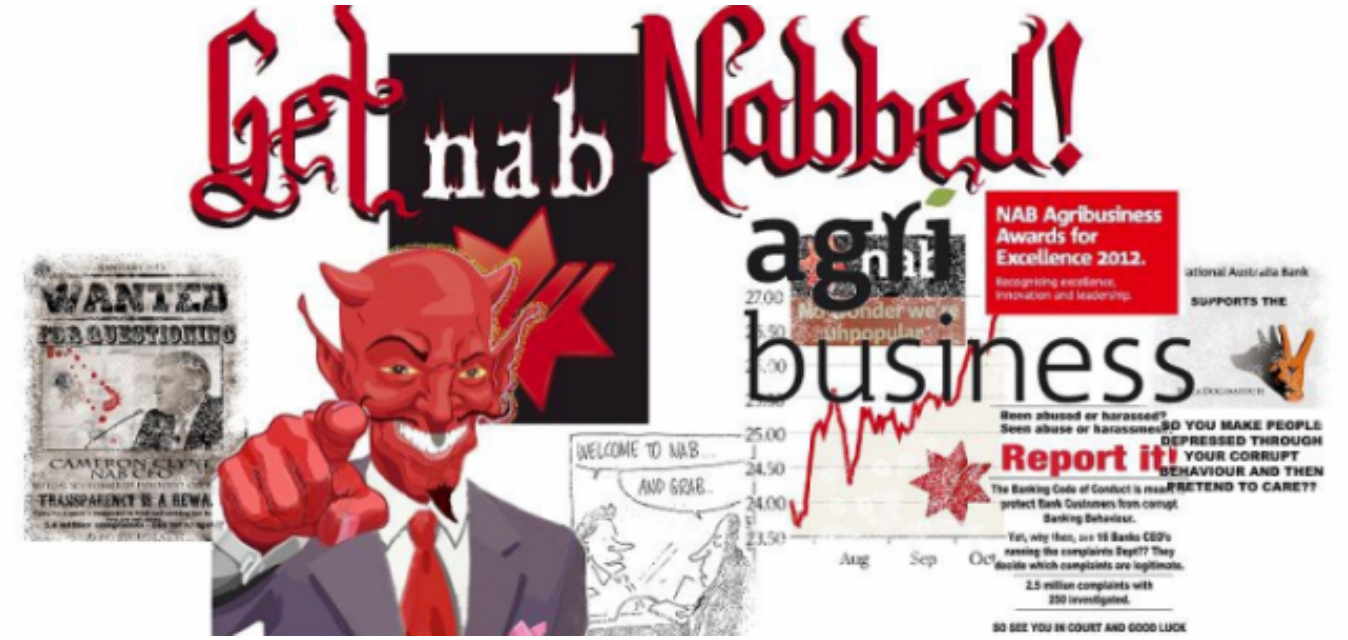
NAB: Small Business Beware

Summary:
The National Australia Bank claim to be the bank of small business — but they are anything but, explains Australia's leading exposer of bad banks, Associate Professor Evan Jones.

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The NAB, Small Business And The Wilful Ignorance Of Judges

THE NATIONAL AUSTRALIA BANK is currently engaged in a blanket advertising campaign. Even for the NAB, at the front line of advertising/public relations expenditure, the current campaign is over the top.

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Thus the Sydney Daily Telegraph, 2 April, front page:

'Every morning millions of small business owners rise to face a new day. Some follow family footsteps, some follow their dreams, some don't follow at all, they lead.'

And a full back page:

'The reasons you started your own business are very personal. At NAB, we work with thousands of small businesses every day. So we learn from all kinds of businesses and we'd like to share that knowledge with you.'

The punchline:

'Small business we see you.'

Pic1

The NAB doesn't learn from 'all kinds of businesses' — except to extend its reach of predation and to refine its techniques of default and foreclosure. In-house expertise? The NAB perennially forces customers to hire external 'consultants' – at customer expense – who will perennially add to the customer's problems (at bank direction?) with the bank.

The Land, 4 April:

'We see that agribusinesses need long-term support to take advantage of new opportunities and that's why we continue to lend more to Australian agribusiness than any other bank. And we're more than just bankers, we're locals who are dedicated to supporting, understanding and growing your agribusiness here and overseas.'

The Sydney Morning Herald, 12 April, full page 7:

'At NAB, we work closely with businesses to help them grow and bring their ideas to life. That's why, over the last 3 years, we have consistently lent more to small businesses than any other bank.'

But any crude loan quantum does not represent the NAB's contribution to the SME community. How much is predatory lending? How much of this quantum will be the subject of predatory defaults? No-one is counting.

