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Re: Inquiry into Trade Practices – Unconscionable Conduct

As per Committee Secretariat directions:

On 15 September 2008, the Senate referred the following matter to the Standing Committee on Economics. "The need to develop a clear statutory definition of unconscionable conduct for the purposes of Part IVA of the Trade Practices Act 1974 and the scope and content of such a definition."

Currently, sections 51AA, 51AB and 51AC of the TPA prohibit 'unconscionable conduct' but the expression is not defined in the Act. The Courts have been reliant on case law to guide their rulings under these sections. The Act refers to matters to which the Courts may and may not have regard in determining whether there has been unconscionable conduct.

The centre of gravity of this inquiry is the prospects of a 'clear statutory definition of unconscionable conduct'. The implication is that a more definitive provision will overcome the present impasse. The centre of gravity of this submission is that the underlying aim, suffused with admirable intentions, has a utopian dimension.

The emphasis below is on the institutional environment that manifestly inhibits a tolerable application of the Trade Practices Act's s.51, especially s.51AC, as presently encoded. Much of the text refers to the problems immanent in the banking sector in particular. The major stumbling block may be not a 'clear statutory definition' but the

incapacity of the current regulatory apparatus, and all supporting sub-strata, to administer the Act as it stands. In short, any clarification of the wording of the Act must be accompanied by reform of the regulatory apparatus if s.51 (and s.51AC in particular) is to be an effective deterrent to unconscionable conduct presently pervasively practised by corporates against the small business sector.

Sections are as follows:

- I. The unsatisfactory state of play
- II. The banks in particular and the regulatory impasse
- III. An impoverished regulatory culture rooted in an impoverished culture of the relevant professions
- IV. What is the problem?
- V. What is to be done?

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Attachments (for the information of Committee members):

- A1. Nigel Ridgway, ACCC, to Jones, 31 May 2007
- A2. Anusha Kangatharan, ACCC, to Carmen Walter, 24 April 2001
- A3. John Cream, ACCC, to Sante Troiani; 3 January 2001
- A4. Greg Tanzer, ASIC, to Jones, 15 June 2004
- A5. Jeremy Cooper, ASIC, to Jones, 9 April 2008
- A6. Peter Witham, ASIC, to Craig Harwood, 21 November 2006
- A7. Jones to Senator Nick Sherry, 21 July 2008

I. The unsatisfactory state of play

It is appropriate that an inquiry into the status of unconscionable conduct in the Trade Practices Act be mounted. It is regrettable that the situation remains unsatisfactory after previous Parliamentary attention to it over the previous 20 years.

Some gains have been made – the legislation of s51AA (and s51AB) in 1992-94 and of s51AC in 1998; a handful of successful prosecutions under s51AC – but the substantive progress has been glacial. The reasons are many, and they interlock, indicating that the prospect of a great leap forward is an optimistic one.

The key reasons for the glacial progress are:

- The big end of town devotes enormous lobbying and public relations resources to preventing s51AC (and of course s46) from being effective – essential because said big end of town derives such a huge swag of its profit from unconscionable conduct in the marketplace against smaller businesses.
- The regulatory agencies are reluctant to tackle unconscionable conduct.
- The Parliamentarians of both major political Parties (now joined by National Party Parliamentarians, Senator Joyce excepted) are reluctant to tackle unconscionable conduct.
- The main professions formally engaged in articulating and policing anti-competitive behaviour (economics and the law) have been schooled out of understanding the phenomenon of unconscionable conduct and thus from recognising its existence in practice. The law is doubly hampered from acknowledging unconscionable conduct because there is no money in it.

Much of my views have already been outlined in recent submissions to related Parliamentary inquiries, notably:

* to this Committee re Costello's July 2007 Trade Practices Legislation Amendment Bill:

http://www.apf.gov.au/senate/committee/economics_ctte/completed_inquiries/2004-07/trade_practices/submissions/sub17.pdf

* to the Parliamentary Joint Committee on Corporations and Financial Services re the Franchising Code of Conduct inquiry:

http://www.apf.gov.au/senate/committee/corporations_ctte/franchising/submissions/sublist.htm

Unconscionable conduct is a way of life for the handful of companies that dominate key sectors, courtesy of past laxness of legislation and/or regulation on takeovers/mergers in Australia – banking, retail, shopping centre ownership/management in particular.

The retail duopoly. There have been a couple of signature successes against the retail duopoly, brought by the Australian Competition & Consumer Commission in the courts – notably the 1996-2003 case against Safeway (aka Woolworths) for bread price fixing, and the 2003-07 case against Woolworths and Coles for persistent wilful restrictive practices against independent liquor retailers. These cases were brought under s.46 and

s.45 respectively, but they reflect an insouciance of the big two in the aggressive use of their market power.

As reported in the contemporary media (c/f Vanda Carson, *The Age*, 15 December 2006; Stephen McMahon, *The Age*, 4 February 2006), Woolworths was unrepentant on both cases, claiming that the court-condemned legitimate activity and accusing the regulators of wasting taxpayer funds as well as shareholders' money. On the liquor retailers' action, Woolworths CEO Roger Corbett was quoted as claiming (via Carson): "We believe we were acting both correctly and completely within the law." *The Age's* Stephen McMahon has commented (regarding the Safeway bread pricing case): "For almost 10 years, Woolworths' senior management fought the case at every turn, leading some analysts and shareholders to wonder if [they] needed a refresher course on what constitutes a breach of the Trade Practices Act." *The Australian Financial Review's* John Durie noted (1 February 2006) that "[the Woolworths' CEO] obviously struggles to accept reality when it comes to trade practices breaches".

The text of the 1999 Baird Joint Committee report, *Fair Market or Market Failure?*, exposes a similar standoff. Figures for a basket of commodities in Woolworths' Dubbo store and representative Sydney stores were produced for a five week period during July & August 1999 (Ch. 6, *Predatory Pricing*, pp.3-5). Woolworths' management claimed that Sydney and regional prices were kept at common levels, with transport costs for the latter absorbed. The price comparisons showed a pattern of dramatically lower prices at the Dubbo store compared to Sydney prices. Woolworths' management in interview claimed ignorance of the details; a separate statement from Woolworths was demonstrated by the Committee to be inaccurate and disingenuous.

The response of Woolworths' management to the ACCC-supported litigation and to the Baird Committee deliberations would seem to provide an indicator of Woolworths' likely future behaviour – that is, it will be business as usual.

