

# Illusion and Reality at the National Australia Bank Part II

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National Australia Bank is being sued by a couple for damages after it invested their money in European property funds, even though the couple claim that they had told an adviser they did not want their capital at risk. ...

A statement of claim says the couple, Malcolm and Kerry Bishop, hired an NAB financial planner in 2007 to recommend investment for their \$3 million in funds. ... The planner allegedly told the Bishops that NAB could “make their money work harder”. The Bishops responded that “under no circumstances did they want to put their capital at risk”. [The statement of claim] says the Bishops were advised to invest 67% of their portfolio into two property trusts that invested in Germany. ...

NAB acted as equity bridge facility provider, joint lead manager, lead equity arranger and joint underwriter for the Multiplex European Property Funder offer and lead manager in the Pengana Credo European Property Trust offer. Under this arrangement, the bank was entitled to a percentage of equity capital raised through both offers, along with other fees. ...

[The statement of claim] quotes an advice statement saying: “Malcolm, whilst you are comfortable with a long term/aggressive position for your MLC Masterkey Custom Portfolio you also hold concerns over current market volatility. This desire for managing volatility further supports our strategy of selectively using dollar cost averaging to acquire a portion of your overall portfolio.” ...

The Bishops are suing NAB for breaches of duty of care and seek damages for lost capital of \$1.7 million, opportunity cost, \$13,008 in fees and commissions paid to NAB and costs from the court case.<sup>1</sup>

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<sup>1</sup> Jane Searle, ‘Investors sue NAB over loss in property funds’, *Australian Financial Review*, 17 June 2011. The Bishops should also be suing the NAB for abuse of the English language.

At NAB, it's all about our people reaching their full potential. And in Wealth, that means transforming talent into leadership. NAB Financial Planning has established a solid reputation for providing quality professional advice. Our aim is to help our customers fulfil their aspirations, not just now but at every stage of their lives.<sup>2</sup>

Perhaps the NAB could invest a little more in its failing technology systems rather than pathetic marketing campaigns. It's a pity they didn't outsource the marketing department! Australia used to have 4 pillar banks ... now we have 3 pillars and an old post.<sup>3</sup>

... I happened to be one of the thousands that was literally told to p\*\*\* off after 15 years of loyal service by the axe wielder especially picked for the job, and just tell me where the new jobs are, NAB branches work on skeleton staff every day, I still have a lot of ex colleagues that are friends from NAB and they continuously tell me I was the lucky one to have got out as there is never any staff & branches are forced to open with only 1 or 2 tellers.<sup>4</sup> The jobs you refer to must also have gone to India & we all know the only service from there is a phone call at tea time trying to flog off products. Luckily I was employed by another financial institution and my loyal NAB customers followed me in droves.<sup>5</sup>

George Wright is leaving the dysfunctional, disaster-prone NAB to become the national secretary of the repeatedly catastrophe-struck ALP (*The Age*, 20/4). One is reminded of a saying about frying pans and fires.<sup>6</sup>

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<sup>2</sup> Template for NAB advertisements for Financial Planners at Bankstown and Newington/Liverpool, NSW ([MyCareer.com.au](http://MyCareer.com.au)), June 2011.

<sup>3</sup> Commenter at Eric Johnston & Farah Farouque, 'NAB serenades shoppers as bank wars get personal', *The Age*, 16 February 2011. This and the following comment were made in response to articles referring to the NAB's massive advertising campaign and its attempt to win customers in the face of public cynicism towards banks. The 'failing technology systems' refers to the NAB's mainframe computer meltdown for two weeks in late November and early December 2010. C/f Chris Zappone, 'NAB glitch may still dog customers', *The Age*, 28 February 2011.

<sup>4</sup> A relevant vignette on customer service. Just recently, a customer went to the NAB's Carindale branch, a Brisbane suburb. He was 30th in the queue to see a teller, and it took an hour to be served.

<sup>5</sup> Commenter at Michael Pascoe, 'When NABbing headlines does more harm than good', *The Age*, 16 February 2011.

<sup>6</sup> Carl Keeney, of Sunshine North, letter in the *Melbourne Age*, 21 April, 2011. Wright, sometime ACTU staffer, was previously Press Secretary for Prime Minister Kevin Rudd, and was hired as Head of NAB Group Communications in February 2009.

Last month [May 2001], the National Australia Bank employed moral heavyweight Tim Costello to help it become more ethical. The Baptist leader headed a committee that recommended more socially responsible services, including low-fee bank accounts for the poor. This week, the NAB admitted unconscionable conduct by forcing a Hobart woman into stress and poverty. The local bank manager railroaded the woman into signing a guarantee that resulted in her house being sold.<sup>7</sup>

## Corporate culture and the National Australia Bank

Economists, whose training is a disgrace, know nothing about the culture of business corporations and its variability. It has been left to lower-status sociologists to fill the vacuum. Given that sociologists increasingly find themselves slumming it under refashioned labels in well-resourced business schools, the study of corporate culture has become a minor scholarly industry. Strange then that the National Australia Bank has not been picked up as a reliable artefact for study.<sup>8</sup>

The 2003 trading desk scandal elicited the admirable March 2004 report from the Australian Prudential Regulatory Authority, *Report into Irregular Currency Options Trading at the National Australia Bank*. The report expanded on the NAB-initiated Pricewaterhouse Coopers report that the rogue trading desk was facilitated by a dysfunctional culture within the company. Here was an important advance beyond the ‘rotten apples’ parry. A dysfunctional culture.

One should go further and place the rogue traders and their tolerant senior management in an even broader context – a dysfunctional sectoral culture that has been spawned with financial deregulation and the subsequent ‘financialisation’ of national economies and the global economy. But it is forbidden, under pain of ridicule and excommunication, for professionals who care for their status to connect the dots to this larger picture.

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<sup>7</sup> Colleen Egan, ‘On balance, morality is the loser’, *The Australian*, 9 June 2001.

<sup>8</sup> There has been a minor flourish in the academic accounting literature. C/f Dianne Thomson, ‘Accountability and Board Functionality: National Australia Bank’s Experience’, Conference presentation, Melbourne, 25/26 September 2006; Carolyn Cordery, ‘NAB’s ‘Annus Horribilis’: Fraud and Corporate Governance’, *Australian Accounting Review*, 17, 2, July 2007; Nonna Martinov-Bennie, ‘What We Might Learn About Fraud and Corporate Governance from NAB’s ‘Annus Horribilis’’, *Australian Accounting Review*, 17, 3, November 2007; Steven Dellaportas et. al., ‘Leadership, Culture and Employee Deceit: the case of the National Australia Bank’, *Corporate Governance*, 15, 6, November 2007. Martinov-Bennie pushes the envelope, but this literature, typical of academic scholarship in general, accepts disciplinary ‘silo’ boundaries and sees the NAB as merely a vehicle for the application of pre-existing preoccupations. No-one has sought to start with the subject and extend the conceptual framework accordingly, not least to ask the question – what is peculiar to a corporation holding a banking license (and in a concentrated sector) that facilitates mis-governance of such character and with such persistence?

The evidence is overwhelming. Financial deregulation in Australia ushered in a period of collective madness, first displayed in the foreign currency loan debacle of incompetence and corruption, and then in the form of unrestrained lending to corporate incompetents and spivs. Twenty years later, the boom leading to the 2008 bust was slightly more restrained than the late 1980s affair – lower bad debts as a percentage of total assets – but the quantum of bad debts after 2008 was comparable to that in the early 1990s, and new avenues for intemperate excess had been pursued. They can't help themselves, there is little collective memory, and the rot persists.

### **The early rush of blood**

For the NAB, the backdrop was established in 1968-69 when the bank created a Regional Management structure and devolved a measure of lending discretion to branch managers in the form of the Delegated Lending Authority. This restructuring followed a McKinsey consultancy report into corporate modernisation. Initial Category A limits (i.e. fully secured with security margin) were \$25,000. A loosening of limits progressed steadily from then on, but financial deregulation in the 1980s saw the limits raised dramatically. By 1983, the Category A limit was \$80,000. In 1984, the limit was raised to \$200,000 and by 1988 to \$1 million. A circular distributed on 9th November 1984 summed up the new regime:

Funds for lending are in abundance and with recent deregulation ... it is imperative that we use every avenue possible to foster our existing customer connections and expand our lending base. Competitiveness is of paramount importance and competition is to be matched or bettered if worthwhile business is at risk.

Not only were DLA limits increased dramatically but some lending managers learned how to manipulate the system for greater flexibility (using fabricated or ill-documented submissions) in the face of upper management restraints. The manipulation continues to this day, sometimes involving spiv middlemen brokers, with parlous consequences.

The playing loose with DLAs was a reflection of a deeper transformation of culture ushered in after the late 1960s re-orientation of practices. When the Associated Banks Agreement was disbanded in the early 1970s (pre-empting the implications of the nascent 1974 Trade Practices Act), senior NAB management informed personnel that service charges were to be considered a minimum and that higher fees were to be applied wherever the market could stand it. The NAB thus saw the abolition of a cartel-type arrangement (parallel with heavy regulation) and the ensuing purported 'competition' as a vehicle not for lower fees but for higher fees.

Another example. In 1973-74, the NAB facilitated a swathe of short-term bridging loans, given available backing. Lending managers made submissions for clearance dates as at the end of the financial year. Head Office decreed that the clearance date would be 31 March, without branch managers accommodating the decree. In the event, many such loans were outstanding at this date; the administration then declared that balances still outstanding as at 30 April would attract

an interest rate surcharge of 5%. Some irate customers sought legal advice, which confirmed illegality, and the bank backed down. But, not for the last time, the backdown was only for those customers who threatened action; the rest copped the differential rate.

And another example. At the end of financial year 1979-80, the NAB sought a bridging loan of its own, of some magnitude. One surmises that the bank faced borrowing from the Reserve Bank window at penalty rates to meet its statutory reserve and prudential requirements with the customary end-of-year rundown of reserves.<sup>9</sup> The bank secretly arranged a loan from its biggest customer in Queensland. The company brought in funds from overseas, which the NAB held on its books for sufficient time to create a favourable reporting balance sheet. When the bank reversed the deposit from the company, it faced interest charges due for the favour. The interest bill was directed to the company's account in a tax haven via its London office; no withholding tax was paid by the company, and the paperwork (organised in Brisbane) destroyed.<sup>10</sup>

These vignettes highlight that it was evidently clear to senior management that the rules of the game were now permissive, and that anything was possible. NAB culture evolved to capture the opportunities.

The National Australia Bank, under CEO Nobby Clark, did one thing right. It sensibly refrained from aggressively participating in the 1980s foreign currency loan extravaganza (save on the margin where selling of this toxic product was deemed necessary to maintain customers). However, given the built-up momentum, and the facilitative structures set in place, it actively participated in the mid to late 1980s corporate loan boondoggle.

Representative of this scuttling of acumen are three instances of madness, all in Australia's own Wild West. First was the NAB's unleashing, without restraint, of its second-tier lender, Custom Credit, on the Western Australian developer sector.<sup>11,12</sup>

Second was the NAB's substantial involvement with Laurie Connell's Rothwells merchant bank. No bank with even rudimentary governance principles would have lent a cent to or have had any relationship whatsoever with Rothwells. The NAB was Rothwell's banker in WA, it lent a considerable sum to Rothwells, and it defaulted Rothwells immediately after the stock market crash of 19 October 1987. A complex scenario ensued in which the NAB sought to recover \$150 million from the wreck, and involving a guarantee given by the then Western Australian Labor

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<sup>9</sup> The LGS (Liquid and Government Securities) ratio, enforcing regulatory prudential concerns over profitability, was then 18% of assets.

<sup>10</sup> When this affair was brought to the attention of a Brisbane-based Australian Taxation Office staffer a decade later, that staffer confirmed that the transactions had taken place. He opined that, in spite of illegality, sleeping dogs should lie, because of the passage of time and because said obliging company had been taken over in the meantime.

