

**UNCONSCIONABLE BEHAVIOUR  
OF  
CERTAIN BANKS AND FINANCE COMPANIES.  
1988-1993**

## **1. INTRODUCTION.**

In the years 1988 to 1993, many companies went out of business as a consequence of the recession triggered by the stock market crash of October 1987. Some of those companies were clients of ours. In many cases we lost money, because we were unsecured creditors and there were insufficient funds to pay everybody what they were owed.

Obviously, because of the disruptions to our cash flow, our creditors were paid late on quite a few occasions. However, in our case, all of them (with one exception, discussed later in this document) were paid out in full, with additional interest and late payment penalties. Nevertheless, because there are reports in various credit reference agencies which note the late completion of some contracts (though without any explicit criticism), we considered it prudent to explain how these late completions were due to circumstances beyond our control and not to any improvident actions on our part.

We have calculated that the losses only to companies whose demise was driven by the unconscionable actions of certain finance organisations, exceeded the sum of all of our late payments (over a period of five years) by a factor of two. Any adverse report from a finance company on the grounds of late payments, therefore, is in effect criticising us for not being able to fight back effectively against the bad behaviour and massive resources of their peers.

This report has been prepared to bring to the attention of future lenders the inadequacy of the simplistic and inaccurate report processes of the day and to remind them of the realities of business activity at the time. Any analysis of our credit record should be judged in the light of these circumstances.

## **2. NATIONAL AUSTRALIA BANK (NAB).**

Between 1998 and 1990, we were engaged by an agency called Computerscene to provide IT services to some of their clients. Computerscene was a very well-run company, but unfortunately its proprietor made some investments in computer technologies that were then not quite mature, though they did later on become very important in the industry. His assets were mortgaged to the NAB and Computerscene's accounts were factored to the NAB's finance subsidiary, Custom Credit Corporation. He lost a lot of money until the situation reached a point when the bank decided to foreclose on his company.

The NAB was, of course, completely entitled to take this action. However, the way they did this was not transparent and in fact, they went further and tried to convince us (the contractors) that the agency was solvent and would continue in business. The intention was that we would continue to put in our invoices, for which we would not be paid, but which Custom Credit could use to claim payment from the end clients who used our services. A most unsettling aspect was that when this process first began, we were customers of the NAB, but eventually we moved to another bank (the original Bank of Melbourne) to try and maintain some control over events.

The usual method of payment was that the Computerscene representative would call at our site of work, collect our current timesheets and hand us our cheques for the previous period. However, there came a time when the field staff were discharged and the exchanges of cheques and timesheets took place by post. Then, the cheques were not forthcoming on time and we knew that Computerscene was in difficulties. Up to a point, we were quite prepared to help the company out, as its proprietor was very well regarded. Also, there were rumours that new investment was forthcoming and that due diligence was being carried out. As it turns out, the people wandering around the office recording details of the operations were not investors, but employees of the administrator installed by the NAB. We cannot say

whether the rumours were wishful thinking on the part of the staff or were deliberately fostered by the NAB representatives.

Eventually, the situation was reached when we had to say “No cheque, no timesheet”. The flow of cheques then started again. Unfortunately, quite a few of them were endorsed “Present Again” and later “Refer to Drawer”. The surprising thing was the time taken for these endorsements to come through – on average about nine days, well outside the five-day norm for clearance (which by the way is just a convention and has no legal standing). Again, we had to defer submission of timesheets until we were quite sure that the cheque would be paid. The response was a couple of variations on the pattern of paying a cheque and then withdrawing it. One trick which we have documented involved sending a “Present Again” notice in respect of a cheque which had already been cleared a few weeks before. When we queried this, we were told to ignore it as it had been sent in error. However, a few days later, the current cheque would be dishonoured without warning. Finally, we received a cheque which was endorsed “Refer to Drawer” nine days after presentation, without benefit of a preceding “Present Again”. We complained to our bank, the original Bank of Melbourne (BOM) who investigated the matter and discovered that these occurrences were the result of a specific manipulation of the cheque system by the NAB.

