Illusion and Reality at the National Australia Bank

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The National Australia Bank as schizophrenic

The National Australia Bank is a schizophrenic organisation, or perhaps multiple banks in one. Like other members of the Big Four, it runs a tolerably amenable retail bank. Like other members of the Big Four, to maintain market share it lends indiscriminately and with little security to corporates and later scurries to clean up the mess following the corporates' failure.

Uniquely, it has been prone to a string of costly grand failures at the general administrative level – the Idoport software debacle (1996-); illegality at the National Irish Bank under NAB control (1988-98); the Homeside mortgage management debacle (1997-2002); the SAP software debacle (1999); unrestrained trading room cowboy culture (2002-03); the ill-considered splurge on US-sourced collateralised debt obligations leading up to the crisis of 2008; the misdirected attempt to acquire AXA APH Ltd (2010); and so on.

However there is another bank within the NAB umbrella and that includes the small business banking and agribusiness divisions. Given the imbalance of power, all the major banks treat their small business borrowers cursorily, with perennial exploitation and occasional malpractice. But the NAB has turned derisory treatment of its small business / family farmer segment into an art form.

The NAB's schizophrenia is most transparent with respect to this latter segment. On the one hand, we have the indifferent, the incompetent, the unconscionable practices. On the other hand, we have the self-congratulatory advertising and the public relations extravaganza – placing the NAB as one of the biggest spenders on spin in the current pantheon of corporate Australia.

An instructive peek behind the facade

After the significant publicity given to the 2002-03 NAB trading room scandal, the Australian Prudential Regulation Authority was forced to step in and look for causes of the problem. APRA was created in 1998, assuming responsibility for systemic stability of the financial sector. APRA has formal powers to investigate internal financial institution procedures, but never exercises that power – save for this one occasion.

Thus appeared APRA's *Report into Irregular Currency Options Trading at the National Australia Bank* in March 2004. For an organisation generally oriented to statistics collection, APRA pulled a rare rabbit out of the regulatory hat – an explicit confrontation with the shadowy concept of 'corporate culture', a domain in which only the low-status sociology profession had cause to frequent and to the existence of which the high-status economics profession remains completely oblivious.

Section 6 of the report is specifically devoted to NAB 'culture'. From the report:

> The culture that exists within NAB contributed to many of the control breakdowns that led to the currency options losses. While their effect is difficult to measure, we are in no doubt that cultural issues had a significant bearing on the extent of the losses that emerged - influencing both excessive risk-taking behaviour and the bank's capacity to detect it. … APRA considers that the cultural issues thrown up by this investigation need to be treated with the same attention and seriousness as the technical and operational breakdowns. … (p.72)

> Lack of willingness by senior management to accept and acknowledge issues, resistance to escalation of issues and less-than-open responses to 'external' parties all are significant drivers of culture within an organisation, and so signals what is expected of staff within that environment. It is difficult to expect operational staff to actively identify issues or escalate concerns if there is no encouragement or evidence of such action higher up in the organisation. (p.75)

With respect to section 6, APRA made several demands, two of which are (p.76):

> APRA believes that cultural change must be driven from the top. APRA requires that the Board undertake a review of cultural norms within NAB and, following this, clearly articulates the standards of behaviour, professionalism and openness it expects of the organisation.

> APRA requires that codes of conduct and disciplinary procedures be vigorously enforced.

And the aftermath of this authoritative (if selective) condemnation of the NAB's *modus operandi*?

The NAB's public relations machine

After the publicity and regulatory intervention following the NAB trading room illegality, the NAB came up with promises of a new broom. The NAB issued a Statement of Corporate Principles in August 2004. This from its monthly staff magazine, *The Star*, in September:

> We will be open and honest

We will tell it like it is (no spin)
We take time to explain issues and answer questions
We aim to ensure that there are no surprises. Mistakes and non-delivery are communicated early.

We take ownership and hold ourselves accountable (for all our actions)
We acknowledge our mistakes and if we get it wrong we will put it right
We all take responsibility for the way that customers experience the organisation

We treat everyone with fairness and respect
We build trusted relationships with all our stakeholders
We actively listen and respond appropriately to our stakeholders
Decisions are made in a reasonable and consistent manner

Fast forward to 2008:

> At NAB, we have built one of Australia' most successful companies – and one of the world's strongest banks – by helping our customers realise their potential. … Our people provide quality advice and can make fast decisions to help out customers in these volatile times. We have dedicated financial experts in locations across Australia, including: A national network of business bankers and industry specialists – we are Australia' leading business bank.