The Sydney Morning Herald, 23 April, pages 1, 3 and 5. On page 5:

'We see Australian business. You see commitment. Australian business needs long-term commitment to succeed. That's why NAB supports our customers through the ups and the downs. And we prove it every day, by lending more to businesses than any other ban

Pic2

Australian business necessarily needs 'long-term commitment to succeed'. But t**he claim that 'NAB supports our customers through the ups and downs' is flatly contradicted by the myriad stories related to me over the years** (and to my collaborator, since the late 1980s) by small business and family farmer victims of the NAB. At least twenty-five years of bank thuggery from the NAB.

S30.1 of the 2004 Code of Banking Practice reads:

"We will ensure that our advertising and promotional literature drawing attention to a banking service is not deceptive or misleading."

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Symptomatic of the bank's attitude to the Code in general — laughable.

The public doesn't know the extent of the NAB's (or other banks') nefarious activities because the print media is too busy raking in the revenue from bank advertising.

The Australian Securities & Investments Commission (ASIC) is too busy telling bank victim complainants to go away, so the media has an excuse for ignoring the issue.

Small business and farmer bank victims are forced into the courts, typically with minimal to zero resources. For a crude indication of the extent of bank litigation, go to the Australasian Legal Information Institute website, type 'bank' into the search box, and order the listings 'By Date'. In some litigation the borrower will ultimately be at fault, but **the bulk of bank litigation is a result of bank staff incompetence and/or corruption.**

Let us reconsider the foreclosed farming siblings Chris and Claire Priestley. Their story is summarised in my January 2013 'Business as usual at the NAB and grab'.

There, I highlighted that the Priestleys had lost several applications to file an Amended Defence against foreclosure of their farm aggregation of 8,800 hectares — the early defences being nugatory thanks to a curiously unhelpful solicitor and the Priestleys damned thereafter. Garling J, in the NSW Supreme Court, decided for the NAB on 10 December 2012, following a 5 December hearing. The bank had been given possession in a previous judgement on 28 September and possession was set down for the next day — the 11th. Christmas intervened.

Pic3

The Code of Banking Practice

In their court appearances, the Priestleys had increasingly highlighted the NAB's failure to adhere to the banking sector's Code of Banking Practice, whose commitments are encased in the bank's contracts with the Priestleys (outlined in my first article).

The Priestleys had applied before Garling J to stay the impending eviction based on belatedly acquired information that the NAB and the other signatory banks had constructed a secret apparatus to hobble the workings of the Code of Banking Practice (of which more below). Their argument for a stay on the eviction and a new defence based on their allegations about the contracts entered into in October 2004, now seen as misleading and deceptive, was rejected.

> Following the whitewash 1991 Martin Report into the banking sector, the Labor Government let the banks off the hook with the gift of self-regulation. Hence the Australian Banking Industry Ombudsman scheme (created in 1989, now the FOS), and the Code of Banking Practice.

The banks' self-interest soon came to the fore. It was reflected in the Australian Bankers' Association intention, under pressure from members, to hobble the Ombudsman scheme in its infancy. This was July 1992. The Ombudsman had shown independence in forcing compensation from NAB and ANZ over their involvement in a scam.

The then terms of reference for the Ombudsman were that judgement should be based on what is 'fair in all the circumstances'. The hawks' preference was for 'general principles of good banking practice'. Ah yes, business as usual. A follow-up banking inquiry (the Elliott Committee) recommended that the upper monetary limit for the sums involved in complaints be raised from $100,000 to $200,000, and that small business be included in the scheme. The Labor Government rejected the recommendations.

It was noted by Tim Blue in the Sydney Morning Herald (19 September 1992):

'Banks have been reluctant to agree to either move on the grounds bigger sums involve business capable of looking after themselves.'

To allow small business into any scheme that involved fair play and potential compensation was anathema. Why kill the goose with the golden egg? And so it has remained in the latter day Financial Ombudsman Service — expanded in scale but still steadfast in the service of stonewalling accountability for the banks' propensity for incompetence and predation.

Ditto the Code. In promoting the second Banking Report, the Committee Chairman Paul Elliott noted (5 November 1992):

'An extension of the code to cover small business and rural customers also will be essential in rectifying damaged relationships in these areas.'

It didn't happen. It was also intended that the Code would have an independent monitor. Ditto.

What did happen is that the Code, being developed by the federal Treasury and the Trade Practices Commission, was handed over to the banks themselves — in particular to the 'hard-heads', the NAB's Don Argus and the CBA's David Murray (Treasurer Keating's choice to run the privatised CBA). The handover was courtesy of then Treasurer John Dawkins. In return for taking control of the Code, the banks 'conceded' to allow coverage of bank loan guarantors – in practice perennially the borrowers themselves – and the contractual enforceability of the Code. The takeover explains why a Code, now sanitised, did not see the light of day until 1996.

