Financial Services Royal Commission

Further Submission Pursuant to the Interim Report

from

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Introduction

This submission follows the publication of the Interim Report arising from the Financial Services Royal Commission ("FSRC") and responds to the invitation for further submissions in response to the issues that emerged in the report.

Until now it has been almost impossible to gain traction for the many stories of enormous hardship and suffering people have endured at the hands of Australia's four major banks. Regulators, governments and even the judiciary have all treated the banks as beyond reproach and their victims as people unwilling to face the fact that they had behaved badly towards their bank.

It is a common tenet that *'you'll never beat the banks in Court'* and this proved to be the case for us in our seven-year fight against the [redacted] in the Supreme Court of Western Australia.

The Role of the Judiciary

There are many reasons why 'the banks always win' in Court. Not the least of these are the enormous resources the banks apply in their fight against anyone who dares to challenge them in law. By virtue of this factor alone, the odds are stacked heavily in favour of the banks. Very few people can marshal similar resources, especially at a time when their 'backs are to the wall'.

In our case, the [redacted] was even found to have acted unlawfully in its endeavours to liquidate our assets, but this counted for nought. The bank admitted its wrongdoings but dismissed them as irrelevant because we 'still owed them the money'. It was of little interest that the reason we were rendered incapable of repaying them was the [redacted]'s own actions against us.

The presiding Judge declared at the onset that she was a [redacted] shareholder. That is not mentioned to suggest that her actions and decision were biased toward the [redacted] but it was probably the case that her investment decision was at least partially made in the belief that this was a respected institution worthy of her trust and financial support.

Our experience added to the widely held community belief that only a fool would go up against a bank in Court. The cost of seeking justice added significantly to our financial hardship and the additional worry and stress of a seven-year battle undoubtedly contributed to health issues that emerged thereafter.

It must now be clear to the FSRC, the Australian government and the general public that, for whatever reason, the judiciary has also failed to deliver justice to victims of the banks' appalling behaviour. It is simply not the case that a judgment in favour of a bank signifies that the bank has behaved justly in its actions against a client.

The Credibility of Bank Personnel

In her judgment, the presiding judge favoured the evidence and credibility of the [redacted]s many witnesses on the basis that she could see no reason for them to offer tainted evidence; the imputation being that we lacked credibility as we were trying to avoid our obligations.

Despite the constant pleas from [redacted] witnesses that they could not recall events, they were favoured over our evidence which was supported by contemporaneous notes on many occasions.

The FSRC has found that the actions and behaviour of the major banks has been driven largely by greed and self-interest. It is not hard now to see that the evidence presented to the Court in our case was tainted.

The Role of Regulators

Our attempts to seek some form of intervention or assistance from the Australian Prudential Regulatory Authority ("APRA") were fruitless and it is now clear from the FSRC that the regulators (APRA and ASIC) were completely ineffective in ensuring the banks behaved equitably in their dealings with customers. Worse still, the banks treated these regulators (and their own obligations to them) with contempt.

The [redacted]s role in Providing 'Advice'

In 1996 the [redacted] provided us with a financing proposal for $3,000,000 to facilitate the purchase of a business. It encouraged us to utilise a home loan facility for part ($600,000) of the finance package on the basis that this would result in lower interest charges. The loan was not associated with the purchase of the home which was hitherto debt-free. This was another instance of self-interest by the NAB as it took a mortgage over our family home, the value of which far exceeded the attached loan component.

It served to maximise the [redacted]'s security position as the home was eventually sold by the [redacted] for a reported $1,700,000. By that time, the loan balance (all components) had been reduced to $1,900,000 – bearing in mind that this figure included 'unauthorised' transactions discussed below.

By late-1999 there had been various changes in the funding components with [redacted] but the overall balance had been reduced to $1,900,000. No scheduled loan repayments had been missed and no cheques had ever been dishonoured.

[redacted]s Unlawful Behaviour

In the Executive Summary of the FSRC's Preliminary Report, it is stated that '*Much more often than not, the conduct now condemned was contrary to law.*'

An example of [redacted]'s unlawful recovery action against us was the attempted sale of an industrial property ("the Malaga property") owned by our Self Managed Superannuation Fund ("SMSF").