According to the BOM, an electronic “Present Again” message was received followed more or less immediately by another message cancelling the first. They were unable to offer any explanation as to why this sequence of events should have occurred, other than that the original message was sent in error. However, this explanation did not accord with the later “Refer to Drawer” endorsement. The CEO of the BOM, Mr. Christopher Stewart, did take up the matter with the NAB but was unable to get any satisfactory explanation. After about a year of desultory correspondence with both banks, we received a bank cheque for the amount of the last cheque, which Mr. Stewart claimed was paid half by the BOM and half by the NAB. However, Mr. Stewart’s correspondence with us suggests that he was very unhappy about the NAB’s behaviour and we would not be surprised to learn that the entire amount was paid by the BOM.

A year or two later, a conversation with a one-time NAB computer programmer suggested a solution to the problem. He explained that the cheque clearance program at the NAB was set up so that unless a “Refer to Drawer” message was sent immediately, then a “Present Again” message had to be sent first. This released the latch that would permit the “Refer to Drawer” message to be sent later. The cancellation message was originally intended to retrieve errors, but in this case was clearly sent to ensure that we did not receive the “Present Again” message which would have alerted us to the unreliability of the transaction.

Throughout the time all of these events were taking place, we were being telephoned two or three times a week by persons purporting to be Computerscene staff asking us to post in our timesheets. Sometimes, I obliged. On other occasions, while waiting for cheques to clear, I pretended I had been engaged on work for other clients. On one occasion, a message was left at my home asking me to ring a Computerscene person at an unusual telephone number. I had previously bought a car from Custom Credit and recognised the number as being one of their PABX lines. To be sure, I rang the switchboard and asked for the person by name. I was put through immediately. I advised that I would not be doing any further work for Computerscene.

There was one pleasant occurrence in all of this sad story. I rang the end client, a software house run by some very serious religious people (Southern Baptists, I believe) and explained the situation. I advised that I preferred them to have the benefit of my work and not the NAB and would therefore not be submitting any more invoices. Later, we signed a contract with the software house directly and our first remittance advice came back with an additional line-item hand-written on the account. It read “One hour at \$1,043 per hour” !

Despite this welcome payment and the refund from the BOM, we were never paid for approximately \$4,000 of work done for Computerscene. It is also important to note that this

situation came about through NAB actions that were taken on behalf of Custom Credit. It is very doubtful that a Custom Credit employee could, on their own initiative, simply ring a friend in NAB and ask for the cheque clearance system to be manipulated in the way it was. Surely, authority for this action had to come from quite a high level in the NAB. As it is an offence for a registered company to trade when insolvent, it is interesting to speculate whether NAB broke the law in its attempt to maintain the fiction that Computerscene was solvent.

Evidence available: Correspondence and bank account documents of the period.

### **3. AUSTRALIAN GUARANTEE CORPORATION (AGC).**

Much of our work over the last twenty-odd years has been carried out around the Informix relational database management system (RDBMS). Although the Informix company has had offices in Australia for several years (it was recently bought by IBM), in 1988 it was represented by a distributor called Rakon Computers. Rakon also sold very sophisticated computers manufactured by a company called AST. These computers used the same Intel chipsets as PCs but due to some very powerful architectural features, they were much faster than the average desktop computer and were much used as servers for small multi-user systems. They were also quite expensive.

We wished to buy a new multi-user system, equipped with the Unix operating system and the Informix RDBMS for development purposes and it made sense to buy a turnkey system from Rakon, a Sydney company, who were offering substantial discounts at the time. We placed an order, subject to appropriate finance being arranged. A finance broker put us in touch with AGC where we arranged a credit facility for about \$25,000, repayable over five years. However, in confirming the order with Rakon, we changed some of the specifications of the computer, reducing the cost by several thousand dollars.

We waited for several weeks for the invoice to arrive, but it never did. Instead we received contract documents from AGC indicating that a sum of money relating to the original order had already been paid to Rakon. AGC could have had no idea what we had actually ordered or whether we had actually received the goods, so I rang up to complain. I explained that we had modified the order, but the only response I received was to the effect that I would have a nice little cash loan when the difference was refunded. Unfortunately, this never happened. The remainder of the Rakon story is told in Section 4 below.

