

SUBMISSION TO THE SENATE ECONOMICS REFERENCE COMMITTEE REGARDING THE PERFORMANCE OF THE AUSTRALIAN SECURITIES AND INVESTMENT COMMISSION

INTRODUCTION

My name is Mark McIvor. I am a solicitor of the Supreme Court of Qld and New South Wales. I was a practicing lawyer for 14 years specializing in mortgage lending (1982-1994). I previously held a role as Chairman of the Mortgage Lawyers Association (Qld), was a partner in a substantial property development company and founder of Equitrust Ltd (formerly Equitloan Ltd). Equitrust Group became one of the largest privately owned property finance companies in Australia. It operated as a Responsible Entity from 1999 until 2011. At its peak it managed \$550,000,000 in funds under management and had \$76m of retained earnings in its balance sheet, a 17 year history of punctilious investor distributions and zero capital loss.

In an orgy of bureaucratic, major bank and advisory sector corruption the Equitrust Group and my family's entire net worth of \$125m (and reputation) was purposefully decimated whilst attempting to protect investors in 2011-2012. Investor capital was reduced from \$1.00 to ten cents in a profound indictment of ASIC's competence. Since this experience, I have re-positioned as a writer and will soon publish a book entitled 'Strange Animals Come Down to Drink: A Requiem of a Financier and a Stinging Indictment of Corporate Corruption.'
<http://www.fairgomate.com.au/>

I am also engaged with concerned commercial citizens in the founding of a not for profit vehicle initiative seeking to design solutions for;
~ the re-empowering of regional Australia through an equitable co-operative financial services model
~ 'shining the light' in respect to corruption in the financial services industry through the Fair Go Mate! Platform.

SUBMISSION CONTENT

I have divided my submission into four sections as follows;

- I. Profound Problems
- II. Fundamental Fallacies
- III. Calamitous Consequences
- IV. Innovative imperative

I will limit my comments to my specialist field being the management of capital and delivery of finance and investment banking solutions regionally. I will extend comments as relevant regarding the impact of the GFC, the issue of centralized control of capital, corporate globalization and corruption in the major banks and insolvency profession.

I make observations based on long term commercial experience.

I. PROFOUND PROBLEMS

The doctrine of *res ipsa loquitur* (the facts speak for themselves) suggests that a conclusion can be drawn from the very nature of the outcome. The parlous state of the systemically corrupt and incompetent Australian financial services system speaks for itself. The gross commercial incompetence of ASIC has played a major role in exacerbation of profound problems and investor losses that must imperatively be addressed. I instance the following;

1. An uncompetitive banking system described by the G20 as 'the most lucrative in the world' and 'a potential moral hazard'. (Major bank collective per annum profit is nearly three times GFC at \$27 billion per annum)

<http://www.theaustralian.com.au/business/financial-services/major-banks-tipped-for-27bn-profit-haul/story-fn91wd6x-1226743452791>

2. Unbridled oppressive and coercive conduct by major banks including routine criminality which several Senate Enquiries have failed to resolve.

4. Implementation by ASIC of a fundamentally flawed mortgage fund industry devoid of a regulatory capital structure essential to ensuring operator commitment and proper capital protection to investors.

5. Compounding the problem by introducing commercially incompetent amendments (in the form of Disclosure Requirements) exacerbating profound loss.

6. Failure to regulate oppressive major bank conduct arising from implementation of BASEL III and resulting in withdrawal of support to the mortgage fund industry.

7. Failure to heed CAMAC's initiative in 2011 to introduce a 'moratorium' for viable Responsible Entities thereby decimating viable operators and investor capital.

8. Providing an environment to support misconduct of the insolvency profession by encouraging appointments to mortgage funds that resulted in decimation of investor capital.

9. A complete failure to understand the commercial imperatives essential to building a competitive, efficient and leading edge financial services delivery system.