<sup>11</sup> Kickbacks to at least one Custom Credit manager helped in the expansion of loan quantum. *C/f* Tom Baddeley, 'Simcock witness plea rejected', *The West Australian*, 14 November 1996.

<sup>12</sup> Custom Credit was previously implicated in corruptly benefiting from a fraudulent video sales package scam. *C/f* speech by Keith Wright, MP for Capricornia, House of Representatives, *Hansard*, 19 November 1985.

Government (presiding over 'WA Inc') to ensure life support to Rothwells until the NAB could retrieve its ill-conceived assistance.<sup>13</sup>

Third were the NAB's unsecured loans to the Bell Group, then dominated by the unlovely Alan Bond. No bank with even rudimentary governance principles would have lent a cent to Alan Bond. By late 1989 the NAB's exposure to the Bell Group was estimated at \$600 million.

### **Icarus soars then crashes to earth**

Loose lending practices notwithstanding, remarkably, the NAB emerged in the early 1990s as the premier bank (the least rotten of a barrel of rotten apples). But hubris, under successive managements, facilitated a string of grand and costly failures at the general administrative level, failures that are ongoing. For example (spiced by some peccadilloes of relevance):<sup>14</sup>

- illegality (tax evasion and overcharging) at the National Irish Bank under NAB control (1988-98): the bank incurred \$110 million in tax payments, customer remissions and administrative costs;
- The NAB, courtesy of then CEO Don Argus, helped to finance the victory of the Liberal-National Coalition Parties in the 1996 federal election, by underpinning the Liberal Party's finances, then in deficit, for the previous 18 months;<sup>15</sup>
- the Idoport software debacle (1996-) in which over \$70 million was spent on legal expenses to smother court litigation over the NAB having broken its contract with the software supplier;
- the US-based Homeside mortgage management debacle (1997-2002): total losses exceeded \$3.6 billion;
- in the lead up to the October 1998 federal election (and subsequently) the NAB under Argus worked the markets and the media into a frenzy in pushing relentlessly for the abolition of the '4 pillars' policy in order to forge a takeover/merger of/with another of the Big 4;<sup>16</sup>

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<sup>13</sup> C/f the WA Royal Commission into the Commercial Activities of Government and Other Matters (the Kennedy Report), 1992, pp.19.53ff.

<sup>14</sup> The pre-2005 cases are elaborated on in Evan Jones, 'The National Australia Bank and Corporate Culture', January 2005.

<sup>15</sup> 'Argus backed coalition campaign', *Reuters*, 5 March 1996. Ron Walker, then Liberal Party federal Treasurer, argued to Argus "... of the benefits in a democracy of sustaining a viable Opposition party".

<sup>16</sup> Eric Johnston and Adele Ferguson, 'Buying Influence', *Sydney Morning Herald*, 6 February 2010. Presumably Argus wanted a return on the NAB's investment in the Liberal Party victory in the 1996 elections. A strategy for a NAB-ANZ merger was dubbed 'Operation Edwin'. As the authors note: 'As part of the [failed] operation, the bank formulated a campaign, which cost tens of millions, to win acceptance for rationalisation from the public, the Australian Competition and Consumer Commission and the government.' Surveys disclosing pronounced public opposition were to be ignored. Argus even threatened the Howard Government with moving the NAB's headquarters offshore if it did not reverse its opposition. Michael Stapleton, 'NAB tries new tack to lift bank merger bank', *Reuters*, 6 November 1998.

- the NAB as vehicle for the transmission of funds that swindler Max Green was appropriating from Melbourne ‘investors’ seeking tax evasion mechanisms (1999);<sup>17</sup>
- the NAB lent Tony Mokbel a total of almost \$5.7 million for various ventures (late 1990s, early 2000s). NAB staff described Mokbel as an ideal customer; the media (following police investigations) described the same man ‘as the state’s most prolific amphetamines manufacturer’;<sup>18</sup>
- the SAP software debacle, in which the NAB purchased off-the-shelf software with the promise of integrating its systems across CEO Argus-driven recently acquired far-flung subsidiaries (1999): at minimum, \$400 million of ‘software assets’ written off in 2003-04;
- the purchase of the insurance giant MLC at a vastly inflated price of 22 times earnings (2000), then a mishandled 2001 rationalisation of wealth management products: \$67 million paid in compensation to burnt investors in 2003;
- a couple of sizeable losses on loans to two companies (early 2000s) – King Bros Bus Group and the Sydney Airport (railway) Link – that no sensible banker would have gone near: estimated write-down of \$100 million on King Bros and \$260 million on Sydney Airport Link;
- Kay Cooper (Colac, Victoria) is arrested, arraigned, fined and hospitalised after local NAB branch staff refused to accept that she had been diddled by the bank’s ATM machine (2003);<sup>19</sup>
- unrestrained trading desk incompetence and illegality (2002-04): estimated \$360 million in losses;
- Amy Davies was hired by the NAB’s UK subsidiaries (Clydesdale & Yorkshire Banks) in September 2005 to handle post-Enron governance issues. In May 2006, she claimed to have discovered discrepancies totalling £128 million in ledger entries recording transfers between the two banks. Initially promised full support from Melbourne Head Office, Davies was moved sideways in June and sacked in July, for ‘behavioural reasons’ as lacking ‘people skills’. The NAB admitted only to accounting errors and subsequently wrote off a mere £323,000;<sup>20</sup>

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<sup>17</sup> Katherine Towers, ‘Scam victims tax cheats says QC’, *The Australian*, 7 May 1999. Peter Hayes, counsel for another party to the investor litigation, claimed that the NAB was “fiddling while Max [Green] burnt”, ‘allowing the stolen millions to be funnelled through its accounts.’

<sup>18</sup> Natasha Robinson, ‘Bank praised Mokbel’s integrity’, *The Australian*, 1 October 2007. Staff described Mr Mokbel as ‘visionary’, ‘a man of integrity’, and noted that “Business associates hold Mokbel in the highest esteem”..

<sup>19</sup> Sam Edmund, ‘Gran wins ATM battle’, *Melbourne Herald-Sun*, 27 November 2003.

<sup>20</sup> Fiona Davidson, ‘Banker fired weeks after she blew the whistle on £128m deficit’, *The Scotsman*, 3 April 2007. Details emerged when Davies sued for compensation. Also Anon, ‘Bank worker “had behavioural issues”’, *The Herald* [Scotland], 4 April 2007. One commenter on the Davidson article noted: “Having left the same employer under similar circumstances, I fervently hope she takes them to the cleaners, as I did. It isn't just that they fire you, which is bad enough, but the attempt to then paint as bad a personal picture of you as they can is purely vindictive.”

- in 2006 the NAB faced repayment of wrongly charged or over-charged fees, interest and government debits tax on a variety of mortgage and savings accounts: estimated cost of \$174 million;<sup>21</sup>
- in its 2006-07 half-year reporting, the NAB pulled an extra \$6 billion in interest-earning assets out of thin air. This magic of contemporary accounting standards meant that the bank's Net Interest Margin (for some reason, of substantial relevance to market analysts) could be enhanced;<sup>22</sup>
- NAB's reporting of financials for full-year 2006-07 (8 November) neglected to account for off-balance sheet exposure. Pressure from an unknown source had NAB belatedly issuing an announcement via the Australian Stock Exchange a week later. Risk-adjusted off-balance sheet exposures at September 2007 (NAB's full-year reporting date) were almost \$32.8 billion. NAB total equity was then \$29.885 billion;<sup>23</sup>
- yet another round of sizeable (hundreds of millions of dollars) exposures to myriad dud outfits in the hollow boom times leading to the 2008 crisis, including ABC Learning, Allco Finance, Centro, Babcock and Brown, and Commander Communications;<sup>24</sup>
- a \$2 billion margin loan book leading into the 2008 crisis, which included a dramatic increase in margin loans to farmers looking to diversify their earnings sources by playing the share market!;<sup>25</sup>
- the splurge on and poor management of collateralised debt obligations prior to the crisis of 2008: write-down of \$1 billion (2007-08), and a further \$400 million hit committed;
- the NAB borrowed \$4.5 billion from the emergency facility at the US Federal Reserve following the 2008 crisis,<sup>26</sup> yet the NAB's only US presence is via purchase in late 2007 of the previously impeccably conservative provincial Great Western Bancorporation;
- in July 2009 the New Zealand High Court upheld the country's Inland Revenue Department's suit against the NAB's subsidiary Bank of New Zealand (ditto for the other Australian banks) on a tax avoidance charge, with implied liabilities totalling \$NZ664 million (\$A530 million);<sup>27</sup>

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<sup>21</sup> Michelle Innis, 'NAB's fee error to cost \$174m', *The Age*, 14 June 2006. Notes the author, 'The problems, which date back to 1994, arose because of faults in NAB's information technology systems and human error.'

<sup>22</sup> Adele Ferguson, 'Watchdog interest in NAB's \$6bn', *The Australian*, 2 July 2007. The NAB's share price was then at an unprecedented \$40 plus, and NAB management hoped to keep it so. Alas, the next 18 months saw the share price plummet to sub \$20 levels; it still languishes below the \$25 mark. Is this a rare instance of stock market rationality, or perhaps unvarnished optimism?

<sup>23</sup> ASX Announcement, *Key Performance Measures*, 15 November 2007, 4pp. This announcement is not listed on NAB's 'Media Releases/ASX Announcements 2007' site.

<sup>24</sup> Citibank analyst, Craig Williams, noted: "The apparent failure to manage this exposure [to Allco Principals Investments] ... has again caused us to question NAB's risk culture and judgement." Nick Lenaghan, 'NAB to offset bad debts with Visa float earnings', *The Age*, 29 March 2008.

<sup>25</sup> Daniel Lewis, 'Battling farmers told it's time to give up', *Sydney Morning Herald*, 5 March 2008.

<sup>26</sup> Eric Johnston, 'NAB, Westpac tapped into US Fed's emergency funds', *The Age*, 3 December 2010.

<sup>27</sup> Alison Bell, 'NAB's BNZ likely to appeal NZ High Court ruling on \$A335m taxes', *AAP*, 16 July 2009. Justice Wild noted: "The [structured finance] transactions had no commercial purpose or rationale ... Their only purpose

- the misdirected attempt to acquire AXA APH Ltd (2010);
- in 2010 the NAB refunded an estimated \$3.5 million in late penalties ‘charged in error’ since 2003;<sup>28</sup>
- a post-2005 software error in the NAB’s UK subsidiaries led to mortgagor underpayment which the bank was trying to recuperate in 2010, generating customer ‘outrage’;<sup>29</sup>
- in 2010 a debt collection agency to which the NAB had sub-contracted its credit card debt persistently harassed one, Donna Venables, for repayment of the debt, even though she was another Donna Venables with a different full name and date of birth, lived in a different town, and had never banked with the NAB. The NAB declined to intervene to clear up the mistake;<sup>30</sup>
- For its UK subsidiaries, the NAB joined in the then ‘widespread’ practice of bundling ‘payment protection insurance’ into bank loan contracts, unknown to customers. The British Competition Commission in late 2008 recommended an end to automatic bundling. The NAB subsequently set aside A\$154 million to compensate customers.<sup>31</sup>

There is something deep-rooted in the NAB that has reduced this 150-year old institution from top rank (if briefly) to also-ran in twenty years. The company was subject to much publicity over the trading room scandal, but the publicity and investigations were quarantined to the trading desk scandal and senior management complicity in that affair. Nobody (inside or out) has sought to forensically analyse the drinking water first at 271 Collins Street and now on Bourke Street.

## Thus is born Dr Jekyll and Mr Hyde

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was to use the bank's tax capacity to generate exempt income." The author notes: ‘The assessment was made on six loans made between 1998 and 2005 to offshore financial institutions at low interest rates which generated tax losses through fees and hedging costs. The transactions were structured to allow the BNZ to deduct its expenses of earning the income gained on the investment, while receiving that income free of tax.’ Allco Finance, that pillar of financial rectitude, was integrally involved in the contrivance. The only thing overshadowing the NAB’s cupidity was the fact that Westpac was in the red even deeper (~\$NZ900m.). A mooted appeal by the NAB in August 2009 drove the Little Big 4 to arrange a (as per usual) cartelised settlement with the New Zealand tax office to the tune of \$NZ2.2 billion, with the NAB’s liability coming in without discount for good behaviour at \$NZ660 million. The BNZ’s CEO provided the customary blather: “Simply put, we acted in good faith at the time ...”. Richard Gluyas, ‘Big four in \$1.7bnNZ tax settlement’, *The Australian*, 24 December 2009.

