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Mr Tony Aloisio
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3 December 2010

Dear Mr Aloisio

Having researched and written on the phenomenon of major bank malpractice against small business/farmer customers for the last decade, I find myself regularly on the receiving end of supplications from such customers who are of the opinion that they are victims of foul play by their bank lender. I have come to the conclusion that generally they are right.

They contact me, as an economist with no legal or banking training and no influence, because they have typically reached the end of the line. In particular, they have been repulsed and given the general run-around by the relevant regulators, including ASIC.

It is with this background that I put together the attached document.

The point is that ASIC is neglecting its responsibilities under s.12 of its Act for business to business unconscionability in financial services. Worse, it is persistently turning away supplicants whose complaints should be taken seriously. Frankly, it is difficult to take seriously the claims in some letters in response from ASIC staff that the complainant's case has been properly examined.

I can state categorically that major bank unconscionability towards small business/farmer customers occurs perennially. The major banks act as if they are above the law, and they are right. The problem needs to be understood as a systemic problem. Which means that ASIC needs to mount a test case in the courts that will establish further precedents. Some ASIC correspondence to complainants claims explicitly that ASIC prefers not to bother about 'run of the mill' cases but rather needs to leverage a representative complaint for precedent purposes. Well, ASIC has had put before it cases ideal for such leverage to take place. It hasn't happened.

No case is too calamitous for the bank customer that ASIC (or the ACCC before it) doesn't choose to reject it for consideration.

In 2004, I sent to the then ASIC chairman a dossier briefly documenting briefly (7 small business/farmers, 1 guarantor) of what I consider to be unconscionability by the National Australia Bank. Greg Tanzer replied for ASIC on 15 June 2004. Apart from much bureaucratic verbiage making up the 4 pages, the substantive sentence is: "To date we have not relied upon the unconscionable conduct provisions in any proceedings involving credit." Six and a half years later, the same reply would be reasonably accurate. (I am aware that ASIC did investigate the Safetli complaint against the NAB, no doubt linked to media and Parliamentary pressure, but the outcome is unknown.)

The Tanzer letter continues immediately: "This in part due to the difficulties, which your paper ably sets out, in bringing such cases. Inevitably they will involve the very particular circumstances of an individual transaction and the recollection of the parties involved. Even where successful, it is only in rare instances that such litigation can produce systemic change as opposed to a finding for the individual consumer that is restricted in its application to their particular history and circumstances."

Now these sentences contain an element of substance – that small business cases have their peculiarities, especially compared to many retail customer or retail investor cases, which is why opportunist law firms are attracted to the latter for potential class action suits but run from the former. But the general thrust of the sentences is wilfully disingenuous. All commercial disputes involve peculiarities, but when litigation ensues it is the court's responsibility to discern peculiarities and to draw on precedent, discerning the elements in common and the contiguities of the specific case to make judgment.

Amadio involved effectively illiterate parents dragged in to support through guarantee the son's failing business, that fact known by the bank. Well, along comes the unknowing wife ('sexually transmitted debt') who guarantees the husband's business soon to fail. Lo and behold the peculiarities are trumped by the perceived elements in common ('procedural unconscionability'), and Amadio becomes a rock solid precedent in guarantee cases for a string of victories against ongoing bank malpractice. In ACCC v NAB (re Ashton) T22 of 2000 the NAB, serial offender, threw in the towel early knowing that the game was up.

No matter, the NAB, worst of the Big 4 but not alone, just keeps going, engaging perennially in oppressive practices against its small business/farmer customers. Not least because it knows that the odds of success are high because of the almost certain prospect of court-sanctioned victory against the customer (the reasons behind that prospect require another dissertation). On the rare occasion that it loses (in other than guarantor cases), as with Kay v NAB NSWSC 1116, the NAB merely assumes away the supposed loss and continues to act as the party in the right. (Admittedly the fact that the court judgment in Kay was half-hearted, in the face of a clear-cut case against the bank, has afforded the NAB leverage.) And Kay et. al. only got to court because the victims continued to run businesses that could finance the litigation, an atypical situation given that the typical small business victim has lost the lot. That's why bank victims need the relevant regulator to run test cases. That's why regulators exist.

I have been reading about bank cases for a decade, as noted above, in collaboration with an ex-banker who has finally given the same game away (assisting bank victims) after 23 years. The perusal of multiple cases highlights that, in spite of the peculiarities, regularities keep appearing in the methods by which the major banks default, foreclose and exploit their sometime customers. The common threads are there to be observed. And the list is both devious and nasty.

The internalised defeat embedded in Tanzer's letter (representing ASIC) naturally is guaranteed to ensure that "only in rare instances that such litigation can produce systemic change". It is up to ASIC to run test cases to set in train litigation that can produce systemic change. This is, after all, ASIC's legislated responsibility.

