

Senate Economics References Committee

Australian Securities and Investments Commission investigation and enforcement

Submission

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a. the potential for dispute resolution and compensation schemes to distort efficient market outcomes and regulatory action;

This term of reference is centred on the concept of ‘efficient market outcomes’ which is an oxymoron, not least with respect to the Wild West that is the financial sector.

The short essay by respected American financial sector insider Albert Wojnilower, ‘[Some Principles of Financial Regulation: Lessons from the United States](#)’, should be compulsory reading. It was delivered at a 1991 Reserve Bank of Australia conference. A national finance sector has inevitably a public purpose. The private firms’ pursuit of private interest (profits) inevitably requires that public authorities channel and proscribe the private finance sector’s actions. In turn, private firms will seek ways to bypass or undermine such proscriptions, which requires revised forms of regulation. And so on and so on, in a never-ending dialectical process. The point? Public regulation is inevitable and is in constant need of re-examination and restructuring.

b. the balance in policy settings that deliver an efficient market but also effectively deter poor behaviour;

Let us repeat that ‘an efficient market’ is a utopian fantasy. Not one nanosecond should be wasted in contemplating this fiction. Any discussion of ‘balance in policy settings’ should not be generated from abstract principles *a priori* but be based on real experience and even involve anticipation of probable private firm developments in the near future – a necessary albeit speculative exercise. Given the inventiveness of the evil geniuses that the finance sector begets and fosters (especially in the US), would-be speculation for regulatory purposes regarding the immediate future can be readily based on the hard facts of the recent past – the 2008 GFC as exemplar.

Recent real experience of the Australian situation highlights that it is not a matter of ‘fine-tuning’ any private/regulatory balance. The current situation at root, from the perspective of serving the commonweal, is untenable. The aftermath of near comprehensive financial deregulation since the late 1970s produced this environment. The flawed optimism on which the 1981 Campbell Report was based has been ignored (except by its casualties) because the Report is venerated as Holy Writ. Of which more below under ‘h.’.

The 1991 Martin Inquiry pretended to deal with the extant failures arising in the 1980s but instead conscientiously finessed and implicitly blessed them. ‘Things have moved on’, it was said, but no, they hadn’t. The 1996-97 Wallis Inquiry ignored fundamentals. The 2014 Murray Inquiry had a formally expansive agenda, but its dominant contribution was in highlighting (desirably) the growing controversies surrounding management of the superannuation sector.

The establishment of the 2018-19 Hayne Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry (the rarely used full title includes the crucial word ‘misconduct’), as with the establishment of the 1991 Martin Inquiry, was a reluctant concession to large scale victims’ complaints of said ‘misconduct’ but was carefully managed to again avoid some key areas. Financial advice and ‘wealth management’ got a well-deserved serve, but the credit relation was put on the stage and taken off in the blinking of an eye, and the fundamentals of the banking sector’s character were ignored entirely.

The current balance of forces is so imbalanced as to render this reference term nugatory.

c. whether ASIC is meeting the expectations of government, business and the community with respect to regulatory action and enforcement:

My particular concern is with the credit relationship between bank (and, to a minor extent, non-bank) lenders and SME/family farmer borrowers. I have been involved in this area since 2000, have been the recipient of myriad stories from borrowers as victims (I use this label deliberately) of bank malpractice, and have written much material on the subject, including myriad submissions to Parliamentary inquiries. I am atypically well informed on this area.

ASIC fails the test under reference ‘c.’ by a country mile. ASIC’s failure with respect to its legislated obligations, persistent and unrepentant, is an ongoing scandal.

I made a 7,200-word submission in September 2013 to the 2013-14 inquiry by this same Committee – ‘The performance of the Australian Securities and Investments Commission’. To that submission I attached a 2010 article ‘Business to business unconscionability – ASIC missing in action’. That submission was labelled #295 and is available (without redaction) on that Inquiry [website](#).

In both the submission and the attachment I cite chapter and verse of ASIC personnel’s flagrant denial of its legislated obligation regarding the treatment of financial entity victim complainants. ss12C and key parts of ss12D appear to be a dead letter.

Pertinent sections of my text are reproduced below.