The SMSF was an unrelated entity in the action between us and the bank, but this did not stop the [redacted] from trying to sell the Malaga property and apply the proceeds against our debt. There was no debt associated with the Malaga property, it was not provided to [redacted] as security for other loans and the SMSF was not a guarantor of the debt in question nor a party to the Supreme Court action.

The held the title to the Malaga property purely for 'safekeeping' – nothing could be further from the truth.

Another unlawful action by the was its processing of transactions by one of our employees who was precluded from entering into such transactions – this is discussed below.

The Conflicted Key Witness

Central to our problems with the was the role played by our Office Manager, ( ) himself a former employee of the Whilst in our employ, he engaged in unauthorised banking transactions that had the effect of increasing our indebtedness to the and potentially painting a picture of us as financially incompetent.

When these transactions were discovered his services were terminated. He was then immediately re-employed by and he later became a key witness for the in its case against us. This glaring conflict of interest was never deemed by the Court as potentially tainting his evidence and he argued (on behalf of the) that, contrary to all the written evidence, he had 'implied authority' to enter into the transactions that compounded our debt and motivated the to take recovery action.

The 's Contempt for Written Authority

The had been issued with written instructions in respect of the limited authority of Klaassen. He was not authorised to sign cheques nor was he authorised to execute Foreign Exchange Contracts ("FECs"). Upon initial employment he was issued with a job description that limited his authority in what we believe was a consistent manner.

Despite this, the allowed Klaassen to enter into a large number of FECs, all but one of which were 'underwater' when discovered. They increased our indebtedness to the bank. In the Supreme Court of Western Australia, the argued (as a key plank of its case against us) that had 'implied authority' by virtue of his title of Office Manager.

Curiously, the also argued that was foolhardy to have delegated to the reconciliation of monthly bank statements as this would have alerted him to the fees that had been charged for the FECs. The reconciliation of monthly bank statements was a specific requirement in 's job description.

The Court seemed not to place any significance on the fact that in my role as CEO of several major airlines I had never engaged in monthly reconciliation of bank statements. In every company, that task was assigned to the most senior financial officer of the company.

When the first batch of these FECs (28 in number) were discovered in October 1999, resigned and took up a new job at .

The entered into a Settlement Agreement with us in respect of the 28 FECs (which they advised were <u>all</u> of the FECs) and they accepted a share of the loss arising; despite their later argument that Klaassen had implied authority. Needless to say, the agreement included a 'no blame' clause to cover the bank.

However, it later became obvious that there were a number of other (undisclosed) FECs that neither the nor had told us about. To cover his tracks, had hidden these FEC documents

in the warehouse archives and they were only discovered by accident after the had taken recovery action against us.

It is hard to imagine how this could be categorised as anything other than 'deceptive and misleading conduct, a breach of trust and unconscionable conduct' by the

The Report

When the commenced its recovery action against our company, it engaged to provide it with an independent report on the business and its proposed actions. The report found that we, as owners, had addressed the issues facing the business and advised the against taking any recovery action. We were required to pay for the report.

Unbeknown to us at the time, the advised that the report was unacceptable and that it should prepare another report. This time, the report supported the s proposed recovery action but did not come up with any new findings; nor did interview the business owners a second time. We were required to pay for this unsighted report.

It was evident to us that the second report was 'manufactured' to support the s predetermined course of action to close down the loans to the business and recover as much as possible from the personal assets of the Meekes, including the sale of their home.

No Justice Without Compensation

Whilst the banks may ultimately face criminal prosecutions and the imposition of huge penalties, this will be of little comfort to those of us who lost our businesses, our family home, our savings, our reputation and our good health.

There will be no justice for those who deserve the FSRC's closest attention – the victims of the banks' appalling behaviour -- until they are appropriately compensated.

According to Newton's Third Law, *'for every action there is an equal and opposite reaction.'* The same might be argued for banking transactions. The FSRC identified that the banks' misdeeds were primarily motivated by greed. For all of the extraordinary profits made by the banks there was a corresponding (and negative) impact on their customers.

Our Decision to 'Settle' with

Once the Supreme Court of Western Australia found in favour of the (it was obvious that they would seek to bankrupt us as Guarantors of the debt.

