

INQUIRY INTO PENALTIES FOR WHITE COLLAR CRIME

Senate Standing Committees on Economics
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Dear Senate Committee,

Unfortunately many people, particularly the victims of WCC, have grown weary of such inquiries. What the people of this country now deserve is a Royal Commission, whereby such penalties for white collar crime can be comprehensively assessed and considered. In 2004 a similar inquiry was carried out by the Victorian Government where recommendations included amongst other things an improved understanding of WCC. We are now approaching 12 years since that inquiry and WCC remains the elusive white elephant in the room.

As my work is mainly confined to the handling of banking disputes this submission focuses on how WCC manifests itself in the practices regularly normalised by the banking industry, regulators and judicial system.

What We Know About White Collar Crime In the Financial Services Industry

From my associated work as paid consultant and unpaid advocate I have noted not only tolerance by the regulatory bodies (ASIC), but also the EDR schemes set up to protect consumers (Financial Ombudsman Service / Credit and Investments Ombudsman) when dealing with white collar crime (WCC) in the banking industry. Working within this environment and representing my clients (many of whom are vulnerable) I have witnessed first hand the pervasive and discriminatory processes at work that not only discourage penalising the perpetrator of WCC but actively penalises the victim of WCC.

However one of my main criticisms concerning WCC is the Government's failure to accurately define the breadth of WCC occurring within the banking industry in relation to how it manifests in the community. By failing in this regard the Government is not able to determine with any accuracy the prevalence of WCC or efficacy of legislative or regulatory frameworks (including the self-regulated EDR schemes) in dealing with it.

At best current penalties for the perpetrator(s) appear arbitrary, inconsistent and wholly inadequate. At worse, WCC has become normalised where only the consumer (victim) is penalised through the loss of assets, livelihood and quality of life.

Many of my clients are vulnerable people, victims of domestic violence and or suffer from a range of debilitating disorders (mental and physical). All are victims of predatory lending and have lost life savings, properties, their family home, relationships and lastly their dignity. In these cases trust leads to abuse and for many abuse is already a part of life. Their desire or capacity to fight back is already severely undermined by their economical, social or mental status. In terms of victimology, the vulnerable make for very green pastures in which to be targeted for WCC.

But what is WCC? How does it exist and present itself in the community? In my experience WCC is a manifestation of poor governance (the powers above / management), systemic failure (often deliberately programmed), opportunistic abuse (weak systems facilitating opportunistic or accidental abuse), random or targeted fraud (rogue banker / broker), organised crime (part of a complex system of transferring wealth and assets from one party to another) and legalised theft (via quasi legal recovery systems such as liquidators / receivers and managers).

Very little effort has been made to understand the devastating effects of what I label legalised theft through quasi legal recovery systems. In such cases the contractual rights of the bank far outweigh any duties that could be imposed had the contract been subject to judicial review. When banks do commence legal action consumers who would qualify as victims of WCC, had they had proper legal counsel, are further victimised by a legal system that is unforgiving and programmed to fail them.

How has Consumer Credit Legislation Impacted on WCC?

Improved provisions to protect consumers through harmonisation of State based legislation under the National Credit Code was viewed by many in the industry as a major win for consumers. Increased access and broader terms of references for EDR schemes, such as the Financial Ombudsman Service and The Credit and Investment Ombudsman, were proudly touted as a win win situation.

The truth of the matter is that complaints have soared and the EDR schemes are losing grip on its function lacking qualified staff, resources and incentives to challenge WCC. Without any clear definition or understanding what constitutes WCC this is hardly surprising.

The failure of the EDR schemes to stem WCC is not without influence of the banking industry itself. My experience shows inexplicable recommendations and determinations, lack of transparency, brazen bias and a complete failure to uphold the principles of the

consumer protection laws. Such activity cannot be ignored. Consumers are not able to access the court system for obvious barriers and there is no assistance for consumers in this regard. WCC thus continues to thrive under the watchful eye of the EDR schemes while the Government receives reports on its relative success.

Specific actions within the EDR schemes noted by the writer include the following;

1. Pressuring vulnerable customers to agree to resolutions while failing to investigate serious claims of misconduct.
2. Banks utilising the EDR schemes to fast-track enforcement action by including acts of enforcement (vacant possession of homes) in agreements. Such agreements often include unworkable repayment schedules ignorant of a consumers (Applicants) financial position.
3. Refusing access to the EDR scheme based on defunct agreements entered into under duress and without disclosure of the consumers right to access EDR schemes to complain of WCC.
4. Regularly determining WCC as maladministration that benefits the customer citing the customer as a co-contributor of such conduct. Effectively under the current interpretations of their terms of reference EDR schemes actively penalise customers for WCC conducted by banks. On the contrary banks benefit from this interpretation as penalty's are minimised, no convictions are recorded and decisions are not reviewable.
5. Systems that cause unacceptable delays prejudicing the customers right to pursue legal action due to expiry of time limits under the Statute of Limitations Act.
6. Persuading customers to disengage 3rd party representatives without cause.
7. Allowing banks to regularly withhold information and accepting incorrect information to base decisions upon.
8. Refusing access to personal information files accessible to customers under the Privacy Act.

