse, post-foreclosure, for its cavalier treatment of the Goonan hardware businesses (outlined in my April 2004 dossier). The leverage that the NAB has given to itself with this unconscionable clause is dramatically enhanced by the tying of other facilities to the overdraft – default on the overdraft immediately signals default on the other facilities. Whereas a customer might conceivably find refinancing at short notice for an overdraft debt, the possibility of refinancing all debt at short notice is zero. This particular ruse was used by the CBA to destroy Claude Cassegrain when the CBA was in the process of cleaning out its Development Bank portfolio with little regard to propriety.

When one examines the fine print of the means by which 'the stronger party's legitimate business interests' are pursued in banking, one would have to ask why anyone with integrity, leave alone anyone with institutional responsibility for regulating business behaviour, would join in support of this mode of doing business.

Structural subordination in the capitalist economy and its reflections in Australia

Certain arenas of economic exchange in the modern capitalist economy involve the structural subordination of one party to the other. Indeed, there is a hint in these structures of the reproduction of social relations prevalent in pre-capitalist society. The most notable of these arenas have been the employer-employee relationship (in which pre-capitalist master-servant law and culture was carried over explicitly), the landlord-tenant relationship, the distributor/processor-farmer relationship, and (albeit unevenly) the capital lender-borrower relationship. Later developments in organizational forms have produced additional arenas – the giant retailer-supplier relationship, the landlord-tenant relationship in its commercial shopping centre manifestation, the franchisor-franchisee relationship, and the contractor-subcontractor relationship (in which the hiring contractor is the sole or dominant purchases of the subcontractor's services).

Of course, many parties in a position of structural dominance do not take advantage of the structured imbalance of power. However, there have always been parties that have sought to take advantage, and it is these situations that have ultimately been responsible for the establishment of organisations to countervail or bypass the power imbalance, and for the evolution of countervailing legislation and regulation.

Curiously, the professions with a significant role in interpreting and regulating economic exchange, economics and the law, have for long failed to come to grips with this socially important domain of the structured imbalance of power. The neglect by economists might be explained by their general employment in the ivory towers of academia and the bureaucracy. The legal profession has no such excuse, having seen the whites of the eyes of parties to unequal exchange.

But there are parallel consequences in both professions. This failure has led to an impoverished corpus of economic theory, and subsequently to inadequate structures of economic regulation; ditto in respect of legal theory and the law. The failure of the latter is reflected in the marginalisation of the principles of 'fiduciary duty' and 'duty

of care', and the insouciance with which the legal profession dismisses such principles in the Australian courts.

The evidence points to entrenched adversity for small business vitality from corporate predation in the Australian business environment. I have expressed this opinion briefly (if polemically) in my submission to the 2003 Senate inquiry into the Trade Practices Act, and more systematically in a September 2005 working paper, 'Small Business – Corporate Business Relations: Dimensions of structural subordination in Australia' (available on my University Home Page).

This adverse environment in Australia is a product of a combination of forces, including an impoverished intellectual inheritance, as outlined above; aggressive practices by corporates to acquire and employ structured power, coupled with aggressive lobbying to defend such practices; and political action and legislative change that is weak and unsustained.

The ACCC is part of the problem

The ACCC is part of the problem. Admittedly, the ACCC has its hands full with s.50 and s.45 matters, and constrained resources, but the small business arena has been put on the back burner. The changes that resulted from the Reid Inquiry were partial; even less, their activation has not embodied the spirit of the Inquiry.

The franchise code is a definite improvement, but this improvement constitutes slim pickings. The position of Small Business Commissioner is token. Section 51AC was formally a major achievement, acknowledging belatedly in the law the capacity for business to business predation; but substantively it has been weak from the start. Worse, the ACCC has acted as if Section 51AC has guts. The ACCC's booklet *Guide to Unconscionable Conduct* is an embarrassment, effectively telling potential small business complainants to go away as they are more likely than not a bunch of whingers who can't face the heat of the marketplace.