The cases brought against Woolworths and Coles were instigated by the previous ACCC Chairman, Mr. Allan Fels. Because of appeals by Woolworths, the cases dragged on into the tenure of Fels' (mid-2003) replacement, Mr Graeme Samuel. Samuel is quoted as saying (via Carson): "I guess if I was Woolworths ... if I was about to front up before the judge that had found my 'commonly acceptable' behaviour to be illegal and unacceptable – I'd be showing a bit of contrition at the moment if I was facing the potential of many millions of dollars of penalties ...".

That December 2006 statement appears to be uncharacteristic. The ACCC under its present chairman appears to have nodded benignly towards the big two retailers. There has long been an uncritical tolerance of creeping acquisitions. The tacit support has culminated in the door-stopping groceries retail prices Report¹, which has employed a forbidding size to occlude the shallowness of its analysis. Admittedly, the terms of reference given to the Commission by the Labor Government were inexcusably narrow. But, to this reader, the report employs inexplicable obfuscation – the crucial chapters on 'buyer power' are fudges: Chapter 14 is theoretical mumbo jumbo, whereas Chapter

¹ Australian Competition & Consumer Commission, *Report of the ACCC inquiry into the competitiveness of retail prices for standard groceries*, July 2008.

15 opaquely refers to the existence of buyer power abuse but quickly moves the text along to contradictory claims of beneficence.

The ACCC's apparent lack of competence and/or will in this crucial domain has a premonition in an earlier report, one that fell under the media radar. Following unresolved concerns raised in the 1999 Baird retail sector inquiry, the Senate instructed the ACCC in 2001 to investigate supplier-retailer relations. The 2002 ACCC report² surveyed supplier prices in 1999-2000 and 2000-01 (excluding fresh fruit and vegetables) to gauge the extent and possible disparity of 'funding support' by suppliers to their customers, and to examine the magnitude of price differences across purchasers.. The ACCC found both buyer power and significant price differences but no correlation of either with the big two retailers.

The ACCC admitted that its examination was limited by the inadequate survey responses – 'At best, the data can only be regarded as indicative'. Effectively, the cooperation of the major players was limited. The Commission then inferred, without examination and without evidence, that there was no discernible anti-competitive dimensions to grocery price determination, and that there has been no breach of the law. The regulator 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.³ The general thrust of the report is that the rising gap between retail prices and farmgate prices is an inevitable product of the evolving complexity and globalisation of the supply chain. The report's mode of analysis is schematic rather than forensic. It mentions the phenomenon of market power, but deals with it analytically rather than empirically. The abstract analysis itself is questionable. The report claims (p.122)

One of the major determinants as to whether there is abuse of market power is whether super-normal profits can be sustained over time. The competitive nature of retail markets and the level of returns being earned in the Australian food sector ... do not indicate that there is major abuse of market power to the detriment of food product suppliers.

The report ignored the substantial and ongoing quantum of 'discounts and rebates' extracted by Woolworths and Coles from suppliers, then running at over \$1 billion for the two retailers per annum (this before changes in accounting reporting standards relieved the retailers of reporting such figures). Moreover, the author confused the retailers' net margins on turnover, traditionally low, with returns on capital employed, which is substantial.

Of relevance here is that the Whitehall report referenced the 2000 ACCC report as denying large retailer market power ('this indicates the market at work with suppliers varying their deals where they achieved best performance for the terms paid'). In turn,

² *Report to the Senate by the [ACCC] on prices paid to suppliers by retailers in the Australian grocery industry*, September 2002.

³ S. Spencer, *Price Determination in the Australian Food Industry*, Whitehall Associates, 2004.

in a major speech on big business - small business relations, Graeme Samuel referenced the Whitehall report as denying retailer market power:⁴

The Report notes that a 'highly competitive retail sector combined with the strong presence of national and international brands has resulted in a low margin, by world standards, grocery sector' – hardly the sign of a rampant duopoly extracting monopoly profits.

We are thus witness to a peculiar phenomenon in which two 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, yet mutually reinforce each other's slippage. The reputed absence of retailer market power was thus in the process of acquiring definitive status, although that status was entirely manufactured. Wishful thinking has been converted into tangible reality. The peculiar character of the 2002 and 2004 reports provides invaluable background to the lead up to the ACCC's 2008 inquiry and report.

Soon after the benign ACCC report appeared, a stellar instance of thuggery was initiated by one of the big two retailers which came to this author's attention. The retailer demanded further draconian discounts of this particular supplier, having previously extracted the usual blood. The details of this activity are strategically not consigned to paper, despite supplier requests, because the retailer's management knows the terms of the relationship to be unconscionable. We see no unconscionable conduct / abuse of market power, says the ACCC, because it is not looking for it.

Shopping centre ownership/management. Admittedly, the ACCC shares responsibility for unconscionability in this arena with the States. But the ACCC missed a golden opportunity in its carriage of the 2001-04 s.51AC and s.52 case against Westfield and others regarding treatment of tenants. The settlement was organised on a 'no admissions' basis. This concession heralded the missing of a golden opportunity. It appears that the powerful are able to dictate the terms of their prosecution. No guilt is established; no precedents are established. Without precedents, the regulator disempowers both itself and the courts. And the guilty parties are enabled to continue their oppression of weaker parties.

In correspondence between me and the ACCC, an ACCC spokesperson (Ridgway to Jones, 31 May 2007; attached: A1) conveniently listed the 15 actions that the ACCC had taken under s.51AC to that date, and the specific sub-sections of s.51AC that were considered relevant to various cases (albeit whether these actions were successful is not made explicit). One admits to being pleasantly surprised that any action had been taken, as most of these actions were under the radar, and given the public image of the ACCC in its publicity and senior staff speeches as being paternalistically dismissive of small business' claims and hopes regarding potential successful action against its powerful adversaries.

Nevertheless, as I have argued in the submissions listed above, the ACCC's actions under s.51AC to mid-2007 pretty much leave the big end of town untouched. The

⁴ Samuel. 'Big Business V Small Business – vigorous or vicious competition?', Australian Graduate School of Management dinner, 4 November 2004, p.6.

actions skirt around the edges of what is a systemic problem. One has to keep being reminded that s.51AC was legislated precisely because the 1996 Reid inquiry found unconscionable conduct by corporates to be a systemic problem, highlighted in its masterly report, *Finding a Balance*.