The above is a small example of the issues affecting users of EDR schemes under the self-regulated arrangement. In order to understand WCC in the banking industry, how it manifests in the community and affects customers I support an urgent independent review of the effectiveness and impact of the EDR schemes.

Banking Industry Reaction to Improved Consumer Protection Laws

A natural assumption is that improved consumer protection laws would rein in WCC occurring in the banking industry. On the contrary WCC has become more insidious, covert and where visible, even normalised. Legislation designed to protect consumers is counteracted by release of new banking products that circumnavigate or fall out of reach of such legislation. Designing new products is rarely considered a form of WCC yet they serve a purpose to reduce the effectiveness of protective legislation. A perfect example is the proliferation of low document and unregulated loans.

The Role of the Media

Traditionally media focused on the rogue banker or broker as the main instigator of WCC. The rogue banker or broker is often portrayed as the one who forges signatures, coerces the vulnerable to take out unaffordable loans or worse, receives the benefit of the loans and or assets. The banking industry is agreeable with this image as it removes from view its own role in fettering the ground for such conduct and rewarding it through KPI's, fee sharing and excessive commission structures. If the banking industry were truly vested in tackling WCC it would be actively involved in decommissioning such behaviour rather than reinforcing it.

Today the media plays a much more active role in investigating and publicising WCC in the banking industry with key journalists, such as Adele Ferguson, leading the way. Such publicity is vital as it counteracts, but does not replace, the lack of affirmative action occurring in our courts and EDR schemes to discourage and penalise WCC.

The Role of Advocates and Consultants

There is a growing number of advocate groups and consultants who advertise specialisation in dealing with banking disputes which may be the result of WCC or other conduct. The lack of cohesive action by the Government in this regard has given rise to other action within the community including information sharing forums, dispute assistance (free and paid services), alternative strategies to deal with WCC that balance power inequities and so on. In this regard the combined action of both media and the various advocate groups has offered some tangible protection for consumers against WCC. However most in the industry accept that true change can only occur with intervention and action via increased penalties and convictions for those engaging in WCC.

The Role of the Courts

Ideally the courts would play a pivotal role in stemming the flow of WCC however is not equipped to do so. Put simply there is a lack of legislation designed to specifically deal with this type of crime. Banks routinely remain at arms length of the law while engaging in conduct that could be defined as WCC creating an impossible task for the judicial system. As a result banks routinely engaging in WCC continue these practices simply because experience shows that the benefit of the risk outweighs the potential cost of the conduct.

Academics have shown that cultural shift is a complex process requiring effort on many fronts. The role of the courts is no exception in this regard. To facilitate improved contribution from the court system the Government must understand how WCC is played out in this setting. It must seek to understand how banks are able to profit further from the inequities existing in the judicial system, via enforcement practices and transfer of duties to third party agents who are often agents of the consumer. The assignment of agency, a key component of credit contracts, further removes instigator and facilitator of WCC by assigning responsibility for such WCC to consumers themselves. As such a sensible action would be for legislators to urgently review provisions banks include in consumer credit contracts covering both regulated and unregulated credit.

As stated, WCC is poorly characterised and defined. The current legislative and regulatory framework focuses on better protecting the consumer rather than discouraging or stemming the flow of WCC. There appears little restitution for victims of WCC nor penalties for perpetrators. To put it into perspective, the current legislation played out within the current WCC landscape is akin to arming oneself with a butter knife in a battle field of swords.

How best to deal with WCC must begin with an intimate understanding of how such crime manifests. This would require cooperation by banks that has to date been unsatisfactory. Urgent review of current legislative frameworks is essential. Provisions within the Australian Consumer Law, Corporations Act, ASIC Act, Banking Act, National Credit Code and associated legislation must be tested to demonstrate effectiveness or otherwise weakness in discouraging WCC. Where policies and guidelines are relied upon to pick up the slack of outdated legislative frameworks transparent processes must demonstrate a willingness and capacity to deliver penalties to further discourage WCC.

WCC must be de-normalised through affirmative action that is adaptable, cost effective and sustainable. Should judicial intervention been deemed prohibitive then a specialised tribunal should be created to handle WCC holding the necessary powers to compensate and prosecute.

2007 House of Representatives Inquiry into Home Loan Lending Practices Recommendations - Where to Now?

Inquiries into practices within the financial sector is not new. In fact such 'Inquiries' are becoming well oiled machines. To plan, develop and implement appropriate action to combat WCC in this country the Government must cease its dependence on the industry to self-regulate in this regard. To combat WCC the Government must work towards legislative reform and effective statutory regulation funded by the industry and removed from its influences.

On a cursory level there is much for the industry to gain if it were to significantly reduce WCC however the reality is that WCC is embedded not only by way of convenient oversights but in a culture of conduct and practices that are routinely rewarded under stringent KPI systems imposed on the workforce itself. Such conduct and practices are far more difficult to overcome due to its covert nature.