10. Exposing the Federal Government to a multi-billion dollar claim (for ASIC misfeasance) arising from losses occasioned in Managed Investments since 2008 of \$15 billion and deliberate efforts to conceal from the investors rights arising from losses occasioned.

FUNDAMENTAL FALLACIES

1. Big is better

The four major banks now control \$3 trillion and employ 160,000 staff. They lend liberally in market upswings and irresponsibly withdraw support in a difficult market. They are too big to deliver the niche specialist service required by small to medium size enterprise, the backbone of Australian commerce. The 30 year trend of aggregation in retail banking has resulted in a major bank cartel that is 35-50% owned offshore. They are an incompetent finance solutions delivery system and enjoy a non-competitive market position. Compare this to Switzerland with 200 banks, \$7 trillion to manage and a population of 8 million people, and the Government's objective becomes clear.

2. Centralised control of capital is positive

Post the GFC it is apparent that centralized control of capital and the banking system lies at the epicenter of the issues to be addressed to create a transparent and fair financial services system.

Our banking system is strongly influenced by BIS (Bank of International Settlements), an organization itself shrouded in secrecy and a tool for corporate globalization.

www.adamblebor.com/books/tower_of_basel/

3. Trust and innovation is unimportant

The GFC was a 1:100 year event decimating trust in the banking system worldwide. Despite receiving Government guarantees the major banks have responded rapaciously and are not trusted by the community. Trust lies at the heart of efficient commerce and must be reinstated concurrent with reducing major bank dominance. ASIC's incompetence has contributed to the historic loss of trust in institutions. ASIC's failure to establish innovative risk managed commercial alternatives for community investment banking grossly hamper Australia's economic capacity.

4. Regulation is the key

Regulation, and the regulator, have historically been the problem. The starting point is commercially flawed legislation erroneously enforced or decent legislation incompetently managed. This regulation has both provided a fertile field for big corporations to achieve market dominance or shysters to flourish. It has grossly limited the potential for innovation and pays no cognizance to talent, commitment or the imperative of regional independence. Our financial services system needs to foster innovation and the rebuilding of finance and capital solutions from the ground up in the communities which require servicing. Educating Australians to understand how to innovate, take risk and manage their own capital needs responsibly in mutual service to their community should be an immediate objective of a responsible regulating body.

4. Status quo is good

Evolutionary theory demands that Australia must be 'most capable of change.' US President Clinton admirably summed up the issues facing re-engineering of the Australian financial services system. He asserted, 'I have news for the forces of greed and the defenders of the status quo; your time has come and gone. It's time for a change.'

Our institutions are not the answer. They are the problem. Decentralising control, facilitating industry to build their own capacity for investment banking and creating a system empowering communities via education in risk management to support needed innovation will provide enduring solutions. It will also combat the ever widening wealth gap and create generational wealth for myriad Australian families. The current concentration and misuse of economic power is a function of status quo. The rich get richer. Inequity in Australia is fostered by a corporate elite whose interests closely align to shape the conventional wisdom offering flawed outcomes for Australian citizens.

111. CALAMITOUS CONSEQUENCES

Equititrust Ltd: A Casebook Study and Microcosm of ASIC Incompetence

My personal experience of ASIC incompetence has been profound. My family and I lost our entire net worth (\$125m) in a vain attempt to protect 1400 investors (mostly aged retirees) during 2011-2012. I experienced inexplicable incompetence and corrupt conduct, overseen by ASIC, that decimated over \$250m of investor, shareholder and third party creditor capital over an 18 month period. This occurred in spite of a clearly articulated plan to preserve investor value, restructure as a listed vehicle and metamorphose to continue 30 year history of entrepreneurship. The experience of Equititrust Ltd serves as an instructive case study of the systemic issues and the dire need for integrity and innovation to be the hallmark of our financial services system.

