Our Ref:

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Date: 07.07.2014

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The Hon Matthew Mason-Cox MP
Minister Fair Trading
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SYDNEY NSW 2000

office@mason-cox.minister.nsw.gov.au

Dear Hon M Mason-Cox

I refer to AFR Monday 16 June 2014 article *'Small business wants banks' power diluted'* (copy attached) that appeared in reference to extending time for submissions on the proposal the Federal Government extend unfair contract laws to credit contracts between banks and small business.

I refer you to the paper I prepared in August 2001 *'Conflict of Interest - Insolvency Practitioners also acting as Investigative Accountants for Banks.'* (copy attached) and tender it as a submission to the Enquiry for consideration.

If you have any questions or follow up please do not hesitate to contact me.

Yours faithfully

Claude Cassegrain

Attached:

- Newspaper Article AFR Monday 16 June 2014 *'Small business wants banks' power diluted'* ;
- Paper on: *'Conflict of Interest - Insolvency Practitioners Also Acting As Investigative Accountants For Banks.'* By Claude Cassegrain in August 2001

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Small business wants banks' power diluted

James Eyers

The federal government has been asked to extend unfair contract laws to credit contracts between banks and small business.

The Commonwealth is considering extending to small business protections which allow individuals to use the Australian Consumer Law to protect them against unfair terms in standard form contracts. Submissions are due with Treasury on August 1 following the release of a consultation paper in May.

On Friday, Small Business Minister Bruce Billson said Australian state and territory consumer affairs ministers supported extending unfair contract term protections to small business.

According to a submission sent to Treasury by an anonymous source – the same individual who provided material to Senator Alan Eggleston for his speech to the Senate in March criticising Commonwealth Bank of Australia's takeover of Bankwest – unfair contract laws should be extended to any financial service or credit contract entered into by a small business with a credit provider as defined by the National Consumer Credit Protection Act.

"Banks have a myriad of non-monetary methods to terminate a customer when needed but they all have one thing in common," the submission says. "They are done unilaterally without the customer having any chance to make any changes to their business finance."

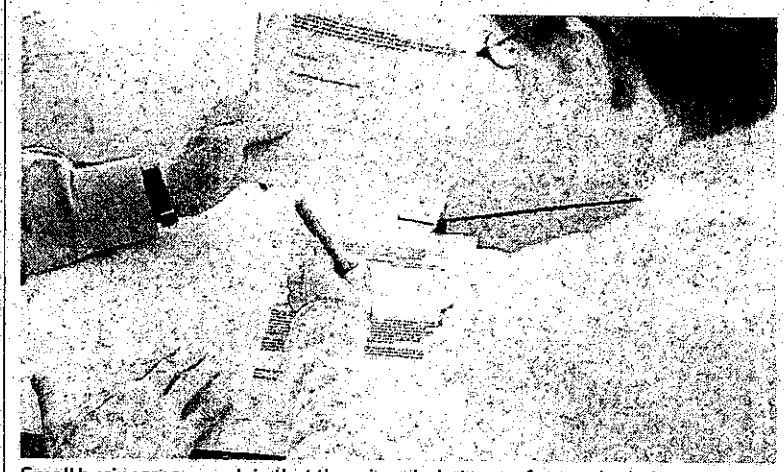
Highlighting various clauses in bank credit contracts triggering non-monetary defaults – including clauses relating to LVR, documentation, EBIT, and anniversary date expiry – the submission says: "The overuse of these contracts by banks has created a significant imbalance of negotiation power between banks and small businesses.

"There is currently very little room for a business to negotiate for financial services for banks. This goes to the imbalance of power between banks and small businesses which is why banks can rely on draconian clauses embedded in credit contracts to call in loans."

It is understood other submissions to the Treasury inquiry, including one from Sydney University professor Evan Jones, also raise the issue of extending unfair contract terms to credit contracts. A 2012 report by the Senate Standing Committee on Economics into the post-GFC banking sector highlighted the discretion provided to banks in their credit contracts.