This implicit mentality is reproduced in speeches by senior ACCC personnel. John Martin's address to the Wine Grape Growers in November 2004 carried the implicit message – there is nothing we can do for you. Ditto Chairman Graeme Samuel's address to the Victorian Master Grocers Association in February 2004 and his speech to the AGSM in November 2004. The message is: 'competition is tough; shape up or ship out'. There appears to have been an uncritical absorption of the 'Contestability' approach to competition, naturally a school of thought loved by the corporates.

Corporate predators have enhanced their power and their extractions under the generally benign umbrella of the ACCC and bipartisan political indifference. Westfield, and Woolworths and Coles, in particular, are serial offenders, yet offenses are conceived of by the authorities as one-off affairs. Meanwhile, the companies are rewarded for their sins. Their market share rolls on under a weak merger rule and a 'contestability' mentality. The settlement with Westfield in 2004 on a 'no admissions' basis was a disgrace. Water off a duck's back.

The significant action by the ACCC against Woolworths and Coles regarding harassment of independent liquor retailers was initiated under the previous

Chairman's administration. The belligerent reluctance of Woolworths CEO Corbett to acknowledge wrongdoing in this case is representative of Woolworths' unrepentant culture. (Corbett was also exposed as a liar in appearance before the 1999 Baird retail sector inquiry, but without being admonished.)

This entrenched culture did not register with the ACCC when it sent personnel to Western Australia on the matter of Woolworth's 2005 takeover of Foodland's Action retail stores, treating supplier concerns cavalierly and condescendingly. ACCC personnel's refusal to take on board the fundamental significance of evidence from suppliers being heard in camera led to the supplying community reasonably concluding that the ACCC was worthy of contempt, for failure to grasp some basic tenets in how the structured imbalance of power operates in the retail supply chain.

With respect to the retailers, the 2002 ACCC report (under instructions from the Senate, post Baird inquiry) on supplier-retailer relations is flawed. The Commission inferred, without examination and without evidence, that that there was no discernible anti-competitive dimensions to grocery price determination, and that there has been no breach of the law. The Commission also saw fit to reiterate its belief that 'price discrimination can also produce a positive outcome and simply reflect competition at work'.

Also of relevance is the 2004 consultancy report by Whitehall Associates for the Department of Agriculture, Fisheries and Forestry. This report similarly and inappropriately draws strong conclusions regarding the healthiness of pricing and the retail supply chain from non-existent evidence in the body of the report. The Whitehall report's treatment of market power is in a throwaway paragraph; no examination is taken of this significant phenomenon. There is evidence that the Whitehall consultancy downplayed the evaluation of market power in the report due to the perceived demands of key stakeholders, not least the sponsoring federal Department. The report was a politicised and hence political document, and its nugatory treatment of market power merits little attention.

Ironically, the Whitehall report reproduced uncritically propositions from the flawed ACCC report. In turn, the general conclusions of the Whitehall report have been reproduced uncritically, not least by ACCC Chairman Samuel in the November 2004 AGSM speech.

As I have written elsewhere (unpublished document), 'We are thus witness to a peculiar phenomenon in which reports blessed with official status are interpreted as denying the existence of large retailer market power although the reports avoided an examination of the issue. The reputed absence of retailer market power has thus acquired definitive status, although the grounds of its declaration are hollow. Wishful thinking has been converted into tangible reality.'

The ACCC and bank-borrower relations in particular

One returns to the blank sheet that is actions by the ACCC regarding bank malpractice. I refer to a letter from an ACCC staffer to a complainant seeking assistance. This letter is representative in tone of letters sent to complainants

regarding alleged bank malpractice (‘we can’t help you’), but it is more fulsome in detail, and thus merits attention.

Carmen Walter (principal of the Wodonga brewing/restaurant business defaulted by the NAB, outlined in my April 2004 dossier) wrote to the ACCC on 17 April 2001. Ms Walter received a reply from Angusha Kangatharan, ACCC Senior Investigator, on 24 April. The letter states, *inter alia*:

> Under Part V of the Trade Practices Act 1974 (“the Act”) businesses are prohibited from engaging in misleading or deceptive conduct. Thus, in the present case, based upon the information you have provided the conduct in question may raise concerns under section 52 of the Act.
>
> However, 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.
>
> Furthermore, the Commission does not as a matter of policy become involved in matters where private legal action has been taken. Accordingly, I regret to advise that the issue you raise is not one this office can pursue.