<sup>28</sup> Melissa Singer, ‘NAB repays millions in late charges’, *The Age*, 15 May 2010. Litigation funder IMF CEO, Hugh McLernon, noted: “... NAB’s repeated error demonstrated that the contract between a bank and its customer was one-sided ...” Quite. McLernon again: “If there were numerous complaints about these exception fees over the seven years they were charged then it is surprising the overcharging was not detected over such a long period of time.” Not detected? Notes the author, ‘The blunder was buried on NAB’s website.’

<sup>29</sup> Alison Bell, ‘NAB faces UK mortgage customer flight’, *Sydney Morning Herald*, 23 July 2010. ‘[Analyst Colin Whitehead] said the IT mistake highlighted NAB’s incompetence in basic banking and executing acquisitions.’

<sup>30</sup> Richard Baker & Nick McKenzie, ‘Wrong woman pursued for \$7000 debt to NAB’, *The Age*, 14 September 2010.

<sup>31</sup> Matthew Drummond, ‘NAB waves goodbye to UK profit’, *Australian Financial Review*, 20 May 2011. This scam is redolent of the 1980s foreign currency loan era in Australia when the participating banks loaded an illegal 10% withholding tax on customer interest payments (a loading that was not passed onto the Tax Office).

The most significant outcome of the investigations into and publicity surrounding the trading desk affair is that the NAB upped its expenditure on advertising and public relations, emphasising that it had changed its spots and the quality of its new operations. However, the NAB continued to treat its small business / family farmer portfolio as a fiefdom in which absolute discretion of treatment would be retained by NAB management. Public image and practices resided in dramatically different worlds. This divergence is the subject of the October 2010 document ‘Illusion and Reality at the National Australia Bank’ (henceforth Illusion and Reality I). As I observed there, ‘illusion has become the new reality’.

### **Dr Jekyll I presume**

Management has evidently taken this maxim to heart, because the advertising and public relations machine has been further accelerated to Olympian heights in the interim. One is reminded of the NAB’s omnipresence with almost every passing bus and every passing bus shelter. The mainstream papers are full of it.

The non-mainstream online forum, *New Matilda*, home to some of my articles critical of the banking sector and its perfunctory regulatory apparatus, has recently sported NAB advertising. Said the ad: ‘Get started at the new NAB Small Business website / Need help turning your ideas into a business? / We’ve got the tools to help make it happen.’ We know that *New Matilda* is most deserving of a financial helping hand, but here is a site that has no truck with chicanery in high places. Is the bank saying, ‘We’ll see you and raise you’?

The bank’s on Hotmail. It’s on the ASX site (presumably to distract site browsers from the NAB’s wallowing share price).<sup>32</sup> More, if I get onto the website of the British *Guardian* newspaper, the NAB is there again. There is no escape.

One advertisement in the New South Wales rural paper, *The Land*, was conveniently placed immediately below an article spruiking National Party Senator John Williams giving banks “... a rare pat on the back for coming to better terms with rural Australians and empathising with people on the land.” Williams exclaims: “... I applaud the banks for sitting down and having those talks with our farmers in a caring manner.”<sup>33</sup> Presumably the placement was coincidental.<sup>34</sup>

The NAB even cares for the hard-put grave-diggers, with whom it does much business and whose money trail would be of more than passing interest to the bank:

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<sup>32</sup> Every time I notice the NAB’s struggling share price, I contemplate the state of Judge Dodds-Streeton’s share portfolio. The Honourable Judge admitted to a holding of 8,000 NAB shares when she presided over *NAB v Walter* (VSC 36, 2004); the share price then hovered around \$30. Still, the yield on NAB shares (as for those of the Big 4 in general) ensures a comfortable above-average return for judicious judicial investments.

<sup>33</sup> Colin Bettles, ‘Make the most of bank mediation’, *The Land*, 26 May 2011.

<sup>34</sup> The *Land* article misspells counsellors as ‘councillors’, the same misspelling used by a NAB agribusiness manager in his missives. One presumes another coincidence, or perhaps they all went to the same ag college.

At NAB we understand the insolvency industry and the pressures insolvency practitioners are under. That's why we've put together our new Insolvency Service, designed to deliver the fast, efficient service we know you need. Supported by a team of insolvency specialists and a dedicated service desk ...

Meanwhile, the advertising industry, that specialist in the manufacture of myths, has delivered a coup to the NAB with 'a public relations Grand Prix at the Cannes advertising festival' with the 'broken up with the other banks' campaign. A spokesperson for the company behind the campaign claimed: "They had done all this work on being a fair-value bank and perception hadn't caught up ... The campaign was a genuine reflection of who they are as a business."<sup>35</sup>

So much for the advertising. The complementary public relations edifice is vast. AFL-sodden Victorians are blessed with NAB's sponsorship of the pre-season competition. The NAB's sponsorship of the National Press Club reminds politicians and the media of the bank's ubiquity. The bank finesses the NSW Farmers Association with sponsorship. It supports the Aboriginal community. It dabbles in microfinance.

The NAB also looks to profit from links to the intellectual community and the now rampant 'corporate social responsibility' sector. It has previously funded professorial chairs in banking/finance. It has a substantial presence at Monash University – notable is the funding of an annual scholarship at Monash's Human Rights Law Resource Centre.<sup>36</sup> The NAB funds a research fellowship at the multi-campus Centre for Social Impact, headed by ex-senior public servant Peter Shergold; the fellowship incumbent, located at UNSW, 'conducts research on the third sector, philanthropy, and volunteerism'. CEO Cameron Clyne is a member of the Leaders Forum of the Australian Institute for Population Ageing Research at the University of New South Wales' Australian School of Business. The bank has given a 'long-term loan' to the coalition of Mission Australia and the Brotherhood of St Laurence that is take over the management of almost 700 child care centres left rudderless following the collapse of ABC Learning.<sup>37</sup>

The bank operates the 'NAB Social Responsibility Advisory Council', which leverages the reputation of moral campaigner Tim Costello as co-chair (with CEO Clyne). This Council 'has a pivotal role to provide NAB with strategic advice, feedback and counsel in relation to NAB's social responsibility strategy and activities.' The Council includes as members former Victorian Premier, Steve Bracks, who 'advises NAB on a range of corporate social responsibility issues in

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<sup>35</sup> Clare Kermond, 'NAB stunt puts it poles apart', *The Age*, 23 June 2011.

<sup>36</sup> The website notes that 'The HRLRC is a joint initiative of the Public Interest Law Clearing House (Vic) and Liberty Victoria.' PILCH (Vic), of which the NAB Legal Department is a member, does excellent work in the field of legal assistance for the less fortunate. Fortunately for the NAB, PILCH's coverage does not extend to bank customers rendered penniless by their lender's malpractice.

<sup>37</sup> Ironically, the NAB was left with an exposure to the dysfunctional ABC Learning of \$140 million. The only factor mitigating yet another reflection of the NAB's incompetence is the fact that the other three of Australia's Big Four banks all were left with a larger exposure than was the NAB.

his role as Executive Adviser to the Group CEO', and the bank's General Manager Corporate Responsibility, Tim O'Leary, who is 'responsible for strategic community and reputational initiatives, corporate responsibility and community marketing.' The NAB has also leveraged the good name of the Benevolent Society through an ongoing relationship. A forum that took place on 5 May 2011 noted that the Society's 'Social Leadership Australia has been working together with the National Australia Bank to design and deliver leadership development for the bank's top two tiers of management since 2007, using our hallmark social leadership model.' The collaboration is presumed to be 'simultaneously delivering on both organisations' missions by putting 'big picture', socially-aware leadership at the heart of the corporation's strategic agenda.'

The NAB website reinforces the glowing picture. Under the heading Organisational Culture, we read: 'People, reputation and culture are a key strategic focus for NAB. Our beliefs and behaviours are the foundation of our culture, which is what our people, our customers and our community experience every time they interact with us and is articulated through our behavioural expectations.' From CEO Clyne we have:<sup>38</sup>

At the heart of the NAB Group is a belief in potential. This belief motivates us to make a positive and sustainable impact in the lives of our customers and communities and underpins a strong and sustainable business for our shareholders.

In 2009, the bank established its Academy (celebrating 150 years in business), an upscale in-house human relations management cum training apparatus to enhance technical skills, nurture talent and foster 'leadership' potential. Much self congratulation has occurred surrounding this institution.<sup>39</sup> As the Microsoft software provider claims: 'Collaboration technologies from Microsoft are helping the National Australia Bank change its corporate culture and achieve its vision for the future.'

In addition, Joseph Healy, the NAB's Group Executive Business Banking, has found time from his demanding portfolio to personally mount the public relations stage. Healy claims that:<sup>40</sup>

... as banks have expanded, in the quest for standardisation we have seen a diminution in the core skills that once defined the traditional banker ['diligent and prudent']. Judgement of 'soft information' has been replaced by a strong emphasis on quantitative data such as credit-scoring outcomes, audited financial statements and the value of available security.

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<sup>38</sup> *Belief In Potential, Annual Corporate Responsibility Review 2009*, 34pp.

<sup>39</sup> Cf 'NAB's house of learning', Alan Kohler interview of Carl Harman, 'Academy Dean – Leadership & Talent', *Business Spectator*, 23 June 2011. The symbolic leadership of the Academy (the 'vice-chancellor') is under Deputy CEO Michael Ullmer. Mr Ullmer has moved on from a troublesome period when, as Chief Financial Officer of the Commonwealth Bank, he was called upon to provide a masterful dissembling regarding his then employer's maltreatment of small business/farmer customers. Joint Committee on Corporations and Securities, Ref: Provision of bank statements to customers [the so-called Shadow Ledgers Inquiry], *Hansard*, 16 August 2000; also Life Matters program, Rear Window: Banking, *ABC Radio*, 27 July 2001.

<sup>40</sup> Joseph Healy, 'Lend to small business or lose out', *Australian Financial Review*, 16 May 2011.

Banking for SMEs is different. The quality of ‘hard’ and market information on a smaller business is not as robust and efficient as it is for larger businesses. To do SME banking well, a bank must harness and use ‘soft’ information. To do this, bankers must commit significant stretches of their career to working with the same customers in their local communities.

The NAB has recently increased its SME market share in spite of comparatively higher margins. Healy claims that NAB fee pricing is based on ‘fair value’, originating from “... the model of higher rates for better service of the business bank”.<sup>41</sup>

### **Mr Hyde emerges from the wings, peculiarly unheralded on the program**

The NAB has devoted so much energy and resources to revving up the profile that something has been missed along the way. And not merely incidentals, but an entirely contrary culture. As I concluded in *Illusion and Reality I*, “The small business/farmer segment is to be permanently quarantined from any considerations of personal competence and integrity and internal institutional mechanisms that channel those desired personal attributes amongst relevant staff.”

NAB maltreatment of its small business/farmer clientele continues apace, in spite of the bank having created a new small business unit in May 2010. Maltreatment has an illustrious history.

My first record is for 1981-82, when the local NAB manager threatened to foreclose on a farmer near Kingaroy after the manager had broken the contract. The record fills out after the mid-1980s. Of stellar significance, as precedent and for substance, is the bank’s support of a branch manager’s 1984 fraud against Ned and Joy Somerset, who were induced to purchase an unviable strawberry farm out of Toowoomba following the manager’s misrepresentations and a loan application based on fabricated valuations.<sup>42</sup> The Somersets came to the bank with a nest egg (successful farmers) and were left penniless – a phenomenon to be replicated from then on.

