



**The National Australia Bank v Walter/Palatinat:  
A Case Study in the Adverse Small Business Environment in Australia**

Evan Jones  
Political Economy Discipline  
Faculty of Economics & Business  
University of Sydney  
[evanj@econ.usyd.edu.au](mailto:evanj@econ.usyd.edu.au)

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Abstract

The bank lender – small business borrower relationship intrinsically structures the latter into a dependent and vulnerable position. In Australia, the major banks have consistently abused this asymmetric relationship. This behaviour has resulted in devastating consequences for small business bank victims, but it has also resulted in the corruption of governance in this significant domain of the Australian economy. The Walter family experience is used as a case study to highlight the dimensions of the problem. It incorporates representative bank litigation (especially with the customer as self-litigant), covering issues of apprehended bias, the ‘shadow ledger’ phenomenon, (mis)representations of bank staff, and the allegiance of the receiver/manager. It includes the involvement of the Victorian government in bringing the Walter family to Australia. It includes a reflection on bank culture for which gaining business is more important than the establishment of long-term mutually beneficial relationships, and in which public relations counts for more than competent and ethical practices. Finally, it includes the inaction of the panoply of regulatory authorities on the matter of bank malpractice. A regulatory impasse has ensued, with adverse implications for the vitality of the entrepreneurial class in Australia.

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**Introduction**

In August 2004, the National Australia Bank issued a Statement of Corporate Principles (National, 2004: 6). The statement, summarised here (not accessible on the NAB website), embodies a strong ethical code of practice:

Our core beliefs and values are based on the following principles:-

- We will be open and honest
- We take ownership and hold ourselves accountable (for all of our actions)
- We expect teamwork and collaboration across our organisation for the benefit of all stakeholders
- We treat everyone with fairness and respect
- We value speed, simplicity and efficient execution of our promises

And we do not have room for people who do not live these principles.

This formal code needs to be juxtaposed against questionable NAB treatment of some small business borrowers, treatment that has extended over an extended period. What follows is a case study of one borrower, the Walter family, who established with NAB credit a brewery/restaurant in Albury/Wodonga on the New South Wales/Victorian border. The experience of the Walter family in the courts is not unrepresentative of bank litigation involving small business customers. Moreover, the experience of the Walters with the regulatory agencies is particularly instructive on the profound vacuum that exists in Australia in the regulation of the relationship between bank lenders and small business borrowers.<sup>1</sup>

**The Walter Family and the National Australia Bank**

Fritz and Ingrid Walter ran a successful business in Germany, had acquired a reasonable nest egg and lived a comfortable life. Several holidays in Australia generated an interest in migrating permanently to this country. In the late 1980s, the Walters attended a seminar at Frankfurt sponsored by Australian government officials on the attractions of business migration to Australia. They met Victorian government officials who promoted the Albury/Wodonga area, reinforced by local officials when the Walters visited the area in 1994. Local officials were promoting the 'Gateway Island' project (adjacent to Sydney/Melbourne traffic) as a tourist attraction.

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<sup>1</sup> The structured subordination of small business borrowers to their lenders is but an extreme case of more pervasive structured subordination of small business to corporate business across key sectors in the Australian economy (Jones, 2005b).

The website of the Victorian government's Frankfurt office (reproduced below, since removed) promoted Victoria as possessing a number of fundamental ingredients for doing business, including sound financial infrastructure.

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**Frankfurt  
Victorian Government Business Office**

The Victorian Government Business Office in Frankfurt was established in 1969. The office is available to assist prospective investors with advice and information about Victoria. It also provides support to Victorian companies seeking to export to the countries serviced by the Frankfurt VGBO.

**Countries serviced by the Frankfurt VGBO**

Germany, Switzerland, Austria, Scandinavia and Eastern Europe.

**Victoria offers :**

- A cost efficient place to do business
- Secure and familiar legal and financial infrastructure and services
- Political stability in a democratic OECD economy
- A location in the Asia-Pacific time zone
- Access to highly skilled and affordable employees
- A strong base in innovation and research
- A high technology manufacturing sector
- Strong safeguards for your intellectual property
- Communication and transport that link you to global markets
- A network of Government Offices in Asia to assist your expansion into the region
- First class quality of life for expatriate executives

**Victorian Government Business Office in Frankfurt  
Contacts**

Grueneburgweg 58-62 D-60322 Frankfurt am Main | Germany  
Phone: +49 69 668074-0 | Fax: +49 69 6680 74-66

The language has to be seen as misleading and frivolous, indeed dishonest, in the light of the Walter family experience.

By 1997 the Walters bought land in the 'Gateway Island' domain, planning a brewery and restaurant. They hired as consultant an Australian-based compatriot with experience in boutiques breweries. Funds for the purchase and development of the property came predominantly from the disposal of existing family assets, generating over \$700,000 in capital. Later, sale of another asset added \$200,000, totaling over \$900,000 in family capital. Additional funds were later made available from sale of the Walter family business in Germany for \$2.2 million. Total expenditure by the Walters on the project was of the order of \$3.5 million.

Fritz and Ingrid and their daughter Carmen Walter moved to Wodonga in February 1998. Construction had begun in July 1997 and the brewery was officially opened (albeit prematurely) by the then Victorian Premier, Jeff Kennett, in May 1998.

The Walters began banking with the National Australia Bank, and developed a seemingly good relationship with the then Wodonga Business Banking Centre manager, Mr. Wayne Keating. The Walters obtained a bridging loan, secured by the unimproved land, in September 1997, and equipment leasing facilities, an overdraft and a home loan in May 1998.

By October, it was clear that business turnover was not up to expectations. There were cost overruns due to the high quality of construction and outfitting, and inadequate

understanding of Australian building codes. Original cashflow projections were too optimistic.

The Walters claim that they were let down by the Council which had not proceeded with the precinct project. Moreover, the Council had failed to install traffic lights on the main thoroughfare that would make the business accessible to traffic passing in the opposite (Melbourne to Sydney) direction. The traffic lights were belatedly installed after the business had been closed down by the NAB and the property sold.

The claim that promised support was not forthcoming was reinforced by the then Branch Manager in a later Credit Memorandum of June 1999. The Manager noted:<sup>2</sup>

On 7<sup>th</sup> May 1998 the business prematurely opened at the request of the local council who were trying to promote the Gateway Island project to the Premier of Victoria and wanted to show him on a visit that there was commercial investment happening.

The Walters approached their manager via their accountant in October 1998 and asked for a restructuring of their loan facilities to reduce monthly repayments. The then manager claimed that the request would probably be acceptable to his superiors. At about this time, the Walters' branch manager resigned, and was replaced by Mr. Barry Membery.

It was not until two months later, in December 1998, that the Walters' received a response. The Walters' accountant had requested a single bills facility, an instrument over which borrowers can exercise some discretion. The Walters were offered \$1.38 million (their existing indebtedness), comprising a fixed interest one-year bank-funded loan of \$1 million and a principal and interest loan of \$380,000. This mix of debt seemed bizarre to the Walters. According to the Walters, the new manager declined to explain the loan's character, and offered it on a 'take it or leave it' basis. Carmen Walter asked Membery, 'How did the bank arrive at these pre-determined facilities?' (or words to that effect). Membery replied: 'You wouldn't understand'. His general response to questioning was that 'it is best for your business'. The Walters presumed that the one-year loan would be turned over (subject to interest rate movements), and they were not disabused of this belief. The discussion generally focused on the interest rate payable; there was no discussion regarding repayment of principal.

The other key change in the restructured facilities was that the home loan debt was unilaterally moved from a personal housing loan and transferred to the business facilities as a 'business combination' loan. As a consequence, the converted housing loan debt faced a higher interest rate and larger repayments (from \$3500 per month to \$5925 per month). This change was done without explanation or permission.

Document discovery highlights that the initial loans were made on the security of the Walters' assets, with inadequate attention to the business.<sup>3</sup> The Walters had come from a country with an entrenched tradition of banks which specialise in small business lending and which take seriously the business of their small business borrowers.

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<sup>2</sup> B. Membery, 'Walter Connection Credit Memorandum', 1 June 1999, p.1.

<sup>3</sup> 'Lending to this connection has in the past been based on security held'. Barry Membery, Credit Memorandum, 13 October 1998.

The original branch manager Keating approved the May 1998 facilities locally within his Delegated Lending Authority (in bank terminology, 'Applicant Approval Level 5'). This decision meant that the documentation can be consigned to the filing cabinet, with the project probably avoiding scrutiny by a superior authority as checks on within-DLA approvals are random and partial. It also means that any problems arising from the initial approval process are encased for festering and deferral, but with the knowledge that remedial action will always be at the expense of the borrower. In the meantime, the manager will have earned 'brownie points' for catering to the permanent pressure from above to expand the loan book. It is noteworthy that Keating concludes his May 1998 Credit Memorandum with the sentence 'Excellent collateral gains have been made with over 10 of this banks (sic) major products & services being provided'.<sup>4</sup>

A branch lending manager contains approval within his/her DLA by establishing a 'Category A' loan to valuation ratio. Leverage by the branch manager is perennially obtained by the manipulation of the Market Value (or, less typically, Bank Value) of assets over which the bank holds security. The higher the Market Value the higher the loan total that can be structured within Category A. Keating has achieved Bank Value by applying what appears to be conventional NAB shading ratios to Market Value – 70% for land/buildings<sup>5</sup> and 80% for the House Property. But Keating has constructed an acceptable Bank Value for the land/buildings by positing a Market Value of \$2.5 million. The all-up cost of freehold land and buildings (not including fitout) was \$2.3 million. Keating's Credit Memorandum claims that 'With over \$3m having been spent ... we have at this point placed a conservative M/V on our security of \$2.5m' (p.2). This sentence implies that he has included the expenditure on the unsecured brewery equipment in total expenditure. By this means, Keating converts an overly generous M/V into a 'conservative' M/V.<sup>6</sup> In the same document Keating concludes 'The abovementioned represents a sound Category A position' (p.3). The clear impression is that Keating has inflated the Market Value of the land/building assets to achieve this end. The documentation itself is not consistent, with the Credit Memorandum differing in loan totals from that within the two Line of Credit Applications compiled on the same day. Examination of the Security Schedule for the approval would provide insight into this matter, but that Schedule was not among the documents discovered by the bank for court proceedings – a perennial omission in bank litigation.