In his submission to the financial system inquiry, Mr Bilson said he had been told by small business owners that "covenants on loans can be very restrictive, therefore limiting the ability of a small business to grow". He also reported concerns "about the propensity for banks to quickly force small businesses that default on their loans into insolvency, rather than working with the small business to get them back on track".

There is precedent for egregious clauses in credit contracts to be invalidated by courts. The NSW Supreme Court in May last year found that CBA could not rely on a "suspension clause", which attempts to suspend a customer's right to sue the bank until all monies are repaid, to defeat a claim of misleading, unconscionable or deceptive conduct.



Small businesses complain that there is an imbalance of power in their relationships with banks.

PAPER ON:

CONFLICT OF INTEREST – INSOLVENCY PRACTITIONERS ALSO ACTING AS INVESTIGATIVE ACCOUNTANTS FOR BANKS.

Claude Cassegrain
August 2001

The observations and allegations in this paper are not theoretical. The practise is wide spread. I became aware of the practise by practical experience. I am currently suing the Bank and the Receivers and Managers for damages. The matter is pending in the Supreme Court of NSW. Claude Cassegrain – August 2001.

RESULT: UNCONSCIONABLE PRACTISE , MISLEADING and DECEPTIVE PRACTISE , COMPLICIT WITH BANKS MISUSE OF MARKET POWER.

The roles of Investigative Accountant and Receiver carried out by the same group.

I have learnt that receivers are regularly engaged by banks to undertake 'Investigative Accountant's' reports on companies owing money to banks.

Insolvency Practitioners undertaking Investigative Accountant's reports on behalf of banks, not precluded from any subsequent work resulting from their report, are in a position of conflict of interest. They become complicit with banks if bank actions involve non-bona fide conduct and the abuse of their unequal advantage over clients.

Appointment as Insolvency Practitioner involves the potential of lucrative fees. Appointment as Investigative Accountant for the subject company enhances the prospect of appointment as Insolvency Practitioner. There is thus an inbuilt tendency for arrangements that institutionalise a conflict of interest, to the detriment to the subject company.

Insolvency Practitioners acting as Investigative Accountants are promoted by banks and represent themselves to the courts, the client company, the authorities and the public at large as independent accounting business experts. However, their formal professional expertise is in the narrow field of liquidations and receiverships. When employed as Investigative Accountant and when available to a subsequent appointment as an Insolvency Practitioner they have automatically forfeited their independence. The prospect of profiting from a subsequent appointment acting as Insolvency Practitioners to a company can inevitably influence the character of any report submitted under an 'Investigative Accountant' guise.

Company directors relying on the bona fides of banks and the professionalism of Investigative Accountants, especially from high profile accounting firms, are mislead and seduced to co-operate and make available details of their business affairs that otherwise would not be available to banks and prospective receivers.

Investigative Accountants are appointed by Banks to satisfy a Bank's pre-determined objectives. The bank's pre-determined objectives could be diametrically opposite to those of the client and those held by the bank at the time the bank-client relationship commenced. To my knowledge there are no regulations governing the conduct of Insolvency Practitioners when acting as Investigative Accountants. The prospect of profiting from a subsequent appointment acting as Insolvency Practitioners to a company will inevitably influence the character of any report submitted under an 'Investigative Accountant' guise.

The 'victim' client, initially relying on the presumption of good faith, integrity and honesty of both banks and qualified accountant professionals, will only belatedly become cognisant of the need to seek redress under Fair Trade legislation. By this time, the client will have suffered substantial damages, often fatal to the business. Honest company directors rarely experience the phenomenon of banks appointing receivers. The naivety and vulnerability of directors under stress and economic duress may be readily exploited by banks and receivers to cover up unfair conduct. Well-resourced banks and receivers are able to dominate legal proceedings such that it is almost impossible for the 'victim' client to gain redress and recover damages.

II. The Power Imbalance between Banks (and Receivers in their employ) and Clients

Most businesses borrow funds on the expectation of the business being a going concern. Many businesses have assets that are not mature – the estimated value of cash flow and assets are seriously affected by assumptions of the future. Future assumptions can only be partly quantified. There will always be a subjective component on any budget and business plan. Receivers acting as Investigative Accountants, on behalf of banks, view immature assets at less than probable value. They value assets on a disabled basis to satisfy banks' likely withdrawal of services and support.