Bank fraud/unconscionability towards its SME customers is systemic in Australia. It is a racket ... In this arena, banks evidently consider themselves above the law and their presumption is justified. The strategic indifference of the regulators in this domain is a farce and a disgrace. (p.1)

In the eleven years since ASIC acquired responsibility for business to business unconscionable conduct, it is my understanding that ASIC has pursued not a single case under this acquired responsibility – this while the country has been awash with bank fraud/unconscionability against SMEs. This is a scandal of the first order. (p.2)

In over 11 years of responsibility for this arena, ASIC has seen and done nothing, seen no pattern in the endless complaints coming to it that outline practices that sum transparently to a pattern of unconscionable and/or fraudulent bank practices, and has instructed victims through parroted misrepresentations within disgustingly insulting letters to bugger off. What an indictment. (p.17)

This decent sample of correspondence to SME victims highlights that there is a pattern at work, and the message is, consistently, ‘Go Away’. This much-utilised pattern constitutes ASIC’s ‘complaints management policies and practices’ with respect to SME bank victims. Highly educated and reasonably well-paid personnel spend considerable time sending off automatically generated rejection messages to those desperately needing a regulatory champion for their cause. (p.11)

ASIC’s indifference to receiver predation, unleashed on bank victims in the wash of bank predation, demonstrates either staggering incompetence and/or cowardice, or active complicity with transparent criminality. (p.15)

ASIC’s relentless and comprehensive inactivity in the domain of bank malpractice against SMEs, for which it has clear legislated responsibility, provides a green light to the banks to continue corrupt practices. De facto, ASIC is a party to criminality perpetrated by several of Australia’s most significant and profitable corporations. (p.16)

The carnage wrought by major banks on small business and the family farm sectors in this country has been widespread and persistent. Thriving or sustainable businesses, product of risk taking initiative, have been destroyed or stolen. Family homes have been stolen. Couples, once independent, have become dependent on the parsimonious goodwill of social services. Family relationships have been destroyed or imperilled. The mental and/or physical health of the victims has suffered, sometimes resulting in premature death. (p.17)

The CBA [EJ: for example, but not alone] feels itself above the law because the law is not enforced. A law that is not enforced becomes de facto a law that operates to the advantage of the law-breaker and to the disadvantage of the victim. (p.4)

With this inaction, apart from indifference to the victims, ASIC shows contempt for all those responsible for bringing business to business unconscionable conduct into statute law, against the odds. (p.3)

My submission was cited on several occasions in the Inquiry Report itself, but the substance and gravity of my submission found no place there. The Report was narrowly focused, marginalising the crucial credit dimension.

Also noteworthy is that there were 474 submissions to that 2013 ASIC Inquiry. Apart from the submissions from the guilty parties and their hangers-on, the bulk of submissions are from victims – a huge number of whom display a well-deserved fear of being further victimised and so have their submissions rendered ‘Confidential’ or ‘Name Withheld’.

That Inquiry and Report was almost ten years ago.

* * *

Since then, although ASIC has been busy (now publicising its activities on a six-monthly basis), in key areas it appears to have been more of the same – and this after having been chastised by the Hayne Royal Commission.

I add two post-2013 examples of ASIC responses to complainants.

One. ASIC (Misconduct & Breach Reporting, Assessment & Intelligence (sic)) to Mr XX, April 2015:

Thank you for taking the time to submit your report on paperwork missing from your loan application form currently held by [ABC] Pty Ltd and previously held by [DEF] Pty Ltd. Reports such as yours are critical in helping ASIC protect Australian consumers, investors and creditors. [EJ: n.b. ‘borrowers’ as absent category]

In our role as regulator we investigate all reports made to use to determine whether if there has been a breach of the law we administer, and whether our actions would benefit the broader Australian community. ...

We are not pursuing your concerns about ... further, but would like to point you to others who might be able to help ...

There are other steps you can take to pursue your matter, or try to recover your losses, including:

- seeking personal legal advice;
- contacting an External Dispute Resolution scheme;
- approaching other government agencies such as the Australian Competition & Consumer Commission (ACCC).

In short – ‘Go away!’ The cynicism, in conjointly denying all requests for assistance while falsely claiming to be building and acting on an information base to serve the broad public interest, beggars belief.

Two. ASIC (Misconduct & Breach Reporting, Assessment & Intelligence) to Mrs YY, September 2020:

A review of your concerns has been undertaken to ensure the handling of your matter was completed in compliance with ASIC’s policies and procedures. ...

ASIC is Australia’s corporate, markets, financial services and consumer credit regulator. ASIC typically responds to alleged breaches of the laws we administer by considering:

- the extent of harm or loss
- benefits of pursuing the misconduct
- the type and seriousness of the matter and evidence available; and
- any available alternative action

These factors, as well as jurisdiction, assist ASIC to decide whether further regulatory action is warranted. ASIC has to consider whether facts and evidence are sufficient to take action and change our prioritisation of current matters. ...

We have reviewed your report of misconduct, including information you provided against our regulatory requirements and made inquiries of our confidential databases.