The apex of perfidy known to this author has been the default and foreclosure of Sante Troiani’s Bundaberg-based Wide Bay Bricks between 1996 and 2001. (Although the taking down of Brendan Communications in the late 1980s, while lesser in scale, appears to be in the top rank of brutality.) Troiani was induced to move his business to the NAB in late 1993, seduced by an October 1993 NAB ‘Ethnic Business Award’. The WBB foreclosure process is labyrinthine, and raises unanswered questions regarding NAB’s intent.<sup>43</sup> With the business and considerable other property, Troiani and his wife had assets valued at well over \$50 million dollars. Upon being bankrupted by the NAB, Troiani, an initially penniless migrant, was returned to penury. Here is

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<sup>41</sup> Matthew Drummond, ‘Business cranks up pace at NAB’, *Australian Financial Review*, 19 May 2011.

<sup>42</sup> The case is summarised in Evan Jones, ‘The Banks and Small Business Borrowers: case studies of adversity’, *Working Papers* ECOP2004-3, School of Economics and Political Science, University of Sydney, April 2004.

<sup>43</sup> This complex process is partially detailed in John Salmon & Evan Jones, ‘Shadow Ledgers and the Default Process in the Australian Banking Sector’, April 2010, p.10ff.

the classic migrant success story, blown out of the water by a gang that hasn't read the script. The NAB even appropriated two superannuation funds, one serving Troiani personally and one serving WBB staff. Troiani died of overwork in 2007, attempting to scratch a living.

The major beneficiary of the taking down of the innovative Troiani was the latter's competitor, the giant building products company Boral, and with whom NAB then had several Directors in common, including Bruce Watson, then Chairman of Boral's Gas Corporation. Troiani had been using LPG from Boral's new Gladstone supply depot to fire his kilns when he switched from diesel in 1984. The gas supplied persistently suffered from impurities, dramatically impeding production. In 1987 Troiani obtained Premier Joe Bjelke-Petersen as a mediator and Boral subsequently paid WBB compensation, acknowledging culpability. When Troiani joined the NAB, the gas impurities (according to Troiani) returned, but the bank demanded that WBB remain with Boral's gas subsidiary, in spite of the fact that a new competitor had appeared (Elgas), offering cheaper rates. The NAB manager who had been cold-calling Troiani to win his business told the naive Troiani that no relationship existed between the NAB and Boral, when Troiani noted to the manager that any such connection would mean no deal. Boral had also made Troiani an offer to buy WBB, without success.<sup>44</sup>

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<sup>44</sup> The NAB/Boral connection was given provincial media attention in 2005 following a speech on the affair in the Queensland Parliament (22 November) by the Independent Member for Maryborough, Chris Foley. Anon, 'NAB accused of dirty tricks in fall of bricks', *Fraser Coast Chronicle*, 24 November. The article opens with the statement: 'Australia's biggest bank has been accused of colluding with one of Australia's biggest companies to destroy a Wide Bay business.' A bank spokesman was reported as claiming that the bank "vigorously disputed the portrayal given", and would be providing a 'detailed response to the allegations'. No such detailed response was forthcoming. In reportage the following day, 25 November, a bank spokesman claimed that "All those allegations that the Member has made have been before various courts, state courts of appeal, etc, and have all been thrown out of court." Well this claim is grievously in error. The NAB acquired a summary judgement against Troiani in the Queensland Supreme Court on 19 March 2001, Chief Justice de Jersey presiding. Being a summary judgement, no bank documents were discovered (the receiver had the company documents) and the defense was subsequently frail. Troiani's barrister, husband of a Queensland Supreme Court judge, withdrew almost immediately after accepting the case and Troiani had no choice but to accept his offered replacement. Troiani's new barrister, a colleague of de Jersey, instructed Troiani not to attend the hearing. The transcript of the hearing has been destroyed, and the judgement is not publically available. An appeal by Troiani was thrown out (NAB v Troiani, QCA 196, 6 June 2002), not least because Troiani could not afford to appear before their learned gentlemen of the bench.

From the Appeal transcript, McPherson JA pontificating: "If you want copies of documents and there seem to be literally hundreds of them, if not thousands in this case, you have to pay for copies of them. [The Troianis are referring to documents of their own business, WBB, withheld from them by the NAB's installed receiver, and to NAB documents relevant to their case.] Now if you can't do that there's no point in our even thinking about setting aside the judgment because after a long trial, which will cost a vast amount of money, you will find yourselves in a position where you haven't proved anything and you won't be able to pay for it. Nobody will act for you unless they have a prospect of being paid. It's just like any business; you don't sell bricks without being sure that you'll be paid for it and the barristers and solicitors are just selling bricks but they don't do it free of charge. ...

"Second Appellant [Mrs Rita Troiani]: Your Honour ...

"McPherson JA: It's no good saying that you won't get justice. You won't get justice unless you're able to pay for the people who can bring it to you, and that's barristers and solicitors."

McPherson's dictum is the flip side of Anatole France's 1894 observation that 'The law, in its majestic equality, forbids the rich as well as the poor to sleep under bridges, to beg in the streets, and to steal bread.' McPherson JA

The notion of a bank taking down a customer for the benefit of third parties, especially a more powerful party, seems unthinkable to the uninitiated but it is not improbable. This interpretation provides the rational explanation for the NAB's appropriation of a small-scale outer Melbourne-based telco Brendan Communications (beneficiaries, Telecom, with trickledown to various hangers-on, 1986-8),<sup>45</sup> and of a suburban Melbourne private mortgage customer, Ross Delahunty (Housing Industry Association, revenge against criticism, 1993).<sup>46.47</sup>

As with the Tour de France, there are exceptional peaks of NAB malpractice, but it has been variations on a theme to this day. Notable is the bread-and-butter case of Anita Bernstrom, who brought a case against the NAB regarding the NAB's cynical treatment of its loans for her North Queensland development property. Chief Justice de Jersey took the trouble to travel to far-off Cairns to hear what was formally a minor matter on 20 September 2001 but ended up privileging a NAB counter-claim and giving summary judgement to the bank – again on the strength of a (contrived) claimed debt and no bank document discovery. Moreover, de Jersey admitted

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neglected to note that even with 'a vast amount of money' spent on legal assistance, the Troianis were not going to get justice in Queensland. In short, the NAB spokesman, regarding the presumed testing of the Troianis' claims in the court, was being economical with the truth.

It is also noteworthy that Boral has form in disliking the phenomenon of competition. Greatest publicity has been afforded the events of the early 1990s recession which led to vicious price competition in Melbourne in concrete masonry products. The ACCC brought a case of misuse of market power against Boral, denied by the Trial judge, reversed on appeal in favour of the ACCC and ultimately denied by the Gleeson High Court, which equated competition to the law of the jungle (*Boral Besser Masonry v ACCC*, HCA 5, 7 February 2003). But the facts are that Boral escalated existing price discounting in early 1993, with the prospects of new entrant C&M soon to be producing from a more efficient plant, with the strategic intent to eliminate competitors (especially C&M) so that when the market returned to normal, stability would prevail. Its scale in the market (market power?) enabled that strategy to be pursued and to succeed. Simultaneously, Boral had been participating in a Brisbane-based concrete cartel, which was successfully prosecuted in 1995. ACCC Chairman Allan Fels called this market fixing "... a particularly blatant cartel in which the suppliers met regularly to share out tenders, to collude on prices for tenders and to ensure that each participant achieved an agreed market share." ('Issues in Competition Law', Speech to the Queensland Press Forum, 12 June 2003.)

In 2009 it came to light that 'Boral managing director Rod Pearse lobbied the federal government to block a rival \$110 million brick-making operation in Perth ... Boral has now admitted it helped generated the community backlash by covertly funding defamatory DVDs and leaflets aimed at stopping the rival brickworks and protecting its status as WA's largest brick manufacturer. The material falsely warned the plant would damage the health of local schoolchildren due to its high level of carcinogens, increase local death rates and become a target for terrorists due to its proximity to Perth Airport, including the phrase "remember 9/11"'. Andrew Burrell, 'Boral's brickbats backfire', *Australian Financial Review*, 30 November 2009. More recently, Boral purchased the largest privately-owned construction materials business in Queensland (analysts thought the price excessive). Significantly, 'The purchase eliminates a cost-cutting competitor and increases Boral's market share in the state'. Philip Wen, 'Boral gets set in Queensland with \$173m buy', *Sydney Morning Herald*, 16 April 2011.

<sup>45</sup> Fabrizio Calafuri, 'Writ maroons communications plan', *Diamond Valley News*, 9 February 1988. A Mallesons Stephen Jaques employee, enforcing the foreclosure for the NAB, threatened the Brendan Communications proprietor and the newspaper over this article.

<sup>46</sup> The Delahunty story is also summarised in Jones, n.41.

<sup>47</sup> Another case is a possible candidate for this domain. A Western Australian firm in the food supplier sector was taken down by the NAB in 1998, with the principal believing that his firm's destruction was done in the interests of a food industry giant. Also suspicious is a NSW farming business, currently under pressure to sell on unfavourable terms with recognisable predators looming.

evidence claimed to have been obtained (from Bernstrom's son) by the bank's barrister outside the court; the hearing transcript was incomplete on significant detail; and the judgement (QSC no.52 of 2001), as per *NAB v Troiani* six months previously, is not publically available.<sup>48</sup>

The NAB, along with the other banks, has been greatly assisted by comprehensive inaction against unconscionable conduct, etc., by the regulators,<sup>49</sup> and general support for or complicity with the banks by the judiciary.<sup>50</sup>

The NAB's treatment of Kay, Inak and Canli has more mileage in this context. Reiterating the summary from *Illusion and Reality I: The NAB recently again found itself on the wrong side of the court in Kay v NAB* (NSWSC 1116, 30 September 2010). For the purposes of a specific property development in Auburn, Suburban Sydney, Kay et. al. borrowed \$1,150,000 at 5.65 % (with a default penalty rate of +4%) on a 12-month interest-only loan (with option for loan turnover) from July 2003. They only took the loan in the first place because the NAB offered them a 'competitive' rate to get their business. Immediately, the NAB charged a (slightly) higher interest rate, and claimed default when the initial loan expired, applying usurious penalty rates of roughly 20%.

Rothman J found "From day one of the contract, NAB was in breach ...". But instead of going for the jugular, Rothman essentially dictated a refunding of money estimated to be obtained through illegitimate penalty rates, and led the parties to mediation. The bank got off lightly, but still considered appealing the judgement (in effect, threatening the beneficiaries of the judgement). The probability is that the NAB only subsequently came to the mediation table because, atypically, the beleaguered former customers had strong media support.<sup>51</sup> If it's anything NAB does not like it is adverse media publicity, which puts a spanner in the well-oiled good news pitch. Indeed, the Kay et. al. case only got to court because of ongoing media support

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<sup>48</sup> The interest of Paul de Jersey, Justice then Chief Justice, in NAB litigation in Queensland has been forensically examined by John Salmon in a document addressed to various authorities. There is a long and a short version (December 2009 and July 2010 respectively).

<sup>49</sup> C/f Evan Jones, 'Business to business unconscionability: ASIC missing in action', October 2010. ASIC has claimed (letter to me, 8 July 2011) that '... ASIC considers every complaint we receive.' From the ASIC responses to bank victims in my possession, that claim lacks credibility. ASIC has also claimed that [from consideration of complaints]: 'To date, this has resulted in ASIC investigation approximately 15 cases where there was or may have been unconscionable conduct.' The evidence indicates that, if the number is to be believed, such cases involve retail customers. The only case reported of ASIC pursuing an unconscionable conduct (and misleading and deceptive statements) was against two mortgage brokers in 2007-08. ASIC annual reports make no mention of its responsibility for business to business unconscionable conduct in financial services. It is reasonable to infer that (save for the 2007 Safetli case, under pressure from Parliament) ASIC has not initiated a single case under this category. The major banks have nothing to fear from ASIC.

<sup>50</sup> C/f Evan Jones, submission to the Senate Standing Committee on Legal and Constitutional Affairs, *Inquiry into Australia's Judicial System and the Role of Judges*, 19 March 2009.