Banks represent, promote and advertise themselves to the community as stable, long term and ongoing lenders of funds to earn interest. In many instances, for reasons unbeknown to the borrowers, banks change their views towards their customers. It could be to do with changing capital adequacy requirements of the bank, change of policy towards the general industry that the bank categorises the borrower to be in,or to satisfy banks end of year Balance Sheet adjustments for banks profit and tax purposes and other reasons not forewarned to the borrower. In these cases, Insolvency Practitioners will become unwitting, but willing tools of the bank in the execution of this altered strategy.

Bank clients expect the banks to have satisfied themselves on their competence and prospects prior to entering into a relationship.

1) The process of establishing a new borrower's relationship with an Australian mainstream banker by an enterprising company is time consuming and costly.

2) The client pays a hefty establishment fee to banks for the purpose of establishing the client's credit worthiness.

3) It is a process that is accepted by clients because of the rewards offered from having the support and understanding of a financier with substance and apparent commitment to the long term earning of revenue from the clients' profitable activities.

However clients, regulators and the community accept that prior to lending money banks need to safeguard themselves from possible future client actions of; corruption, dishonesty and business incompentance. Banks do this by including in the documentations standardised draconian clauses and conditions eg. overdrafts on call, fixed and floating charges, Directors' guarantees.

Borrowers know that bank documents contain draconian clauses and conditions. Nevertheless, they ultimately accept the one sided contracts, relying on:

a) Their own commitments to act and conduct the relationship honestly, in good faith and in accordance with the implied terms and conditions.
b) The banks' bona fides, integrity and commitment to their long term business of earning profits from interest out of lending funds to the client.
c) The bank's bona fides, integrity and commitment to the reality of the image they promote and advertise of themselves as scrupulously honourable institutions.
d) The bank's representation of their experience and understanding of commercial reality of business budgets and projections.
e) Banks activating the standard draconian clauses of loan contracts only in the instance of the client demonstrating bad will, dishonesty, unco-operation, or commercial recklessness within his control. and
f) The knowledge that all banks retain similar draconian clauses and conditions.

III. Unfair Trading Position held by Receivers who have acted as Investigative Accountants on behalf of banks.

1. Forfeiting of Objectivity and Independence.

Insolvency Practitioners acting on behalf of banks as Investigative Accountants should be, and should be known to be, automatically precluded from any further engagement past the completion of the Investigative Accountants task. Furthermore the Independent Investigative Accountants' reports undertaken on behalf of banks should be, and should be known to be, confidential and not available to any Insolvency Practitioners prior to and during the term of engagement as Receiver, Manager or Liquidator of a company.

When Insolvency Practitioners are retained by banks as Investigative Accountants, they owe their commercial loyalty and duty to satisfy the bank's objectives and concerns. They have no duty towards satisfying any bona-fide objectives of the company. An Investigative Accountant's report, comparable to the subjectivity of valuations, can vary as the length of a piece of string. The only limitation in satisfying the appointor bank's interests, at the expense of the company, is the risk to their reputation.

Insolvency Practitioners not precluded from a pre-appointment offer banks and themselves a nexus between the Investigative Accountant's report and the outcome of receivership. In principle, when acting as receivers, the investigative accountant is serving two masters – the bank and the company. In reality, receivers, by their pre-appointment as Investigative Accountant, have already lost their objectivity and independence and, on appointment, are serving the bank and themselves, at the expense of the company, unsecured creditors, directors and employees.

Insolvency Practitioners who have not undertaken, and are precluded from undertaking, the confidential Investigative Accountant's report are unable to offer banks (and themselves) the same nexus between the result of the first examination and the result of the receivership.

The breaking of the nexus between the Investigative Accountant and the Receiver exposes the bank to the result of a genuinely independent investigative accountant's report and to uncharted and uncontrolled results of a genuinely independent receivership. The breaking of the nexus should result in banks having to conduct their relationship with their clients with the proper degree of due diligence and honesty.