From the April 2010 NAB submission to the Senate Inquiry on *Access of Small Business to Finance* we read (p.2):

> NAB's commitment to provide direct finance to Australian small businesses is unmatched by any other financial institution. Over the past two years, NAB has invested heavily in customer facing relationship roles to assist and support small business owners, and prospective small business owners.

From blanketed advertisements later in 2010 we read:

> We're serious about supporting your business. If you're running a business you need to have the finances available to seize opportunities and a team that understands your needs. At NAB, we're ready when you are.

Recently, more cutely and concisely: "More give, less take."

Back in the real world

Back in the real world, I know of ten NAB customers who have recently experienced or who are currently enjoying the NAB's boot on their neck: a Victorian welfare worker and property owner; a Victorian builder; a Victorian machinery manufacturer; a Victorian rural retail business; a Western Australian farmer; a Western Australian small-scale farmer; a Western Australian egg

producer; a Western Australian home services supplier; and two New South Wales farming families.. I'm sure that this list is representative of a larger collection of aggrieved borrowers.

Victories in the Australian courts by bank victims against their bank lenders have been extremely rare. A sizeable proportion of these victories involve the National Australia Bank as the losing party. Judges, normally falling over themselves to decide for the bank lender against the hapless borrower, have occasionally broken ranks with their confrères to make various uncomplimentary declarations about the NAB.

Here is Balmford J in NAB v Petit-Breuilh, and other directors of the Latin American Social & Sporting Co-operative Ltd (VSC 368, 5 October 1999), par.101:

> In summary, having considered the evidence before me in the light of the passages cited from [Commercial Bank of Australia v] Amadio [1983] in paragraph 49 above, I find that each of the defendants was under a special disability in that he had a limited command of English other than for routine day-to-day transactions;
>
> the bank, in the person of Mr Collins, was aware of this;
>
> the bank was by far the stronger party to the transaction;
>
> the bank, in the person of Mr Collins, nevertheless proceeded to obtain the signatures of the defendants to the guarantee, which was prima facie unconscionable in terms of the decision of the High Court in Amadio;
>
> the bank has not discharged the onus of satisfying me that the transaction was fair, just and reasonable. In particular:
>
> the bank took no steps to ascertain whether the defendants' financial position was such that they could meet the liability under the guarantee without incurring financial hardship;
>
> it prepared what it should have known was a defective and unregistrable mortgage;
>
> when the correct remedy for the defect was discovered, it took no action for over a year;
>
> in order to allay the expressed concerns of the defendants, and to obtain the execution of the guarantee, it gave an assurance as to the execution of fresh guarantees by an incoming committee, which assurance did not bind the bank and was not complied with;
>
> in order to allay the expressed concerns of the defendants, and to obtain the execution of the guarantee, it gave an assurance to the defendants that in the ordinary course of business, should there be default, the bank would have recourse first against the land under the mortgage before proceeding under the guarantee, which assurance did not bind

> the bank and, because of the neglect of the bank, was at the time impossible to comply with and was not complied with;
>
> it completed the guarantee, by the insertion of the names of the guarantors and the warning clause, after its execution by the guarantors;
>
> it failed to obtain the execution of the guarantee by all of the directors, contrary to the agreement for the loan, and did not explain to the defendants the consequences for them of that failure;
>
> it entered into the transaction without disclosing to the defendants the full implications of the guarantee so far as they personally were concerned;
>
> the defendants received no personal benefit from the transaction;
>
> it relied on the presence of Mr Rosati, who was thought to be acting for the borrower, and was certainly not acting for the defendants, as satisfying the need for the defendants to be afforded independent financial advice;
>
> it took no steps to ensure that the defendants obtained independent legal advice.

One risks reader fatigue with this long quotation, but the judge's pedantry neatly outlines every rule in the guarantor book that the NAB has broken. And this after *Amadio* had provided incontrovertible precedent; more, after the NAB itself had had its knuckles wrapped for comparable unconscionability on three previous occasions (Nobile, 1987-88; a Greek-born equivalent of the Sicilian-born Nobile case, settled out of court, late 1980s; Garcia, 1993-98).