Another peculiar aspect of the approval process was the early neglect of the significance of asset ownership by a family trust. As noted in court (*National Australia Bank v Walter*, 2004: par.50):

Mr Keating did not recollect whether he was aware, as at September 1997, that the brewery property was owned by the Walter Family Trust. There was no evidence to establish that the Walter Family Trust was brought to his attention at that date. He was unable independently to recollect when he had first heard of the establishment of the Walter Family Trust. [c/f *Dodds-Streton*: 'disinterested and honest witnesses']

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<sup>4</sup> W.B. Keating, Credit Memorandum, Palatinat Brewery Pty Ltd [etc.], 28 May 1998, p.5.

<sup>5</sup> The standard shading of Market Value in the 1970s and 19980s was 80%.

<sup>6</sup> The Market Value was deflated in 1999 to \$2 million, which may have been more reasonable in the prevailing circumstances.

Keating appears to be dissembling with this statement. The Walters claim that Keating was apprised from the beginning of the Trust; their claim is the more plausible. Trust arrangements present a natural threat to bank security. NAB procedures have conventionally dictated that potential relationships involving trusts were to be vetted with the State Legal staff to confirm the borrowing powers (and any other relevant contingencies) of the trust. Such a procedure was clearly not followed in the Walter case, highlighting again that the 'level 5' local approval suppressed potentially troublesome elements of the relationship. Superior officers would have been alerted to the unconventional process belatedly when renegotiation of the facilities was sought in late 1998;<sup>7</sup> for this reason alone, the facilities would have been put on watch, but it was to the Walters' account that any initial laxity was attached.

Yet another peculiar aspect of the approval process was the benign creation of loan facilities for a building still under construction, especially given that the Walter family were owner-builders. Under past NAB conventions, the project would have been placed within 'Under Building Advance Conditions' (UBAC) which allowed loan extensions only after expert certification or in stages related to building progress subject to regular inspection. Again, there is the bypassing of a procedure that builds caution into the approval process.

After the December 1998 restructuring the Walter file remained 'upstairs' with the Credit Bureau, unbeknown to the Walters, effectively on watch. The restructuring foreshadowed a review in six months time. That review took place and the new branch manager's lengthy June 1999 Credit Memorandum was essentially positive. Local turnover was looking up, and there was the prospect of enhanced beer sales through a wholesaler that would further increase turnover. The branch manager concluded his report (p.4):

We have every confidence in the Walters meeting there (sic) commitments on an ongoing basis. Their input and honesty is considered a strong point.

The regional manager concurred with this assessment.

One other dimension from the mid 1999 Review merits attention. The Business Banking Centre manager noted (pp.5, 4, 3):

On the brewing side the Walters have shown there (sic) ability to produce an excellent product that at this moment is entered in the World Beer Championships in Melbourne. The product regardless of all other opinion in the district is considered of a high standard. ...

However it is noticed that this brewery has come under the notice of CUB and there is some evidence to say CUB may be attempting to frustrate their efforts.

...

Discussions also reveal that they are close to signing contracts with a wholesaler that has potential to double sales. Due to twice in the last month

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<sup>7</sup> Henceforth, the Market Value of the assets was deflated, and deliberation moved upstairs within State Administration to 'Aggregate Approval Level 3', as per Membery's Business Credit Submission of 31 May 1999.

having their attempts to purchase equipment being undermined by CUB they will not disclose details of upcoming contract.

This is a curious situation. Does the CUB have an interest in this tiny boutique brewery? CUB personnel did come into the restaurant and spoke to Walter senior, saying 'you won't make it without us'. Was this a veiled threat?

Following the positive report, Membro (the Walters' second manager) left soon after to be replaced by an interim manager, and by September 1999 a fourth person was in the position. One of the first actions of this fourth manager was to turn up unexpectedly at the business and try to sell the Walters life insurance.

Although the fixed interest facility was due for reconsideration in late December 1999, no correspondence was forthcoming. Out of the blue in February 2000, interest rates were increased to penalty levels – to 12.25%, up from 7.9%. The Walters' accountant complained, and was met with an April 2000 response from Asset Structuring expressing concern regarding the company's profit and loss position. The Walters had not been informed that their accounts had been downgraded to impaired status and moved to the Asset Structuring Unit in October 1999.

The Walters were not in default on their payments. All loan repayments had been met. Moreover, supplier relationships were debt free.

In mid April 2000, the Walters were instructed to sell their business and home by 30 June. Since the debt restructuring in December 1998, they had reduced the total debt by approximately \$400,000 through the sale of two properties in Western Australia. A meeting with Ben Edney, Head of Asset Structuring, in Melbourne in September was met with the response 'we don't want you'. A subsequent meeting with Ray Pridmore, General Manager of Asset Structuring, was met with refusal of assistance as it was claimed that the Walters' assets had been eroded.

On 30 November 2000, the bank withdrew almost \$15,000 from the company account (consistent with regular payments on the two loans). On the next day a bank-appointed receiver, D'Aloia Handberg, arrived and took possession of the brewery and subsequently froze the account. The Walters were denied access to the balance of the account, estimated at \$30,000. G. D. Sutherland, a Melbourne-based valuer appointed by the receiver, valued the property (freehold, goodwill, plant and equipment, excluding brewery equipment) in the range of \$800,000 to \$1 million.<sup>8</sup> This valuation contrasted with a May 1999 appraisal by a local valuer (initiated by the Bank) at between \$3-3.5 million, with a 'fire sale' valuation of \$2 million. The receiver closed down the business on 16 February 2001, having run it in his own interests for 2 ½ months.<sup>9</sup>

The property was auctioned on 2 March 2001, the sale price being \$1.03 million, inclusive of all chattels (but not the brewing equipment). The land and buildings component of this return was \$919,000. Why did the receivers not attempt to sell the

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<sup>8</sup> Sutherland Property, *Report and Valuation, Palatinat Brewery ...*, 5 December 2000.

<sup>9</sup> On the 18 January 2001, Handberg wrote a letter to himself followed by a reply to himself, wearing the two hats of receiver of the freehold and manager of Palatinat Brewery. The contents highlight that the Walters' interests were of no consequence in his management (and ready disposal) of Palatinat.



business as a going concern? Why did they jettison the brewing equipment, worth \$.75 million? It is not inconsequential that the bank did not have security over this equipment. Why was the property auctioned two weeks after the business was closed down? What kind of marketing process for a specialised property can occur in two weeks?<sup>10</sup>

The 1999 \$3-3.5 million valuation was probably an over-estimate, but the Sutherland valuation was almost certainly an under-estimate. The figure has the appearance of a contrivance. The reasoning behind the December 2000 valuation by Sutherland was replicated in the 2003 litigation. Grant Sutherland, principal of G. D. Sutherland, claimed that the business was worthless, that sunk costs were irrelevant, and that all that mattered was future potential use.

It is noteworthy that a NAB file note dated 18 January 2001 confirms discussion between a bank officer and Geoff Handberg, D'Aloia Handberg principal. Mention is made of the implications if the receiver were to sell the property for \$1.5 million. There is explicit recognition that this outcome would result in a \$200,000 surplus for the customer. NAB standard practice appears to be to ensure that the defaulted borrower is left with a residual deficit so that the bank can pursue the borrower to bankruptcy, if necessary, leaving the borrower legally powerless. The Sutherland valuation and the auction sale price conveniently left the Walters with a residual deficit.

By the time of sale, the land would be conservatively valued at \$400,000. The purchaser was getting a building constructed to the highest standards for a relatively cheap price, at something of the order of \$520,000.<sup>11</sup>

The Walter residence, quarantined during litigation, was appropriated in August 2004.

### **The Victorian Courts**

Carmen Walter has sought redress in the Victorian courts. However, with no resources, and without legal representation or training in the formalities of court procedures and protocol<sup>12</sup> (typical of aggrieved bank borrowers), her representations have floundered.

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<sup>10</sup> D'Aloia Handberg is representative of the receiver/manager profession whose nominal responsibility is to seek to resurrect the business in their hands but who act instead as liquidators. Another instance involving this company is instructive. In November 2000, the Commonwealth Bank of Australia cavalierly put Vic Air Supplies (manufacturer of heating/air conditioning equipment) into receivership, appointing D'Aloia Handberg. The receiver attempted to dismantle the company as quickly as possible, arranged a doctored report on the health of the company which the owner only managed to obtain six years later due to pressure from the Banking Ombudsman, and attempted (fortunately unsuccessfully) to prevent the company's owner from raising the funds to recover the company from receivership. The aggression of D'Aloia Handberg received a judicial condemnation in *Smarter Way v D'Aloia* (2000).

<sup>11</sup> Events since the auction compound the presumption that the sale process was flawed. Subsequently, the purchaser at auction leased the property to another party, who in turn leased the property to a third party. The up front lease consideration sum extracted by the purchaser was not significantly different to the price paid at auction. In effect, the initial price was sufficiently low that it has allowed another party to henceforth enjoy rental income on a property in which he has no capital invested, a very astute commercial proposition indeed.

<sup>12</sup> Apart from her substantive claims, Ms Walter pursued various undiplomatic sorties, including demand for trial by jury, claims of the illegitimacy of fractional reserve banking, and accusations of freemasonry in the Victorian judiciary. Curiously, under pressure on the freemasonry allegation, a male judge withdrew from the Walter case.

Initial Walter representations in court in 2001 were addressed to the receiver, centred on the illegality of seizure due to ownership of property through a family trust. But the courts kept returning to the fundamental fact that the bank possessed registered mortgages and a debenture against the Walter assets, guaranteed by the Walters.

For the law, a contract is a contract. The divergence between legal formalities and substance was captured neatly by Victorian Supreme Court Justice Beach in the 2001 case against the receiver (*Handberg v Walter*, 2001: 2):

I feel a deal of sympathy for the Walter family. From the material before the court it is clear that their life's dream of establishing the brewery and restaurant at Wodonga has been shattered. However ... I am required to administer the law as I find it to be and I can simply find no basis upon which the first-named defendant can lodge any caveat in relation to the property in question.

Conventional litigation involving banks and small business customers does not get to the nub of the relationship or the key sources of the ensuing crisis. The 2003 hearing of the Walters case against the Bank, presided over by Supreme Court Judge Dodds-Streton, is representative of such litigation (*National Australia Bank v Walter*, 2004). Given that 7 ½ months elapsed between the end of the trial and the delivery of Dodds-Streton's judgment, one might have hoped for a better quality product.