Now we find that the ACCC is prosecuting a Melbourne shopping centre landlord regarding alleged unconscionable conduct towards tenants. This is a desirable move in principle. Nevertheless, the landlord, Dukemaster Pty Ltd, is a minor in the field. Certainly it is important to get justice for the tenants; but the crucial result here is that the case not be settled on a 'without admissions' basis, that it be exposed to the full glare of publicity and that a precedent be established. If this case happens to be settled on a 'without admissions' basis, like the Westfield case, nothing of substance will have been achieved for the functionality of the unconscionability provisions. Behind the scenes it will be taken as yet another green light for the big landlords that it will be business as usual.

The banks. There have been no cases taken under s.51AC against the banks, not by the ACCC when it had jurisdiction during 1998-2002, nor by ASIC since it acquired jurisdiction in 2001 becoming operative in March 2002.⁵ The ACCC under Fels took an action in 2000 against serial offender National Australia Bank in the Ashton case, but that was under s.51AA and there is substantial legal precedent in third party guarantee 'disability' cases. Nothing has occurred under the more important s.51AC wherein lies the formal power to tackle predation against small businesses in their credit relations with the banks.

II. The banks in particular and the regulatory impasse

There is no more deserving group worthy of attention under s.51AC than the big four Australian banks. The comprehensive inaction in this arena embodies all that is currently dysfunctional with the regulation of unconscionable conduct. There is much excerpting of correspondence below, but I would claim that the correspondence to which I have been exposed points to a pattern that exposes an entrenched culture within the regulatory apparatus that lies behind this inaction.

The Australian Competition & Consumer Commission

Let's start with my April 2004 documentation of eight cases of what I allege to be unconscionable conduct or fraud by a particular bank against its small business customers (one is a guarantee case). This dossier is available at:
<http://www.arts.usyd.edu.au/departs/political/PDF/ejon7226/Evan%20Jones4.pdf>

I sent a copy of this dossier to Graeme Samuel, ACCC Chairman, in April 2004. No response. By default, I sent a copy to John Martin, ACCC Small Business Commissioner, in January 2005. ACCC staffer Nigel Ridgway replied for Martin in April 2005. There was no mention by Ridgway of my concern in the Samuel/Martin

⁵ Although responsibility for finance sector unconscionability was moved to ASIC in 2002, the ACCC still assumes a joint responsibility for the sector. However, the December 2004 Memorandum of Understanding between the ACCC and ASIC that encodes this joint responsibility is incomprehensible, and it is possible that no-one understands it. It is clear that no-one has acted upon it, so it is at present demonstrably without significance.

letter regarding the general issue of the parlous state of legal and regulatory protection for small business in Australia. The essence of Ridgway's response was that the cases fell into three categories: they did not involve unconscionable conduct; they potentially involved unconscionable conduct but such had occurred before the relevant legislation was in place (presumably meaning s.51, but no mention of s.52); or they potentially involved fraud in which case another jurisdiction was involved. The implication is that there was nothing in the detail of my extended document that warranted consideration or action by the ACCC. The regulator did not take the opportunity to educate its staff on an apparently virile strain of unsavoury corporate culture, a culture from which the particular bank has never resiled.⁶

With other commitments, and being nonplussed by the unsympathetic character of the reply, I put the letter aside. Experiencing ongoing input from bank victims, I replied to the ACCC's Ridgway on 28 February 2007 with an 8,000 word letter. The letter reiterated the claim as to the systemic nature of bank malpractice against small business customers, documented the ACCC's and ASIC's failure to fulfil its obligations towards complainants, and noted the apparent judicial complicity in this ongoing saga of neglect.

I received a reply from Ridgway on 31 May 2007. The reply listed all the cases that the ACCC had pursued under s.51AC, as noted above. There are no financial institutions on the list. The letter emphasised that the ACCC strategically pursues those cases that it considered 'winnable'. The implicit message appears to be that banks are of necessity outside the realm of cases considered winnable. Ridgway, for the ACCC, also denied responsibility for measures with the intent of strengthening the section so that effectiveness can be enhanced. And there the situation rests.

The substance and style of letters with which the ACCC replies to small business complainants regarding alleged bank lender malpractice provide substantive insight into the ACCC's strategic lethargy in this domain.

* ACCC staffer to Carmen Walter, liquidated NAB customer, 24 April 2001 (attached: A2). The ACCC staffer tells Ms Walter to go away. As I noted in my February 2007 to the ACCC, "The author writes of the necessity for selectivity in choosing arenas to pursue, listing selection criteria. The ACCC staffer 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 [the Walter family included]."

* ACCC staffer to Sante Troiani, liquidated NAB customer, 3 January 2001 (attached: A3; I refer to this case in my other recent Parliamentary submissions). The definitive sentences are: "... the alleged conduct does not appear to indicate a breach of the Trade Practices Act.", and "... your complaint has been reviewed on a number of occasions since it was first raised with the ACCC." The Troiani case from the evidence involves malpractice of gigantic proportions; a sting operation. The ACCC letter indicates either incompetence on banking issues within the ACCC's ranks or a strategic decision to

⁶ The Adelaide unit of Channel 7's Today Tonight program produced a segment on three alleged NAB small business victims which went to air on 5 April 2006 in South Australia and 4 January 2007 in the other States. The producer received over 100 calls from people claiming to be victims of bank malpractice; all but a handful of calls were with reference to the NAB.

decline to carry out its legislated responsibilities. There is one sense in which the ACCC staffer's statements may contain implicit substance – that Troiani's treatment may have involved fraud, an offense qualitatively more heinous than that of unconscionable conduct. But the ACCC declined to so advise, for the obvious reasons that it would have admitted to understanding the nature of the case.

* ACCC staffer to Paul Buckman, liquidated NAB customer, 21 January 2003. "You should note that [ASIC] is the Commonwealth body that regulates financial services and enforces laws that promotes honesty and fairness in financial markets. ... You may also wish to consider contacting the Australian Banking Industry Ombudsman. The ABIO's role is to help individuals and small businesses (including incorporated small businesses) resolve complaints, including all financial services provided by banks." The claim regarding the Ombudsman is inaccurate. ACCC staffers would know that the claim is inaccurate. Buckman in turn wrote to the ABIO on 9 July 2003 seeking assistance, as advised by the ACCC. An ABIO staffer in turn replied on 6 August 2003, claiming that Buckman's company had been deregistered. "When a company is deregistered, all rights, including the right to bring a claim on behalf of that company vest in [ASIC]. ... Accordingly, this office is unable to assist you further." Yet, regardless of this technicality, ABIO did not acknowledge that it does not handle substantive small business complaints, period. The ABIO was also misleading Buckman.