Based on the information available, ASIC has decided not to take any action at this time. ... ASIC is not required to investigate every reported instance of misconduct. ...

You continue to have private remedies available to you in relation to your dispute with [the bank]. Your legal adviser can provide more information on ways to pursue this matter.

Here’s the same automated response, with minor variations on a constant theme. This particular complaint involved one of the Big Four banks regarding loans of a small business

and included the bizarre claim from the complainant that the bank ‘has used a fictitious person to execute documents used in court proceedings’. The ‘surname’ used derives from Norse mythology, so someone on the bank’s team has a truly wicked sense of humour. ASIC claims that ‘it is likely that a natural person by the name [] exists’. Rather, it is highly *unlikely*. Does this person exist or not? ASIC won’t open that huge can of worms.

ASIC staff thus feel empowered to treat a complainant with utter derision, debasing their own integrity with vulgar catchphrases in the process.

* * *

After the CBA acquired Bankwest in 2008, the bank, on available evidence, fraudulently defaulted somewhere in the vicinity of 1000 Bankwest commercial borrowers. Two designated Parliamentary inquiries (the 2012 Post-GFC Banking Inquiry and the 2015 Impairment of Customer Loans Inquiry) whitewashed the affair. The 2018 Hayne Royal Commission, without subpoenaing relevant bank documentation, explicitly and scandalously denying any wrongdoing.

During one hearing of the Impairment of Customer Loans Inquiry, [23 November 2015](#), almost by chance, one has a revelatory exchange that is pertinent to this second ASIC inquiry. I reproduce below a substantial portion of the text of a submission I made (19 October 2018) to the 2018 Treasury inquiry into ‘Reforms to strengthen penalties for corporate and financial sector misconduct’ (Treasury inquiries generally do not publish submissions on the relevant site).

Witnesses on the occasion were three senior ASIC executives – Adrian Brown, Warren Day and Michael Sadaat.

Here is Saadat:

“Generally speaking, ASIC does not intervene in individual disputes in financial services and corporate regulation and is not funded to undertake such a role. The exception is where such action would serve a broader public interest.”

Followed by Day:

“... we have not seen a case where we would say we get involved and will explore or better something or widen the class or the definition of 'unconscionable conduct'. We just have not seen that type of case in what has been brought to us. So, in effect ... any case we would take on we would effectively be becoming a form of pro bono lawyer for the individual borrower concerned. We would be using taxpayers' funds where we are trying to get a wider interest for the Australian public.”

Followed again by Sadaat:

“What we would say is that there is scope to establish precedents that have wider applicability, whereas in these commercial contracts, whilst you might get a decision in favour of a borrower in a particular case with particular facts, it is unlikely that those decisions would automatically provide a remedy for other borrowers because whether or not the conduct is unconscionable for another borrower will really turn on the very specific facts of the case, whereas in the consumer space we see much more scope for that wider applicability.”

These claims are complete rubbish, and they were called out by Committee member Ann Sudmalis.

Saadat again:

“It is important to note that courts generally impose a high bar when a party is seeking to establish unconscionable conduct in a commercial loan. The courts put significant weight on the enforceability of contractual promises as being central to the conduct of commerce. In making a finding of unconscionability, the courts have generally concluded that some serious moral fault or lack of ethics must be proved. This requires a consideration of legal, commercial and social norms.”

Quite. It is noteworthy that ASIC correspondence with aggrieved victims never admits to this claimed reason for its inaction. Here, senior ASIC personnel admit to being not up to the job. No doubt, ASIC relies upon this revelation receiving zero publicity (it judged correctly).

It is *precisely* ASIC’s role to champion individual disputes in the courts because the victims lack the resources to do so. Whatever the outcome, lessons are learned for the more honed pursuit of future litigation.

At the hearing the ASIC trio claim that they have consistently argued for governments to deal with the impasse. Yet in the cited ASIC submissions to various inquiries I can find no evidence for this claim. There is ASIC support for the extension of ‘unfair contract terms’ to SME contracts – a move initiated by others. This development is important but ultimately not central to the criminal character of bank default mechanisms and judicial complicity. ASIC personnel have shown no interest in surmounting the barriers they claim to have inhibited their action in the courts.

The moral of the above? There is no point talking about improving a penalty regime if ASIC personnel decline to enforce the regulatory regime for which they have legislative responsibility and obligations.