#### Selective treatment of the litigants

Selectivity of treatment by Judge Dodds-Streton is manifest. The business' financial status is reported from the bank's perspective, without acknowledgement that there was disputation over the significance of the figures regarding viability. In particular, Dodds-Streton states that the Walters were 'in default under the interest-only loan ... [which] constituted a default under the home loan' (*ibid.*: par.185). One cannot tell from the judgment transcript that the default refers to the loan status *after* the bank had issued demand. Default is a consequence of bank action. Moreover, the December 1998 debt restructuring had conveniently (for the Bank) brought security over the family home within the business facilities. This latter manoeuvre was a clear indication of malintent on the Bank's part.

Much of court proceedings in bank litigation cases is devoted to exploring the intricacies of what or was not said at crucial meetings, with the necessity for the judge to make up with inference for the paucity of information and for conflicting accounts – not least because of the prevalence of verbal exchanges rather than documentary records. In the Walter case, extant documents might have been handled more sagaciously by the Court. At the 16 December 1998 meeting at which the new facilities were offered to the Walters, including the 'time bomb' 12-month interest-only loan, Carmen Walter had the letter of offer in front of her, and on it she wrote the essence of the words she heard from the new manager at time of hearing, '[it will be renewed] year by year'. This document, with annotations, was submitted to the court, without effect. The bench was not interested in contemplating the possibility of misleading representation, but sees only the terms of the letter of offer: ' ... The Balance Owing shall be repaid in full on the Maturity Date'.

Perennially in court litigation, bank staff claim that they do not remember the substance of particular meetings, but that 'it was their normal practice to ...', etc. Perennially also does His/Her Honour conclude that bank staff were 'disinterested and honest witnesses', and that the borrower(s) were 'evasive, unresponsive, inconsistent with contemporaneous documentation and inherently improbable' – Dodds-Streeton's phrases during this hearing (ibid.: pars.361, 362) – or words to that effect. A disinterested reader of the Dodds-Streeton judgment would readily conclude that Dodds-Streeton J has suspended her critical faculties on the reliability of bank staff statements.

There is a transparent bias of judges accepting bank officer statements as *bona fide*, given that past court cases have exposed that banks may submit fabricated statements and that bank officers may lie under oath. The courts will not dig beneath the verbal testimony to confront an underlying structural asymmetry embodied in the nature of facilities dictated to the borrower and in the potential draconian clauses contained therein. The terms on which borrowers go into the relationship and are subsequently forced out of the relationship are generally hidden in the black box called 'commercial discretion'.

#### Bank document discovery

Carmen Walter has naturally sought discovery of documents from the bank. In this endeavour, the bank responded belatedly with dribs and drabs, on each occasion insisting that all relevant documents have been discovered.

Document discovery should be in accordance with the parameters of the statement of claim. In this case, discovery was transparently partial. No security schedules, prime documents, were discovered. The Lending Manuals were sought but denied, and only belatedly released during the main trial but then under restricted conditions; thus the possibility of reasonable examination by the Respondents was denied. As per usual, the bank Realisation Accounts were not discovered.

Bank behaviour regarding the discovery of documents is perennially contemptuous of court processes. Judge Balmford in the Victorian Supreme Court delivered a harsh judgment on non-discovery in earlier litigation involving the NAB (National Australia Bank v Petit-Breuilh, 2000: par.7) regarding discovery:

However, it transpired that the bank's affidavit of documents, which had been sworn on 7 January 1998, was significantly incomplete. Many documents were discovered by the bank well after the commencement of the hearing, and only after repeated demands by counsel for the defendants. The Frankston branch of the bank was handling the loan to the Co-operative from November 1994 ... Nevertheless, the substantial file of the Frankston branch, which incorporated relevant material from the Burwood and Moorabbin East branches from 1991 onwards, was not produced until after counsel for the five defendants had closed his case.

The evidence of the solicitor ... for the bank was that that was when the Frankston file "came to light". The latest document on the Frankston file is dated in January 1999, and it includes a note of a conversation with that solicitor in December 1998. Other documents were still being discovered on the

final day of evidence – that is, day twelve of the hearing. The bank's conduct of its case in this manner affected the ability of counsel for the defendants to present their case. The experienced practitioners representing the bank should be aware of their responsibilities to the Court and to the other parties to litigation in which their client is concerned.

The language is sober but the substance is damning of NAB behaviour and of the Bank's legal representation. The NAB lost this case (*Petit-Breuilh*), but it involved a guarantee, the one area in which there is legal precedent for rulings regarding unconscionable conduct (*c/f Commercial Bank of Australia v Amadio, 1983*).

#### Shadow ledgers and their elusive status

Fragments of bank statements obtained belatedly by the Walters through discovery are instructive. After informal demand was issued by the bank in May 2000 (formal demand was issued in November), the 'address' for the statements for the \$1 million interest only account was changed from the Walters' home address to 'Do not mail, refer to manager'. The Walters thus were ignorant of the fact that their account was being loaded with legal costs or of their extent, or that the account was subject to a partial bad debt write-off.

This system of parallel accounts has been called 'shadow ledgers' within the Commonwealth Bank and 'red ink' or bad debt memorandum account records within the NAB, and has generally acquired the generic label of shadow ledgers. The pervasive practice by banks of withholding these statements from defaulted customers was examined and condemned by a federal Parliamentary Committee in August 2000. The Committee hearing was contemporaneous with the period in which the NAB was engaged in this practice with the Walter accounts. The Committee under Chairman Grant Chapman issued its 'shadow ledgers' report in October (Parliamentary Joint Statutory Committee on Corporations and Securities, 2000).

In the 2003 litigation by the Walters against the Bank, Judge Dodds-Streeton found that the bank practices described as standard 'are explicable by legitimate internal record-keeping and accounting requirements of the NAB' (par.264). On the contrary. They constitute a deliberate withholding of information from the borrower, and provide a vehicle for the loading of arbitrary charges at the bank's discretion. Her Honour was oblivious that Parliament had highlighted the dubious ethics of these practices. Even as a matter of first principles, a well-trained legal mind should be able to discern the intrinsic unacceptability of the practice.

Fragments of bad debt memorandum account (BDMA) records obtained through discovery present a conundrum. On the 'principle plus interest' term loan for a particular period, there are different BDMA statements with the same account number showing different amounts. These amounts differ from another statement with the same account number but produced by the official mainframe computer, which shows the account as closed. There is another BDMA statement for the same loan with a different account number showing a different amount. It would be natural to infer that there is something amiss in this collection of statements; it would not be unreasonable to infer that the figures on the memorandum account statements have been contrived. It would follow that the residual debt claimed by the Bank as owing by the Walters has also been contrived.

The BDMA statements, or parts thereof, have been presented to the court as an accurate representation of debt. The Legal Services Manager of the NAB, Athol James Aldous, prefaced the presentation of such statements to the Court with a 'Certificate Pursuant to Section 55B of the Evidence Act 1958' claiming:<sup>13</sup>

To the best of my knowledge and belief –

(a) each document was produced by computer facilities operated by the Bank which were used regularly to store or process information for the purposes of the Bank's business;

(b) each document was printed by a computer linked printer from information stored in the computer which was transmitted by the computer to the printer after retrieving that information from the computer, and requesting the computer to transmit the information for printing;

(c) over the period of the accounts, information of the kind contained in each statement was regularly supplied to the computer in the ordinary course of the Bank's business;

(d) throughout the period of the accounts, the computer was operating properly; and

(e) the information contained in the statements reproduces or is derived from information supplied to the computer by the Bank's personnel in the ordinary course of its business. [c/f Dodds-Streton: 'disinterested and honest witnesses']

The BDMA statements were until recently produced by hand. That they are now produced 'by computer' offers no proof of their veracity. Those who legislated the Evidence Act would not be amused.

Aldous' statement has all the hallmarks of a contrivance, and is essentially without substance. John Salmon, Brisbane-based retired NAB branch manager and longtime banking malpractice consultant, has examined the available *Walter v National Australia Bank* litigation documentation. Salmon is thoroughly conversant with the shadow ledger phenomenon. It is his contention that the Aldous Certificate has been designed to confuse the court. Aldous' 'computer' (a word mentioned 8 times) is not that of the bank's mainframe computer which processes all 'for value' transactions for the bank's customers and for the bank itself. Any amount can be plucked out of thin air, as indeed it was, and typed into Aldous' computer for printing.

The legerdemain of the Legal Services Manager may have been superfluous. The learned judge has declined to insist on the convention that Aldous must swear that he has checked the contents and found them to be correct. Dodds-Streton J was content to allow the bank full discretion in its paperwork (*National Australia Bank v Walter*, 2004: par.264):

I am satisfied that the differences between the monthly statements and the bad debt memorandum account cards are explicable by legitimate internal record-keeping and accounting requirements of the NAB. The differences identified by the Walters do not constitute evidence of absence of consideration, inaccuracy, deception or other illegality or impropriety. There is no basis for the allegation that the NAB was "deliberately misleading to conceal a willful (sic) deceit of

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<sup>13</sup> Bank discovered document labeled D35, dated 12 June 2003.

the real transactions to the detriment of the Walter Family and their associated Trust or Company".

Fiduciary duty and the allegiance of the receiver

The Walters claimed breach of fiduciary duty by the NAB with respect to the sale of the property. Judge Dodds-Streeton devoted over six pages of judgment transcript to outlining why the Walters had no case. Part of the judgment depended on Dodds-Streeton denying that the sale was under value (based on her claims of Sutherland as an 'insolvency expert', a properly-organised auction sale, and the purchaser declaring that 'the price he paid was higher than he anticipated').

On the issue of general duty of care to the borrower by bank and/or receiver, Her Honour proceeded on a less than coherent discourse through relevant law and precedent, disclosing ultimately that law and precedent left us only with ambivalence as to what was legitimate practice on the part of the bank and the receiver (pars.277ff.). Ambivalent law and precedent placed aside, Her Honour (accompanied by the presumption that the sale was not under value) proceeded to deliberate over to whom the receiver was responsible in his actions.