The Walter and Troiani cases occurred after s.51AC had been enacted and during the period that the ACCC had formal responsibility for unconscionable conduct (1998 to March 2002).

The Australian Securities and Investments Commission.

I also sent my April 2004 NAB dossier to Jeff Lacy, then ASIC Chairman. ASIC's Greg Tanzer replied on 15 June 2004 in a considered letter (attached: A4). However, the definitive sentence is: "To date we have not relied upon the unconscionable conduct provisions in any proceedings involving credit." Tanzer acknowledges the difficulties of pursuing financial services providers under this category of offense; he also implicitly (and correctly) highlights that ASIC's dominant responsibilities (and culture) mean that ASIC is not well suited to this job. However, Tanzer also concludes by recommending as possible outlets for solution the banks' Code of Banking Practice and the Banking and Financial Services Ombudsman – an evasion because the banking Code is a public relations exercise of no consequence to small business victims, and the Ombudsman's charter explicitly excludes small business complaints from consideration. Dead end.

That was mid-2004. ASIC's annual reports indicate implicitly that no unconscionable conduct cases have been pursued in the small business domain in the ensuing four years to date.⁷ Section 12 of the ASIC Act (which replicates the unconscionable conduct provisions of the Trade Practices Act) is a dead letter.

⁷ ASIC has initiated only two unconscionable conduct cases – one against the CBA regarding lending practices in Northern Territory indigenous communities (2005-06) and one against a minor mortgage broker (2007-08).

In 2007, a number of bank victims were given atypical media exposure (thanks to an intrepid *Australian* reporter). Publicity was given, *inter alia*, to the phenomenon of the parallel 'shadow ledger' account system used by banks in the defaulting of customers. The Parliamentary Joint Committee on Corporations and Financial Services pricked up its ears, as the PJC had pursued an inquiry/report in 2000 on the shadow ledger phenomenon (mildly condemnatory of the CBA, the principal bank 'defendant', but generally a weak and permissive document). The PJC instructed ASIC to examine some of the publicised cases. There is no public information available on whether ASIC followed up on the instructions, replied to the PJC, and offered some satisfaction to the complainants. ASIC's 2007-08 annual report is silent on this issue, and makes no reference to its obligations to pursue unconscionable conduct in financial services.

Serendipitously, John Salmon, my collaborator on bank malpractice, and I wrote a 23,000 word document on the shadow ledger system and its integral role in facilitating bank malpractice. Four case studies in bank victimisation were outlined in the document. I sent a copy to Jeremy Cooper, ASIC Deputy Chairman, with covering letter, dated 26 March 2008. Cooper replied on 9 April 2008 (attached: A5), claiming that the cases referred to were old hat, bank practices have changed since then (no they haven't), and there are no outstanding issues specifically with respect to the shadow ledger phenomenon. Finally, claims Cooper in passing, a small number of cases have proved intractable, and action by ASIC on these matters is "neither warranted nor, in most cases, possible". In short, there are no problems.

It is pertinent that Mr Bruce Ford, sometime bank victim and now bank victim consultant, some years ago spent considerable time liaising with ASIC staff trying to impress on them the significance of the shadow ledger system and its adverse implications for bank victims. It appears that nothing came of these meetings from the point of view of ASIC staff developing a better understanding of the complex and deceptive paper trail that defaulted small business bank customers face in dealing with their bank lenders.

It is also pertinent that one Ms Lana McLean, one of the victims (CBA) whose cases were publicised in the *Australian* and which generated PJC interest, remains distinctly unhappy with her situation, having had no satisfaction from any regulatory agency whatsoever, but who has decided to get on with her life by default. Mr Cooper clearly does not speak for Ms McLean and may have misrepresented the overall situation with respect to the cases that the PJC asked ASIC to investigate.

As with the ACCC, the substance and style of letters with which ASIC replies to small business complainants regarding alleged bank lender malpractice provide substantive insight into ASIC's comparable strategic lethargy in this domain.

* ASIC staffers to Paul Buckman, liquidated NAB customer:

- 17 January 2003:

"ASIC is considering the issues you have raised."

- 31 March 2003:

"After careful consideration ASIC has decided that we will not commence an investigation into the issues you have raised at this time.

"ASIC conducts an assessment of every complaint we receive. [No they don't.] 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. [There is no evidence for this claim.]

"The matters you raise in your complaint appear to concern to (sic) the bank in question, and the banking industry as a whole. [Quite] The issue is, however, not a matter ASIC is able to effectively pursue as securities and financial product regulator. [Since March 2002, ASIC has been allocated precisely the legislated responsibility for this arena] You may wish to raise the matter with the Banking Industry Ombudsman ...". [Another inaccurate and irresponsible reference to the ABIO.]

- 2 October 2003:

"As discussed previously, ASIC is not able to take further action in respect of your concerns in relation to NAB. ... it does not appear to offend any legislation administered by ASIC. As a result, there is no basis for any regulatory intervention by ASIC here.

"... this does not prevent you from pursuing civil remedies otherwise available to you.

"Additionally, should you feel dissatisfied with ASIC's decision in relation to your complaint, you may choose to raise your concerns with the Commonwealth Ombudsman. The Ombudsman's role is to investigate complaints in relation to the actions of Commonwealth departments and authorities such as ASIC."

- 14 October 2004 (in response to further correspondence from Buckman):

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

- 6 December 2004:

"I reiterate that, in all the circumstances, ASIC has decided not to take further action in relation to these issues.

"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."

The astute reader will note the insouciant change of direction, whatever reason for rejection is required for the current purpose, and the strategic round robin of buck passing – we can't help you; try one of the other mob. Buckman's experience with the regulators is not exceptional but representative. As Buckman rightly noted in a letter to ASIC, 13 April 2003: "[paraphrasing] If it is not the province of the various Legislative jurisdictions nor the charter of Regulatory Agencies to protect their citizens, whose province is it and who will uphold the law?" Quite.