Later, Day claims, in responding to a comment by Committee member John Williams [EJ: whose family had been sold a self-destructive foreign currency loan and so he was intimately familiar with CBA practices] regarding a particular Bankwest victim of the CBA takedown after its December 2008 purchase:

“I think there are always two sides to a discussion about that. The lender may have a very different take on some of those statements for their own perspective because they may say, ‘I hear that but we had this risk to deal with. We had this risk to deal with.’ As I said before, they might say, ‘We weren’t prepared to throw good money after bad and so we didn’t want to take that risk. We’re risk averse businesses because we’re banks.’ I am just hypothesising in that respect. They might say, ‘We’re not prepared to do that. We just need to get out’, and to a certain extent ...”

Day and his support staff have evidently failed to pursue even a cursory examination of the evidence supplied by foreclosed Bankwest victims, not least in this reasonably well publicised case. Why not? Day here implicitly admits to complicity with CBA criminality.

(During the initial hearing of the earlier Senate Post-GFC Banking Inquiry, [8 August 2012](#), Saadat (as well as Treasury officials) made a comparable reference, if passing, to the toughness of the courts regarding unconscionable conduct without acknowledging that such toughness cemented ASIC’s own inaction.)

Bank victim complainants knew from ASIC replies to them that ASIC staff lied. Now here are ASIC staff publicly acknowledging that they lied. They have the obligation but don’t have the wherewithal to engage in litigation on victims’ behalf. Day then goes into bat for the CBA, without knowing any details. ‘I am just hypothesising in that respect’, he says. Exactly. Day didn’t know and didn’t want to know.

Fortunately for ASIC staff, nobody noticed the admissions by Saadat and Day on 23 November 2015. Except for me. However, my observations and analysis of bank malpractice are of no consequence for anybody in authority. (Saadat has since moved to the bottom-feeding financier Afterpay in late 2019.)

d. the range and use of various regulatory tools and their effectiveness in contributing to good market outcomes;

This term of reference returns to the curious concept of ‘market outcomes’ whose meaning, in spite of its omnipresence in economics discourse, remains opaque. More, this term is so open-ended as to render a concise outline impossible.

Every country needs a financial system that is technically, economically and socially functional. It’s simple really. Australia’s financial system does not satisfy these fundamental norms, in spite of myriad parliamentary and designated inquiries and a Royal Commission. Australia’s financial system is not fit for purpose, with bank and other lenders centring, by default, on fostering a turbo-charged housing sector as commodity with the debt comfortably secured by bricks and mortar assets.

Such a damnation carries with it an implication that the associated regulatory apparatus is damnable. I highlighted this situation in my submission to the 2013 Senate ASIC Inquiry. APRA cares only about financial system stability, condones malpractice, and is secretive in its doings. ASIC, whatever its ‘busy-ness’ elsewhere, cares not a jot about the crucial credit area. What is staggering is that ASIC staff display not even the most rudimentary knowledge of, nor interest in, the credit relationship and its essential asymmetry. AFCA, behind a huge impenetrable bureaucratic machine and associated language is criminally complicit with its major financial organisation funders – this while its CEO, lacking appropriate credentials, appears to spend his time twittering.

The sum of the disparate dysfunctional parts appears to be so useless in key domains (retail investor security, credit above all else) that it gives the impression to be so intended. Look to the power of the financial sector lobbies? Why is the Australian Banking Association fronted by a former senior Labor Party Parliamentarian with no prior banking experience?

A big tick for any regulatory regime is the acknowledgement of and action upon the fundamental asymmetry of the credit relation between lender and borrower where the latter is an unincorporated business and/or a retail consumer. Such asymmetry, post-financial deregulation, provides a natural vehicle for predation by the lender.

Such acknowledgement occurred in the belated passage of the National Consumer Protection Act 2009, but the battle in this domain is ongoing.

As for the more controversial area of unincorporated businesses, such acknowledgment was explicit in the exemplary House Committee Inquiry and (Reid) Report, *Finding a balance: towards fair trading in Australia* (1997). From which followed the enactment of s51AC into the Trade Practices Act, which statute was reproduced in ss12C of the ASIC Act in 2001, operational 2002.

As noted, ASIC staff assume that ss12C doesn't exist, writing *Finding a balance* out of history. This reversion of progress is a fine example of Wojnilower's dictum, as above. Creating a functional regulatory regime is a perennial crusade in the face of private sector operatives pursuing profit and dominance to the detriment of the public interest.

Disarming justice for unincorporated businesses is the secret long term war of lenders to ensure the continuation of a significant area ripe for predation and booty. Appropriating the family residence, taken as 'additional' security for business loans, is money for jam. Subsequently, the family residence (or farm) is perennially sold under value, leaving the foreclosed with an artificial residual debt strategically constructed by the lender. This disarming of justice is a product of powerful vested interests (paralleling in the political sphere the asymmetry embodied in the credit contract itself) and of the hold of a powerful ideology.