The fact is that the bank conventionally appoints the receiver and that the receiver acts according to the bank's instructions. The law says otherwise. The law says that the receiver is an agent of the mortgagor (the borrower). This connection was said to be entrenched following *Muirhead v the Commonwealth Bank* (1996). Here the divergence of law and practice has led to the law being conveniently interpreted to further the power of the powerful. The receiver is legally beholden to the borrower; if the borrower found fault with the receiver the borrower should then litigate against the receiver. Nothing the receiver did, therefore, could reverberate on the bank even though the receiver acted on the bank's instructions.

Further, the fact that the bank (the mortgagee) might have appointed and instructed the receiver did not change this principal-agent relation, because the bank itself is held to be an agent for the mortgagor. According to McPherson J in the failed *Muirhead* appeal against the adverse Trial court judgment (1996: no pagination):

... [the mortgagee] who in exercising the power is expressed by the bill of mortgage to be acting as agent for the mortgagor.

So delighted has been the NAB by this artful line of judicial reasoning that the NAB has incorporated the strictures in the wording of its facilities. The debenture of the Walters' operating company, Palatinat, provides:

Every Receiver appointed under or by virtue of this Deed is deemed at all times and for all purposes to be the agent of the Mortgagor and the Mortgagor is solely responsible for the Receiver's acts and defaults ... and the exercise of any right, power of remedy by the Receiver do not render, or deem the Bank liable, as a mortgagee in possession.

A similar clause attaches to the mortgage that the bank possessed on the Walter property. Her Honour dutifully reminded the court of the substance of these clauses in the Walter facilities (par.86ff.).

This attribution of agency for the receiver to the Mortgagor constitutes an extraordinary sleight of hand, reproduced *ad nauseam* by the cream of our judiciary. It is pertinent to quote Justice Spender in the Queensland Federal Court of Appeal, who confronts the conundrum in *NAB v Freeman* (2002). Spender first highlights the curiosity that the bank is held to be the agent of the borrower by virtue of the borrower having signed a mortgage deed. Notes Spender, this argument depends on ‘the somewhat artificial meaning of agreement when a mortgagor is presented by a mortgagee with a mortgage to sign’ (par.20). Quite. But Spender has borrowed the language of Thomas J from the Trial court Muirhead hearing (*Commonwealth Bank of Australia v Muirhead*, 1995: no pagination):

The bank is entitled to take advantage of the somewhat artificial, but well-known legal consequence that a receiver pursuant to instruments such as those signed in this case must be treated as the agent of the defendants.

Thomas drew on a 1943 judgment, so his ‘well-known legal consequence’ was no understatement. The ‘somewhat artificial’ arrangement has been paradoxically entrenched as its opposite. Spender nudges a long locked door ajar (2002: par.21):

The unreality of that situation in fact is a matter which has troubled me on a number of occasions, but the authorities to which I will refer make it plain that I ought to accept that the contractual term is effective, so that the receiver appointed by the mortgagee, exercising the power expressed in the bill of mortgage, is acting as agent for the mortgagor. Notwithstanding what might be thought the unreality of the situation, the legal position is that, if there was negligence in the conduct of the sale, Mr Freeman would have an action against the receiver. Almost certainly, the receiver will have received an indemnity from the bank, but the legal characterisation of his rights in respect of any claimed sale at an undervalue is legally a claim against the receiver and not against the bank.

This paragraph is of extraordinary significance in the matter of receivership authority, and it is powerfully instructive on the dexterity of the legal mind. Spender J acknowledges the artificiality, the ‘unreality of the situation’ entrenched in the law, and that this situation ‘has troubled me’, but he proceeds to replicate that legally entrenched unsatisfactory interpretation of the law and to find against Freeman.

There is a small potential ‘out’ for the borrower, and that rests on whether the mortgagee has ‘interfered’ with the receiver’s actions. Dodds-Streeton finds no interference, so the Walters are lost from then on. The fact that at all times the receiver has been an instrument of the bank and that the mortgagor is a hapless captive in the process has been neatly swept under the legalistic carpet.

Under the current arrangement, the bank indemnity bestowed on the receiver allows the receiver complete discretion to engage in any activity disadvantageous to the defaulted customer, benefiting the bank or receiver or both.<sup>14</sup> This structure for asset

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<sup>14</sup> It is not inconsequential that Walter, Muirhead and Freeman all alleged sale under value, but all are equally denied consideration on the indemnity of the receiver.

expropriation is a fool-proof system. The bank knows it, the receiver knows it, and the judiciary facilitates what is essentially a racket.

### Potential apprehended bias

Judge Dodds-Streton disclosed belatedly in the hearing that she was the beneficiary of 8,000 shares in the NAB. Her Honour prefaced the opening of the court case with the acknowledgment of share ownership, but had to correct the details on the second day, altering total share ownership from 3,000 to 8,000 shares. At the then price of \$30 a share, that holding would have been worth a not inconsiderable quarter of a million dollars. Her Honour also informed the Walter family that she held a personal bank-customer relationship with the NAB. Her Honour declined to disqualify herself, declaiming that 'a fair-minded observer with knowledge of the material facts would not reasonably apprehend that I might not bring an impartial mind to the resolution of the questions to be decided in the proceedings' (par.199).<sup>15</sup>

Carmen Walter then took Dodds-Streton herself to court in April 2004 claiming that she:<sup>16</sup>

... acted oppressively when interested by wilfully and perversely exercising federal jurisdiction ... in a matter in which she has a personal interest by virtue of her substantial shareholding and indebtedness to the National Australia Bank Ltd, which bank was party to the matter before Her Honour. Her Honour refused to stand down despite (sic) objection.

The transcript of the hearing is a masterpiece of comedy (Walter v Dodds-Streton, 2004). The Defendant declined to appear. The magistrate demonstrated incompetence regarding his brief. He asked to see a copy of the Crimes Act to check section 34 1B under which Ms Walter had brought charges (which refers to the administration of justice).

However, the hearing was henceforth taken over by a representative of the Commonwealth Director of Public Prosecutions. The DPP's factotum, a Mr. Sharp, instructed the magistrate that the Act under which the DPP operates allows the DPP to take over proceedings without needing to seek leave – 'pursuant to Section 9 subsection 5 of the Commonwealth Director of Public Prosecutions Act 1983' (p.3). The DPP thence appropriated the proceedings and closed the case. Mr Factotum also instructed the magistrate that 'the legislation does not require the Director to give reasons for taking over and decline to further proceed with matters' (p.8).

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<sup>15</sup> As a long-time member of NAB staff, John Salmon sighted in 1962-63 a confidential memo from the Queensland State Manager to the Manager of the NAB Brisbane branch. The memo noted that there had been a recent appointment to the Supreme Court of Queensland bench. The State Manager instructed the Brisbane manager to make discrete inquiries to the new judge, offering him, as a potential favoured customer, 'concessional banking arrangements'. The prospect that this under the table corruption was merely a past and occasional practice was disabused by the account of a comparable practice to Salmon in 2005 by a solicitor for a medium-sized Brisbane legal firm. The solicitor confessed to Salmon that she was personally embarrassed at the extent of concessional arrangements that the NAB was prepared to give to members of her firm. It is not impossible that Dodds-Streton J has been the beneficiary of 'concessional banking arrangements' from the NAB.

<sup>16</sup> Charge and Summons, executed by Carmen Walter, 26 March 2004.



Ms Walter noted that the letter that she received from the DPP claimed that the case was being closed because of lack of evidence. Ms Walter points out to the magistrate that the DPP has not yet been privy to any evidence, so how would he know? The factotum then claimed that the jurisdiction at issue is a State not a federal one and that the case must be stuck out on that ground.

The Judge's counsel demanded costs, demanded the eradication of the hearing and material from the public record, and noted that (p.14):

... the defendants status is a Justice of the Supreme Court of Victoria the allegations made are scandalous in as much as that they allege serious impropriety in the course of her judicial duties.

Precisely the point. The Judge's counsel has an *a priori* presumption that a Supreme Court Justice is above human foibles. The propriety of the 8,000 share ownership and personal banking relationship with a party under the Judge's jurisdiction, not to mention sloppy reasoning through the Walter judgment, has disappeared from the ledger.

In 2005, the Walters sought a stay of proceedings in the Victorian Court of Appeal against The Dodds-Streeton judgment, which was denied. In turn, they sought leave of the High Court to intervene, which was denied in March 2006 (Walter v National Australia Bank, 2006). Those steps mark the completion of a long series of litigation of a self-representing litigant against a major bank.

## **The Industry**

Carmen Walter sought assistance from the banking industry organisations that field complaints from customers.

\* Terry Boocock, Case Officer, **Australian Banking Industry Ombudsman** (the industry funded scheme that brings a self-regulating dimension to bank-customer conflicts), replied on 23 May 2001 to a Walter letter and telephone call of mid-April.

The Banking Ombudsman Scheme provides an alternative and independent dispute resolution service for customers with relatively small claims against a bank. The upper limit for any claim is \$150,000. ...

Based on the information you have provided, it appears you are claiming for the difference between your valuation of the property on 31 May 1999 at \$3.3 million and the amount achieved by the Receiver's sale of \$1 million. This difference of \$2.3 million would mean that the Ombudsman cannot consider your complaint.

I note from your correspondence that the family has commenced a Supreme Court action and this office considers that such a forum is the appropriate place to consider the issues you have raise. Accordingly your file with this office has been closed.

In October 2002 Ms Walter, as a self-litigant, also sought legal assistance from the Melbourne office of the Public Interest Law Clearing House, a body funded by the legal profession to provide pro bono advice. PILCH, via Ms Natalie Bugalski, initially feigned interest, but then rejected the Walter request without explanation.

\* Natalie Bugalski, secondee solicitor, **Public Interest Law Clearing House**, confirmed an adverse decision to assist Ms Walter, in a letter of 22 November.

While the negative experiences that you have had in relation to your dealings with the major Banks [EJ: no; specifically the National Australia Bank] appear to have been shared by others, it would be difficult to refer your matter to one of our member law firms as a ‘public interest matter’ as the term is defined by PILCH and the *pro bono* schemes of some of our members.