* ASIC staffer to Craig Harwood, liquidated Westpac customer 21 November 2003 (attached: A6):

"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 [nowhere acknowledged in any ASIC official documentation, including its annual reports] ... ASIC weighs every complaint against four basic questions:

- What action can we take? [Simple – enforce the legislated responsibility under s.12 of the ASIC Act.]
- Is the evidence likely to be sufficient [A lay down misère in the Harwood case, albeit facing the usual problems of inadequate bank discovery, itself unconscionable.]
- How urgent and serious is the complaint? [A representative urgency and seriousness; one generation of Harwood has lost everything, including of course the family residence, and is now spending his forcibly retired years in impecunious circumstances; the other has lost a lifetime of the results of entrepreneurial activity and is now working as an employee in the industry of which he was previously a major player; and over \$1 million in federal government grant money has disappeared down the gurgler.]
- If we succeed, will people behave better in the future? [It will take more than one successful action against bank malpractice to break an ingrained culture built up over the previous 25 years of financial deregulation, but one must start somewhere. All regulatory progress is built upon adequate legislation, committed enforcement, and judicial precedent.]

"In circumstances where a potential defendant has a reasonable basis for engaging in the alleged misconduct, such as acting on professional advice and therefore not forming the required intention of dishonesty, ASIC's opinion is that it would not be in the public interest to prosecute a matter that does not have a reasonable prospect of success. [This hypothetical situation is not relevant to the Harwood case.]

"In addition to this, the age of the alleged conduct ... [well within statutory limits] ... as well as the regulatory impact of taking such action on the future behaviour of people [action would have a dramatic salutary effect on bank willingness to perpetrate similar practices in the future], are all factors we consider ...

"... 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."

This last response of ASIC to Harwood is reprehensible in the extreme. We can comfortably infer that there were no then current investigations, and no subsequent investigations. Where is the trail? I await breathlessly ASIC's 'proper administration of the law'.

The Australian Prudential Regulation Authority

APRA is a marginal but nevertheless integral player in the regulation of the Australian banking system. Although not formally responsible for unconscionable or fraudulent conduct, APRA has legislated responsibility to ensure that bank incompetence and/or malfeasance does not reverberate adversely on the rules and appropriate culture that underpins a secure and trustworthy credit system. As demonstrated by APRA's investigation and report into the 2003-04 NAB's trading desk scandal (this scandal fell into the normally somnolent APRA's lap), APRA has substantial powers to intervene in a bank's internal operations.

Nevertheless, APRA keeps such a low profile that one wonders if there is a heartbeat. As with the ACCC and ASIC, I also sent a copy of my 2004 NAB victims dossier to Dr John Laker, APRA Chairman. There was no response. On 26 March 2008 I sent a copy of the Salmon/Jones dossier on the shadow ledger system to Laker. The material is integrally within APRA's bailiwick. As I noted in the letter:

As the enclosed document highlights, the unsatisfactory characteristics of current banking non-accrual accounting processes are intimately related to the capacity of the banks to engage in unconscionable conduct and even fraudulent practices against small business borrowers. ... APRA's responsibility for banking non-accrual auditing [i.e. of impaired assets] brings it within the purview of the document's subject matter. ... I would be thankful if the document could be passed on to APRA staff responsible for policy and oversight of the banking sector's non-accrual reporting.

There was no response.

Sundry players: governments, Members of Parliament and public servants

Government Ministers and other Members of Parliament have been reluctant to acknowledge that a particular small businessperson alleging bank lender victimisation has merit to his/her complaint. Government Ministers and MPs have been even more reluctant to acknowledge that there is a systemic problem with bank malpractice against small business customers. It is heartening to see that Members of Parliament have recently spoken out strongly and with understanding of franchisee victims of franchisor unconscionability (the subject of the current Joint Committee inquiry into franchising).

All four of the major Australian banks are practitioners of the black art, albeit there is a hierarchy of intensity. They all know that, at the moment, bank malpractice is above the law. Even s.51AA, previously a source of satisfaction to aggrieved guarantors of bank security over small business assets (from Amadio at common law as precedent in 1983 to Ashton in 2000), has now been removed from the Trade Practices Act with respect to financial services.

In particular, the stance of the Right Honourable Peter Costello is exemplary. As I note in my July 2007 submission to the Costello Trade Practices Amendment Bill, Mr Costello was happy to claim on the floor of the House the governing Coalition's sterling credentials in supporting the Australian small business community.

On those grounds (and also because Costello as local member had been a recipient of a complaint from a bank victim residing in his constituency, the aforesaid Ms Lana McLean), I wrote a letter to the Treasurer on 13 April 2007 requesting attention to the general issue, appending weighty documentation. There was no response. I wrote again, with a longer letter, on 23 August 2007. There was no response. Instead I received a letter on 8 November 2007 from the General Manager of the Financial System Division of the federal Treasury, acting in Mr Costello's stead. Costello, it appeared, was prevented from responding to my April and August letters because of the impending November election!

Treasury's letter was in the bureaucratic mode, with no substance and no relevance to my concerns. Having better things to do, I let the matter slide. But, faced with ongoing instances of buck passing, I wrote a response to the Treasury letter on 25 July 2008, addressed to the new Manager of the relevant Treasury Division and to the previous Manager (titular author of the November 2007 letter), copy to the then Acting Secretary, Mr Jim Murphy. There has been no response. The Treasury is part of the problem.

With the reporting of the *Australian's* journalist on alleged bank victim cases in 2007, and with the 'shadow ledger' dimension being prominent, the Joint Committee on Corporations and Financial Services got into the publicity act, as noted above. Liberal Senator Grant Chapman, PJC Chair, was Chairman in 2000 when the PJC issued a report specifically on the shadow ledger phenomenon.

I wrote a letter to Chapman on 30 May 2007 pointing out some fundamental truths. With considerable media attention, Chapman's staffer called me and urged me to find some ready-made solutions (of benign character, not much interested in hearing about malpractice) for an impending PJC meeting on 11 June. I wrote a submission at speed on the parameters of bank malpractice against small business customers, dated 8 June, but the Monday meeting ignored the bank issue altogether. The political heat was presumably off. As noted above, ASIC had been asked to investigate certain matters, but the demand disappeared into ASIC's inner workings. There was no response from Chapman's office with respect to the larger issues in my scene-setting submission.

During that same period, various spiv operators (Westpoint, Fincorp) had gobbled up precious savings of the unsuspecting, and Senator Nick Sherry was prominent in the media as Opposition Financial Services spokesman, promising reforms. I wrote a letter to Sherry on 30 May 2007 highlighting the impasse associated with the fragmented regulatory structure in the financial services arena. No response.