The powerful ideology holds that unincorporated businesses, no matter how small, are businesses. They are run by individuals or family/small groups imbued with rationality and in pursuit of their self-interest. They are willingly engaged in the rough and tumble of the 'free market' and thus require no special protection. The ideology is embedded in contract law in which the English language judiciary is indoctrinated (c/f the brutal determination by Gleeson CJ in *ACCC v Berbatis Holdings*, [HCA 18](#), 9 April 2003, cited by judges in some bank-related litigation).

The embedded bias in judicial education and culture provided a powerful impetus to the Reid Inquiry/Report, and to pressure for a regulatory and ombudsman apparatus that bypasses dependence on the courts and/or mitigate their long term bias. However, the Australian regulatory and ombudsman apparatus has reproduced the traditional judicial bias, reinforcing the asymmetry of the credit relation within the entire superstructure that overlays it.

No regulatory structure worth its salt should continue to blissfully tolerate this entrenchment of the asymmetry of power of the lender in the credit relation.

In the meantime, one contribution to reform would be to return the oversight of business-to-business unconscionable conduct in financial services to the ACCC, given that ASIC is blind to its obligations in that regard. Long time TPC/ACCC Chairman Allan Fels has argued for this move.

Another contribution to reform would be the establishment of a specialist competent financial fraud investigative arm within the AFP (the gargantuan scale of AFP offices on Kings Ave / Macquarie St, Canberra, would seem to indicate that the organisation has room to move). At present, absurdly, victims of financial fraud have to report and argue their case at the local Cop Shop.

e. the offences from which penalties can be considered and the nature of liability in these offences;

The language of this term of reference is incomprehensible.

Suffice it to point out that the range and level of penalties on the books, or the size itself of the door-stopping Corporations Act, is irrelevant unless they are accompanied by

enforcement and application. In 2018, the federal Treasury was instructed to investigate via an inquiry ‘Reforms to strengthen penalties for corporate and financial sector misconduct’. As noted, I made a submission to that inquiry making the point immediately above. It does appear that this penalties reform has made little difference. There were, of course, the two spectacular fines made against Westpac and CBA for account security neglect that facilitated money laundering, but AUSTRAC was the force behind these events. These cases are as rare as they are notable. Prosecution matters.

When the CBA’s ‘wealth management’ scam under the Commonwealth Financial Planning Ltd mantle was exposed (a key motivation for the 2013 ASIC inquiry), complemented by insider whistle-blower (Jeffrey Morris) chapter and verse, a handful of financial advisers were deprived of their licenses and that was it. The senior executives, for which there was a clear line of authority over the scam, remained untouched. This has been the model by which any penalties on the books are rendered irrelevant. How many Australian financial sector operatives have received gaol terms for a multitude of crimes? A couple of people for insider trading – a minor demeanour in my opinion (as only the intrinsically corrupt stock market is impacted) – and that’s it. White Collar crime is a crime without punishment.

Attributing guilt to and within the beast that is the joint stock corporation is admittedly a complex problem. One can count the number of Australian legal academics concerned with this fundamental problem on the fingers of one hand. American legal scholars are busier. Recent works are representative – Samuel W Buell, *Capital offenses: business crime and punishment in America's corporate age* (2016) and John C Coffee, *Corporate Crime and Punishment: the Crisis of Underenforcement* (2020). The issue of making the unaccountable corporation accountable can’t be deferred indefinitely.

In March 2021, ASIC Deputy Chair Karen Chester publicly announced that ASIC was renouncing its ‘light-touch principles-based’ stance and replacing it with ‘express investigation’. This was formally a desirable move as the complaisance accompanying the so-called ‘principles-based’ approach was redolent of the worst of the US SEC’s acquiescence to corporate power. However, Chester claimed that the new approach will involve a ‘lighter but more impactful regulatory footprint’ – which sounds like a contradiction in terms. ASIC’s ‘express investigation’ could gain some credibility by revisiting all those small business/farmer victim complainants who had been previously told to ‘go away’.

f. the resourcing allocated to ensure investigations and enforcement action progresses in a timely manner;

Adequate funding matters but ensuring ‘investigations and enforcement action ... in a timely [and effective] manner’ depends more on organisational culture. A devastating critique of ASIC’s culture by Anne Lampe, seasoned outsider (as long time financial journalist) and sometime insider (as ASIC employee), in her submission (#106) to the 2013 Senate ASIC inquiry, sums it up. Lampe refers to ASIC’s scandalous neglect of uninformed retail investor victims of multiple scams, but her claims are equally relevant to ASIC’s scandalous treatment of small business/family farmer victim complainants. Lampe’s submission was given considerable attention in the 2014 Senate Inquiry Report, but ultimately to no effect.