Highlights

- ~ Incorporated in 1993 (Equitiloin Ltd) to manage the loan book of law firm McIvor Coghlan.
- ~ Granted a Money Market Corporation licence in 1998 and authorized to designate as a Merchant Bank
- ~ Obtained Responsible Entity (RE) licence in 1999
- ~ Built strong investor following (1400 investors primarily retirees)
- ~ Developed specialist property development finance capacity contributing to regional prosperity
- ~ Long standing major bank customer and meticulous performance record with banks
- ~ Major banks withdraw support in 2008 and concurrently oblige Equititrust to subordinate \$40m of investment for no commercial benefit. (Banks using Equititrust money to 'hide behind' whilst oppressing business model designed to protect investors and compete against banks)

in property development lending. Bank uses dominant economic position and engages in unconscionable conduct and equitable fraud.)

~ Navigate three years of GFC including withstanding major bank misconduct.

~ Strong balance sheet of \$76m in retained earnings dedicated to investor protection as at commencement of 2011.

~ 17 year record of consistent investor distribution and zero capital loss as at commencement of 2011.

~ Equitrust manages down a 'run off loan book' and proposes restructure to move away from moribund mortgage fund industry.

~ Equitrust prepares to diversify as an asset manager and fund manager to protect value of residual loan book assets (primarily land development sites.)

~ ASIC thwarts capital raising in early 2011 designed to evacuate modest residual bank debt of eight cents in the dollar.

~ ASIC concurrently impedes attempts to restructure to protect investors, and renders nugatory the business model.

~ Auditor slashes asset value as business is no longer a 'going concern'.

~ Equitrust balance sheet crippled and \$40m lost instantaneously

~ Founder resigns to transition to public listed structure, accelerate moribund fund wind up whilst preserving asset value and pursuing investor and shareholder legal rights.

~ Director dismissed for misconduct and gross breaches of fiduciary duty.

~ Director uses influence to facilitate ASIC raid (28 officers including armed Federal police) to enable director/lawyer and insolvency practitioners to cripple operator and graft over assets for fees.

~ ASIC misfeasance, major bank equitable fraud, directorial and lawyer misconduct result in \$1.00 asset value being reduced to ten cents and \$250m of investment value being decimated in 12 months.

~ ASIC fails to protect investors, purposefully and negligently harms Responsible Entity and fosters the actions of bad bank executive, ex-director and insolvency practitioners actively engaging in misconduct.

RECAP of Real Causes of Demise of Equitrust and Consequent Investor Loss as an indictment of ASIC conduct

1. Major bank covenant in 2008 obliging Equitrust to subordinate \$40m for no commercial benefit.
2. Transition to Bad Bank in 2010 for no reason.
3. Oppressive conduct by bad bank executive (insolvency practitioner) acting as a shadow director.
4. Refusal by ASIC to allow a fresh capital raising in early 2011 to repay modest major bank debt and facilitate restructure and proper management of assets securing investor value.
5. Auditor write down of assets as Fund no longer a going concern destroying balance sheet of Responsible Entity despite inherent value of assets being unchanged.
6. Entrepreneurial founder resigns from Board to facilitate high level of corporate governance whilst transitioning Fund and successful business model to the ASX.

7. Directorial and senior executive misconduct (three insolvency practitioners) resulting in public dismissal of director for breach of fiduciary duties and immediate departure of senior executives.
8. Corrupt influence of dismissed director to facilitate ASIC raid of Equititrust and render nugatory efforts to oversee orderly wind up of fund and preservation of asset values through restructure.
9. Appointment of receiver to Fund assets on submission of dismissed director to ensure continuous control of legal work and fee gouge. Assets included 2000 housing allotments, industrial land, resort holdings and massive legal rights. Competent asset managers and a National Stock Exchange (NSX) vehicle were on stand by to assist, but EFFORTS SWEPT ASIDE BY ASIC.
10. Systemic corrupt conduct by suite of commercially incompetent insolvency practitioners engaging in garage sale of assets whilst charging high fees.
11. Measured efforts to conceal true cause of losses through clever media campaign and focussed efforts to financially disable and discredit Equititrust founder (including bankruptcy in relation to fictitious legal fee judgement whilst unable to legally defend).
12. Efforts to silence all parties (including third party creditors) through sustained coercive legal attack
13. Loan assets purchased at deep discount by corrupt participants and now held offshore (Hong Kong).
14. Close networking among corrupt insolvency practitioners to ensure 'fee festival' and safeguard guilty parties from counter attack.