Apart from the message of the last paragraph, a regular and key component of ACCC letters to such complainants, and the failure of the writer to mention section 51AC as being of possible relevance to the Walter inquiry, the middle paragraph merits attention. The author writes of the necessity for selectivity in choosing arenas to pursue, listing selection criteria. Ms Kangatharan fails to take the small step and a natural application of logic to note that most of the criteria listed fit closely the circumstances complained of by aggrieved small business borrowers. It is readily arguable that there is no more worthy arena deserving of the ACCC’s resources that would be directed ‘towards achieving compliance with the Act for the benefit of the public as whole’. The ACCC has not taken this step.

Ms Walter then wrote to the Hon. Joe Hockey, then Minister for Financial Services and Regulation. Hockey’s office replied in mid June, saying (as per usual) that it was inappropriate to intervene in a private matter, but that she should contact the ACCC. (An ACCC press release was appended to the Hockey letter, in which the ACCC was trumpeting success against the NAB with respect to a personal guarantee case. It would not have been clear from the ACCC press release that the NAB has, to this writer’s knowledge, never lost a court case except on a handful of personal guarantee cases, for which there is established legal precedent supporting the hapless defendants.)

Ms Walter wrote again to the ACCC, care of Ms Kangatharan, on 9 July 2001. The essence of the letter was that, if the ACCC could not intervene in the Walter case, 'we would expect the responsible government bodies to take action outside our personal case to prevent matters as ours in future (sic)'. The ACCC did not reply to this letter. A follow up letter from Ms Walter on 13 August 2001 met with a similar silence.

Enter the Australian Securities and Investments Commission

As if s.51AC was already not a damp squib, into the equation comes ASIC, which is handed responsibility for business to business unconscionable conduct in relation to financial dealings in March 2002. Whoever is responsible for the conception and execution of this handover should be taken out the back and shot.

ASIC's skills and associated culture are incommensurate with the skills required to regulate unconscionable conduct. Even were ASIC interested in acquiring skills, which it is not, ASIC does not have the resources to regulate unconscionable conduct. There appears to have been an implicit but mistaken belief that one could readily tack on the regulation of business to business unconscionable conduct to the management of consumer protection.

In correspondence with me in relation to ASIC's coverage of bank malpractice, letter dated 15 June 2004, ASIC's Greg Tanzer (for Greg Kirk), wrote, *inter alia*:

> To date we have not relied upon the unconscionable conduct provisions in any proceedings involving credit.

Tanzer proceeded to elaborate at length on the difficulties, constraints, and so on.

One might also highlight that Bruce Ford, sometime CBA victim (Traztea) spent an inordinate time with ASIC personnel before and during 2004 in trying to get ASIC to take seriously the use by banks of the 'shadow ledger' system for customers in the process of being defaulted. The shadow ledger system facilitates extraordinary discretion for banks to manipulate customer indebtedness, with implications not merely for the hapless customer, but also for reporting accountability to the Tax Office and to the banking regulatory authorities. Ford was heard on a personally sympathetic level, but the issue ultimately was shelved.

The plot thickens. I quote from an article in the *Australian Financial Review*, dated 18 February 2005 (authored by David Crowe and Alesandra Fabro):

> The crackdown on property spruikers was being hampered by overlaps between two key regulators, prompting 'intense frustration' among investigators as they tried to prosecute offenders, a senate committee heard yesterday. … [ACCC chairman Graeme Samuel] described the situation as 'less than satisfactory' after the separation of financial services regulation under ASIC. …
>
> The Productivity Commission last month described the overlaps between ASIC and the ACCC and other bodies as a 'source of confusion to industry'. Mr Samuel said there was 'intense frustration' among some ACCC staff when

> they needed to refer matters to senior counsel to determine whether they had jurisdiction to investigate a case. …
>
> Labor consumer affairs spokeswoman Kate Lundy described the overlap as a 'dog's breakfast'.

To this writer, Ms Lundy's evaluation is on the generous side. The situation, to be kind, is a shambles and a disgrace. The outcome? There is effectively *no* regulatory oversight of business to business unconscionable conduct in financial services.