By contrast, the Sydney office of PILCH has facilitated pro bono advice to small business bank victims. Ms Bugalski pointed Ms Walter to the Banking Ombudsman, the Consumer Credit Legal Service, the Consumer Law Centre, the Victorian Bar Legal Assistance Scheme and the Law Institute Legal Assistance Scheme. Ms Bugalski would or should already have known that the first three bodies do not assist business litigants. The latter two schemes were both administered out of the PILCH offices. Carmen Walter’s attempt to seek legal assistance proved to be a time-wasting diversion.<sup>17</sup>

### **The Federal Authorities**

Carmen Walter also wrote to various federal authorities seeking assistance in her fight with the National Australia Bank over foreclosure of the Walter family business. Excerpts from that correspondence are reproduced below.

On 17 April 2001, Ms Walter wrote to the Australian Competition and Consumer Commission seeking assistance.

\* Anusha Kangatharan, Senior Investigator, **Australian Competition & Consumer Commission**, replied on 24 April.

Under Part V of the Trade Practices Act 1974 (“the Act”) businesses are prohibited from engaging in misleading or deceptive conduct. Thus, in the present case, based upon the information you have provided the conduct in question may raise concerns under section 52 of the Act.

However, the Australian Competition and Consumer Commission (“the Commission”) is unable to pursue all matters that are brought to its attention. Its efforts are aimed more towards achieving compliance with the Act for the benefit of the public as a whole, than towards achieving resolution of particular complaints. The Commission’s selection criteria for matters which it will pursue include the following;

(i) an apparent blatant disregard of the law;

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<sup>17</sup> It is a coincidence that the PILCH Board President is David Krasnostein, Chief General Counsel of the NAB.

- (ii) significant public detriment;
- (iii) the potential for action to have a worthwhile educative or deterrent effect;
- (iv) a significant new market issue; or
- (v) an opportunity to test the reach of the Act in appropriate circumstances.

Furthermore, the Commission does not as a matter of policy become involved in matters where private legal action has been taken. Accordingly, I regret to advise that the issue you raise is not one this office can pursue.

As the ACCC has been a regular recipient of correspondence from bank borrowers seeking assistance, it is arguable that there is no more worthy arena deserving of the ACCC's resources that would be directed 'towards achieving compliance with the Act for the benefit of the public as whole'. Moreover, most of the criteria listed fit closely the circumstances complained of by aggrieved borrowers.

In particular, the Walter case (and others involving the NAB) would have been ideal to test 'the reach' of section 51AC, included in the amended Act in 1998 to extend the coverage of the 'unconscionable conduct' provision. Curiously, Kangatharan does not mention section 51AC as being relevant to the Walter inquiry.

\* Andrew Lumsden, Chief of Staff, Office of the Hon. Joe Hockey, **Minister for Financial Services & Regulation** [Junior Minister to the Treasurer] replied to a Walter letter on 12 June 2001.

The Government encourages financial institutions to be sympathetic and responsive to small business customers such as yourself as this is crucial to growth in this vital sector of the economy. However it would not be appropriate for the government of the day to intervene in private commercial arrangements between financial institutions and their customers. The general operation of these institutions, the policies they adopt and the decisions they take are properly matters for the management of the particular institution.

As the dispute is the subject of legal action between yourselves and the NAB, it would be inappropriate to offer detailed comments on the merits of your case.

PS You might also want to take this matter up with the ACCC. See the attached press release. [The press release referred to a minor success of the ACCC against the NAB with respect to NAB duplicity over a personal guarantee arrangement – that of Tasmanian Kathryn Ashton as guarantor of securities over husband's business (Australian Competition & Consumer Commission, 2001).]

Carmen Walter wrote again to the ACCC, care of Mrs Kangatharan, on 9 July 2001. The essence of the letter was that, if the ACCC could not intervene in the Walter case, 'we would expect the responsible government bodies to take action outside our personal case to prevent matters as ours in future (sic)'. The ACCC did not reply to this letter. A follow up letter from Ms Walter on 13 August 2001 met with a similar silence.

On 13 August 2001, Carmen Walter wrote to the Australian Securities and Investments Commission, seeking assistance.

\* Megan Cassidy, Complaints Management Program, **ASIC**, replied on 27 August.

ASIC has conducted an assessment of the issues that you have raised, and made further inquiries, and has decided not to take action in relation to your complaint. ... Your complaint does not appear to concern a breach of any of the laws administered by ASIC. ... ASIC will not be able to assist you further in connection with your complaint.

The creation of ASIC (out of the Australian Securities Commission) and the amendment of its Act in 1998 had led to the responsibility for unconscionable conduct with respect to financial transactions being given to ASIC (the new Section 12). When ASIC acquired responsibility for *business to business* unconscionable conduct is unclear, with contradictory claims.<sup>18</sup> However, by August 2001, ASIC had certainly acquired legislative authority for this domain. Given ASIC's enhanced responsibilities, Ms Cassidy has been slightly less than honest in her reply, indeed one might say duplicitous.

\* David Lane, ACTRO Business Centre, **Department of Immigration and Multicultural Affairs**, wrote to Fritz Walter on 22 July 2003:

Notice of Intention to Cancel under Section 116 of the Migration Act 1958

It has come to the Department's attention that there may be a ground for cancellation of your visa under section 116(1)(a) of the *Migration Act 1958*. ... It has come to the attention of DIMIA that the business is no longer operating. ...

You must provide your response in writing by 7 August 2003. If you do not respond within that time, a decision on whether to cancel your visa will be made using information already held by the Department.

One is led to ask who contacted DIMIA regarding the status of the Walter family's affairs. Representations were made to DIMIA from those sympathetic to the Walter family experience; no further action has been initiated by the Department.

Carmen Walter wrote again to ASIC on 10 August 2004, met with ASIC personnel on 24 September, and wrote another letter on 8 October.

\* Philip Laird, National Complaints Management, **Australian Securities & Investments Commission**, replied on 21 December 2004.

In determining which matters we will select for further action consideration is given to a range of factors, including the likely regulatory effect of any available action. ...

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<sup>18</sup> The issue is clouded because the authorities for some time implicitly incorporated 'small business' within a generic 'customer of financial services' category centred on retail customers. An ACCC document has the assumption of responsibility occurring on 1 July 1998, following the 1998 Act that created ASIC (Australian Competition & Consumer Commission, 2004: 38). An ASIC spokesperson has the assumption of responsibility occurring on 11 March 2002, following the 2001 amendment to the ASIC Act (Tanzer, 2004).

After careful consideration ASIC has decided that we will not take any further action into the issues you have raised at this time. ...

Although we have decided not to investigate your complaint at this time, this does not prevent you from pursuing any civil remedies otherwise available to you.

As with other aggrieved borrowers, the authorities have signalled to the Walters that self-help is the only solution to their dilemma. Unlike the August 2001 Cassidy letter, Laird does not deny coverage; rather, with masterly obfuscation he notes merely that his organisation has declined to consider her case (we can assume that 'After careful consideration' is a bald-faced lie). The state of relevant federal law and regulatory culture will be re-visited below.

### **The State of Victoria and the Bracks Government**

Given the origins of the Walters' arrival and establishment of a business in Australia, the state of the State of Victoria provides a complementary dimension to this story.

On 3 April 2001, Carmen Walter wrote to Steve Bracks, Victorian Premier. Said Walter:

We can not accept that the NAB can be right by Law because we NEVER defaulted in our obligations towards the Bank. ...

We are of the opinion that the NAB has fraudulently disseised (sic) [dismissed?] us from our freehold and property ...

We can not just give up. We need Government support and hope you won't deny us our urgent request.

\* Tim Pallas, **Bracks' Chief of Staff**, replied on 20 April:

It is disappointing that the NAB has decided not to continue to support the business. However, this is a commercial decision of the bank and is not a matter in which the State Government can intervene. It would be inappropriate for me to comment on your allegations concerning the behaviour of the NAB.

Carmen Walter wrote to the Premier again on 9 July.

\* In response, Dr Lynne Williams, **Director Economic Policy, Department of Premier and Cabinet**, replied on 23 July:

It is our understanding that many of the issues raised in your facsimile are currently before the Supreme Court. Accordingly, it would be inappropriate for the State Government to commence investigating these issues, as this might compromise the ongoing court proceedings. The decision of the Court may well have an important bearing on whether these issues warrant further investigation.

On 4 February 2002, this author wrote to the Premier via his Chief of Staff Tim Pallas (Jones, 2002):

The essence of your 20 April reply [to Carmen Walter] is the judgement that the NAB process 'is [a] commercial decision of the bank and is not a matter in which the State Government can intervene'. The essence of Dr Williams' reply is that 'it would be inappropriate for the State Government to commence investigating these issues, as this might compromise the ongoing court proceedings'.

From my experience with aggrieved banking clients who have attempted to bring attention to their plight to regulatory authorities or to those in political office, it is customary to receive a reply comparable to that received from Dr Williams. I would estimate that the fact of ongoing litigation is a convenient excuse for inaction on the part of our elected representatives.

Moreover, the reply of 20 April deserves critical attention in this case. The Walter family case is emphatically not just of private commercial concern. The Victorian Government was instrumental in the Walter family moving to Australia and starting a new business. Mrs Kathy Portes, representing the Business Migration Programme in Frankfurt, was instrumental in 1989 in persuading the Walters to make this move. ... The then Albury-Wodonga Development Corporation and Wodonga City Council were also party to the promises of a rich entrepreneurial environment favouring those capable of hard work and initiative.

It is clear, however, that the promised environment came to an early demise in the form of apparent malpractice on the part of their bankers since 1997, the National Australia Bank. ...

The existence of incompetence and unconscionable conduct in key institutions of society is intolerable. In this case, moreover, the reputation of the State as a safe haven for economic development is also at stake. I was amused to read on the web site of the Victorian Government Business Office that Victoria offers, inter alia:

- a cost efficient place to do business
- secure and familiar legal and financial infrastructure and services
- strong safeguards for your intellectual property

The actions of NAB officers in the Walter case have rendered these claims inaccurate and misleading. The claims constitute false advertising, and on fundamental matters relating to the integrity of our commercial system and, indirectly, our political system. The fact that the Frankfurt office services a considerable portion of Europe makes the responsibility of that office in this matter of even greater import.

We still genuflect to notions of justice, and I would like to think that your office will have an interest in some measure of assistance to the Walter family in their efforts to achieve same. I leave this matter in your capable hands, trusting that your office can appreciate the seriousness of this situation.