<sup>51</sup> C/f John Rolfe, 'National Australia Bank rips off family but GE Money holds off on eviction', *Daily Telegraph*, 21 October 2010.

and ongoing income generated by the principals, two factors typically absent when bank customers seek redress against malpractice.

During the hearings of the Senate Economics Reference Committee inquiry into banking competition in late 2010, Committee member Nick Xenophon queried NAB CEO Cameron Clyne about the Kay case. Xenophon, a lawyer, had attended the NAB - Kay mediation. Here is the exchange.<sup>52</sup>

**Senator XENOPHON**—Finally, I attended, as did Senator Williams, for much of a day a mediation between the bank and three individuals—Ozzie Inak, Memhet (sic) Ali Kay and Memhet (sic) Canli. This was in relation to what I think you could say was quite an ugly dispute that ended up in the New South Wales Supreme Court before Justice Rothman, where certain findings were made against the bank. Fortunately, that matter was resolved as a result of the intervention of senior bank officers—and all credit to you for that. But it was a long, drawn out dispute; it was very ugly, it was very unfortunate in terms of the personal impact it had on a number of those individuals. What can be done so that these sorts of things do not get out of control? Again I emphasise that fortunately it has now been resolved. How do you prevent things from going haywire in the first place so that you do not have that enormous toll on the individuals and also the resources of the bank tied up in that sort of long-running dispute?

**Mr Clyne**—Obviously, it would be inappropriate for me to comment—

**Senator XENOPHON**—Just in terms of the systemic issues.

**Mr Clyne**—We have over three million customers in Australia and inevitably, given the millions of interactions we have with those customers, there are going to be situations where we do not do the right thing by them. What we have been trying to drive is, I think, evidenced by our push on the fee front. We have been heavily criticised for that by a range of people who suggest that we are trying to drag the industry down. What we are trying to do—and what we are saying—is: ‘No. We want to provide a competitive offering. At the heart of that is our desire to have a better relationship with our customers. There will be situations—not wanting to comment on the specifics of that case—where we do not do the right thing by our customers. I think what we have to do as an industry, and certainly what NAB is committed to doing—is step up, acknowledge where we have made a mistake and try to rectify it. We deal in a regulated industry as well and, in many cases, you have to deal in black and white. You have to be very clear in the terms that you are providing and in the nature of the contract you have between the bank and the customer. Inevitably, when there is a dispute, there is grey. Unfortunately, those things often take time to resolve because you do not want your bankers dealing in grey. You

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<sup>52</sup> *Hansard*, 13 December 2011, p.E69.

need to do most of what you do in black and white in order to make it fair and transparent for the customer, and sometimes it does need to be escalated, unfortunately, where people make a pragmatic and common sense assessment on individual cases. We would like to see that resolved more quickly in most cases, but that is generally, unfortunately, what drives it. It gets to a situation where there is a dispute and an element of grey. Generally, it has to then go to more senior members in the bank to try and—

**Senator XENOPHON**—Although, in this case the Supreme Court said that it was black and white.

**Mr Clyne**—I cannot comment on the individual details of that case.

This response from Clyne is unmitigated blather. The buck stops where?

The Kay trio's relationship with the NAB began in 2003 and it was abused by the NAB from day 1; the seven years gap to separation is a result of the NAB's unrepentant indifference and belligerence towards this relationship. The victims' lives are put on hold, while bank personnel sleep soundly. In being presented with this case, Clyne treated the Committee inquiry process, and the Committee members, with contempt, and he should have been held in contempt. Said Clyne: "I think what we have to do as an industry, and certainly what NAB is committed to doing – is step up, acknowledge where we have made a mistake and try to rectify it." On the contrary; the NAB was dragged screaming to the mediation. Some NAB personnel were aware of the significance of this case, but that awareness evidently still hasn't filtered through to the top or to lending management in general. The outcome, as per usual, remains confidential, which will allow the bank to continue with business as usual. Which is precisely what it did.

During precisely the period at which the mediation with Kay et. al. was taking place, the NAB, through one of its myriad second tier bottom-feeding law firms, applied for summary judgement (29 November 2010), with no warning, against Melbourne-based Tess Lawrence for possession of several properties over which the bank holds security. A summary judgement denies examination of the circumstances of the case; it presumes that the bank-claimed debt which the bank seeks to 'recover' is a legitimate figure; it is a brutal means of expunging the interests of the less powerful of the parties (the bank customer against the bank lender); and its use in relation to bank-customer relationships should be made illegal. The unconscionability of the summary judgement procedure is precisely the reason why the NAB finds it an appropriate and much-used vehicle, to be legitimised by its validation in the courts. Uncharacteristically, the presiding judge declined the NAB's claim in the Lawrence case.<sup>53</sup> It is not without interest that the presiding judge, Mukhtar J, not long appointed to the Supreme Court of Victoria, had himself

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<sup>53</sup> Mukhtar AsJ presided over *Perpetual Trustee Ltd v Baranov* (VSC 18, 2010) in which he judged as legitimate Perpetual's appropriation of the defendant's family home rather than of any of the other assets over which the lender held security – proving, once again, that the Law is an Ass. Perpetual Trustee, as perpetual litigator (the Austlii database confirms) has given the banks a run for their money in keeping the courts in business.

appeared as counsel for the NAB in the unsavoury case of *NAB v Walter* (VSC 36, 16 February 2004), a classic exhibit for why bank victims find justice in the Australian judicial system so improbable.<sup>54,55,56</sup>

No matter. On 17 December 2010, the NAB tried again, demanding a summary judgement against a Queensland property investor. The Queensland judiciary, in the person of Judge Philip McMurdo, turned back the NAB demand (*NAB v McCall*, QSC 25, 2011). It is not without interest that said judiciary has not found for bank victims since foreign currency loan victims Thannhauser and Ferneyhough won their suits against Westpac in 1991 – twenty years with an unblemished record for the banks, with some shockers in the interim, not least Troiani.<sup>57</sup>

## **Promise and performance at the NAB powerhouse**

### **Service in general**

‘Our Small Business Banking team is available 7 days a week. Preposterous!’, goes another current NAB spiel. The NAB advertising / public relations blitz is a quality product. And behind it? According to a Roy Morgan ‘satisfaction survey’ for May 2011:<sup>58,59</sup>

Despite targeted marketing drives backed by millions of dollars in advertising spending, the big four banks are making little headway with businesses whose turnover averages \$1 million or less a year. ... These remain the least satisfied of all the business customers that have the big banks as their major lender. None of the majors can claim satisfaction levels above 61 per cent ...

The lowest marks ... were reserved for four key areas of service: following developments in customers' businesses; maintaining regular contact with them; having a good understanding of specific industries; and having good knowledge of the specific firm in

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<sup>54</sup> C/f Evan Jones, ‘The National Australia Bank v Walter/Palatinat: A Case Study in the Adverse Small Business Environment in Australia’, April 2007.

<sup>55</sup> It is instructive of the perspicacity of the legal profession that Mr Mukhtar’s elevation to the bench should be celebrated by a sustained denigration of the character of the bank-impoverished self-representing defendant in *NAB v Walter*. Address by Steve Stevens, President elect of the Law Institute of Victoria, 26 August 2009.

<sup>56</sup> Mukhtar also appeared for the NAB in *Kranz v NAB*, VSCA 92, 2003.

<sup>57</sup> This affair is a curiosity par excellence. The investor’s position was parlous, evidently due to his property investing eyes being too big for his stomach (Noosa as perennial seducer), compounded by NAB lending on evidently unsound grounds, including an ‘on demand’ facility. By coincidence, the wife of the learned judge in *NAB v McCall* presided over Bernstrom’s failed appeal as President of the Appeals Court (QCA 231, 28 June 2002), a hearing and judgement which ignored the lamentable absence of due process in the lower court case against which the appeal was brought. Curiouser still, the NAB showed itself willing to reach a settlement on this case, sending a manager from Sydney to handle the negotiations. Anything is possible in the Deep North that is Queensland.

<sup>58</sup> Danny John, ‘Big four, little joy’, *The Age*, 16 June 2011.

<sup>59</sup> I am reliably informed by a small businessperson with a decades-long pedigree in the area (‘the Shire’, where ‘closeknit-ness’ is legendary) that her local Business Banking Centre at Taren Point (southern Sydney suburb) used to house real people. She now deals with a telephone answering service, which may or may not (more probably the latter) connect one to a sentient being. ‘7 days a week’ indeed.

question. "These problems are more severe among micro customers who obviously feel that their bank doesn't pay the same attention to them compared to their bigger customers," Roy Morgan concluded.

So the NAB remains hanging around the rear of the pack with the rest of the Big Four. In the words of a Fairfax journalist:<sup>60</sup>

According to [CEO Cameron] Clyne, NAB has grabbed almost a quarter of a million new customers from its rivals in the past six months courtesy of its high profile marketing push. There's no doubting the power of advertising. But fluff without substance delivers nothing.

To repeat, fluff without substance delivers nothing. Is the NAB getting value for money with its gargantuan advertising/PR budget? The answer depends on the NAB's objectives. Is it possible that customer satisfaction is not the objective?

Formally CEO Clyne has expressed concern. At a business conference in late November 2010, Clyne exclaimed:<sup>61</sup>

The industry needs to stop being as arrogant as it has been. It needs to be less defensive, less dismissive. It needs to be more open. It has to do more listening. It has to display more empathy. It has to display more action ... We need to talk about what's created the dynamic. Is it prices? Is it customer service? Is it issues of access? Is it a product of the fees? Is it a product of the failure to put bank profits in perspective? Is it CEO salaries?

Clyne's then concern was not to do the right thing as a principle, but explicitly to deter further regulation of the industry. And the only avenue for which he publically foreshadowed remedial action was retail banking. Again, small business and the family farm are not on the radar.

### **A more accessible lender**

The NAB has made much of the claim that it maintained and expanded its loan book in the period immediately after the 2008 crash, by contrast with its rivals.<sup>62</sup> Well and good. This is possibly an improvement over 2001 when CEO Frank Cicutto faced the absorption of the massive Homeside fiasco losses and the integration of the MLC purchase, and he instigated the 'Positioning for Growth' strategy (following yet another masterly Masters of the Universe

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<sup>60</sup> Ian Verrender, 'Banking on good times with a guardian angel', *Sydney Morning Herald*, 30 June 2011.

<sup>61</sup> Jacob Saulwick, 'End arrogance, says NAB chief', *Sydney Morning Herald*, 26 November 2010.

<sup>62</sup> See Healy, n.39.

McKinsey review), in which the SME loan book was slashed in the interests of ‘tighter risk management’.<sup>63</sup>

But an expanded loan book is not an automatic sign of loving support of the SME sector. There are considerable traps along the way – including irresponsible or predatory lending; pulling the financial plug when a business project is underway and funds borrowed are committed; unconscionably making the conditions more draconian or defaulting the customer; and selling the customer’s assets under value. But there are no figures for what happens to the loan book down the track, so the publically available initial loan figures mask the more accurate picture.

For a start, some customers included in this expanded loan book should not have been given a loan (or had their loans extended) in the first place. If the NAB was indiscriminately chasing market share prior to 2001, and subsequently regretting it (ditto late 1980s to early 1990s), it hasn’t fully taken that lesson on board. The NAB has proved itself still competent in incompetent lending or in its conscious equivalent, predatory lending.<sup>64</sup> With lending managers looking to up their loan book to achieve bonuses or higher status, predatory lending is a natural by-product.

Public discussion of predatory lending in Australia has mostly centred on retail customers and investors, and even then the legal academic contribution appears to have been slim.<sup>65</sup> More, recent moves for ‘national credit reform’ have excluded small business credit under lobbying

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<sup>63</sup> From October 2001 (apparently also spooked by 9/11 which was supposed to usher in a global recession), the NAB ‘offloaded more than \$1.3 billion of business loans ... because those customers either wouldn't work with us or failed our tests.’ George Lekakis, ‘NAB sheds marginal customers’, *Australian Financial Review*, 16 August 2002. It was claimed that a poor loan book was the result of previously chasing market share, but whether such customers were treated justly on the way out is another matter. The Goonans certainly were not, for which case see Jones, n.41.