g. opportunities to reduce duplicative regulation;

In short, none. There is no duplicative regulation.

h. any other related matters.

i. ASIC's remit – a huge canvas inherited from Campbell

In my 2013 ASIC inquiry I made the following point:

The NCSC and ASC were constructed narrowly on the principle of enhancing information transparency, aimed at the investor segment then assumed sophisticated. But ASIC has been handed responsibility for oversight of the populous unsophisticated investor and for small business credit (the latter responsibility perennially denied), requiring different skills and a different culture. (p.4)

Throw in the oversight of retail mortgage and personal debt consumers as well. ASIC has failed on the narrower agenda inherited from the ASC, and it has failed dismally on the grand remit accorded it by successive governments (and the Wallis Report) since 1998. Ironically and tellingly, its vastly expanded remit has not even been acknowledged in its new title.

ASIC has never catered to its legislated obligations since day one of its creation out of the ASC. Apart from the entrenchment of an ill-equipped, indeed hostile, culture, the scale of demands on ASIC is enormous. This Senate Inquiry was inspired by the publicising by consultant economist John Adams of the very small percentage of complaints received by ASIC that ASIC responds to. Striking, however, is the very large number of complaints received. What's going on here? Could any single organisation, no matter how principled and capable, cope with such a flood?

Relevant is an astute article by long time Fairfax journalist Malcolm Maiden, '[ASIC has far too much on its plate](#)', *Sydney Morning Herald*, 19 June 2013. After referring to ASIC's lamentable failure to deal with the CBA's CFPL scam, Maiden reflects:

There are several contributing factors. First, while ASIC is an earnest and well-intentioned organisation [EJ: far too kind], it has also become a regulatory dumping ground. It began life simply, as the overseer of corporate and securities law. Now, it is also overseeing areas including insurance, superannuation, credit markets, margin lending and business names, and is directly supervising the sharemarkets, having inherited that role from a conflicted ASX.

Quite. The implication is that ASIC's manifest failure is symptomatic of a larger systemic failure. Simply, the Australian financial sector at large, as judged by its users, is a failure. There is a comprehensive myopia regarding this fact, not least amongst the specialist intellectuals who were handmaidens to the sector's evolution post-deregulation.

A jaundiced revisiting of the Campbell Australian Financial System Inquiry and Report is in order. That inquiry was a monumental endeavour, as reflected in its 800-page Final Report, accompanied by a 570-page Interim Report containing background material. The Reports were complemented by a considerable number of commissioned studies (Final Report p.824),

albeit the alert reader will notice a preponderance of a cabal of libertarian economists amongst the commissioned throng. The bias in this massive enterprise is hidden in plain sight in the very first paragraph of the Final Report:

1.1 The Committee starts from the view that the most efficient way to organise economic activity is through a competitive market system which is subject to a minimum of regulation and government intervention.

This statement, of course, is preposterous. Banking competition *in practice* led, immediately and then continuously, to some shockers contrary to the public interest. Straight off there was the foreign currency loan scam, then through the entire 1980s an orgy of witless lending to spivs. The latter extravaganza was well documented, for example, by the legendary financial journalist Trevor Sykes in *The Bold Riders* (1994/1996) and the cost to the banks in bad debts in ‘How the Banks lost \$28 bn’, *Australian Business Magazine*, October 1993.

In the meantime, anti-competitive mergers and takeovers were unleashed at a furious pace – condoned by the Trade Practices Commission after s.50 of the Trade Practices Act was gutted by the Swanson amendments (the young John Howard was the presiding Minister), and later, by the TPC/ACCC (under Fels, surprisingly, and Samuel, unsurprisingly) after s.50 had been strengthened.

Malpractice against borrowers (and later investors and self-insurers as the banks moved into ‘wealth management’) was institutionalised in a tacit cartel agreement that meant that no particular bank felt the necessity to reconfigure an ethically-based professionalism. This consensus was overseen by the ABA and given cover by a meaningless Code of Banking Practice. In July 2010 I sent then NAB CEO Cameron Clyne a letter offering advice on such a breakout:

In my view there is a good argument for a strategic reorientation of reconciliation towards these people [EJ: NAB-foreclosed small business/farmer borrowers]. Compensation is in order. What is several hundred million dollars (perhaps even a billion) if the bank were to clean the slate and build a new reputation on competence and rectitude? The bank would be home clear indefinitely for dominance in the SME/family farmer market. Whatever the immediate cost, there are ready savings and significant long term profits to be had. he savings? ... the bank spends a motza on public relations; it has pursued a public omnipresence and it has succeeded. But is the product saleable? A reputation built on substance rather than chutzpah would reduce the annual public relations budget dramatically. ... Build the SME book on competence and integrity, and the mammoth time and expensive legal resources devoted to fighting off and destroying the victims could also be dramatically reduced.