ASIC was forced to confront the bank unconscionability issue when it arose again with media publicity (then sterling work by *Australian* journalist Richard Gluyas) in 2007, which led the Parliamentary Joint Committee on Corporations and Financial Services to have another look at bank treatment of small business customers via the 'shadow ledgers' dimension, a dimension that the same Committee had examined in a mini-inquiry in 2000. The Committee asked ASIC to look into a range of cases. I wrote a letter to ASIC regarding this issue in March 2008. I received a letter from Jeremy Cooper for ASIC in response on 9 April. The tenor of the reply was essentially that everything was now in perfect working order.

The elements? Some of the complaints are old hat. True, but recovering the details is to highlight that bank malpractice is old hat (reaching back in its current manifestations at least until the mid 1980s), and has been generally ignored by the relevant authorities.

Next, "ASIC found that bank policies and practices have changed significantly since the PJC's inquiry in 2000." Well, there is no evidence of that, and I don't believe that ASIC had the evidence. ASIC staff would not know what a shadow ledger statement looked like. It appears that ASIC staff merely took the CBA's word for it. I remember that the CBA promised immediate redress and a changing of their ways after the late 2000 shadow ledgers inquiry. Some time later, the Timms family (thankfully brought to the public eye by the then indefatigable *Sydney Morning Herald*'s Anne Lampe) were still waiting for the relevant documents on their case. Lana McLean (whose case against the CBA only got into the media because she was in the federal Treasurer's electorate) was in that 2007-08 package that ASIC was supposed to have sorted out. Not so. McLean received no satisfaction from the CBA, remains bitter at her treatment, and ASIC conveniently ignored her situation for the sake of convenience. How many others on ASIC's list were in the same category (possibly in the 'unresolved' but 'intractable for a variety of reasons' box, as Cooper's letter claims).

The CBA retains the same opportunist, deceptive and belligerent culture as before (vide its contribution to the Storm fiasco and the more recent bad smell from dodgy 'advisory' practices from its subsidiary CFPL). More generally, the banks are still actively denying discovery to their victims, with the courts reluctant to push the matter. And even if some documentation does trickle through, the status of statements (is it a shadow ledger document or a for value statement?) cannot be readily discerned because of the manipulation of presentation and because there are no experts on hand to assist the victim.

Bruce Ford and Wendy Murray, CBA victims from the mid 1990s (casualties of Murray's cynical dismantling of the Commonwealth Development Bank) spent much time with ASIC staff

around 2002-04 trying to get some sympathy for and assistance regarding the ‘shadow ledger’ imbroglio. Without success. Admittedly, it is probably APRA’s responsibility to deal with the ins and outs of the mechanisms and documentation of the bank default and foreclosure process; but where there is a whiff of unconscionability, and the murky shadow ledger parallel default accounting system enhances the opportunity for unconscionability, then ASIC formally has a role in the area.

But back to the Cooper letter. Cooper concludes with: “On the issue you raise of problems in small business lending, ASIC has not historically received a significant number of complaints from small business borrowers. Given that there might be more than one explanation for this, ASIC is currently actively consulting with representative bodies of small business and farmers to see whether there might be broader or more systemic problems that are not showing up through our complaints process.”

Now the claims in this paragraph are deeply embedded in the dissembling department. I myself am aware of a significant number of cases. And even if one complainant case smells badly (as most of the ones that I am familiar with do) it is ASIC’s responsibility to act. Moreover, I frankly don’t believe that ASIC has actively consulted with the representative bodies. Even if it had, these bodies have their own agendas and they have been notoriously indifferent and ill-informed on their membership’s problems with banking relationships. The small business peak body, COSBOA, faces the difficulty of presiding over the vastly differentiated constituency and is effectively ineffective. Re the rural bodies, the NFF cares nothing for the family farmer, and the State bodies decline to get involved in the farmer credit domain.

ASIC already has the raw material. Somebody within ASIC might care to re-read Ch.5 of the 1997 Parliamentary inquiry report, *Finding a Balance: towards fair trading in Australia*. It was precisely that report that led to the legislating of s.51AC into the Trade Practices Act. But none of the complaints registered in Ch.5 have been addressed, and s.51AC TPA and its ASIC Act equivalent sit on the books with the seeming dominant aim to create the impression that the authorities have malpractice covered. It’s a sham.

The refusal of ASIC to mount test cases re substantive unconscionability makes it a party to ongoing major bank unconscionability against its small business/farmer customers.

If the relevant ASIC staff feel themselves unwilling or unable to effect their legislated responsibility, there is a natural remedy. That is to convey to the government that the responsibility for overseeing business-to-business unconscionability should be handed back to the ACCC. The ACCC has its own dysfunctional culture in this arena, but at least it knows what unconscionable conduct means and, with suitable staffing, might be induced to action in this crucial arena.

Yours sincerely

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