<sup>64</sup> There is an equivalent of irresponsible/predatory lending in the retail market, with the NAB in this respect merely following industry ‘best practice’. The Four Corners program, ‘Debtland’, of 31 March 2008 has sometime NAB employee Kim White claiming that he ‘... was under considerable pressure to ‘upsell’ larger loans to customers. “I upsold someone to \$80,000 on more than one occasion when they only came in for a \$20,000 or \$30,000 loan and it was my job to basically talk that person into taking extra money.” Cited in Miki Perkins, ‘Banks take a lend of vulnerable: ABC’, *The Age*, 31 March 2008.

Similarly, the NAB’s involvement with the Satchithanantham couple over a housing mortgage is in this category. *C/f Satchithanantham v NAB*, NSWCA 395, 4 December 2009. At par.6, “The primary judge’s reasons disclose sufficient facts to reveal what can be described as the less than prudent banking approach to the transaction by the NAB. The NAB knew, for instance, that Mr Satchithanantham was an undischarged bankrupt and that the applicant was in receipt of Centrelink payments. (The Satchithanantham’s son is severely disabled.) The primary judge’s reasons also disclose that the bank was given facts about the rental income of the property by Mr Satchithanantham that were less than accurate. The primary judge concluded that the NAB engaged in ‘pure-asset lending’, that is ‘to lend money without regard to the ability of the borrower to repay ... in the knowledge that adequate security is available in the event of default’ ...” At par.12, “In response to this, counsel for the NAB reminded the judge that this was a facility cancellable at will and that it was cancelled and that a clause of the loan agreement conferred a contractual entitlement on the bank to take possession of the security property.” A housing mortgage facility cancellable at will?

<sup>65</sup> An exception is Jeannie Marie Paterson, ‘Knowledge and neglect in asset-based lending ...’, *Journal of Banking and Finance Law and Practice*, 20, 1, 2009.

pressure from the bank lenders.<sup>66</sup> The old story is that small business is run by a businessperson who of necessity has his/her wits about them and enters into any contract with a clear head.

It is desirable/necessary to quote a marvellous passage from Australian legal academic (and some-time barrister), Lee Aitken:<sup>67</sup>

What is the business of a bank? It is to lend money on a secured or unsecured basis to a borrower who uses the funds thus advanced to make a profit and repay both the principal and interest to the bank. It is often said that a bank should not 'lend against security', ie it should not lend on the basis that it is likely that it will need to take enforcement action to recover the collateral offered for the debt. Rather, the bank should only lend when its lending appraisal, conducted according to its own rigorous criteria, makes it clear that the intending borrower ... will nevertheless be able to repay the debt from cash flow with its interest, whereupon the bank will discharge the security. Thereupon, in a never-ending virtuous cycle, the bank will lend again to the ultimate benefit of the economy. Although it is a rule of sound banking policy that the bank should lend against security [what?], it has not thus far been elevated into a substantive rule of law, breach of which may preclude the bank from recovering its advance.

Let us also hear from a reputable banking textbook, having gone through myriad editions [J.M. Holden's *The Law and Practice of Banking*].<sup>68</sup>

... it must be stressed that the most important qualification of a successful banker is, and always has been, the ability to judge the character and credit-worthiness of his (sic) customers. ... [Quoting the bankers' submission to a British 1978 financial sector inquiry] "The most fundamental principle of all is that the bank should have confidence in the integrity, competence and continuing creditworthiness of the borrower." Any security should be regarded as a last line of defence to fall back upon in exceptional circumstances only.

Quite. But back to the real world. As a (then) British legal academic, Joan Wadsley, has claimed: "As the law stands at present, lenders, such as banks and building societies, have no duty of care to lend reasonably."<sup>69</sup> Wadsley continues:

Banks' advertising is often warm and encouraging [The NAB as Exhibit A] and bank staff can unintentionally give the reassuring impression that a project is viable,

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<sup>66</sup> Though a federal Treasury Green Paper, surprisingly, makes positive noises about including small business in the next stage of the reforms: Australian Government, The Treasury, *National Credit Reform: Enhancing confidence and fairness in Australia's credit law*, July 2010.

<sup>67</sup> "A 'duty to lend reasonably' ...", *Journal of Banking and Finance Law and Practice*, 18, 1, 2007.

<sup>68</sup> Holden, 8<sup>th</sup> edn., 1993, vol.2, p.12; quoted by Joan Wadsley, 'Bank lending the family home: prudence and protection', *Lloyd's Maritime and Commercial Law Quarterly*, 3, 2003.

<sup>69</sup> Wadsley, *ibid*.

particularly in periods of financial expansion. ... In recent decades, under the pressures of the liberalization of financial markets and of greatly increased competition, their traditional prudent policies have given way to a more dynamic and entrepreneurial approach. It can be argued that the changed approach to lending evidenced by transactions in the 1980s, as well as modern banks' behaviour and advertising, justifies different expectations in modern borrowers.

The crux of the matter is that bank lending to SMEs in Australia is rooted in one practice and one convention, combining into a generally accepted culture, and with often parlous consequences. The practice is that banks lend to SMEs on the basis of security, not prospects. More, security is first and foremost taken on the family residence (in the case of farmers, the business and residence being physically co-located).<sup>70</sup> The convention is that banks have no fiduciary duty towards their borrowers, as dictated (with very rare exceptions) by imperious judicial precedent.

The combination means that banks are essentially money-lenders; professionalism – competence, commitment and integrity – is a surplus commodity, a fact unknown to the typical borrower. The lender and the borrower, from the signing of the contracts, have a mutual agreement but the understanding of the meaning of that contract is divergent. Therein lies the rub.

A couple of court cases in Britain have found for the borrower on the grounds of irresponsible lending *per se*.<sup>71</sup> There appears to have been only one such victory in Australia.<sup>72</sup> Australian banks (and other financiers) more or less have *carte blanche* in this arena.

Cases of NAB irresponsible/predatory lending include:

- Troiani / Wide Bay Bricks, Bundaberg (mid 1990s; the ultimate 'sting' operation)
- Lawrence property financing, Victoria (mid 2000s)
- Tasmanian small retailer (mid 2000s)
- Boyd, NSW retail business (mid to late 2000s)<sup>73</sup>
- Victorian rural retailer (late 2000s)
- Cornell farming application. Western Australia (late 2000s)
- Western Australian importer (late 2000s)

### **Dodgy Brothers Inc**

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<sup>70</sup> A legal academic opines: 'Moreover, in *Cook* [Cook v Permanent Mortgages, NSWCA 219, 2007] the dealing concerned an issue of extreme emotional importance, the family home. The family home has significant emotional and social importance unlike most other assets.' (Paterson, 'Knowledge and neglect ...', see n.64) Well, duh! This compulsory offering of the family home is at the heart of the equivocal moral character of small business/farmer finance, the implications of which the legal profession, whose judicial arm hands over these assets of 'extreme emotional importance' on a daily basis before repairing for lunch, is completely oblivious.

<sup>71</sup> Notably *Bank of Cyprus (London) v Markou*, 1999, and *National Westminster Bank v Breeds*, 2001.

<sup>72</sup> *Smith v Elders Rural Finance*, NSWSC Equity Division (Bryson J), 25 November 1994 (unreported).

<sup>73</sup> This loan package was arranged in conjunction with a corrupt Wizard broker.

Regarding lending manager practices, incompetence and/or opportunism share a spectrum with dodgy dealing rather than being separated by a clear divide. But some NAB cases can be readily attributed to corrupt practices by managers. Managers involved may be sacked, may be moved sideways out of range, or may be excused, even rewarded, but the customer will be the one that suffers the consequence.

- Keith Smith, hapless guarantor, Queensland (1984)<sup>74</sup>
- Somersets / Kabwand, Queensland farmers (1984)
- Brendan Communications, Victorian telecommunications (1986-91)
- Fred O'Connor, hapless guarantor, Queensland (late 1980s)<sup>75</sup>
- Troiani / Wide Bay Bricks (1993)
- McMinn, child care centre, Queensland (1996)
- Pavlis and Pisano families, Sydney (mid 2000s) [retail cases]<sup>76</sup>
- Voula Amassah, Sydney (mid 2000s)<sup>77</sup>
- Lauro family, small business & home of parents as guarantors, Queensland (2005)

### **Ensuring the blood supply**

If lending is based on the security of pledged borrower assets rather than on business prospects, the garnishing of adequate security on loans extended is fundamental to 'sound business practice'. The family residence is the security rock. The smart lending manager then builds further security through interlocking guarantees – in particular the tying of as many personal assets of the principal/s as possible into the business-bank relationship. If bank personnel decide that the business should be defaulted, the bank can go after the bulk of the borrowers' personal assets (as in Troiani above).

Then on to the relatives. The convention of demanding that business borrowers supply guarantors (other than the principals) of the business debt is a key means of enhancing security at the time of the original contract. It is a practice open to slovenly lending practices at best and corrupt abuse at worst. Atypically, a series of court cases have found for the borrower/guarantor (under unconscionable conduct provisions of the Trade Practices Act) after the 1983 Commercial

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<sup>74</sup> See Jones, n.41, for a summary of the Smith case.

<sup>75</sup> O'Connor was one of three guarantors on a water pipes development project at Maryborough. The bank went after O'Connor, a customer at the same branch, who had the title to his property looted from his private safe custody packet to which the bank had no right of access.

<sup>76</sup> Geesche Jacobsen, 'Staff rot leaves bank customers in bankruptcy', *Sydney Morning Herald*, 27 April 2010. The Pavlis and Pisano families (and others) were victims of a cabal of three bank staff and a 'loan arranger'. The scam involved three banks (NAB, ANZ, CBA), highlighting the systemic nature of poor governance. The ANZ and CBA remained (at reporting date) resolutely recalcitrant with respect to their complicity. The NAB has settled with Pisano but the bank '... refuses to talk to the Pavlises about their loan because they are still bankrupt.' A NAB spokeswoman claimed: "Where [claims are] found to have any validation at all, no customer would be left out of pocket as a result." Pull the other leg and it plays jingle bells.

<sup>77</sup> Nick Grimm, 7.30 Report, *ABC*, 9 August 2007.

Bank of Australia v Amadio litigation, cases in which the NAB has been regularly invoked as the guilty party (*vide* Illusion and Reality I). Suffering no remorse from previous judicial and regulatory condemnation, the NAB pursued the same unconscionable process with respect to the Safetli family.<sup>78</sup> Some legal practitioners consider that other-party guarantees are innately problematic.<sup>79</sup> In this context, the then NSW Labor Government instigated a review of the practice, which resulted in an admirable report.<sup>80</sup> The banks carry on regardless.

In spite of the fundamental significance of ensuring initial security and of the use of loan guarantors, situations perennially arise in which the NAB decides that its security is ‘inadequate’, and thus procedures are put in place down the track (regardless of ethics or legality) to top up security. Some instances:

- Fred O’Connor, guarantor, Queensland (late 1980s)
- The NAB’s disastrous involvement with Alan Bond’s Bell Group is the granddaddy in the genre. The NAB, instigating and in collusion with the other major bank lenders, stepped in in January 1990 to manufacture security for its dud loans. The bank consortium put the Bell Group into receivership in April 1991, looting \$280 million from Bell coffers and leaving other unsecured creditors, owed over \$1 billion, with nothing. This chicanery, layered on incompetence, has cost the exchequer vast sums in subsequent litigation, and it’s still ongoing.<sup>81</sup>
- Doneley family, Queensland farmer (mid 1990s)<sup>82</sup>
- Victorian rural services company (2007)<sup>83</sup>
- Boyd family, NSW retail business (2009)
- Parents of NSW builder (current)
- Queensland farmers (current)<sup>84</sup>

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<sup>78</sup> Richard Gluyas, ‘Regulator examines NAB over ‘breach’’, *The Australian*, 17 May 2007. Also, Nick Grimm, 7.30 Report, *ABC*, 9 August 2007. This is the only occasion in which ASIC has acted on its legislated responsibilities for business to business unconscionability in financial services since it acquired them in March 2002. See Jones, n.48. Tellingly, it only pursued this case because of pressure from the Parliamentary Joint Committee on Corporations and Financial Services. ASIC has not disclosed the outcome of its investigations, although the rumour mill indicates that a settlement was reached.