Given that there was no remorse over being found out over Petit-Breuilh, the learned judge was lead to put the boot in further (par. 6):

> 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, and the statement of claim refers to the Co-operative as "indebted to the Bank on its accounts conducted at the Bank's Frankston Branch". Nevertheless, the substantial file of the Frankston branch, which incorporated relevant material from the Burwood and Moorabbin East branches from 1991 onwards ("the Frankston file"), was not produced until after counsel for the five defendants had closed his case. The evidence of the solicitor who had the handling of this matter 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.

Ah yes – inadequate document discovery. Balmford J's displeasure opens a rare window into a consummately practised art by the NAB, still active. And when you do ultimately extract a document from the reluctant NAB you can't be sure whether it has been falsified or fabricated. Balmford J's homily was to the delinquent merely water off a duck's back. Business as usual.

Just several months prior to this judicial blast, the NAB had called in the debt on a husband's failing business secured on an unconscionably-acquired guarantee from the uninformed wife, Mrs Kathryn Ashton. This case was pursued in 2001 by the Australian Competition & Consumer Commission, then under Allan Fels and the NAB was forced to settle out of court. Said Mr Fels in June 2001:

> The prohibitions on unconscionable conduct in the Trade Practices Act 1974 will continue to be an ACCC enforcement priority. [In fact no; Ashton was the last case taken by any regulator for unconscionable conduct by a bank] … NAB and other financial institutions should not take unfair advantage of a person in a vulnerable situation by obtaining a guarantee without ensuring the person has full knowledge of its terms and effect.
>
> It is of particular concern that NAB has been found by the Courts on three previous occasions in 1988 [Nobile], 1998 [Garcia] and 1999 [Petit-Breuilh] to have engaged in unconscionable conduct in relation to the obtaining and enforcing of personal guarantees, and has now again admitted to the Court to have engaged in such conduct.

The NAB may have belatedly acquired some nous regarding 'disability' unconscionability (now covered by s.51AA of the Trade Practices Act under which the ACCC pursued the Ashton case) in the pursuit of additional security for troublesome loans. But where the courts are complicit or complacent, the NAB (as with other banks) continues to attempt to belatedly garnish additional security over customer and related party assets through unconscionable means. In Doneley v the NAB (Queensland farmer, 1992-98; in particular, QSC No.7367 of 1998, unreported), the NAB supplemented security over a near worthless dry land property with belated acquisition of the adjacent property possessing valuable water licences – this through court-supported skullduggery.

Well, that was the 1990s. Following the enunciation of corporate principles in the 2000s, isn't there a new leaf? Well no. We find the NAB recently demanding an odious 'all money' additional guarantee from a business couple through misrepresentation (Victorian machinery manufacturer, current).

Another area where the NAB sharpens its predatory instincts is that in which a customer is debilitated through fraudulent actions by a third party. Thus when Paul Buckman's Gippsland-based Basstech Co went into the red after the NAB processed a series of cheques transparently forged by Basstech's then accountant, the NAB closed down Basstech. However, a comparable situation of third party forgery found the NAB in court and on the losing side (NAB v Voloshin, NSWSC 84, 25 February 2000).

In Voloshin, Master Harrison had this to say (par. 21):

> It is my view that it is at least arguable that the plaintiff's [the NAB] conduct in seeking to enforce the mortgage is unconscionable with the consequence that the court will decline to permit the National [Australia] Bank to enforce its legal rights. The bank was the one who accepted the forged cheques. The defendant has not pleaded unconscionable conduct and I give leave for him to do so. In addition it may be that the defendant has suffered some other type of damage other than the loss of the moneys he loaned the company. … It is my view that the defendant has an arguable cross claim. Also the success of this case depends on a matrix of facts, including whether the plaintiff knew that cheques were forged prior to the giving of the $425,000 mortgage. For these reasons the cross claim should not be struck out but needs to be amended. … As this case involves fraud, it is not appropriate to strike out the defence nor is it appropriate to enter judgment for possession. … The plaintiff is to pay the defendant's costs.

Another judicial condemnation of NAB practices. Again, water off a duck's back?