In March/April 2008, I also sent the weighty Salmon/Jones document on shadow ledgers (noted above) to the Treasurer, Mr Wayne Swan (no response), to Mr Ripoli, the new Labor Chairman of the PJC (no response), to Mr Chapman, previous PJC Chairman now Deputy Chairman (no response). I also sent a copy to Senator Sherry, now Minister for Superannuation and Corporate Law. I received a considered and concerned reply from Sherry on 19 June 2008. Sherry knew of ASIC's Deputy Chairman Jeremy Cooper's 9 April letter to me, the benign response to the Salmon/Jones shadow ledger document. Sherry, without good reason in my view, took comfort that the regulatory machine was ticking satisfactorily. Sherry also noted that if unsavoury practices were continuing there would be need to re-open the issue. I replied in the affirmative on 21 July (attached: A7). There has been no response.

Repose is the natural equilibrium of those called to political office to serve the public interest.

III. An impoverished regulatory culture rooted in an impoverished culture of the relevant professions

Behind the regulatory impasse is a deeper cultural problem.⁸ The mentalities of the professionals who staff the financial system regulators and who mediate bank-related litigation are decisively deficient in precisely the areas that count.

Economists and lawyers dominate staffing in the regulatory agencies; the latter dominate in the legislative process and the judicial system. The recognition of and redress for business to business unconscionable conduct has been a glacial process. A key reason, apart from the tidal wave of lobbying in defense of the powerful, is the impoverished culture within these two professions, substantially linked to an impoverished education. The *weltanschauung* of both professions has a black hole in recognising predation against business by business that transcends legitimate norms of 'competition'. Power and power imbalance – entrenched in the marketplace and its cultural and legal trappings? Unthinkable. Inconceivable. Literally inconceivable because the conceptual socialisation of economists and lawyers precludes the issues or, at best, consigns them to the margins for consideration by the lesser mortals amongst their breed.

For both economists and lawyers, the quintessential businessperson is rational, informed, on her/his own; if they fail it must inevitably point to their own failings in meeting the ultimate consumer's demands. The impersonal market has no favourites and takes no prisoners.

For economists, the central and abiding paradigm by which economics is differentiated from other social disciplines, Neoclassical economics, is constructed self-consciously so as to systematically by-pass the conceptualisation of power. Economics is that discipline for which the 'market' and 'power' are mutually exclusive entities. At best economists are allowed to confront the phenomenon of market power against ultimate consumers; wrought through 'market failure' – hence the dominant consumer-oriented emphasis of antitrust legislation in general and the Australian Trade Practices Act in particular. Economists can't understand why s.46 and s.51 are in the Act.

The impoverished economics syllabus with respect to the analysis of real world market processes is compounded by the systematic failure to theorise and empirically document the public corporation, the characteristic dominant business enterprise since the early Twentieth Century. Those few economists concerned with real corporate behaviour in real markets are typically confined to the margins of the discipline and at low status. As dogmatic theoretical sophistication intrudes even into the 'applied' subjects, the number of people currently graduating from Australia with a smattering of learning in corporate behaviour and in trade practices legislation would be not significantly different than zero.

No matter. The hard yards of the 'industrial organisation' economists have recently been overwhelmed by American-sourced ideological stalking horses of the Chicago School and its blood brother in Contestability theory, which jointly promise, from *a priori* principles, the universal delivery of the public benefit from the offices of the large corporation whose reach should suffer no constraints. The Chicago/Contestability ideology has been appropriated by the incumbents in the ACCC as cover for their

⁸ This section has been reproduced, albeit edited, from my submission to the Parliamentary Joint Committee on Corporations and Financial Services' franchising inquiry.

benign indifference to the distinct contributions of and the sustainability of the small business sector.

The lawyers display a variation on a common theme. A central theme in legal culture is that a contract is a contract is a contract, period.

First, the law and the bench have trouble confronting a contract that is *intrinsically unconscionable*. Consider section 5 of the National Australia Bank overdraft contract:

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. I.e. – an intrinsically unconscionable contract for the most fundamental of financial instruments underpinning commercial life. Does this status bother anybody in regulatory circles? Not a jot; the NAB and other banks continue to use this unconscionable contract unconscionably to good effect (c/f NAB v Goonan, 2001, no court case involved; NAB v Bernstrom, 2001, unreported; Commonwealth Development Bank vs Cassegrain, 2002).

Second, the law and the bench have trouble confronting a contract that is formally above board but binds parties unequally *whose relationship is rooted in asymmetry*. Enter the franchisor-franchisee contract, shopping centre owner/manager and tenant, etc. All contracts between bank lenders and small business borrowers are in this category.

The bench has trouble confronting that the more powerful party to a formally above board contract will use its structured power to profitable effect. Compare the odious decision in Australian Competition and Consumer Commission v C G Berbatis Holdings Pty Ltd, HCA 18, 9 April 2003, under s.51AA, a provision of the Act that explicitly acknowledges structural asymmetry of the parties. All a result of 'hard bargaining', says the learned judge. Bollocks.

Third, the bench even has trouble ruling against the more powerful party when that party *chooses to break the terms of a contract at will* (c/f CBA v Cooke, 1996-, unreported; NAB v Walter, VSC 36, 16 February 2004; NAB v McMinn, 2001, unreported; Westpac v Harwood, 2003-, no court case involved; Kay, Canli & Inak v NAB, 2004-, unreported). More than a limited education; transparent prejudice dogs the beatific delivery of 'justice' by the Australian bench. It appears that the sanctity of contract applies only to the weaker party.

It is understandable why the status of 'fiduciary duty' or of 'duty of care' appears so irregularly and is treated so derisively in the law. A contract is an arrangement entered into voluntarily by parties with full knowledge of the implications. With respect to the banking field, the then venerable Professor Weerasooria (whose Banking Law Centre at Monash University was thoughtfully funded by the National Australia Bank, that inveterate supporter of worthy causes) could claim with assurance that "well established judicial decisions holding that the banker-customer relationship is basically

a contractual relationship of debtor-creditor", and could point indubitably to the fact that "Banks owe no fiduciary or 'special duty' to customers".⁹

Thus with economists and lawyers dominating the gate-keeping regulatory and judicial arenas, small businesspersons hardly need enemies.

The main professions themselves need to be re-educated, but for this the established paradigms in those professions need an overhaul. Hell will freeze over before this happens in economics, and we want workable solutions tomorrow. There is more hope amongst the lawyers because of a number of independently minded and ethical persons in their ranks.

IV. What is the problem?

I am not a lawyer. I have had no banking experience. However, I have long been involved as an ear and an (unpaid) advocate for small business people who have been treated abominably by their major bank lenders. I have had the advantage of long collaboration with one John Salmon who, as career-long employee with the NAB, has experience of bank procedures and bank culture and who, in retirement, has advised bank victims in negotiation with and litigation against their bank lenders.