Clyne’s NAB was then embroiled in the serious misdeeds of its British subsidiary Clydesdale and Yorkshire. Clyne ignored my advice, let fester the Clydesdale debacle and resigned in 2014 for greener pastures, leaving the NAB to continue with business as usual.

The considerable expenditure and human resources involved in foreclosing victims and fighting victim resistance (with extensive ‘Customer Relations’ staff in tow), and in associated massive expenditure in advertising and public relations highlights that more than profit is involved. There is also power and dominance for its own sake, on occasions evidently amounting to sadism at work. If a loan manager (a perennial practice) fudges or forges a loan application, creating what becomes a predatory loan and one destined to fail, the manager’s bank hierarchy and its contemptible amoral legal entourage will act to thoroughly

destroy the loan victim. Why? Because they can. The regulatory authorities remain oblivious to the widespread racket.

The banking cartel is currently engaged in a sweeping de-branching of the entire banking physical infrastructure, closing down branches that survived the previous closure sweeps. If the Commonwealth Bank had not been privatised, its masters could have readily dictated selective branch retention, not least in the beleaguered regions. But no. The Campbell Report (Chs. 26ff.) dictated that publicly-owned banks should be a thing of the past once oppressive regulations were overturned and ‘competition’ was allowed to operate unhindered. David Murray, installed as CBA CEO during the CBA’s privatisation process, spearheaded the 1990s branch closures. The current push to create a publicly-owned bank installed in Post Offices (the NZ Kiwibank shows it can be done), which could partially offset the adverse effects of branch closures, is being condemned by the banking cartel (with federal Treasury complicity) as running counter to ‘competitive neutrality’ ([*Regional Banking Taskforce, Final Report*](#), September 2022). The chutzpah is beyond belief.

Such is the fiendish stranglehold of the Campbell Report’s sacred scriptures in the face of a damnable deregulation era record that dramatically contradicts the Report’s axioms and prescriptions. The Hayne Royal Commission barely scratched the surface of Campbell’s dysfunctional legacy.

ASIC’s heavy caseload that it is incapable of managing is the fallout of the entire dysfunctional infrastructure and culture let loose by the Campbell Report. Can some official intelligence be directed towards the inhibition of misconduct and criminality at their source?

ii. ASIC’s failures implicate the entire political and regulatory system

ASIC’s negligence and complicity in finance sector malpractice is also complemented and facilitated by a comparable negligence and tacit complicity of the political class and the relevant bureaucracy. Once again, I made this point almost a decade ago in my 2013 ASIC Inquiry submission:

The regulators, with rare exceptions, have been missing in action. ASIC’s manifest failure is thus merely representative of a larger failure – pervasive in the financial regulatory system and ultimately in the political sphere itself. (p.2)

In general, ASIC is unaccountable. But of additional significance is that ASIC’s unaccountability is excused, de facto condoned, reinforced by all those in relevant authority – the entire financial regulatory and bureaucratic apparatus and the cabals that direct the three major political Parties which govern interchangeably. (p.7)

Liberal Party indifference to small business victimisation is peculiar. National Party indifference to family farmer victimisation is equally peculiar.

The Labor Party’s apparent indifference seems inexplicable. Under Bill Shorten as Opposition Leader, Labor promised assertive action against financial sector misdeeds as part of its 2019 electoral promises. Clare O’Neil, as Shadow Financial Services Minister, oversaw an admirable and enlightening cross country survey of disgruntled victims. The 19 page (undated) *Australian Labor Submission to Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry: on behalf of victims of bank*

misconduct became a submission to the Hayne Royal Commission (it has subsequently disappeared from the web). Following Labor's loss at the 2019 election, O'Neil was moved from that portfolio and Labor dropped financial sector misconduct from its frontline concerns. O'Neil was replaced by Stephen Jones.