The Larger Picture - A National Calamity

Lawyers were banned by ASIC from engaging in mortgage lending in 1999. At that time, unregulated growth in solicitor's mortgage lending resulted in losses estimated at sub \$100m. Losses due to solicitor negligence were subsequently covered by professional insurances and little, if any, investor loss was suffered. Lawyers were ideally positioned to be matured as infrastructure for lending as they were equipped to document and enforce loans, accustomed to managing trust monies and obliged by a high standard of fiduciary care. Despite this they were effectively excluded as a viable option to building a community centric finance and capital solutions delivery system.

The introduction of the Managed Investments Act 1998 heralded a massive growth in the mortgage fund industry. Retirees flocked to investments that offered the prospect of higher than bank rate investment return. The reality is that such an investment return is easy to provide in the form of a secure finance product. However, the legislation promulgated by ASIC was fundamentally flawed from inception. It failed to provide for a regulatory capital structure designed to ensure operator commitment. Trustworthiness of operators, capital commitment to

investor protection, skill and capacity to innovate commercially are the obvious and important factors in ensuring investor protection.

As an attempt to stem losses ASIC introduced a set of disclosure requirements for compliance by operators. This offered no practical protection to investors and typifies ASIC's form over substance approach. It served simply to compound the risk and exacerbate losses. This additional layer of compliance provided no commercial protection to investors and simply misled further investors into thinking that proper measures for their investment security had been taken by the regulator. This amply demonstrates that ASIC's arrogant lack of commercial competence and unwillingness to collaborate with experienced market participants, lies at the heart of investor losses.

The extent of investor losses arising from the Managed Investments Act since the onset of the GFC (2008) is estimated at \$15 billion. The calamitous cocktail of flawed legislation, major bank withdrawal of support for the mortgage fund industry and ASIC incompetence in offering up funds to the insolvency profession unprotected has rendered destitute hundreds of thousands of aged Australians. In the context of world-wide regulation obliging banks to hold 8% Tier 1 capital (bank equity) and 7% Tier 2 capital (borrowed funds), a replicable model readily existed. ASIC's negligence is unfathomable. The misfeasance engaged in by ASIC in damaging the financial wellbeing of aged Australians is compounded by a refusal to take any responsibility by trying to sheet home blame solely to operators. The incompetence of operators was ASIC's fault in the first place. The important factors being the degree of skill, commitment and capitalization of operators was irrelevant to ASIC.

Determining which operators had a demonstrable historical commitment to investors, balance sheet strength and a cogent plan was not 'rocket science'. Ironically, notable collapses of MFS (which lost \$2 billion in investors funds) and LM Investments (arguably a ponzi scheme) operated with impunity and yet Equititrust was singularly attacked.

IV. INNOVATIVE IMPERATIVE

Overview of Issues

Australia has profound issues arising from ;

- i. A major bank cartel that will not relinquish market dominance
- ii. Offshore owners whose long range plans anticipated this degree of control
- iii. A financial services system that does not benefit the average Australian and is primarily a servant to 'big business'.
- iv. A lack of understanding and acceptance by ASIC of the dangers of corporate globalisation to communities of Australia. A network of 147 companies control nearly 40% of global economic value of transnational companies.

<http://publicintelligence.net/global-network-of-corporate-control/>

The Unsustainable Modern Corporation

Of the world's largest economic entities, 51 are now companies and 49 are countries. The top 200 companies combined sales are 18 times the size of the combined annual income of 1.2 billion people (24% of the total world population) living in severe poverty. The sales of these companies are 27.5% of world economic activity, whilst employing 78% of the world's workforce. Bank of America is bigger than Vietnam, GE is bigger than New Zealand and Morgan Stanley is bigger than Uzbekistan. If the sole purpose for existence of the modern corporation is pursuit of self interest and shareholder profit the communities of Australia are not safe in the current context of ASIC's commercial incompetence.