At no time (to this day) were we provided with any details of the recovery made by the liquidator from the sale of the assets of the business, although rumours circulated that 'friendly' deals were done with other customers to purchase assets at massively discounted valuations.

There had been considerable media interest in our fight with the and, once the unfavourable judgment was known, I was contacted by a journalist (Frank Pangallo of Channel 7 in Adelaide) with the suggestion that I contact who was at that time in a senior management role at in Melbourne. He was described to me as 'an unusually ethical banker'.

I made email contact with and suggested that we come to a settlement arrangement that would preclude personal bankruptcy action. It was important that we were both able to earn income so that we might eventually recover from our run-in with the bank.

said he would look at the file and revert to us. When he did, he stated that (in his view) the was not without fault in the matter and he would entertain a settlement offer. The terms were soon agreed and a settlement deed was executed.

The subsequently sold our family home (for a reported $1,700,000) and the proceeds were topped up with a cash payment of $300,000 from our SMSF. This was considered by both parties to be more than the likely recovery from bankruptcy proceedings.

For our part, the decision to settle was made for a number of reasons that were incorporated in the confidential agreement:

1. No bankruptcy action would be taken against us personally;
2. Our credit record would not reflect the judgment against us;
3. The agreed payments were in full and final settlement of all monies due to the

Conclusion

The demanded recovery of its loans at a time that the business was beset by the many pressures arising from the introduction of the GST and, in particular, its profound impact on the building industry upon which our business relied. Those circumstances made it virtually impossible for the loan facilities to be placed elsewhere and for the to be repaid. Whilst we were not in 'default', we had failed to meet some of the associated loan covenants due largely to the one-off impact of the GST introduction.

We believe the timing of the 's recovery action was also influenced by its knowledge of the unauthorised FEC trading and its hope that those transactions would remain undiscovered if they took pre-emptive action.

The central person in our dispute with , and he admitted (para 180 of Judgment) that he did not have specific authority to purchase FECs but considered it was his job to do so. Likewise, the which relied on supporting documentation in respect of all banking matters, had specific written instructions from us that limited 's authority and did <u>not</u> include authority to purchase FECs or sign cheques. Instead, claimed to have relied on 's job title as their authority.

We believe it is fundamental to the avoidance of banking fraud in small businesses that preventive measures are put in place that limit the potential for employees to make unauthorised transactions. For a bank to ignore those written instructions (which we put in place for that very purpose) and hold the business responsible for losses arising from its own negligence in not enforcing those restrictions is a fundamental breach of trust, a breach of duty and evidence of unsound banking practices.

In its Interim Report, the FSRC refers to a potential over-reliance by bank customers on the fact that they did not default on loan repayments. The Report makes clear that loan 'covenants' are also mechanisms by which banks legitimately seek to limit their loan exposure and which must also be met by borrowers.

However, the people who lend the money are not the same people who come to collect it. When the loan is made, an assurance is given that third-party guarantees will not be exercised unless the borrower defaults on the loan.

Sometimes, loan covenants can be breached by virtue of external events (such as the introduction of the GST in our case) whilst the borrower continues to focus on avoiding a loan repayment default.

The FSRC on Volume 1, page 6, states that the Letters Patent defined 'misconduct' as including four kinds of conduct:

- conduct that 'constitutes an offence against a Commonwealth, State or Territory law, as in force at the time of the alleged misconduct';
- conduct that 'is misleading, deceptive or both';
- conduct that 'is a breach of trust, breach of duty or unconscionable conduct'; and
- conduct that 'breaches a professional standard of a recognised and widely accepted benchmark for conduct'.

In its dealings with us, [redacted] engaged in misconduct that qualified under at least three of these measures.

[redacted] admitted it had behaved unlawfully, but it also failed miserably to do 'the right thing' at any time in its dealings with us. It is our firm conviction that the [redacted] wilfully misled and deceived us in respect of the unauthorised banking transactions (to which it was a party) that were a precursor to its liquidation actions.

The FSRC itself encountered a less-than-ideal response from [redacted] to its various requests for information, noting (on page [redacted] of the Interim Report) '*[redacted] repeated expressions of difficulty in making full response to the inquiries I have made*'. We are certainly not surprised.

As the Interim report states (page 267) .... *'there is always a striking asymmetry of power and information between bank and customer that favours the bank.'*

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