2. Sunk Cost & other Advantages

Insolvency Practitioners who have had pre-appointments by banks as Investigative Accountants have acquired the bank's goodwill and have established sunk costs, advantages over independent Insolvency Practitioners, who might otherwise be available to be appointed as receivers to the company.

In other words, Insolvency Practitioners, acting as Investigative Accountants on behalf of banks, have a large foot jamming the door open for their subsequent entry as Receivers. This is a corrupt advantage exploited by both banks and Insolvency Practitioners.

IV. Conflict of Interest of Insolvency Practitioners acting as Investigative Accountants on behalf of Banks and not being precluded from subsequent appointment as Liquidator, Receiver and/or Manager.

1. Knowledge of advantageous position placed for prospect of future work.

Insolvency Practitioners acting as Investigative Accountants, if not first precluded, are aware of an unfair trading position they will hold in the instance that the bank decides to appoint receivers to the company under investigation.

2. Ability to influence Bank-Client relationships.

The appointment of a Liquidator, Receiver and/or Manager to a company will largely be influenced by the character of the Investigative Accountant's report. Insolvency Practitioners acting as Investigative Accountants are able to influence their own appointment. Insolvency Practitioners' pecuniary interests are best served by the banks severing any long term relationship with the clients, given that the banks will hold fixed and floating charges over company assets. This imperative will not necessarily be in the bona fide interest of the banks, unsecured creditors, employees, the company and the wider community.

3. Use of inside knowledge for own pecuniary interests.

Insolvency Practitioners acting as the Investigative Accountant are able to ascertain from the analysis of the bank's draconian clauses and conditions, the value of and the prospect of the fee profits they could earn out of a subsequent appointment as Liquidator, Receiver and/or Manager. A receiver can benefit by the tone, assumptions and bias of his earlier report. Moreover, the knowledge gained of a business as Investigative Accountants can subsequently be subtly used to advance the pecuniary interest of the Insolvency Practitioner when acting as Receiver, Liquidator or Manager.

The Investigative Accountant, with the prospect of subsequent appointment as an Insolvency Practitioner, is able to influence, nullify or cover any legitimate defence or action that might be available to the company to protect itself against the appointment of an Insolvency Practitioner. Thus the Insolvency Practitioner as Receiver is able to conduct the affairs of the company to fulfil the evaluation undertaken by himself as Investigative Accountant.

4. Subservient to Banks for ongoing work.

The independence of Insolvency Practitioners acting as Investigative Accountants is compromised if they are dependent on banks for their livelihood. Insolvency Practitioners have an ongoing relationship with banks and a one-off relationship with a particular company and are highly dependent on banks for ongoing work.

As Investigative Accountants, Insolvency Practitioners are not constrained by their duties owed to the company when acting as Insolvency Practitioners. It is therefore during the investigative accountant's phase that Insolvency Practitioners are able to circumvent laws and codes of professional conduct that might otherwise be available to protect the company from unfair and reckless conduct both by banks and Insolvency Practitioners.

5. Pecuniary Interest from Reckless Conservatism.

Investigative Accountants, with the prospect of subsequent appointment as Insolvency Practitioners, are compromised in their evaluation of a company's assets and cash flow as a going concern. It is in the interest of the Insolvency Practitioner that, as Investigative Accountants, they value companies' assets and cash flow projections to the most conservative figure possible for the following reasons:

(a) The lower the value of the company's assets in the Investigative Accountant's report, the less is the risk of any subsequent action by banks and creditors against Insolvency Practitioners not achieving values in accordance with the asset realisation recorded under the Investigative Accountant's report.
(b) The lower the value of the company's assets and cash flow projection, the more likely the authors will be appointed as Insolvency Practitioners. The lower the value given to the company's assets and projected cash flow, the less likely is a bank going to maintain a relationship with the company. Companies without bankers' support are almost inevitably insolvent.
(c) The lower the valuation, the lower is the level of care, responsibility, expertise, competence and risk required by the accountant in both the Investigative and Insolvency phase of his relationship with the company. Evaluating a business of a going concern requires a level of expertise and cost significantly greater than that of evaluating a business for the premature repayment of Bank debt on a fire sale basis under the control of an Insolvency Practitioner.