As indicated in the introduction, our cash flow varied widely over the period covered by this report, but we always had some income, because we nearly always had several projects in hand at the same time. We doled out the money we received in a sort of round robin, so that our creditors took turns at having our account in arrears. We always tried to tell them when the arrears would be made up. AGC were actually only in arrears on a couple of occasions, the second one occurring late in the contract period (in 1992) when we had actually paid back an amount exceeding the original loan. We told AGC the arrears would be cleared within a week, but were told that documentation had already been signed off to foreclose the account and repossess the computer. They duly took this action, but when the papers were handed to us, we found that the date of execution was quite a bit later than the payment date we had quoted to them.

At the time, I had accepted a permanent position as Information Systems manager at Plan International, a NFP overseas aid organisation. Because, their pay scales were below industry norms, it had been agreed that I could accept outside work, provided that Plan's needs were met. With the loss of the computer we did not have the resources to carry out any such work and our income from all sources was substantially reduced for the following 18 months (a loss which we estimate at about. \$30,000).

After a considerable lapse of time, we were advised that the computer had been sold for about \$900 and that AGC would be taking legal action for the recovery of about \$25,000. (This figure gives a startling indication of the interest rates at the time, as we had already made total payments exceeding the original purchase price). We produced evidence that computers of the same type were being sold for about \$5000 and asked for documentation of the sale, which AGC were unable to produce. They said it had been mislaid. Eventually, the usual negotiations preceding legal action began.

Because of what we considered their incompetent behaviour and documentation which had had an adverse affect on our business, we were unwilling to give them what they were demanding. At the same time, we felt badly about not meeting our commitments. Our solution, remembering that our contract was taken out at the interest rate peak and rates had declined markedly since, was to recalculate what the payments would have been at the opportunity rate of interest. In other words, they did not lose money – they simply failed to make the large profits that we felt they were not entitled to. We also deducted \$4000 more, representing the balance of the value of the computer. This offer was accepted immediately and notably, AGC made no adverse reference to our creditworthiness in any credit reporting system that we are aware of.

It was only after reading Edna Carew's remarkable book about Westpac and its subsidiaries that I realised that AGC's action probably had more to do with moving money to the immediate bottom line to avoid accusations of insolvency than to any action by our company. This view is supported by the fact that it took AGC two full years to even threaten legal action for recovery of the outstanding balance. Given the straightened circumstances of the company, it would obviously suit them to have \$30,000 of collectables on the books than to clear the matter up with a settlement of a much smaller figure.

Of course, one could argue that AGC were contractually entitled to take the action that they did. On the other hand, they departed from their contract processes by overpaying the vendor without my endorsement and by not following the contractual process for the disposal of the computer transparently. Therefore, one can argue with equal force that the contract should have been made void by their own actions.

Evidence available: Correspondence, contract documentation, deed of settlement.

#### **4. BANK OF NEW ZEALAND (BNZ).**

Note: We bring in the name of the BNZ bank here, on the presumption that either the liquidator it appointed was acting under orders or guidelines issued by its client or that the contract between the bank and the liquidator encouraged the latter to behave in the way that he did. It is hard to believe that the bank, being the principal beneficiary, would not have made it clear to the liquidator that its interests must come first, to the exclusion of all others. However, it is just possible that they really knew nothing and that the liquidator had carte blanche. We are prepared to accept any evidence the BNZ might put forward on this point, but even so, it does not reflect very good practice, does it ?

When we complained to Rakon about the invoice which they had sent direct to AGC, they first said that there was no discount deal, but when we produced documentation given to us by their Melbourne manager, they said that the offer applied only in Sydney. Shortly afterwards, they closed their Melbourne office and discharged the manager.

We persisted with our claim for a refund, and were fortunate in that Informix, with whom we had had a long association, insisted on the discount being honoured for the software component, at least. This strengthened our hand, but Rakon still would not give us any money back. Instead, they said they had secured a systems integration project with Telecom (now Telstra) in Melbourne which involved the supply of computer hardware, an Informix

database and customised software. In exchange for us dropping our claim for reimbursement, they offered us a contract to write the software, which on the face of it, was a very good deal, which we accepted.

