ASIC
Australian Securities & Investments Commission

Parliamentary Joint Committee on Corporations and Financial Services inquiry into impairment of customer loans: Opening statement

A speech by Michael Saadat, Senior Executive Leader,
Australian Securities and Investments Commission

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CHECK AGAINST DELIVERY

Introduction

Good evening, Chairman. Thank you for this opportunity to address the Committee.

My name is Michael Saadat and I am the Senior Executive Leader for ASIC's Deposit Takers, Credit and Insurers team. With me today are the following Senior Executive Leaders:

- Adrian Brown, who leads the Insolvency Practitioners team, and
- Warren Day, who leads the Assessment and Intelligence team.

As the Committee is aware, ASIC has made a written submission to this inquiry. ASIC's role, as relevant to the terms of reference of this inquiry, is in regulating:

- insolvency practitioners, including receivers, under the Corporations Act, and
- lenders under the ASIC Act and the National Credit Act – noting that the National Credit Act does not apply to business loans.

In my introductory comments, I want to touch on ASIC's role in regulating lenders and receivers and previously mooted reforms in this area.

ASIC's role in regulating lenders and receivers

ASIC regulates the conduct of lenders and receivers (and other insolvency practitioners) under the Corporations Act, the ASIC Act, and the National Credit Act including the

National Credit Code. Our submission to this inquiry details the regulatory framework for lenders and receivers.

ASIC's role is not to provide an ombudsman or mediation service for individual disputes. 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.

Since and including the 2010–11 financial year, ASIC has received 60,031 reports of misconduct from all sources. Over this time 50,331 companies entered into external administration and, according to ASIC records, 5,912 companies had a receiver appointed. Over the same period, ASIC received 66 reports of alleged misconduct about lenders' treatment of commercial loans and 45 reports of alleged misconduct about receivers that relate to issues raised in this inquiry's terms of reference.

ASIC provides these figures to give the committee context, without wanting to diminish the concerns raised by affected businesses. In reviewing the reports of misconduct lodged with us, we considered whether any matter could be pursued in the public interest, which is a factor in all our enforcement actions. However, given the characteristics of the misconduct reports received, and the applicable regulatory framework, we were not able to identify a case that would be in the public interest to pursue. By 'public interest' in this context I mean an impact beyond the benefit to the individual borrower in having their case run, whether through setting a precedent, clarifying the law in a way useful to other borrowers or establishing a basis for those borrowers to seek recourse.

ASIC regulates consumer lending through the National Credit Act, which includes specific protections for consumer borrowers that have gone into default or are experiencing hardship. ASIC has a strong record in enforcing the law against large and small institutions, and getting good outcomes for consumers.

In comparison, the regulatory obligations for commercial lending are far more limited and less specific than for consumer lending. For commercial loans, ASIC's role is limited to administering the general consumer protection parts of the ASIC Act, including the prohibition on false or misleading representations and unconscionable conduct.

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, 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.

The existing law does not provide a systemic remedy for many of the concerns raised with this committee and previous committees. If the committee considers the balance established by existing court decisions is not appropriate, then consideration will need to be given to law reform – an issue to which I now turn briefly.

Previously mooted reforms

ASIC has previously sought to alert governments to the lack of specific protections for business borrowers, including, in 2008, in our submission to the Productivity Commission's review of Australia's consumer policy framework. In that submission, ASIC provided support to extending some consumer credit protections to small businesses.

More generally, ASIC has highlighted the limitations of the unconscionable conduct provisions as a mechanism for addressing market-wide conduct problems.

More recently, matters relating to commercial loan defaults were considered in 2012 by the Senate Economics References Committee Inquiry into the post-GFC banking sector.

That inquiry's report noted that, in order to encourage entrepreneurial activity and allow sufficient flexibility for contracting parties, it did not propose additional government intervention in relation to commercial lending practices.

The inquiry therefore recommended industry address small business lending concerns through a code of conduct for small business lending developed by the Australian Bankers' Association (ABA). ASIC is aware that the ABA considered the inquiry's recommendations. The ABA concluded that the existing Code of Banking Practice provided comprehensive coverage for small businesses.

We can see value in considering how the specific provisions suggested in the final report of the 2012 inquiry to ensure fairer treatment for small business, such as minimum notice periods and access to valuation reports, might be adopted by industry. Of course, law reform in this area would be a matter for the Government.

Further, we note that the existing Code of Banking Practice does not specifically address some of the concerns raised with this inquiry.

The report of the Financial System Inquiry also noted it had received several submissions suggesting some non-monetary loan covenants are unfair and that lenders could be more transparent when exercising them. That inquiry therefore recommended support for the Government's process to extend unfair contract term protections to small business, for which legislation received Royal Assent on 12 November 2015, and that industry be encouraged to develop standards on the use of non-monetary default covenants.

The inquiry into the post-GFC banking sector also recommended improving banking practices relating to the enforcement of security interests and the conduct of receivers when exercising the power of sale under s420A of the Corporations Act.

The Productivity Commission's inquiry into business set up, transfer and closure, in its draft report in May this year, proposed reforms including that a receiver's duty under s420A should be subject to a duty not to cause unnecessary harm to creditors as a whole, including putting the company's continuation, or the company's preservation as an ongoing concern for sale, at risk. The Government now has the Productivity Commission's final report but has not yet released it.

ASIC notes that while there may be scope for reform for regulating insolvency practitioners, it is important to proceed with a number of current reforms already underway, including the Insolvency Law Reform Bill 2014.

Correction

Finally, we would also like to note, for the Committee's reference, an inaccuracy in ASIC's submission (number 45). At paragraph 71 we refer to correspondence to the ABA dated December 2012. The correct date should read 'December 2013'.

Mr Chairman, thank you for your time this evening. We are happy to take questions.