\* Ian Killey, **Director Legal Branch, Department of Premier and Cabinet**, replied for the Premier a mere 13 months later on 11 March 2003:

Notwithstanding the encouragement given by the Victorian Government to the Walter family to move to Australia, it is not apparent that the State is otherwise “implicated” in the Walter family’s dispute with the NAB as your letter suggests. The State was not a party to the Walter’s dealings with the NAB and is not responsible for the “apparent malpractice” of the NAB that your letter refers to.

The advice received by the Walter family from Dr Williams is not merely a “convenient excuse for inaction” but indicates that the State cannot intervene in a personal dispute before the courts. A concern for notions of justice must contemplate that private disputes are best resolved where the facts are ascertained by independent courts and the law applicable to that fact situation (sic) is applied impartially. This would not be achieved by the arbitrary intervention of the Victorian government even if it had the power to do so.

On 24 August 2004, this author wrote again to the Premier via Tim Pallas, Chief of Staff (Jones, 2004b):

On Thursday 26 August, the Walter family will be unceremoniously removed from their residence in Wodonga. Possibly, they will also be unceremoniously deported from Australia.

This event will be the culmination of a process that began when the Walter family was seduced by the Frankfurt office of the Victorian Government to relocate as business migrants to the State of Victoria as an ideal location to do business. ...

It is presumably Mr Killey’s job to deal in official-speak, but as an officer versed in the law he should be aware that the judicial process involving the major banks and small business customers is characterised neither by independence nor impartiality. The dominant court case in the Walter affair, *National Australia Bank v Walter* VSC 36 (16 February 2004), produced the standard formulaic judgement, with Her Honour skirting superficially over substantive issues (in spite of a 7 ½ month delay between hearing and judgment). ...

The NAB’s initial provision of facilities was based on indifference and probably incompetence. The Walters’ request for a renegotiation of facilities was met with a top-down imposition of a twelve-month facility that amounted to an entrapment device. The plug was duly pulled, and the NAB’s indifference and incompetence shifted to unconscionable conduct.

It needs to be emphasised that payments on the Walter facilities were not irregular. The Walters were not in default. The business paid its suppliers COD. But the NAB imposed punitive rates; withdrew the ‘entrapment’ facilities; initiated dodgy red ink accounts which involve the discretionary allocation of ‘costs’ unbeknown to the customer (a practice condemned by a Federal Parliamentary Committee in August 2002, but condoned by the presiding judge in VSC 36); appropriated and engineered the stripped-down sale of assets under value; and failed to cater to full discovery of documents in subsequent litigation.

Mr Killey, in his letter of 11 March 2003, goes on to claim that “A concern for notions of justice ... would not be achieved by the arbitrary intervention of the Victorian Government even if it had the power to do so”.

Yet when Ms Carmen Walter sought to bring charges of (effectively) apprehended bias against the judge presiding over VSC 36 in the Victorian courts ... the process was truncated in May of this year by the intervention of the Commonwealth Director of Public Prosecutions, so that Ms Walter was not permitted to submit her evidence. Independence and impartial indeed. ...

The stark reality is that the State of Victoria (along with other Australian States) cannot guarantee secure credit facilities for small business in its State.

\* David Fredericks, **Acting Deputy Secretary, Policy and Cabinet Group, Department of Premier and Cabinet**, replied on 2 September 2004:

If the Court had found that the Bank was guilty of any misconduct, then action would be necessary to prevent such misconduct from being repeated. This would, however, be primarily a federal role as banking is regulated at federal level in Australia. You are referred to s.51(xiii) of the Commonwealth Constitution.

The Court, however, dismissed the claim brought against the Bank by the Walters, and found that their factual allegations were incorrect. That being the case, it would be improper for the Premier to act upon your suggestion that some punitive action should be taken against the Bank. The correct remedy for the Walters to pursue, if they choose to do so, is to appeal against the judgment to a higher court. I cannot accept your view that the judiciary is neither independent nor impartial.

I disagree entirely with any suggestion that the Government is responsible in any way for the failure of the Walters' business.

### **The NAB and the New Public Relations Program**

The stance of principled detachment of the Bracks Government's principal spokespersons regarding NAB activities stands in juxtaposition with the Bracks Government's involvement with the NAB's activities to recover its reputation. The significant loss by NAB's currency dealers, exposed in late 2003, was merely the latest of a long series of costly errors of poor strategy, managerial incompetence and lax governance standards.

The deceit of the dealing room brought an unprecedented response from the typically somnolent Australian Prudential Regulation Authority, leading to intervention and circumscription of NAB's banking activity, and the issuance of a report highlighting the bank's dysfunctional culture (Australian Prudential Regulation Authority, 2004).

In mid-2004, under new management, NAB initiated a number of public relations programs to seek to recover its reputation. The sponsorship of the Melbourne Commonwealth Games was the initial key plank of an ongoing public relations exercise of substantial proportions.



NAB is Melbourne-based and integral to the Melbourne business establishment. How could Premier Bracks not be impressed by NAB's civic-mindedness? Thus, in September 2004, Bracks appeared in public with John Stewart, the NAB's Chief Executive, evidently grateful for the NAB's sponsorship of the Games, itself a public relations exercise for the Victorian Government but a perennial loss-making event



[reproduced from the *Courier-Mail*, 10 September 2004]

A month later in October, Bracks appeared in public again with NAB management (Graeme Kraehe, Chairman, and CEO Stewart) when opening the NAB's new offices in the Docklands, a joint public relations exercise for Bank and Government.



[reproduced from the *Australian*, 14 October 2004]

The NAB website then claimed:

More than just a building, the new development will play an important role in the National's cultural change program, bringing together 3500 employees from across Melbourne under the one roof to work more effectively and collaboratively to serve the needs of customers.

It's much more than just real estate, it's a statement about the new National and its culture. It helps to embed some of our key corporate principles including being open and honest, teamwork and collaboration, speed and simplicity and efficient execution of our promises.

A Premier with a sense of propriety, and properly advised by politically-attuned advisers, might be led to consider the potential compromises to integrity of the governmental apparatus by appearing at public relations activities of the NAB.

In April 2005, the NAB became the principal sponsor of the National Press Club. Here is the NAB's version of the event (National Australia Bank, 2005):

National Australia Bank Chief Executive, John Stewart, said the role of Principal Sponsor enabled the National to demonstrate in a concrete way its support for the development of active, informed community discussion as the basis for policy-making. Mr Stewart said the Bank would work with the National Press Club to expand such activity wherever suitable opportunities arose. "Good journalism is an essential element of good governance in both the political and corporate arenas," he said.

Presumably, the NAB would be aware of the public relations value-for-money to be derived from the sponsorship, as reflected in the National Press Club's own view of the institution's potential leverage (National Press Club, n.d.):

For people who shape Australian society, the National Press Club is Australia's most recognised vehicle, an icon chosen for major statements and for initiating change. Whether the issue of the day is political, economic, corporate, diplomatic, military or societal, the National Press Club plays a significant role in Australian Society. Companies that share this stage and image have distinct advantages over their competitors.

The National Press Club is an icon institution that reaches the influencers and decision makers of Australia; be they Federal or State Parliamentarians, political advisors, Government Heads of Departments, diplomatic community, academia, legal and other professions, journalists including the Federal Parliamentary Press Gallery or just thinking Australians many of whom are leaders in their own communities.

The NAB's Press Club sponsorship had an immediate payoff when the federal Treasurer (the Minister presiding over banking regulation) delivered his budget speech in May 2005 (Costello, 2005):

Ladies and gentlemen welcome to the Great Hall of Parliament House in Canberra, and today as many of you have already heard, we welcome you to the first National Australia Bank address. The National Australia Bank has become the Club's principal sponsor taking over that role from Telstra who have had a long and productive period as our principal supporter for 12 years, and they will remain a major supporter in a different role which you will hear more about later in the year. But there could hardly be a better way to start a new relationship like this than welcoming back the Treasurer the day after the Budget, his tenth, please welcome Peter Costello.

The NAB has more recently acquired sponsorship of the pre-season competition of the Australian Football League, Victoria's iconic sporting code.

In retrospect, the NAB's strategic emphasis on public relations, especially in the State of Victoria, appears to have involved resources well spent.

### **The Regulators, the Law and Bank Malpractice**

The response of the authorities to Ms Walter's complaints and requests for assistance provides a window into the regulatory infrastructure that formally mediates the banking

sector. One observes a labyrinth of obfuscation and inaction. There is not merely an unwillingness to assist; there is a positive lack of sympathy for the complainants, and a positive inclination to be unhelpful.

The attitude of the authorities can be further gleaned from responses (or non-response) to a dossier that I sent to ASIC, the ACCC and the Australian Prudential Regulation Authority in April 2004. The dossier documented eight cases of seeming victimisation by the National Australia Bank, including the Walter case, and concluded with a series of questions arising from these cases that deserved answers (Jones, 2004a).

In terms of the letter of the law, it appears that the appropriate 'port of call' for complainants is to the Australian Securities and Investments Commission (although note the caveat below), since July 1998 the home of unconscionable conduct against consumers of financial services (section 12 of the ASIC Act).<sup>19</sup>

But ASIC does not act according to its recently enhanced formal responsibilities. Regardless of the intentions of particular staff members, the entrenched priorities of ASIC (at best) are towards capital markets participants. In reply upon receipt of my dossier, a senior staffer claimed (Tanzer, 2004)

To date [June 2004] we have not relied upon the unconscionable conduct provisions in any proceedings involving credit.

That is, ASIC has been given authority to act on business to business unconscionable conduct and has failed to act on this new authority. There is no evidence that the unconscionability provisions have been raised from their repose in the ensuing period since June 2004.

Other organisations, when fielding complaints, do not as a rule direct these complainants to ASIC (see below), which would indicate that they know that there is no point. ASIC, at least, does give the odd bank victim the time of day. However, in the Walter case, ASIC specifically misrepresented the formal powers that it was in the process of acquiring, denying capacity to assist.

The ACCC tells the complainants to go away. To Ms Walter directly, the ACCC spokesperson implied that Ms Walter's case was potentially actionable, but that it did not fall within a representative striking category that have lead to the ACCC allocating scarce resources to its examination and potential pursuit. In a belated reply to this author's 2004 dossier sent to the ACCC<sup>20</sup>, the spokesperson responded, with specific reference to the Walter case (Ridgway, 2005):

Withdrawal of support of a marginal business by the bank was harsh but is unlikely to have been unconscionable in breach of 51AC. Also in 1998 the loans totally \$1.38 million exceeded the 51AC threshold (which has since increased to \$3 million). ...