6. Disincentive to achieve "Real Market Values" of assets.

An Insolvency Practitioner is able to manipulate the result of any 'asset sale' of a company. There no incentive for a receiver to achieve a sales value of assets that exceeds the valuation of an asset recorded in his Investigative Accountant's report. In addition, there is an incentive to ensure that no sales substantially exceed the conservative values of his Investigative Accountant's report. Any such result could expose the Insolvency Practitioners' initial conflict of interest when undertaking the Investigative Accountant's task. It could also expose the banks own assessment of the security it held when determining to sever its relationship with its clients.

V. The Substantial Fees charged by Receivers

Receivership can last as long as assets are available to pay fees. It would appear that Receivers earn fees largely with impunity.

(a) They enjoy indemnities from banks
(b) They have first bite of the revenue from asset sales or cash flow of the company.
(c) They are able to obtain **fettered** 'independent expert' reports at the company's expense to deflect responsibility and justify decisions made, that otherwise could be controversial.
(d) Companies under receivership are unable to engage equivalent expertise to protect assets from destruction under the control of the receivers.
(e) Receivers are able to conduct the company to achieve their own projection incorporated under their investigative accountant's report.

The damages and losses that flow to and from a company that has lost the support of its Bankers with the subsequent transfer of control of the conduct of the company to Insolvency Practitioners can be wide ranging, and self-fulfilling in both monetary and emotional terms. It is possible that the greater current scale of the dominant banks in Australia and the centralisation of authority have resulted in the execution of standardised factory type procedures with little regard to unjust consequences.

VI. Recommendations

That regulations be enacted to support a code of ethics and professional conduct prohibiting Insolvency Practitioners from accepting or being available for appointment to any company where they have undertaken any Investigative Accountant's work, whether directly or indirectly. Such a code should go a long way to address the conflict of interest, loss of objectivity, loss of independence and complicity in the abuse of power of banks in relations with their clients.

If Insolvency Practitioners are precluded from benefiting from any ongoing business resulting from, or associated with, a company for which they have undertaken an "Investigative Accountant's' report, three results could be expected to follow.

a) Insolvency Practitioners will no longer be exposed to the conflict of interest incentive to treat Investigative Accountant's tasks as loss leaders for other business.
b) Investigative Accountants should become professionally more independent from bank appointors and more likely to consider alternative future assumptions, such as the value of the business assets and future cash flows on a going concern basis. This would take the form of the Investigative Accountant, quantifying the avoidable losses and damages that are predictable to be incurred in the instance of the appointment of an insolvency practitioner to the company or by the bank's unforewarned withdrawal of it's support.
c) An Insolvency Practitioner put forward as an Investigative Accountant, precluded from any subsequent work, on behalf of a bank, is more likely to alert the company to the objectives of the bank, prior to being given free and co-operative access to the company's books and records.

In general, Insolvency Practitioners' are inappropriate specialists of the accounting profession to undertake Investigative Accountant reports. In the absence of suspected fraud, dishonesty and reckless conduct, the appropriately qualified members of the accounting profession who should undertake Investigative Accountant's reports of companies, on behalf of banks, are those with skills in analysing and assisting businesses as a going concern.

NSW GOVERNMENT

The Hon Matthew Mason-Cox MLC
Minister for Fair Trading

IM14/21133

Mr Claude Cassegrain
'Sancrox Park'
482 Sancrox Road
WAUCHOPE NSW 2446

Dear Mr Cassegrain

Thank you for your recent correspondence to the Hon Matthew Mason-Cox MLC, Minister for Fair Trading, concerning your submission on the Unfair Contract Terms and Small Business Consultation Paper.

I have forwarded your submission to the Small Business, Competition and Consumer Division of the Commonwealth Treasury, to be considered as part of the current review.

Yours sincerely

Matt Beattie
Fair Trading Liaison Officer
17 July 2014

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