Jones appears to have lost little sleep over the devastation wrought by the Trio Capital fraud on residents in his Wollongong region (blaming the main financial advisor and the Coalition government for impeding financial advisor controls), or with ASIC's eschewing any interest in the crime. Those victims who had been (without their comprehension) placed in self-managed funds were written off because *caveat emptor* supposedly reigned in that domain. In Jones' invited response to Trio victims' spokesperson John Telford's submission (#396) to the 2013 ASIC Inquiry (in which Jones is mentioned unfavourably), he misrepresents the events at a meeting, wrongly vilifying Trio Capital victims for the collapsed meeting. Jones was at the forefront of Labor's pullback from a recent Greens' initiated bill to constrain financial sector excess, especially involving a plan to directly fine executives implicated in misconduct ('[Plans for banker fines ...](#)', *Sydney Morning Herald*, 26 November 2022). Jones' performance as financial services Minister has been so odd as to receive withering criticism from the pundits ('[Stephen Jones is out of his depth](#)', *AFR*, 27 November 2022). Remarkably, when the Senate was urged to vote for this current inquiry by the Senate Economics References Committee into ASIC, Labor voted against and tried to establish a competing ersatz House Committee (with a Labor MP as Chair) inquiry running simultaneously. It's not a good look.

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The federal Treasury is the ultimate repository of financial sector oversight. Treasury culture and opinion is not uninfluential in the orientation of successive governments. It appears that Treasury itself resides within the spiritual orbit of Campbell.

At the opening hearing of the Senate Economics References Committee Post-GFC Banking Inquiry, [8 August 2012](#), senior Treasury official Jim Murphy was questioned at considerable length (with Ian Beckett in support). This long interview provides a rare exposure to official Treasury opinion. Murphy engaged in an endless circumlocutious response to questions. He declined to answer a significant question probing the then Government's and authorities' support of the CBA takeover of Bankwest (the fallout from which led to the establishment of the Inquiry). Murphy acknowledges that ASIC has responsibility for unconscionable conduct (contradicting ASIC's public stance) but claims that ASIC's capacity for action in this regard is restricted by the narrow determinations of the courts. Murphy claimed that protections in the ASIC Act 'are narrow, because you are cutting across what are basically commercial contracts between people'. Murphy, like most of those on the bench by virtue of their dogged attachment to the axioms of contract law, chooses not to educate himself on the essential character of corporate-small business relations. Murphy then expresses sympathy for the CBA's approach to loan 'risk management' (foreclosing commercial borrowers *en masse*) following its acquisition of Bankwest's loan book. And so on. In short, Treasury sees no possibility nor need for action on any front. *Que sera, sera*. The Senators didn't confront that they were being conned.

As noted above, in October 2018 I made a submission to Treasury's development of 'Reforms to strengthen penalties for corporate and financial sector misconduct'. I outlined

immediately: ‘The strength of a penalty regime is only meaningful if legislation and regulations are enforced.’ I included in the submission, as also noted above, the fact that ASIC personnel had knowingly lied to victim complainants regarding their obligation and capacity to investigate and potentially prosecute complainants’ accusations of lender misconduct. This damning exposé, which I would have expected to ring bells at the highest level of Treasury, was ignored.

In August 2021, Treasury published its obligatory investigation into AFCA – [*Review of the Australian Financial Complaints Authority*](#). The 43,000 word 124 page Report is an embarrassment and a disgrace. I have criticised it elsewhere. I made a 6,000 word submission in March 2021 to this Treasury AFCA Review but the substance of my submission was ignored. Complainants’ Parliamentary representatives advise the complainants to go to AFCA with their complaints. Complainants, to their dismay, confront a bureaucratic brick wall in seeming complicity with the organisation’s financial sector funders. Treasury thus explicitly condones the ongoing charade that hides and protects financial sector misconduct and criminality.

These vignettes point to a wilful refusal of Treasury staff to engage with its formal responsibility for broad financial sector oversight. This refusal is not surprising, given that Treasury culture is heavily influenced and reinforced by the hiring of recruits with dominant formal training in tertiary economics. The latter is centred on a syllabus that systematically excludes the recognition and analysis of economic power in commercial dealings.

In general, ASIC’s failings are transparent. It is imperative that these failings be addressed directly. However, that ASIC’s failings exist, and that they have been allowed to persist for so long, points to a more fundamental dilemma.

The entire political, bureaucratic and regulatory system (as well as the courts) is implicated in the long term failure to bring justice to the victims of misconduct, some simply criminal, by operatives within the Australian financial sector for which senior management and Board members across the sector bear ultimate responsibility.. The status quo is preferred by those in power, covered by hypocritical rhetoric.

Is there someone or a grouping courageous out there who will revisit the false promises of the Campbell Report, not least the fairy tale claims of what constitutes competition in banking? Campbell is ancient history, but its nostrums remain embedded in the collective psyche of financial sector regulatory authorities and of the self-reproducing political class.

Is this latest Parliamentary Inquiry merely another instance of ritual absolution after which all the players carry on as usual? Can we hope that this Inquiry will break the mould?