All went well for a while and we laid the foundations for a relationship with Telecom which later helped us to gain continuous contract work extending for a period of eleven years. Eventually, however, our accounts stopped being paid and then we received papers to say that the company was being put into liquidation by its principal creditor, BNZ. We discussed this matter with the Telecom project management team and discovered that the liquidator had submitted an invoice asserting that the project was 90% complete and that this account had been paid. In fact, my reports to Rakon showed that it was only about 70% complete. In other words, it was a speculative (and successful) attempt by the liquidator to get more money out of the project than Rakon was entitled to. They had also represented me to Telecom as being an employee instead of an independent subcontractor, which is why the Telecom team did not verify the account with me first.

I indicated that we would do no more work on this contract until the situation was clarified. Telecom, in accordance with the contract terms, gave Rakon 45 days to resume work or terminate the contract. The liquidator never replied to this demand. However, for the following six weeks, I was telephoned two or three times a week by a member of the liquidator's staff, trying to do a deal which would give them some more of the money still left in the contract (no doubt hoping that we were desperate for cash). When the six weeks were up, Telecom signed a contract with us to complete the project for the remaining funds, supplemented by a small amount of uncommitted money in their budget. We were, of course, substantially out of pocket on this new contract, but we regarded it as a good investment in a relationship, as in fact it turned out to be.

The liquidation documents listed our company as an unsecured creditor owed more than \$8,000. The statistics are in fact quite interesting. The BNZ got about \$4,000,000 as the prime secured creditor. Other secured creditors owed a total of \$165,000 received \$160,000. Unsecured creditors, including all of Rakon's staff got nothing. Many of those members of Rakon staff who were involved in the Informix product were offered jobs by Informix when they opened their office in Sydney, so I had the opportunity to speak to them on various occasions. One fact which came to light was that Rakon was in trouble (perhaps even under administration) before we did any business with them and we were probably offered the Telecom contract because no one in Sydney would take it on. There was also the suggestion that the liquidation was in fact a repatriation exercise. Rakon was, we understand, owned by a New Zealand entrepreneur in the Alan Bond mould and it was speculated that loans were taken out against Rakon assets and used to pay off other loans outside the country. Of course, we have no evidence of this, but the neatness of the figures is the sort of material that feeds rumours. One final thought. Given the fairly unconscionable behaviour of the people concerned, we would not be surprised if the overpayment to Rakon by AGC was either a bank-to-bank favour or at the least, a response to a request for quick settlement which they simply did not bother to refer to us, in the belief that the request was an honest one. Either way, AGC's conduct was quite deplorable.

Evidence available: Liquidation documents. Correspondence. The Telecom project managers, Mr. Chow Haw and Mr. Rod Veith were quite appalled at the behaviour of Rakon (or rather the BNZ liquidator) at the time and would probably recall these events.

## **5. CREDIT REFERENCE AGENCIES.**

As we stated earlier, there were a number of contracts and other debts which, while endorsed as "paid in full", indicated that some considerable time had taken place between the dates when they were incurred and the date of settlement. The case of AGC has already been referred to in this regard. Once a claim was made by them, payment was

made promptly in accordance with the terms of settlement. There were also a few minor accounts which were late for an unusual and quite interesting reason. These accounts were actually written off by the creditors because we were threatened with bankruptcy by the ATO and they believed that they would not receive anything at all. However, we fought off this attack (which had its own unconscionable elements), but in the general confusion, the existence of these accounts was overlooked for some time. When they did come to attention, they were paid voluntarily, somewhat to the surprise of the creditors !

## **6. CONCLUSION.**

Leaving aside the losses due to AGC's actions, which were only an estimate and might not have been realised, the amounts owed to us by Computerscene and Rakon comfortably exceeded the value of all of the late payments to all creditors. Thus, we, who have a demonstrated ethical approach to business relations may have had judgements about our creditworthiness passed upon us by peers of finance organisations who were prepared to descend to very unethical practices to cover up their own bad business decisions taken in the 1980's euphoria following financial deregulation and who, it could be argued, were almost entirely responsible for our problems. The irony is not lost on us.

Finally, we would like to make the point that we had other clients who went out of business, but managed to do so in a transparent and dignified manner. The major one was a company called CatSoft owned by interests associated with Sir Roderick Carnegie. We had to wait several months for our accounts (about \$6,000 in all) to be settled but in the end we received every penny. But then, Catsoft was not in the grip of a bank !