The NAB recently again found itself on the wrong side of the court in Kay v NAB (NSWSC 1116, 30 September 2010). For the purposes of a specific property development in Auburn, Suburban Sydney, Kay et. al. borrowed $1,150,000 at 5.65 % (with a default penalty rate of +4%) on a 12-month interest-only loan (with option for loan turnover) from July 2003. The competitive rate, offered by the NAB to get their business, was key to borrower evaluation of the viability of the project. Immediately, the NAB charged a (slightly) higher interest rate, and claimed default when the initial loan (of arbitrary 12-month duration) expired, applying usurious penalty rates of roughly 20%. Rothman J. had this to say:

> From day one of the contract, NAB was in breach … NAB continued in breach for the duration of the contract. The rate of interest was an essential term of the contract or NAB's conduct was a sufficiently serious breach of an intermediate term. In either alternative, the plaintiffs had a right to elect either to rescind the contract (and sue for damages), or continue the contract on foot and sue for damages arising from the breach. (par.75)
>
> When, eventually, the plaintiffs were in default by refusing to pay interest at the rates being charged by NAB, that refusal was a direct consequence of the breach by NAB and

> the dispute between the parties as to the payments to which NAB was entitled. It is, in those circumstances, inappropriate, and inconsistent with the terms of the contract between the parties, to refer to the plaintiffs as being in default. (par.76) …
>
> It seems that, notwithstanding that the contract documents emanated from NAB, NAB did not have on the plaintiffs' file a copy of the original contract documents and, during the whole of the dispute about interest rates, had at no stage referred to the contract documents. The Court has already noted the evidence, which it accepts, that, notwithstanding the foregoing, NAB had represented that it was entitled, under the contract (which it had not for that purpose examined), to charge the interest rates about which the complaint had been made. (par.58)

Rothman J. played a conservative hand. He could have and should have gone for unconscionability. The NAB managers in this case (presumably supported from above) assumed that the terms of the contract were irrelevant – that (in effect) any contract was there to be broken. In this particular case, they had mislaid the contract; but, given that they had assumed absolute discretion of the terms of the relationship, not having the contract at hand was of little consequence.

Illusion meets Reality

Inevitably the NAB's illusory world of spin and its real world of unsavoury practices must occasionally collide. And which comes up trumps?

On 5 April 2006, *Today Tonight* Adelaide, courtesy of producer Frank Pangallo, showed an atypically large segment devoted to three small business victims of predatory behaviour by the NAB (the Troianis, the McMinns, and Allessandro Zollo). Film footage of a recent speech by Ahmed Fahour, then Executive Director and CEO Australia, has him declaring that his organisation is one:

> … that lost touch with its customers; lost touch with what matters; lost touch with the key things that drive the business – that's the customers and looking after its staff. It became an. arrogant organisation, developed a culture that was inwardly focused rather than outwardly focused.

Approached by Pangallo for comment on the ex-customers represented in the program, Fahour replied that he hadn't heard of the allegations (after all, Fahour had only been appointed in September 2004). Nevertheless, he said: "were not out of the woods; not declaring victory – not anywhere near for the whole organisation where we want to be."

Similarly, during a speech (to the International Chambers of Commerce Business Forum) on 26 April 2006, Fahour noted:

> … notwithstanding a long and proud tradition, the simple fact is we are rebuilding the NAB – hacking off the hubris which saw our gaze turn inward and lose sight of the customer that the organization was formed to serve. At times, and despite our best endeavors, we forgot the one key lesson from our earliest beginnings – that is to back people, not just bank them.

And again, during an interview in May 2008 (Michael Warner, 'Just a suburban boy', [Melbourne] *Herald Sun*, 3 May):

> The thing that got this company into trouble was arrogance and hubris – and losing sight of the ordinary person. And I'd have to say that the company learnt a pretty heavy lesson from that …

Ahmed Fahour formally eats humble pie for the organisation with which he has not long been associated. But how deep is the emotion?

The 26 April 2006 speech was essentially a claim that any cultural dysfunctionality was an ephemeral blip and had now been transcended. Said Fahour:

> Today, at NAB, that fundamental emphasis continues – the success of customers defines the success of the bank: whether it's a young family in search of their first home or a middle-aged couple thinking about their retirement; whether it's a small business wishing to take the next step or helping the devastated banana grower in the wake of Cyclone Larry. NAB's success ultimately depends on our customers' success. Inside NAB we call it helping our customers fulfil their dreams.
>
> We frame this simply. It means:
> 1. Delivering on our promises
> 2. Being real and open
> 3. Easy to do business with; and
> 4. Backing our customers

Is it any coincidence that this up tempo speech was delivered only several weeks after the 5 April Today Tonight program that featured Fahour acknowledging his company's failures?