More can be done with s.51AC even in its present incarnation. As outlined above, there are mutually reinforcing impediments to achieving the potential of the provision.

There is a transparent lack of commitment on the part of the key regulators – ASIC and the ACCC. I have some respectable companions in this assessment. Witness the speeches to the House of Representatives on 1 and 3 September 2008 by backbenchers representing their constituents over the current debacle in the franchising sector:

It is enforcement of suspected breaches by the Australian Competition & Consumer Commission that gives struggling franchisees the biggest headaches. Enforcement by the ACCC is something I am very concerned about. (Don Randall, Liberal MP for Canning, 1 September)

I believe there is evidence of unconscionable conduct on the part of some franchisors, but I am not confident the ACCC has properly examined the claims. ... if the ACCC has the resources and cannot even prosecute one case then I would question the competency of that agency. (Joanna Gash, Liberal MP for Gilmore, 1 September)

Approaches to the ACCC were as fruitless then as they are today. ... The only sensible conclusion I can draw is that the ACCC is incapable of performing a forensic investigation and, as such, is incapable of protecting consumers even if they are franchisees. (Joanna Gash, 3 September)

Etc., etc. With respect to bank malpractice in particular, one witnesses not merely comprehensive inaction, but an assertive commitment to inaction. Add a grievously high-handed and mischievous treatment of complainants, as evidenced above.

⁹ *Australian Banking & finance Law Bulletin*, 15, 9, April 2000.

Behind the regulatory inaction is an impoverished professional culture, born of an impoverished disciplinary education and training.

One infers a more fundamental inhibition, equally embedded – an obeisance to power. Regulatory staff absorb the imperative, consciously or sub-consciously; ditto elected political representatives. This is the nub of the problem.

A readily available exposure to this imperative is in the workings of the legal profession, both on the bench and before it, in matters of litigation involving the banks. Banks attract the more talented members of the bar, because the banks are perennial and well-resourced litigants. With the carrot comes the stick – work for the other side and you're dead meat. Later, many barristers are elevated to the bench via a sterling career representing banks.

On the bench, judges have been known:

- to tolerate false testimony from bank officers or bank counsel
- to accept doctored bank documentation
- to accept discretionary bank claims of customer indebtedness
- to tolerate the ludicrous legal somersault in which the legal obligation of a receiver/manager to the mortgagor (the bank customer) is converted to the natural right of the bank to employ the receiver/manager as collaborator in the demise of the mortgagor (Exhibit A of the dexterity of the legal mind is the articulation by Spender J, in *National Australia Bank v Freeman*, Queensland FCA 244, 12 March 2002)
- to pull dubious legal precedents out of the hat to justify deciding in favour of the bank party to proceedings, and to hell with the evidence (*Westpac v Potts*, Queensland Supreme Court of Appeal, No.657 of 1988, 16 April 1992¹⁰)
- to preside over litigation involving a bank which they have represented as counsel before being elevated to the bench
- to preside over litigation involving a bank with which they have a current material interest (*National Australia Bank v Walter*, VSC 36, 16 February 2004)
- to preside on a regular basis over hearings involving a bank at a level that would normally be beneath one's seniority (in particular, a Chief Justice presiding over summary judgement hearings)
- to instruct court officials to alter or destroy transcripts of court hearings

Most regularly, judges consistently tolerate the steadfast refusal of banks to discover documentation crucial for the liquidated customers to adequately mount their case against their former lender. Ditto a bank's strategic discovery of documents too late for them to be of use in the liquidated customer's court case.

A prime example of the latter is in Westpac's counsel handing over 250 pages of documents to the counsel of foreign currency loan victim Lionel Potts at 5.30 pm on the Friday (1 November 1991) before the trial slated for the Monday morning (4 November). Westpac was appealing against a lower court judgement in favour of

¹⁰ This wretched judgement, which conveniently stemmed the tide of Westpac foreign currency loan cases decided in favour of the borrower, was delivered 5 months after the hearings, and is a mere 2000 words in length. The lead judge, before elevation to the bench, had acted as counsel for Westpac and publicly admitted having been the beneficiary of a retainer from the bank.

Potts. Of course the material could not have been assimilated and used by the defendant in the conduct of the trial (*Westpac v Potts*, as above).

A rare case in which the bench did not tolerate customary bank practice regarding discovery is salutary – Balmford J. in *NAB v Petit-Breuilh & Ors*, VSC 291, 26 July 2000:

However, it transpired that the bank's affidavit of documents, which had been sworn on 7 January 1998, was significantly incomplete. Many documents were discovered by the bank well after the commencement of the hearing, and only after repeated demands by counsel for the defendants. ... the substantial file of the Frankston branch, which incorporated relevant material from the Burwood and Moorabbin East branches from 1991 onwards, was not produced until after counsel for the five defendants had closed his case.

Other documents were still being discovered on the final day of evidence – that is, day twelve of the hearing. The bank's conduct of its case in this manner affected the ability of counsel for the defendants to present their case. The experienced practitioners representing the bank should be aware of their responsibilities to the Court and to the other parties to litigation in which their client is concerned.

* * *

With respect to legal practitioners, the current attitude towards the unconscionable conduct provisions is a peculiar one.

A difficult area is the relationship between fraud and unconscionable conduct. To the untutored outsider, the two would appear to be on a spectrum of outrageousness. However, the two reside in different jurisdictions and formally require different standards of proof. Lawyers apparently prefer to avoid pleading fraud because of the onerous onus of proof. (One also faces the problem that the police will perennially decline to investigate alleged fraudulent complaints against a bank.) Formally, pleading unconscionable conduct appears a potentially more viable option because pleaded on 'the balance of probabilities'.