The broader parlous environment for small business bank victims

There is no doubt that confronting the abuse of the structured imbalance of power by corporates is a Herculean task. Even by these demanding standards, banking malpractice is in its own elevated category. Even if s.46 and s.51AC had robustness, and if ACCC personnel had both sympathy and commitment to small business complainants, the broader environment remains unappetising.

The political class declines to go near bank victims. Democrat Senator Paul McLean was forced out of Parliament in 1991, McLean himself experiencing exhaustion and disgust at the lack of integrity of Parliament on this issue. The Martin Banking Inquiry closed down the issue, and nothing has been heard from Parliament since (except for the very occasional intrusion from backbenchers putting in their two bits for constituents during the Adjournment Debates, to be immediately ignored).

With political supineness as background, the banks' foreclosure process has sucked up and compromised other sectors, in particular the receiver/manager sector and the property valuation sector. The public bankruptcy trustee, the Insolvency and Trustee Service Australia, lacking resources, has lapsed into a cowardly neglect of its responsibilities to those who have been trapped by bank bankruptcy proceedings.

But the centre of the larger problem is the legal profession and the judiciary. The NAB public relations machine recently tells it thus: 'All of the material [put forward by foreclosed complainants] has been the subject of exhaustive investigation many times by ourselves and by multiple courts of law. In each case the courts have found the allegations to be unfounded'.

Very convenient for the NAB to hide behind the fulsome integrity of the Australian legal system. The public relations entourage can sleep soundly at night because it is its role to write the script to order. The detail conveys a contrary story.

Anyone who has cared to examine a court case or two from the foreign currency litigation would already have acquired a less sanguine view of the Australian legal system (with some honourable exceptions). It is more of the same with recent bank litigation. A representative case is the Heinrich v CBA litigation in South Australia. It is a disgrace. Hyland J settles the case for the Bank by preferring the credibility of the corrupt lending manager Saunders to the credibility of the hoodwinked farmer Heinrich. The *a priori* presumption of bank staff integrity, rather than a forensic investigation from available documents and testimony, determines the outcome. Why

bother wasting resources going through the motions when the outcome is predetermined?

In principle, the structured asymmetry of legal firepower to the banks' advantage should not inhibit the bench from looking behind the rhetoric. Yet we have learned members of the bench perennially displaying contortions of logic, acts of faith in bank personnel and documentation, and selective appropriation of evidence to find in favour of the more powerful party. Judges perennially accept statements on faith by bank staff on events and claims regarding the debt quotients. There is a pervasive ignorance of bank procedures amongst the judiciary, and a pervasive lack of interest in acquiring a workable knowledge of such procedures.

In particular, the issue of who the receiver/manager owes allegiance to – the mortgagor or mortgagee – provides a colourful legerdemain. The law says that the receiver/manager owes allegiance to the mortgagor, but the practice is that the receiver/manager is the chattel of the bank. Spender J, in National Australia Bank v Freeman, FCA 244, March 2002, more honest than most, exposed the distortions necessary to turn the law to the advantage of the practice. Those in more of a hurry to dispense with niceties (such as Dodds-Streeton J, in National Australia Bank v Walter, VSC 36, February 2004) merely crash through the inconsistencies to find the desired result.

Some judges come to office having acted for banks, not surprising as banks are most prevalent in litigation and have the resources to match the demand. Such has been the position of Paul de Jersey, now Queensland Chief Justice, with Westpac; ditto Richard Chesterman, now Queensland Supreme Court, with Westpac; ditto George Fryberg, now Queensland Supreme Court, with the NAB (Fryberg was senior counsel for the NAB in the Kabwand/Somerset case, another disgraceful outcome).

We then find judges presiding over cases in which a previous long term bank client is one of the parties. Thus did de Jersey J preside over a decision for his previous benefactor Westpac in the crucial foreign currency case Westpac v Potts, Queensland Supreme Court of Appeal, No.657 of 1991, April 1992, a case resulting in what Queenslanders in the know consider to be one of the worst decisions in recent judicial history. This decision had the not inconsiderable effect of not merely reversing the lower court ruling in favour of Potts but also a series of decisions in the Federal Court against Westpac in Chiarabaglio, Thannhauser and Ferneyhaugh, whose cumulative impact was threatening to damn Westpac comprehensively over its foreign currency loan debacle. With the Potts reversal, the significance of which was duly advertised to all and sundry by Westpac, Drambo was subsequently won for Westpac. As with the equally culpable CBA, the remaining foreign currency loan casualties were left to rot and dissolve unlamented into history.