<sup>79</sup> C/f Matthew Bransgrove, of Bransgrove Lawyers, “From all the cases we have seen, it is hard not to conclude that they don’t serve any useful purpose ... I think they should be banned, especially where the guarantee is used to support a business loan.” John Kavanagh, ‘Asking for trouble’, *Sydney Morning Herald*, 30 March 2011.

<sup>80</sup> NSW Law Reform Commission, *Guaranteeing someone else’s debts*, Report 107, November 2006.

<sup>81</sup> The receiver finally took the banks to court in July 2003, the litigation lasting until September 2006. Justice Neville Owen handed down a 2,600 page judgement in October 2008. Owen found the banks “... were liable as recipients of property from companies whose solvency was in doubt” (quoting *Lawyers Weekly*). Michael West, ‘Bell tolls for the Bad Boys’, *The Age*, 28 October 2008. In April 2011, the banking consortium, unrepentant as ever, launched an appeal against the Owen judgement.

<sup>82</sup> In particular, QSC no.7367 of 1998, unreported, Chief Justice de Jersey presiding.

<sup>83</sup> Involving an odious ‘all monies’ guarantee, imposed without the borrowers’ awareness.

### **Lending managers here today ...**

Business Banking Manager Joseph Healy claimed in May 2011 that "... bankers must commit significant stretches of their career to working with the same customers in their local communities."<sup>85</sup>

An admirable principle not consistently applied, certainly not where the bank decides in advance that a customer will be defaulted. Cases of lending manager turnover prior to default include:

- the McMinn Queensland child care centre (late 1990s)<sup>86</sup>
- the Walter family Albury/Wodonga restaurant/brewery (early 2000s)
- the Cornell case (and the Narrogin WA branch in general) (late 2000s)<sup>87</sup>

A variation on the theme is where a manager with a functional relationship with the customer is moved elsewhere, to be replaced by a manager who takes an aggressive and destructive posture with the customer:

- Freeman, Queensland grazier (mid 1990s)
- WA rural producer (late 2000s)

or where a functional manager is replaced by a token manager sidelined by a higher authority:

- a current NSW farmer situation.

### **Nurturing the customer I**

Business Banking Manager Healy notes that NAB SME customers are charged a premium, but that this is 'fair value' for a premium relationship.<sup>88</sup> Yet there is the practice of pulling the plug on the borrower when loaned funds have been (if only partially) committed; the borrower is trapped. A premium relationship par excellence. This may not be a regular practice but one occasion is one too many. Developer/builders (in a corrupt industry yet to attract its chronicler) appear to be especially prone to this phenomenon. Some instances:

- the McMinn Queensland child care centre expansion (late 1990s)
- a Sunshine coast builder (early 2000s)
- a Melbourne builder (mid to late 2000s)

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<sup>84</sup> C/f speech by Warren Entsch, National MP for Leichhardt, House of Representatives, 16 June 2011; *Hansard*, p.63.

<sup>85</sup> See Healy, n.39.

<sup>86</sup> Alan McMinn estimates that he had at least 10 managers over a 3 1/2 year period.

<sup>87</sup> In this case, bank spokespersons variously blame its lending manager/s, dissemble about which manager (or both) made the shonky applications, and claim that the problem manager can't be located, though Google could resolve the latter issue in a nanosecond.

<sup>88</sup> See Drummond, n.40.

## Nurturing the customer II

Under the title ‘Small Business Hardship’, the NAB’s website notes:

In the life of a small business, there are always going to be ups and downs. But when short term difficulties arise, it’s good to know there’s someone there to lend a hand. ... So, if times do get tough, get in touch. We’ll take a look at your current position, and suggest ways to move forward to help you get back operating at maximum cash flow and profitability as soon as possible.

Yet the NAB has proved itself adept at going in for the kill (or threatening or attempting such) when adverse conditions of a widely varied nature arise (even if they are evidently of a temporary nature). These instances demonstrate that the relationship is viewed as a money lending operation and not as a business partnership for mutual benefit (or, indeed, for greater social benefit, *vide* Aitken above). Some examples:

- Alessandro Zollo, South Australian builder (late 1980s)
- NAB finance subsidiary Custom Credit borrowers en masse, Western Australia (1990-91)<sup>89</sup>
- Stuart Bros, NSW builder (1994)
- Goonans, NSW Regional hardware business (early 2000s)
- Basstech P/L / Buckman & partners, Victorian instrument calibration business (late 1990s / early 2000s)
- dairy farmers en masse, Queensland (early 2000s)
- Western Australian kitchen supplier (late 2000s)
- Victorian rural services company (late 2000s)
- Western Australian rural producer (late 2000s)
- Thompsons, Western Australian farmers (current)
- NSW farmers (current)
- South Australian manufacturer (current)

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<sup>89</sup> Account of an exchange over dinner in December 1991 involving a former Custom Credit lending officer, Matt Potter (name changed): ‘Potter said that Barton [name changed] and the national management of CCC had encouraged the West Australian Property Division of CCC to “balloon” the property loan book as it was very profitable for CCC. He also said that when the property market started to decline, CCC “panicked” as many of the loans were capitalised and had not yet expired. Potter said that Barton had told him to “get as much security as you can off them (the borrowers) and come December (1990) we’ll fuck them up the arse”. Potter said that he believed that Barton had been told by the National Australia Bank in July 1990 to reduce the loan book in WA from \$350m to \$120m by March 1991 and that Barton’s main function was to asset strip borrowers with assets to balance the books.’ Laurence F. Hoins, *How to Avoid the Coming Crash: the Coming Doom*, 1994, p.329. The Hoins book is self-published, and thus its credibility is formally diminished. Yet the book’s contents, gleaned from interviews with key players in the issues described, are not inconsistent with the broader picture available from published sources and from my records obtained from NAB casualties.

It is true that banks will support farmers for a period through drought or some other climatic adversity. Government relief funds and reconstruction subsidies will be banked. But banks, the NAB included, will also readily default a borrower with a long-term viable operation before a restabilisation has been effected.

### **Shooting fish in a barrel**

Some NAB foreclosures look like they were enacted just for the hell of it, to give the Asset Structuring unit something to do when they're not tearing the wings off butterflies. Instances:

- Magill, NSW farmer (late 1980s)
- Hunter timber products, New Zealand (1997)
- Queensland Book Depot stores (late 1990s)
- Angel, WA vegetables/horticulture farmer (2000)
- Darley, NSW orchardist (2001)
- Mary Ryan books, Queensland (2001)

### **The farmer's friend**

From NAB's advertisement in *The Land* (June 2011, etc.): 'With 153 years of local knowledge, we'll get you growing'; not least with 'our comprehensive range of banking services';<sup>90</sup>

Well, not quite. If the NAB has all the knowledge and the services under its roof, why does it demand that farmers seek (and incur extra expense for) external consultants for advice? There is one possible reason. Judicial precedent has it that a bank generally has no fiduciary duty to a business customer, with the legal protection to the bank being clear if the lender declines to offer advice and, particularly, instructs the (potential) customer to seek advice elsewhere.<sup>91</sup> There is another possible reason – that the bank does not possess the expertise of which it claims. Either way, the NAB would appear to be guilty of misleading representation (s.52 of the Trade Practices Act and s.12DA of the ASIC Act). Fat to no chance of facing prosecution here.

What if the bank gives advice that turns out to be not only misleading but deceptive. Such was the action taken by NAB agribusiness staff to NSW farmers facing extraordinary rainfall in early 2010 after a near decade of drought. Don't plant cotton was the *diktat*, as there's no money in it. At the same time, cotton experts were noting rising cotton prices, the best for a decade. So one NAB farmer grows low-return sorghum instead and suffers the consequences; another farmer grows wheat by default but the bounteous yield is decimated by rain and flood. At the same time,

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<sup>90</sup> The bumpf on the bottom of NAB agribusiness managers' emails notes: 'Client Referrals are very important to our business. If you know of any friends, work colleagues or family members who can benefit from our comprehensive range of banking services, please do not hesitate to contact me.'

<sup>91</sup> There is a sinister variant. The bank may demand input from an 'independent' consultant (who fails to perform) to impede effective action from the farmer, as happened recently to a NAB farmer.

the NAB (with Suncorp) lends another \$60 million to the Cubbie Station, currently in receivership, to grow cotton!

Lo and behold, ‘The global cotton price surged to a 15-year high this week and Australian growers are forecasting one of their biggest crops on record after rain filled dams and swept the industry out of drought’.<sup>92</sup> The NAB itself noted in September 2010: ‘... agribusiness confidence in cotton has increased dramatically and has also at its highest level on record. Increasing water allocations, a strong crop outlook and the tightest global supplies in 15 years should help to keep confidence in cotton at high levels over the near term.’<sup>93</sup> Cubbie subsequently produces a bumper crop;<sup>94</sup> those farmers subject to NAB expert determinations are left floundering.

Meanwhile, in New South Wales, banks wishing to foreclose on farmers are compelled, since 1994, to take farmers designated as in trouble to mediation. Mandatory mediation was legislated to offset the innate asymmetry of power of bank lenders over farmer borrowers, but the Act and the process are weak reeds, not least where there is an absence of ‘good faith’ on the part of the bank involved.<sup>95</sup> The NAB has shown that it is capable of using the mediation process to maximum effect for its own cause, bullying the borrowers in the process, and with the mediator going through the motions. So the NAB finds mandated mediation as a convenient vehicle to entrench and legitimise its foreclosure process. Meanwhile, the NSW Rural Assistance Authority that oversees the mediation process ticks the boxes.

Back in Bank World, the NAB’s agribusiness general manager, Khan Horne, is the omnipresent media interviewee on the state of the bush and the prospects for agriculture (general optimism all round), but the lot of NAB indebted farmers is mired in the trenches. The specialist rural newspapers, which favour optimistic stories and dislike unfavourable bank-related stories (too much advertising revenue at stake), are happy to oblige the bank’s PR agenda.

### **Sale of property/business for maximum benefit**

Notes the NAB website: ‘Selling your business is one of the most important decisions you’ll make. There are many factors to consider including how much the business is worth and what you’ll do with the money you make from the sale.’ We are also informed, under the category labelled Selling a business: ‘Prepare your business for selling and maximise its worth with our helpful Small Business Resources – assessing its value, getting the best price, cash flow forecasting, calculators and more...’.

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<sup>92</sup> Sophie Morris, ‘Cotton comes good on price and rain’, *Australian Financial Review*, 22 September 2010.

<sup>93</sup> NAB *Economic Report*, Post farm gate agribusiness survey, September quarter 2010.

<sup>94</sup> ‘Australia’s biggest cotton farm, Cubbie Station, has beaten its own bullish expectations to earn more than \$150 million from a 249,000 bale cotton crop on its 93,000-hectare holding on the Queensland-NSW border. ... National Australia Bank and Suncorp Bank have backed plans for the 2012 crop.’ Andrew Marshall, ‘Cubbie’s \$150m crop’, *The Land*, 9 June 2011.

<sup>95</sup> A requirement for the lender to act in good faith in the mediation process was deleted from the Farm Debt Mediation Act in a 2004 amendment. *Cui bono?*

Quite. That's when one has full control of the sale. When the NAB has appropriated the property/ies underpinning the business or is dictating conditions of sale, the NAB appears disdainful of its own advice. The NAB has developed the knack of selling secured properties/assets under value (as with the other major banks, but the NAB has mastered the art), with valuers and real estate agents compromised, and the receiver acting on the bank's instructions may have taken a discretionary cut in the meantime.