The playing of this Today Tonight program on the East Coast was curiously long delayed (the NAB had harassed Channel 7 management over the program), but it belatedly showed on 4 January 2007, with Fahour's auto-critique again going to air – this time for the benefit of Head Office viewing in Melbourne. Yet, again, only several weeks later, Ahmed Fahour has a guest opinion piece in the Melbourne *Age* (23 January) in which only sweetness and light is on display.

> I was once asked: "How do you strike a balance between shareholder interests and being a socially responsible corporation?" The problem with this question is it assumes a

> corporation's goal of providing satisfactory, sustainable returns to shareholders somehow conflicts with being socially responsible. This is not my experience. … It is a relatively simple exercise for any company to see that contributing to a more prosperous community will provide greater opportunity for their business and reward shareholders.

The NAB was now extending its benevolence to the lower rungs of the community via the miracle elixir of micro-finance.

Everything is now in perfect working order.

Producer Frank Pangallo popped up again with a segment on Today Tonight on 31 January 2007, filming a demonstration outside the NAB's Annual General Meeting (by coincidence) held in Adelaide, the demonstration led by the Troianis and the McMinns, subjects of Pangallo's previous program. There followed more harassment from the NAB of Channel 7 management, this time involving Fahour himself.

More, Today Tonight received communication from the NAB's Public Affairs office claiming:

> On rare occasions businesses regrettably fail and disputes do sometimes arise, however, NAB works hard to resolve those situations to the satisfaction of all parties. Where this isn't possible it is sometimes necessary for a court of law to be the final authority.
>
> All of the material put to NAB by these customers and Today Tonight has been the subject of exhaustive investigation many times by ourselves and by multiple courts of law. In each case the courts have found the allegations to be unfounded.

Revisiting the 2004 APRA report (pp.73, 74):

> It is clear from our investigation that a number of important risk issues did not come to the attention of the Board and CEO. In our view, NAB's highly regimented culture acted to impede transparency and mollify the message when it involved acknowledging concerns or difficulties at operational level. Managing the message was frequently given equal, or greater, priority than dealing with the underlying issue. … Issues or concerns raised by external parties were not routinely accepted or prioritised for attention.

To repeat: 'Managing the message was frequently given equal, or greater, priority than dealing with the underlying issue.' And so it remains.

In September/October 2010, the banks have been threatening to push up borrowing rates independently of movements of the official cash rate dictated by monthly decisions of the Reserve Bank of Australia. The public has not been amused and the media, mostly pro-bank, has raised the spectre of yet more 'bank-bashing' by the populist hordes. Even the Shadow

Treasurer, Joe Hockey, has broken ranks with his Party and claimed that the banks lack appropriate regulatory restraint.

In this context, banks spokespersons have been called on to defend their turf. In a representative media piece (Matthew Drummond, 'Banks struggle with reputation', *Australian Financial Review*, 1 October 2010), Westpac senior executive Rob Coombe warned that "… reputational issues were just as important for the banks as new regulation". In a combative tone, the NAB CEO Cameron Clyne claimed that "… banks need to address the slur that they were 'bastards', or face mounting regulation".

The 'slur'? Move along now, nothing to see here.

On 29 August 2010 I sent Mr Clyne a letter, highlighting my familiarity with a number of current small business/farmer victims of his bank. I pointed out that if the bank was to work on improving the capacity and integrity of its relevant staff, thus building a reputation rooted in substance, the associated costs could be readily offset by savings on the mountainous sums that the bank currently spends on public relations/advertising and on legal expenses. I received a reply from the bank's 'Office of the Customer Advocate (sic)' claiming that everything was in perfect working order.

The grand illusion reigns

For the National Australia Bank, illusion has become the new 'reality' and reality has been banished to public oblivion, residing only in the bosoms of the victims whose post-bank vanquished status consigns them and their stories by definition to irrelevance.

Is it possible that NAB culture is so deeply entrenched that senior management, though periodically renewed, is captive to its own propaganda? Or that high-order chutzpah is a pre-requisite for high office in the NAB?

Whatever the source of the impenitence, one thing is clear. The small business/farmer segment is to be permanently quarantined from any considerations of personal competence and integrity and internal institutional mechanisms that channel those desired personal attributes amongst relevant staff.

The structural imbalance of power that prevails between bank and small business borrower is too addictive to be offset by temperance. And with the regulators, and the judiciary, and the political class, and the media, being acquiescent, all the forces point to the sensibility of continuing with business as usual.

Repeat after me: more give, less take.