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<sup>19</sup> See fn. 18 and associated text.

<sup>20</sup> The dossier and covering letter, addressed to Chairman Graeme Samuel on 6 April 2004, was mislaid within the ACCC. The Ridgway (2005) response followed my follow-up reminder to John Martin, ACCC Small Business Commissioner, in January 2005 (Jones, 2005a).

The Walters represented themselves in court in an attempt to have the agreements set aside for unconscionable conduct alleging a position of special disadvantage. In [NAB v Walter 16 February 2004] the court found that ‘They were, and are, intelligent, resourceful and experienced business people who had access to independent professional legal, financial and business advice in entering transactions designed to advance their own interests [EJ: incorrect and misleading]. The allegation of unconscionable conduct based on the unconscientious exploitation of special disability or special disadvantage, or any other basis, is not made out.’

The response from the ACCC to me thus differs from its response to Ms Walter. This time, the Walter case is claimed to have failed the unconscionability provisions, and on two counts. To compound the opinion that there is nothing in the Walter case to merit the ACCC’s sympathy, the ACCC spokesperson reproduced the slovenly judgment from the main Walter court case.

The ACCC spokesperson reinforced the specific comments on Walter with general comments on the need to allow ‘tough business practices or hard bargaining’ within the bailiwick of section 51AC (Ridgway, 2005):

I would note that, in general, the factors in section 51AC allow the court to consider whether the conduct of the stronger party was necessary to protect that party’s legitimate business interests (refer to section 51AC (3) and (4) (b)). So, for example, certain conduct, or a course of conduct, might be detrimental to the interests of the small business concerned, however if it is referable to the stronger party’s legitimate business interests, this may indicate that the conduct is less likely to contravene section 51AC.

A cursory examination of sections 51AC (3) and (4) (b) of the Trade Practices Act (and their replication within the ASIC Act) will highlight that the ACCC spokesperson has conveniently ignored the context and inverted the intent of the phrase ‘the protection of the legitimate interests’ in lists of factors which the Court ‘may have regard to’ in determining whether conduct has been unconscionable.

This vignette provides a window into the hurdles faced by bank victims when seeking assistance from the ACCC.<sup>21</sup> The thrust of my correspondence with the ACCC is that the evidence points to *systemic* malpractice against small businesses and their guarantors within the banking system (Jones, 2005a). The thrust of the ACCC

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<sup>21</sup> It may be that the ACCC’s negativity regarding unconscionability provisions reflects an internalisation of its failure of advocacy over *Berbatis*. The ACCC initiated a case in 1998 concerning a shopping centre landlord-tenant dispute over negotiation of a lease renewal. The case involved the usual structural imbalance of power associated with shopping centre landlord-tenant relations, but also the strategic leverage by the landlords (*Berbatis*) of that structural power with the imposition of unsavoury conditions on the tenants. This case provided a readily recognisable instance of ‘hard bargaining’ at work. The case was decided in favour of the ACCC in the Federal Court in 2000, but overturned on appeal in 2001 (*Berbatis Holdings v ACCC*, 2001), the Appeal Court decision being upheld by the High Court in 2003 (*Australian Competition & Consumer Commission v Berbatis Holdings*, 2003). The case was necessarily fought under section 51AA, which requires a ‘special disability’, a condition that the overturning courts decided was not available to the tenants. However, the sympathy of the judges in the higher courts towards the preeminence of the ‘commercial reality’ of hard bargaining highlighted a prescient threat to the prospects of success in unconscionability litigation even under the stronger section 51AC legislated in 1998.

spokesperson's response (Ridgway, 2005) is that there was no cause for action by the ACCC on any of the cases discussed in my dossier and that the relevant sections of the Trade Practices Act were functioning as appropriate.<sup>22</sup>

That the ACCC still deems it appropriate to comment on unconscionability reflects the ongoing comprehensive ambiguity regarding authority for unconscionability in the financial sector. *A Memorandum of Understanding* between the ASIC and ACCC was signed on 15 December 2004 (not available on the ACCC website). According to a spokesperson, 'The Memorandum of Understanding clarifies that the regulation of unconscionable conduct arising from the supply of financial services will be the role of ASIC, as intended by the financial services reforms' (Ridgway, 2005). Yet the ACCC *Guide to unconscionable conduct* notes that '... in some circumstances the ACCC will share responsibility with ASIC' (Australian Competition & Consumer Commission, 2004: 38). Moreover, Appendix B to the Memorandum includes under 'Matters of interest to ASIC' the domain of 'misleading and deceptive, and unconscionable conduct, and undue harassment and coercion in relation to financial services including credit'. Appendix B includes under 'Matters of interest to ACCC' the domain of 'Unfair, unconscionable and/or unilateral conduct which significantly damages/impacts small businesses'.

This confusion is replicated behind the scenes. A newspaper article inadvertently disclosed that there is even disquiet in high places (Crowe & Fabro, 2005):

The conflict between the jurisdictions of the Australian Securities and Investments Commission and the Australian Competition and Consumer Commission was slowing some investigations, ACCC Chairman Graeme Samuel said [before the Senate Economics Legislation Committee yesterday].  
...

The Productivity Commission last month described the overlaps between ASIC and the ACCC and other bodies as a 'source of confusion to industry'. Mr Samuel said there was 'intense frustration' among some ACCC staff when they needed to refer matters to senior counsel to determine whether they had jurisdiction to investigate a case.

The ACCC bulletin, *A small business guide to unconscionable conduct* (Australian Competition & Consumer Commission, 2005) curiously omits any mention of financial services and any reference to authority for dealing with unconscionable conduct in that arena. This is a scandalous omission.<sup>23</sup>

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<sup>22</sup> The ACCC spokesperson placed the cases in my dossier into three categories – cases that did not involve unconscionable conduct; cases that may have involved unconscionable conduct but that nevertheless occurred before the relevant sections of the Trade Practices Act were legislated; and cases that possibly involved fraud and therefore were appropriately addressed not to the ACCC but to the criminal authorities. The ACCC spokesperson may not know that the police will generally decline to act on allegations of bank criminality; indeed, the police can often be induced to act at a bank's behest in pursuing the bank victim on a charge trumped up by the bank. My reply to the ACCC spokesperson noted (Jones, 2007): 'The convenient by-product of such classification is that there is nothing in my dossier that warrants any action, or indeed any thought, from the ACCC. Indeed, your letter bears all the hallmarks of a 'Yes Minister' response.'

<sup>23</sup> The ACCC pamphlet, *Know how to complain* (Australian Competition & Consumer Commission, 2006) contains the section headed 'What the ACCC cannot do', after which follows 'Investigate misleading or deceptive conduct in financial services. These concerns should be directed to the

What is an aggrieved small business banking customer to make of this chaos? One could hardly have devised a more dysfunctional arrangement for regulating unconscionable conduct in financial services than if one had set out strategically to make it so.

Then there is the Australian Prudential Regulation Authority. APRA was formed in July 1998, following the Wallis Inquiry emphasising convergence of financial institutions, consolidating the banking prudential division of the Reserve Bank of Australia and the Insurance and Superannuation Commission. APRA's formal responsibility is system stability, the lynchpin of which is the risk management that underpins stability of the main financial institutions. However, how this responsibility for system and institutional stability extends to responsibility for the full range of stakeholders is unclear.

APRA's mission statement is fulsome in its claims: 'We play a critical role in protecting the financial well-being of the Australian community: as a result, high standards are required in everything we do'. Similar broad claims are made by APRA Chairman, John Laker, in a recent talk (Laker, 2005: 2):

As the prudential regulator, APRA's mandate is to promote prudent business behaviour and risk management on the part of regulated institutions ... so that these institutions can meet their financial promises. In pursuing this mandate, we do not act on behalf of shareholders or individual customers but on behalf of groups we call "beneficiaries". These are depositors, policyholders and pension fund members, who rely on the continued solvency of regulated institutions for their financial security but who are themselves not well placed to assess financial soundness. ...

Bank customers are a curious omission from the list of beneficiaries, but we can be generous in assuming that their omission was accidental. The context of these grand claims indicates that the beneficiaries benefit indirectly through the system stability which APRA purportedly underwrites. That APRA does not act on behalf of individual customers is understandable, given the formal responsibilities of other authorities, but there is a fuzziness regarding APRA's responsibilities towards 'classes' of customers.

Even apart from APRA's failures regarding its core responsibilities (notably embodied in the collapse of the insurer HIH on its watch), APRA (and its predecessors) has shown a notable reluctance to take a hands-on approach to ensuring the generalised 'financial wellbeing of the Australian community'. This reluctance is in spite of APRA's acknowledgment that the finance sector is unique and therefore demanding of greater control than for industry in general (Laker, 2005: 4).

The [Basel Committee on Banking supervision] concluded [in a July 2005 report], without qualification, that "minimum standards of corporate governance for banks should therefore be more ambitious than for non-financial firms." ...

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Australian Securities and Investments Commission ...'. Small business agents themselves would be uncertain as to whether or not they are classified as 'consumers'. A legislated monetary limit to claims dictates that the representative small business cannot be classified as a consumer, but no official publication outlines a bank complainant's status or avenue for redress.

APRA strongly supports this conclusion. Indeed, we believe it also applies to all regulated institutions responsible for safeguarding the financial and physical assets of the community.

There is at best a macroeconomic orientation to APRA's concerns, and, at a structural level, with manifestations rather than with root causes. There is no concern for the temporal casualties of bad practices. This mentality was present during the mid-1980s and the eruption of the 'foreign currency loan' affair.<sup>24</sup> This mentality is present in current concern for potential irresponsibility in the housing mortgage market, with APRA stepping in under pressure from Treasurer Peter Costello and the Reserve Bank (Patten, 2007). It is not clear what happened to earlier expressions of concern in late 2004 by APRA Chairman Dr. Laker over precisely the same issue (Clout & Boyd, 2004).