The reasons for this bizarre practice are complex and opaque, but there is one positive side effect (for the banks, that is) – the customer can be left with a contrived residual debt, which provides the vehicle for the bank lender to pursue bankruptcy in the courts, and the customer is left not merely bereft of resources but also the legal right to seek redress. Some examples of NAB property sales under value:

- Brendan Communications telecommunications equipment and outer Melbourne property (1988)
- Somersets/Kabwand , Queensland; failed farm but purchased as development for subdivision (1989)
- Basstech P/L, Victorian instrument calibration business (1999)
- McMinn child care centre (2000)<sup>96</sup>
- Troiani, Queensland brickworks and multiple properties (late 1990s, early 2000s)
- Walter NSW restaurant/brewery building (2001)
- Freeman, Queensland grazing property (2001)
- Goonan, regional NSW residence (2002)
- Freemans, Queensland mixed farming property (2003)
- Bernstrom, Queensland investment property (2003)<sup>97</sup>
- Western Australian rural producer (2009)
- NSW farmer (current)

### **The package deal**

One must highlight, albeit skeletally, the scaffolding for the links between the initial fulsome welcome of the potential customer and the ugly denouement – the loan instruments conducive to the facilitation of default (the wolf-in-sheep's-clothing overdraft, the 12-month loan, the bill facility – choose your poison); grasping of additional security; sending in receivers masquerading as advisory accountants; contrived default; usurious 'penalty' interest rates imposed at the proverbial drop of a hat (the levels not outlined in any contract) by which contrived accumulated debt sucks out equity; and attempted summary judgement in court.

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<sup>96</sup> McMinn had a buyer offering substantially higher than the subsequent sale price, an offer ignored by the bank.

<sup>97</sup> The auction process was corrupted; the property was sold to a neighbour, the same individual who had thwarted Bernstrom's effective development of the property through constant objections, rather than to the highest bidder.

### **The sector's dysfunctionality at root**

The transparent reality of the banking sector's relationship with its small business and family farmer borrower segment is its dysfunctionality. The Big Four are all *allfinanz* institutions that have grown mightily from their specialist trading bank origins, but they retain the culture of the past at their heart. The short-term overdraft remains the bank's key facility – i.e. a facility appropriate for traders but not for producers.

Small business has special needs that trading banks were always reluctant to cater to; the special needs of the family farmer are even more dramatic. Hence the early creation of State government rural-oriented banks and the federal Coalition's creation of the Commonwealth Development Bank in 1960, built on Labor's rural Mortgage Bank Department (1943) and Industrial Finance Department (1945) of the Commonwealth Bank. Hence the creation of the Primary Industry Bank of Australia (1978). These institutions, often more competent and entrepreneurial, were resented by the private banks, and the functioning of the federal institutions were hobbled by the banks' blood brothers in the federal Treasury. When the CDB was created, compromised from birth, the banks were given a sop to compete with longer-term lending in the form of Term Loans (1962) and Farm Development Loans (1966), both initially heavily funded by being granted access to the banks' Special Reserve Deposits at the Reserve Bank.<sup>98</sup>

Financial deregulation and privatisation wiped these specialist institutions away.<sup>99</sup> It is true that rural borrowers were coddled and the state-owned institutions not guilt-free, but the revolution dispensed with the baby as well as the bathwater. Thus we have David Murray at the CBA, representative of the new breed of ill-bred bankers,<sup>100</sup> strangling the CDB in the early 1990s (and thus, unconscionably, CDB customers) even before it was buried in 1996 with bipartisan indifference (including the now moribund National Party) manifest at the gravesite. The specialist rural bank Rabobank belatedly acquired the privatised PIBA but Rabobank has transcended its mutualist cooperative bank origins – it can be as ruthless as its corporate peers. Moreover, there is no component of any tertiary syllabus that provides an adequate background for erstwhile professionals in the character and needs of SMEs and the family farm.<sup>101</sup>

Thus in the aftermath of the late 1980s boom and early 1990s crisis, and since, we find a cynical pragmatism from the major banks with respect to the facilities offered SMEs and family farmers.

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<sup>98</sup> C/f Evan Jones, 'Rural Finance in Australia: A Troubled History', *Rural Society*, 12, 2, 2002.

<sup>99</sup> The section on 'Government-Owned Financial Institutions' in the 1981 *Campbell Report* (Chs.26-31) is ahistorical, ideologically driven, and an intellectual disgrace.

<sup>100</sup> Murray got rid of the library at CBA headquarters in Martin Place, Sydney, because of the opportunity cost of using valuable floor space for such an excrescence. The past is a dead country, but also potentially dangerous.

<sup>101</sup> Small business is near universally absent from all syllabuses across the traditional University disciplines (whizz-bang courses in 'entrepreneurship' don't count). University Departments of Agricultural Economics, the products of which fill the agricultural bureaucracies and bank agribusiness sections, are peculiarly oriented to emphasis on a blend of technical abstractions and a benign vision of rural commodity markets that paints out the brutal power imbalances and politics that pervade those markets.

The bill facility is symbolic of this mentality. Few SME/farmer borrowers would understand a bill facility's complexity or its capacity for manipulation. But at the root of the relationship is the banks' traditional instrument, the overdraft. The last time I had the misfortune to be exposed to a NAB overdraft contract (I presume that nothing has changed in the interim), section 5 read:

Despite 6 below [review of the customer's operation of the facility], the *Bank* may cancel the facility at any time whether or not *you* are in breach of this agreement.

Here is the essential character of the holy writ that is 'freedom of contract'. Like the Master and Servant Acts of yore (still underpinning today's labour law), the freedoms are on one side of the contract and the obligations on the other. The bank can default a customer at will; and it does.

Thus, for example, in 2001-02 (with CEO Cicutto mounting a seasonal phase of banking muscularity), we find the NAB cleaning out, willy-nilly its SME / family farmer loan book. In Queensland, this is how it worked:<sup>102</sup>

A Darling Downs farmer recently received a bill for more than \$350 for three phone calls and a meeting with a NAB officer in February. The farmer, who fears identifying himself because he is negotiating the refinance of his rural properties, is being charged management fees although he has not defaulted on any payments on his loan. The fees were charged because his account was reviewed and transferred to Brisbane under the asset structuring manager. ...

[Legal Aid lawyer Mr Lee] Nevison said clients are given the option of paying the fee or facing foreclosure, even though many of them had not defaulted on payments. Mr Nevison said farmers and small businesses were being forced into paying fees to stave off foreclosure. Some of the 120 farmers and small business owners on his current client list who had been hit by fees were so angry they had threatened bankers with violence. Every case I see is where people are meeting all their commitments and the bank has reviewed their loan and said they are not prepared to continue on. I have seen farms being judged unviable because off-farm income was higher than farm income."

Nevison thought that bank policy was dictated by a new breed of 'money men'.<sup>103,104</sup>

... these fellows are so programmed to do their job that they don't look at it responsibly or rationally. ... Finance, it's now seen as a share market, able to be traded daily ... we are not providing a product that is flexible enough for rural Australia.

<sup>102</sup> Amanda Gearing, 'Bank slugs farmers for advice', *Courier Mail*, 17 April 2001.

<sup>103</sup> From interviews with Nevison, 16 August 2001, 22 February 2002.

<sup>104</sup> Ironically, this interpretation is comparable to that of the NAB's business banking head, Joseph Healy, in his description of the current banking culture in which he is immersed, and which the NAB is supposed to have resiled from. See Healy, n.39, and p.12 above.

Nevison was of the view that bank rural/SME loan quantum and instruments had become subordinated to bank priorities in other sectors and the culture associated with globalised capital markets in which flexibility for the lender (as opposed to flexibility for the borrower) was king. Nevison's clients complained to him: "Why are we paying for the mistakes of the corporate giants; why huge interest rates; why facilities that we don't know whether we've got in three months' time or not?" Nevison again:

In terms of bank's assessing viability, I have a concern about their objective review from a technical perspective of the viability options, and the exit options which are open to producers which are unviable. ...

What it's done has created great uncertainty, distraction, pressure, grief, greed in the sector that I've been involved in. ...

[At a meeting with Asset Structuring personnel from the major banks] one of the senior managers from one of the banks said "We've got a real problem with all you blokes. You're just trying to keep unviable people on the farms." I said, you're out of touch. It's often not a matter of the decisions you made, but how you go about it, that's our problem. If you're dealing with human beings, if you look at it purely from a commercial perspective, you leave a trail of destruction behind you. And it's not necessary. At the end of the day you take all the material things away you're still left with a people. You're turning out a class of not merely welfare dependent people but dysfunctional people. broken psychologically by the experience.

In 1990-91, soon after Don Argus became CEO, Argus issued instructions that the bank wanted all borrower irregularities, potential bad and doubtful debt, to be cleaned up and off the books post haste. Everybody on the watch list as irregular (accounts beyond the approved limit for greater than 90 days) was to be issued with letters of demand. Here is the formulaic 'technical perspective of the viability options' at play. With his riding instructions, one regional manager, visiting the Upper Mount Gravatt branch in Brisbane, opined to the then branch manager: "Let's shake the tree and see what falls out."

Twenty years down the track, the mentality remains entrenched. The structural incapacity of the dominant financial intermediaries to service appropriately their SME/farmer sector (and the NAB has the largest market share therein) is translated into a lending manager culture combining a varying mix of lassitude, opportunism, hubris and corruption. The bull and bear cycle at the coalface translates as: get them in, regardless; later, shake the tree and clean them out.

### **In short**

Small business and family farmers have the promise of a beautiful relationship with the NAB as per the public image. The relationship with the real NAB may be entirely another matter.

## Postscript

‘Grow your savings faster’ says the NAB spiel. And another: ‘Don’t let your bank pick your pocket.’ Here’s a two-part vignette on how the credo operates in practice.

Con (name changed) is an elderly Brisbane man with a nest egg. But he has been generally content to not keep an eagle eye over his bank statements.

A decent sum had previously been invested in a NAB term deposit. In mid-December 2010, with the term deposit maturing, Con upped the nest egg to a round \$500,000. With sums like this, one expects an above-average interest rate. The branch gave him a receipt (‘Confirmation of Amendment’) for the sum deposited, noting the six-month interest rate at 6.15%. Some days later, an official document (‘Investment details’) was received in the mail, but the interest rate recorded therein was 4.15%. Who but an eagle eye would be the wiser? The disparity was noted by a neighbour, the bank was contacted and the rate belatedly fixed at the agreed rate of 6.15%.

Comes June 2011 and the impending maturity of the six-month deposit, the bank automatically renews the deposit – at the rate of 4%. \$500,000 at 4%? Con resolves that 4% is for the birds, and that it is time to move the half a million to another bank, and the procedure is set in train. That sum is now residing at Another Bank, attracting a rate of 6.15%, thank you very much.

On the side, several years ago, there arrived two grandchildren and so Con started two savings accounts which ended up averaging around \$9,000 and \$8,000 each in balances. As Con is winding up his NAB accounts to move to more verdant pastures, he confronts that the grandchildren’s savings accounts have been attracting only .01% interest. To repeat – .01%. Seeking clarification, the bank’s explanation is that the token rate is there because the balances were being insufficiently augmented. Back to the bank to complain. Down the track, the bank remits \$500 to Con’s cheque account, designated as ‘Interest Refund Good Will’. Goodwill indeed (and they can’t get the spelling right). The piggybanks were being raided on the sly.

Regarding the term deposit, instructions were given to the bank that the maturing \$500,000 was to be paid into Con’s cheque account upon maturity. After the agreed date, a cheque for the sum was drawn and paid into the new account at Another Bank. But, unbeknown to Con, the NAB had held over the \$500,000 in suspense for several days after the maturity date. The cheque account goes into debit for a day for a cool half a million, and Con is lumped with an interest charge of \$253, courtesy of a debit interest rate of 18.05%. In effect, half of the ‘goodwill refund’ has been recuperated, aftermath of a transparent absence of goodwill. The bank has yet to respond to a request for a refund of the dough.

All together, boys and girls: More give, less take.