The world has entered an era of sustainability and clearly the legislative framework must support new paradigms that safeguard and support the spirit of community and foster growth of the middle class.

Designing a 21 st century MUTUAL CAPITAL CO-OPERATIVE

Problem to Overcome

Currently, our banking system controls the people, largely ignores government and is fostered and supported by a commercially inept regulator. The capital management industry is optimally positioned to take up the challenge of re-building regional capital, investment and finance solutions. Adopting a new paradigm of sustainability and fairer re-distribution of capital control with attendant generation wealth benefits requires the following;

1. Acceptance that the current system is non-mutual and benefits few at the expense of many.
2. Acceptance that ASIC has neither the commercial acumen nor political will to resolve the issues and favours status quo, as does 'the system'.
3. Acceptance that age old principles of mutualism enshrined in a modern commercially competitive corporate structure will offer solutions.

Banking as an industry is a monopolistic, closed shop in which viable competition is either swallowed up or destroyed. Ownership of the highly leveraged bank equity by generational power elite offers exponential commercial advantage. Equality of access to market opportunity is not available to average citizens and ASIC has not discharged its duty to promote responsible market behaviour or act as an effective umpire.

A Sustainable Mutual Capital Co-operative

Banking and finance is not a complex business. It is a simple business and a solution to empower regional Australia lies in constructing a community capital co-operative with leading edge investment banking capacity. Mutual commercially minded businessmen must build market businesses that can harness the aggregated capacity of the non-major banks, and the wealth of Australians, to create a fifth pillar- The People's Bank. The fundamental elements to ensure enduring success and generational community benefit are;

1. Founding a not for profit vehicle that owns and controls the intellectual property.
2. Constitutionally enshrining the principles of mutualism , customer and community centric conduct (in lieu of profit to shareholders) as the fundamental driver.
3. Allocating to the community a founding stake (suggest 12.5%) in exchange for the privilege of accessing the social institution of the market place.
4. Designing a simple capital structure replicating a bank capital structure.
5. Ensuring the not for profit owns and controls the brands for the benefit of the community and future generations.
6. Distinguishing between investment partner class (passive investors/ shareholders) and strategic partner class (active business building participants and shareholders)
6. Ensuring strategic partner class assume greater risk and receive higher reward than investment partner class.
7. Creation of generational roles to be carried out by executives whose foremost commitment is to sustainable and mutual outcomes with profit motive being secondary.
8. Providing legislative support for an appropriate licencing which is not subject to the vagaries and corrupt control of the Bank of International Settlements (BIS).

In Conclusion

I congratulate the efforts of Senator John Williams who has tirelessly pursued solutions to these matters of grave importance to the future of Australia. Nothing is an accident, including the travail of the many who have suffered at the hands of the few. If Australia is to prosper it must respect it's heritage of fighting for fairness, and accurately balance the needs of our communities with a company or citizen's entitlement to reward for risk.

Most importantly, corporations and professional advisors must respect the importance of trust and the role of fiduciary care as paramount to safeguarding our citizens, especially the aged. I finish with a poem which accurately sums up my experience as a hard working, entrepreneurial Australian.

The Crooked Fiduciary

Immorality knows no bounds, for the fiduciary whose client he grounds

Trust and truth you do overlook, in your haste for profit to book

Your arrogant regard for duty of care, completely smashed beyond repair

Ask the question why would he, apples don't fall far from the tree

Ruling elite do as they please, always certain their palms to grease

I must warn you as I say, there is always the fiddler to pay

Now it's time to take an oath, and shine a light in undergrowth

For of this to be sure, there is dirty money behind that door.