There exists the unedifying precedent of the appeal in *Kabwand v National Australia Bank* (G355 of 1988, 21 April 1989). The semi-retired farming couple Ned and Joy Somerset had been taken to the cleaners by a corrupt lending manager and with the bank opting to weigh in on the manager's side rather than the customers'. The lower court judgement (G65 of 1988, unreported) went against the Somersets. The Somersets' not-up-to-the-task solicitors advised them to plead s.52 of the Trade Practices Act (s.51 being not then available). In the appeal, the Somersets attempted to alter their pleadings from misleading representation to that of fraud. But Lockhart J. ruled the mid-hearing attempt inadmissible.¹¹

¹¹ Remarkably, both the lead judge (Lockhart) and the bank's senior counsel expressed opinions that the case demonstrated fraud, but the court nevertheless ruled in favour of the bank with respect to the original pleadings. Given that the trial hearing also witnessed doctored bank documentation (fabricated diary notes) and false testimony from bank officials, *Kabwand* encompasses the panoply of the failings

On this view, fraud cannot be subsumed within unconscionable conduct. The Somersets were beaten regardless of the label for their treatment. Given that bank malpractice appears to not infrequently stray into the big-time arena of fraud, we have a problem of enforcing action against fraud as much as we have a problem with unconscionable conduct. Who is going to conduct an inquiry into that neglected domain? (It may be that the vesting of indictable criminal jurisdiction in the Federal Court as a consequence of the criminalisation of cartel offenses could open the way for 'unconscionable conduct'-type fraud to be tried in the Federal Court system.)

If lawyers would prefer their clients to plead unconscionable conduct rather than fraud, the legal knees again go weak at the next step. It appears that lawyers are prepared to put unconscionable conduct into a suit against a bank but see it functioning as a threat against the bank that might facilitate the gaining of a settlement (or a settlement on better terms) against the bank. The unconscionable conduct section is so used because lawyers don't have confidence that the section will bear up in court against the problems that I have enumerated above – in particular, inadequate discovery and judicial prejudice.

Segments of the legal profession that want to take the intent of the unconscionable conduct section seriously decline to do so because they (rightly) estimate that the court system is stacked against bank victims. They have internalised the structural weaknesses of the system. It is another layer of the process of emasculation that is invisible to most eyes. Obeisance to power.

V. What is to be done?

There is no magic wand. By all means should the legislators pursue a statutory definition of unconscionable conduct, with input from the handful of legal minds that have specialised in this unfashionable field. But it is essential that there is also modification to institutions and personnel at the focal points of known blockages, and that there is greater resourcing of the area.

One matter of the wording of s.51AC deserves attention. The 2007 amendments to s.51AC involved one step forward, one step back. The step forward was the extension of applicability to \$10 million transaction quantum, including lines of credit.

The step back was the inclusion of 51AC(3)(ja) and 51AC(4)(ja): 'whether the supplier/acquirer has a contractual right to vary unilaterally a term or condition of a contract between the supplier and the business consumer for the supply of the goods or services'. These amendments modify the constraining power of the sub-clauses that declare unilateral contract variation to be of dubious character.

These amendments are a back door mechanism to further entrenching unequal power. The structural subordination of the small business is to be entrenched in the contract that embodies the parties' future relationship. The game is rigged for exploitation before it starts. These amendments appear to run counter to the spirit of the section, indeed they run counter to the fundamental principles embodied in the contract itself,

of litigation against bank malpractice. Nothing has been learned from this disgraceful case in the ensuing twenty years.

the foundation stone of commerce. I argued against these amendments in my July 2007 submission to this Committee's inquiry into the Costello Amending Bill. They bear the hallmark of being included in the interests of the big end of town. These latter day inclusions in s.51AC provide a signpost into the scale of the task ahead.

Herewith some partial recommendations to improve the functionality of s.51AC.

1. Repeal (3)(ja) and (4)(ja). Then establish a task force to vet representative contracts between financial services providers and borrowers. The bank overdraft, the lubricant of commerce, should be first cab off the rank. The mentality of the reviewers should be borrowed from the National Competition Policy inquisition established in 1995 – all contracts are guilty until proved innocent.

2. Remove ASIC's responsibility for unconscionable conduct in financial services (at least for small business) and return it to the ACCC post-haste. This move would be a win-win situation – there would be created the potential for substantive action and ASIC could stop devoting resources to pretending that it is conscientiously administering its responsibilities under the ASIC Act. This is an essential step – without it, all other changes are but a farting in the wind.

3. The ACCC needs to be reconstructed in personnel and culture, root and branch (as recommended in my PJC franchising inquiry submission).

3a. The revamped ACCC might take a more jaundiced approach to hiring economics graduates straight out of university, unless they are put through a long apprenticeship before being let loose on anything to do with the real world.

3b. Specialist staff with an understanding of (and preferably some on-the-ground experience in) unconscionable conduct need to be hired who can knowledgeably front future actions on this front.

3c. With respect to banking in particular, at least one specialist staffer with an expertise in banking practices and culture needs to be hired who can knowledgeably front future actions against bank unconscionability. A plus on this person's (or persons') CV might be that they had worked intimately on the dark side and since have repented for their sins.

3d. With appropriate staff and appropriate resources backing, the ACCC should mount an unconscionable conduct case under s.51AC against a bank, to establish the first of desirably an accumulation of precedents. One might start with small ambitions, tackling a case that is not complex and oozes unconscionability even to Blind Freddie. I would suggest, for example, *Kay/Canli/Inak v NAB, 2004-* (currently before the courts without regulator assistance), a transparent case of unilateral variation of contract for transparently predatory ends.

4. The deep prejudice of the court system against small businesses in litigation with corporates, especially banks, needs attention. Any small steps are better than none, to highlight to the judiciary that it is on notice.

With respect to banking litigation in particular, it has been suggested that court-appointed banking expert consultants would facilitate the education of the presiding judge on the nature of the material before them, material on which judges currently deliver definitive declarations of opinion that presume expertise but expose someone out of their depth.¹² But such personnel would have to possess a character and background of impeccable impartiality, a near utopian demand. The smarter option would appear to be, as recommended above, that the ACCC hires its own banking specialists and uses them to create a beachhead in the legal war against bank malpractice.

4a. One needs some means of making and enforcing demands that bank lenders facing litigation from their former small business litigants engage in full discovery of material relevant to the litigant's account and to the ensuing process of default and liquidation of customer assets (including the never discovered bank customer 'realisation account'). If Balmford J. in *NAB v Petit-Breuilh* can do it, why not all his colleagues?

4b. One needs some means of mandating that judges enforce the law that a receiver/manager is the agent of the mortgagor and not of the mortgagee.

4c. A number of procedures need to be established to head off the prospect of a presiding judge displaying bias against a litigant against a bank. For example:

- No judge who has been elevated to the bench after a considerable time spent in his barrister years acting for banks should be permitted to preside over litigation involving banks.
- 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 any connection.
- Tampering with court transcripts, other than corrections mutually agreed by all parties, should be a criminal offense; ditto the prevention of the public availability of court transcripts.

¹² Many judgements in favour of the banks in the notorious foreign currency loan cases of the late 1980s and early 1990s are embarrassing classics in this genre)