In late 2004, APRA's concern for possibly declining (housing mortgage) credit standards was focused on the bank's property valuation practices, with the prospect of 'drive-by or desk' valuations being introduced and generalised. This concern is entirely appropriate, but its ambit is unnecessarily constrained. APRA acknowledges that the profit imperative can generate dangerous corner-cutting practices, but its label for this tendency ('creative tension', c/f Clout & Boyd, 2004) belies a smug confidence that this tendency can be readily harnessed. In response to a journalist's recent query, Dr Laker claimed that 'We've got a robust regulatory framework' (Patten, 2007). The claim rests more in hope than in substance when it comes to detail. APRA has never pursued the subject of its initial concern to its logical implications, from which lax practices can merge neatly into corrupt practices.<sup>25</sup>

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<sup>24</sup> During the 1980s crisis of the banking system associated with the profligate creation of a foreign currency loan book for unsophisticated small business borrowers, the Reserve Bank showed concern (if ephemeral) for the lack of bank prudence, but no concern for the tragedy that befell the borrowers. Subsequent events highlight that the Labor Government saved the major banks involved (in particular, Westpac and the Commonwealth Bank) precisely by jettisoning justice to the victims. One particular document that was leveraged from Westpac by disgruntled borrowers in an imperfect discovery process indirectly attests to the Herculean detachment of RBA staff during this crisis (Clarke, 1986). Current APRA Chairman John Laker was then a senior staffer in front line divisions and communicant with the document's author regarding Westpac's vulnerability. Dr Laker would thus have had the opportunity to observe the perennial crisis tendencies of the Australian banking system for a period extending well over twenty years. A one-sided 1993 exchange between sometime Democrat Senator, Paul McLean, bank victim champion extraordinaire, and Reserve Bank Governor, Bernie Fraser, highlights the comprehensive standoff by the regulator during the catastrophe sparked off by financial deregulation. McLean sent Fraser a 13 page document, appropriately headed 'Prima Facie Evidence of Widespread Corruption in Australian Banks and its Concealment', detailing malpractice both in the foreign currency loan arena and in the generic lending arena, highlighting the systemic nature of bank malpractice (McLean, 1993). Fraser sent McLean a brief 4-paragraph reply, repudiating the desirability of RBA investigation of the crisis 'in the absence of any hard evidence of specific wrongdoings by individual banks' (Fraser, 1993).

<sup>25</sup> In April 2004 I sent a copy of my dossier detailing eight case studies of victims of the NAB (Jones, 2004a), accompanied by a covering letter, to Laker. Receipt of the dossier was not even acknowledged. In January 2005, banking consultant John Salmon sent a dossier to Laker in response to the late 2004 disclosure of APRA's interest in the asset backing of housing credit (Salmon, 2005). Salmon argued that concern for property valuation practices deserved to be extended to practices in business lending, especially to small business. Salmon highlighted a pattern, especially within the NAB, of manipulation of security values. There may be an initial inflation of asset security values to capture business and to facilitate approval readily within the local lending manager's authority. Then if the bank seeks to foreclose on a borrower, the latter's securities will be deflated, often dramatically. The initial inflation is strictly an internal affair, but the process of deflation typically involves external valuers and the consequent corruption of their integrity. Salmon received a reply from APRA's Secretary on 1 February

APRA possesses a formal power that no other regulator possesses – that of the right to intervene in a bank’s operations. One needs to be reminded of this power because it has been so rarely invoked. APRA’s intervention in the National Australia Bank’s exchange desk corruption was a rare instance of this power in effect. The subsequent report and directions over NAB operational detail display what can be done (Australian Prudential Regulation Authority, 2004). The bank departments responsible for impaired assets are crying out for a forensic audit of procedures and culture, especially those of the National Australia Bank and the Commonwealth Bank of Australia. However, the NAB exchange desk scandal fell into APRA’s lap, upon which it was aroused from its somnolence and to which it has subsequently returned. There are thus weapons in APRA’s regulatory arsenal that have the potential to assist bank victims but the prospect is that they will never be so used.

In short, the edifice centred on the regulatory bodies that preside over bank behaviour has evolved into a complex phenomenon from which bank victims can expect energy-consuming and frustrating involvement, with the prospect of nil assistance at its end. There are contradictory signals from the regulators – on the one hand, ‘we are here to assist and we have powerful mechanisms at our disposal’; on the other, ‘the competitive process at the heart of our system is a dog-eat-dog process, look inwards at your own failings and develop your own capacities in order to avoid failure’.

Individual contact between complainant and regulatory staff is met almost uniformly with rejection, if occasionally after a period of ‘going through the motions’. Regularly, advice is given to complainants to try other bodies – the Banking Ombudsman, or the ACCC, for example – when the advisor should know that acting on such advice will turn out to be fruitless. At bottom, the complainants are advised that the most appropriate arena of action is in the courts, that great leveler and bringer of justice, when the advisors would know that the prospects of the complainant getting redress in the courts is close to zero.

It is plausible to infer that the overall unhelpful stance of the regulatory bodies is a product of the internalisation of an adverse environment<sup>26</sup> – the shortage of resources; the extraordinary paucity of legal precedents favouring bank complainants; the aggressive stance of the general corporate business lobby against better legislative protection for small business; the indifference and/or cowardice of the political class; and the prevalence of a generally unsympathetic intellectual culture on which regulatory staff have been nurtured. But binding all these elements is the profound power of the banks, the dimensions of which have never been documented but whose might is observed episodically whenever that power is threatened.

Complainants against bank malpractice thus confront a paradox – an elaborate regulatory infrastructure with apparent substance but tangible hollowness. Why regulatory staff as individuals participate in this illusion (apart from the attractive superannuation package) remains a mystery.

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2005, noting ‘I acknowledge receipt of your letter and will formally respond once the issues you have raised have been investigated’. No response was forthcoming, and the issues raised have clearly not been investigated. A subsequent inquiry from Salmon in April as to the status of the investigation (again accompanied by a submission of substantial length, documenting another case of significant import) received no reply.

<sup>26</sup> c/f footnote 21.



## Conclusion

The Walter family, naïve migrants from Germany, learned an important lesson about how business and politics is done in Australia. It has been a very expensive lesson.

To a large extent, the Walters have been fodder in the machinations of a larger process. The Walters have experienced a traumatic loss of their business, family home and accumulated savings. Yet this phenomenon does not register in the overarching structure that is conventional banking practices and culture and its legal and regulatory complements. The Walters are not even a statistic, because theirs and myriad comparable experiences are not perceived, acknowledged, aggregated, and analysed. Thus is the overarching structure reproduced.

Ironically, it is difficult to discern a rationality in the process for which the NAB's treatment of the Walters is representative. There are some cases in which a bank's foreclosure on a small business will reap it monetary gains. Yet a representative foreclosure may involve the commitment of internal resources, substantial legal costs, reduced net gain through sale of secured assets under value, enhanced claims on secured assets in the receiver/manager arrangement, not to mention the expense of a public relations apparatus devoted to offsetting adverse publicity. An outsider might inquire as to whether it would not be more profitable for banks to eradicate such practices by performing competently and ethically on a comprehensive basis. Of course, bank denial of any impropriety<sup>27</sup>, and judicial and regulatory indifference to such practices, means that the environment conducive to such an inquiry is unlikely to arise.

As a prelude to questioning the rationality of the larger process *per se*, it is appropriate to posit questions that expose components of the process. The questions below, all of which are pertinent to the Walter case, refer to curious dimensions of bank foreclosure practices that anyone in command of their senses would interpret as demanding of ready investigation and answers.

1. Why do some borrowers who have never defaulted on loan payments have their facilities withdrawn and their assets subsequently commandeered?
2. Why do borrowers who have had a productive relationship with a bank but who may have experienced problems (possibly short-term) have their facilities withdrawn, as opposed to two alternatives: working with the customer to re-establish their viability with appropriate instruments and terms for mutual benefit of both customer and lender; or working with the customer to facilitate an ending of the relationship on terms that minimise the costs to the borrower without substantially inconveniencing the lender?
3. What is the rationale of foreclosing on a borrower on terms that would have left the bank with better returns if the alternatives of either continued support or support until sale as going concerns had been pursued? Are there net gains to the bank from tax deductions arising from write-offs of the debt?

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<sup>27</sup> Surprisingly this denial has persisted under a new generation of management at the NAB, in particular, which has inherited the sins from its predecessors,

4. Why are foreclosed customer assets perennially sold under value, and often substantially under value?
5. Why do customers not have the most appropriate credit facilities for their needs, with the potential for inappropriate facilities contributing to their demise?
6. To what extent is staff turnover at the point of contact with customers a contributory factor in a customer's demise? What principles have driven the substantial staff turnover at branch manager level in recent years, and has the functionality of such turnover been evaluated?
7. On occasions when the apparent cause of customer problems is incompetence on the part of bank employees, why is the customer left (or pursued through the courts and often to bankruptcy) as the ultimate victim?
8. (Relevant to 5. above) Is it possible that banks have traditionally and continue to determine facilities on the criterion of borrower assets rather than that of borrower business prospects?
9. (Relevant to 5. above) Is it possible, as appears likely from experience of defaulted customers, that credit facilities are strategically designed to facilitate default of the borrower at the bank's discretion (as evidenced by the draconian common overdraft contract, and by the 12-month facility)?
10. Is the perennial and continuing use of security over the family home a morally legitimate practice? This issue was raised in *Finding a Balance* (House of Representatives Standing Committee on Industry, Science & Technology, 1997: p.150), which in turn noted that the issue had also been raised in the House Industry Committee's previous report on small business in 1990 (House of Representatives Standing Committee on Industry, Science & Technology, 1990).
11. Following the bank's decision to place customer assets on an impaired status, are all customer bank statements (including both conventional 'mainframe' and red ink/shadow ledger statements) distributed to customers, as per the recommendations of a Federal Parliamentary Committee (Parliamentary Joint Statutory Committee on Corporations and Securities, 2000)?
12. Why is bank discovery of relevant documents, following request from aggrieved customers, a belated, inadequate and probable deceitful process?
13. In banking litigation, why do the courts persist with the farce that the 'receiver is the agent of the mortgagor' (the borrower) and that 'the mortgagor is solely responsible for the receiver's acts and defaults and for the payment of the receiver's remuneration' (National Australia Bank v Walter, 2004; National Australia Bank v Freeman, 2002)? Is this fiction a perennial de facto vehicle for the mortgagee (the bank lender) to exercise discretion over the receiver's actions without incurring any legal responsibility?

The questions above are part of a larger list that concluded a 2004 dossier (Jones, 2004a) on NAB victims sent to the CEO of the NAB, John Stewart, and to the regulators. Nobody has yet seen fit to address these questions.

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