To determine the 'Where to Now' the Government must look over responses to past inquiries that provided improvements in regards to consumer rights and protections but fell short of discouraging WCC in the banking industry. In past inquiries WCC has maintained its position as the giant white elephant in the room that no-one quite knows what to do with. These inquiries, such as the 2007 Inquiry into Home Lending Practices, focused on improving access to EDR schemes and broadening consumer credit legislation.

Inquiry outcomes and those following provided short-lived benefits for consumers. The EDR schemes have buckled under the strain of increased responsibility and the relationship between the EDR schemes and banks is one marred by claims of bias, unqualified adjudicators, internal systemic failures, case management timeframes running into years (causing further hardship), inadequate compensatory models and lack of transparency.

In conclusion the 2007 inquiry made three core recommendations. These were as follows;

1. The ABS expand data collection on repossessions of homes, requiring more detailed information from lenders and the courts.
2. The federal government take over responsibility and expand the regulation of credit to all lenders and mortgage brokers in order to simplify and unify legislation and supervision.
3. Mortgagors be given comprehensive access to external dispute resolution (EDR) to address complaints, easing current eligibility limits and specifying the lifting of the Banking and Financial Services Ombudsman's limit of \$280 000 to \$500 000.

Of these core recommendations the only tangible benefit for consumers has resulted from the second recommendation, the expansion and modernisation of the consumer credit legislation. In relation to the first recommendation there are significant gaps in this information and what information is available is so standardised it is of little practical assistance. Raw data is required and it must be independently assessed. In relation to the third recommendation, as stated previously the EDR schemes are wholly inadequate and have proven themselves to be an inappropriate forum for dealing with cases involving WCC.

Another key failure of these past inquiries has been the omission of dealing with unregulated credit. By setting more stringent guidelines around regulated credit only demonstrated the financial industries willingness to circumnavigate consequences by creating new smart products under the 'unregulated' credit banner. As a result we have seen a plethora of regulated loans converted to unregulated loans since implementation of the National Credit Code.

The effect of WCC on unregulated credit consumers is largely unknown. Access to EDR schemes is often limited by larger loan limits, complex loan structures and advanced delinquency. Many unregulated credit consumer groups, particularly rural consumers, have suffered immense losses as a result of conduct fitting of WCC.

In relation to unregulated credit, Basell III provided grounds to facilitate WCC on a broad scale. As the new capital requirements were announced to protect banks from future global financial meltdowns, banks reacted by taking to their loan books to unload high risk and under-securitised debt resulting from WCC conduct. In many cases classification of high risk debt preceded a coordinated devaluing of assets, such as farmland in the grip of major drought. This has been well publicised yet many farmers remain victims of such unethical conduct. Farmland and businesses overtaken by liquidators, receivers and managers are thrust into a very dubious world of WCC that remains largely unexplored.

Very little discussion remains around fee sharing structures on foot between banks, law firms and recovery agents involved in the realisation of assets. That banks do not question legal fees, nor excessive asset management fees should raise more than a few eyebrows. That WCC is occurring under the guise of legal enforcement must be further explored. There are thousands of cases to be examined in which to draw conclusions on this front, providing for thousands of victims that have succumbed to suicide, marriage breakdowns, homelessness and destroyed lives. All that remains is the desire of Government to end this.

Conclusion

I note the low number of submissions put forward to the committee to date. This is not for the sheer lack of negative impact in the community but a consequence of inquiry 'fatigue'. The many victims who have spoken out and contributed to previous inquiries have become disappointed by the Governments continual refusal to launch a Royal Commission into banking industry practices. Most continue to experience the effects of WCC and thus it is expected their voice may become more shallow the longer 'nothing' is done to combat the issue. Such loss of will leads to an acceptance of WCC and the cycle of normalisation continues.

Even though your submissions are few I ask that you do not discount the enormous negative impact WCC is having on our communities. In fact the full potential risks of WCC



are yet to materialise. With superannuation funds totalling billions soon to reach maturity there will be a plethora of opportunity for perpetrators of WCC in the banking and financial industry to make a grab for a share of this wealth. In fact the signs are already out there in the form of reverse mortgages. Such action may deprive retirees the opportunity to self support and increase reliance on Government welfare.

In conclusion I ask for the following steps to be considered;

1. Independent review of the efficiency of EDR schemes in addressing WCC.
2. Legislative and regulatory review of current systems and how they facilitate or otherwise stem WCC.
3. Improve data collection of enforcement activity.
4. Improve data collection on realisation activities.
5. Improve data collection on effect of WCC on individuals and the community.
6. Review protection for consumers of unregulated credit for specific purposes including agriculture.
7. Improve understanding of the role of profit models, incentive systems and career advancement processes in the facilitation of WCC.
8. Improve understanding how Government processes may facilitate opportunity for WCC.
9. And importantly review of penalties and accountability systems for all participators in WCC including those who instigate, facilitate, cooperate and execute acts of WCC.

Thank you for your time in reading and considering this submission.

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