Similarly judges routinely preside, without embarrassment, over litigation in which one of the parties is the bank with which they have a financial interest or a personal banking relationship. Judge Dodds-Streeton admitted to beneficial interest in NAB shares worth a quarter of a million dollars in National Australia Bank v Walter, but claimed that impartiality would prevail on her watch.

Chief Justice de Jersey has admitted to a personal banking relationship with the NAB. And yet His Honour presided over a Summary Judgment Hearing in early 2001 on the matter of Troiani as guarantor and majority owner of Wide Bay Bricks. The Judge delivered a decision in favour of the NAB and judgment on debt which allowed the NAB to proceed to pursue the Troianis to bankruptcy. The NAB offered no proof of debt, and there was no transcript of the hearing. The additional advantage of this summary judgment was that there was nil discovery of documents, documents which would have disclosed a telltale path of how the Troianis were defrauded by the NAB. Curiously, Sante Troiani was not present on that fateful day because his then barrister, a friend of the court, had advised him against attendance. Estimate of net debt at time of appointment of receiver/managers in 1999 is impossible due to apparent widescale NAB manipulation of accounts (as an instance, the NAB stole $3.985 million from WBB accounts shortly before appointment of receiver/managers), but a rough estimate would have the Troianis' net equity in Wide Bay Bricks at $40 million. Add $20 million in personal assets, and the NAB has neatly appropriated $60 million from the Troianis through a judicial *auto-da-fé*.

'Exhaustive investigation' indeed.

In sum

At present in Australia, banks are effectively above the law with respect to small business customers. Banks operate, self-consciously, in the realm of the law of the jungle. The public image of the Australian regulatory system is that the rule of law prevails. The ACCC, ASIC, APRA, and so on, are the public face of this public image. The public image in this domain is a lie.

Most victims, good law-abiding citizens, have lapsed into passivity, which suits the banks and the regulatory agencies perfectly. The less fuss the better. The victims have been reduced to idleness (when not futilely seeking assistance from politicians and regulators), supported by relatives, and/or are on pensions at public expense. Family breakdown is par for the course. Suicide is not unknown, especially amongst farmers (drought is a contributing factor to depression in the bush, but bank thuggery is also a contributing factor, well known to those affected but suppressed by the media and rendered oblivious to those in authority). Frankly, one can understand if bank victims took the view that they could achieve better justice if they themselves took the law into their own hands and operated according to the same law of the jungle.

It follows

The intellectual and moral frailty of the legal profession is a larger problem, but there are lessons for the bailiwick of the ACCC.

1. The ACCC needs to confront that there is a problem with bank malpractice in this country, and that it is systemic.

2. The ACCC should lobby the government post-haste to retrieve the unconscionable conduct in financial services provisions from ASIC.

3. The ACCC should cease to pretend that the current s.51AC has any guts and should support the small business lobby's current efforts to have it strengthened.

4. The ACCC should consider mounting a test case or two in the courts against bank malpractice. There is no shortage of cases to choose from. The ACCC's existing selection criteria regarding prioritisation, as outlined conveniently by Ms Kangatharan above, highlight that the ACCC already has the tools to hand to expedite this process. The availability of a quality legal team to a bank victim would be a welcome change to the perennial dependence on lesser talents or the inability to hire any legal assistance because of penury. ACCC involvement would also bring much needed publicity to an arena starved of publicity, given the extent to which financial journalism has been cowed in matters of banking malpractice.

5. The ACCC should hire an individual experienced in bank procedure and culture, preferably someone from an asset structuring division who has seen the light and wishes to reclaim his/her soul.

Yours sincerely

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cc.

Mr Graeme Samuel, Chairman, ACCC
ASIC (Greg Kirk, Compliance and Campaigns, Consumer Protection Directorate;
directed to Robert Drake, Acting Assistant Director)
Various relevant Members of Parliament
Various small business organisations
Various bank victims and friends