This early history of the Ombudsman scheme and the Code of Banking Practice exposes the major banks' collective ethos. The Labor Government acquiesced to the banks' formal commitments to meaningful self-regulation. **The banks committed themselves immediately to ensuring that neither the Ombudsman scheme nor the Code would function effectively.** In particular, a bank's contractual obligation under the Code has never been enforced. The banking sector henceforth became essentially unregulated (save for the weak reed of 'prudential' regulation of banks' capital adequacy), and so it remains to this day.

Coincidentally the small business lobby had a rare (if ultimately symbolic) success. With the Howard Government elected in 1996 with help from small business, the Government established a Parliamentary Inquiry into corporate predation against small business. The excellent 1997 report, Finding a Balance, assertively outlined corporate predation across a range of sectors including banking — i.e. nothing had changed since the 1991 Martin Report. The 1997 report led to the introduction of a historically significant 'business against business' unconscionable conduct section, s51AC, into the Trade Practices Act in 1998. The section was replicated as s12CC in the ASIC Act in 2001. **Yet not a single case has ever been brought against a bank under these sections.**

Thus comes time for the refashioning of the Code of Banking Practice in late 2003. Small business (presumably including the family farmer – a Code brochure cover has a farmer in a cowboy hat) is belatedly included in the Code's coverage, and a Code Compliance Monitoring Committee to be established. Red alert for the banks, but no worries.

The banks first created the Code Compliance Monitoring Committee Association, for which a Constitution was written in February 2004. Then the CCMC was created, and the new Code promulgated in May 2004. The Constitution constrained both the CCMC and the operation of the Code. The CCMC's capacity for compliance monitoring was inhibited in utero. CCMC members themselves expressed dissatisfaction to the 2008 McClelland Review of the structure, claiming lack of independence, constraints on their actions, and being kept in the dark by the FOS through which it operated. The integrity of the revised Code itself was inhibited in utero. All utterly predictable.

In the context of Garling J listening to the Priestleys' complaints about the bank's non-compliance with the Code, before ignoring the implications, Garling notes:

> 'As well, the Priestleys argued that the terms of the Constitution by which the Code Compliance

Monitoring Committee Association operated, meant that contrary to the Code, a copy of which the Priestleys were given by the NAB during 2010, the NAB did not have to investigate all complaints and hence had failed properly to investigate their complaints and submit their complaints to the monitoring regime of the Code Compliance Committee.'

What was supposed to be given to the Priestleys? The Code was readily available, the Priestleys had it, and the NAB would not be drawing attention to it at precisely the time when its non-compliance was in full bore. As for the Constitution, it is a secret document dictating the activities of a secret body, whose object was to scuttle the formal intent of the Code. The Priestleys obtained a copy that had fallen off the back of a truck.

The judiciary in general will not touch the elephant in the room which is the monumental duplicity that is the Code of Banking Practice. The legal profession and the judiciary prefer to have no idea of the Code, its significance or its politics, save for Mallesons (NAB's premier law firm) which wrote the CCMCA's Constitution in order to emasculate its impact.

It was Garling J's task to tick the boxes on the Priestley possession and get the hell out of there asap. Thus:

> [The Priestleys] did not make it apparent how a failure of the NAB, assuming one was established, to comply with these contractual provisions, could amount to a defence of the NAB's claim for possession of the land.
>
> ... the matters which the Priestleys now seek to raise do not, in the form in which they are advanced, constitute an arguable defence against the NAB's legal claim for, and its entitlement to, orders for possession of the farming properties. At their highest, it is possible that they may a basis for a claim for damages, although the evidence presently before the Court does not suggest that any such claim is likely to be successful. ...
>
> It follows that I am not persuaded that the Priestleys have an arguable defence to the NAB's claim. In light of the fact that this is their seventh attempt to formulate a defence, even making all proper allowance for the fact that they are not legally represented, I am not satisfied that it is in the interests of justice to make the orders sought by them.

The brief exchange in the 5 December hearing goes to the heart of the matter:

> His Honour [Garling J]: ... There seems to be little doubt that you and Mr Priestley borrowed some money from the bank. Claire Priestley: Yes, we did.
>
> His Honour: There seems to be little doubt that the payments are not up-to-date. CP: Yes.
>
> His Honour: Ordinarily that would mean that the bank could take their security. CP: Yes.
>
> His Honour: And that is the order they have got. CP: Yes, I appreciate that.
>
> His Honour: So why is it that you say in this case the bank should be stopped from getting the benefit of their security?

That exchange captures the essence of bank litigation and the rest is white noise. Such is the beauty and simplicity of the Common Law. A contract is a contract is a contract.

The Priestleys did attempt a 'yes, but'. The Priestleys had contracted the initial loan with NAB in late 2004, with the (written) promise of long-term support. The Code of Banking Practice was part of the contract. The mortgaged properties were in drought and remained so (as elsewhere) for the next five years.

Pic4 Priestley aggregation reservoir, February 2012; since January 2010 a not-infrequent inundation.

Davidson Cameron's advertisement for the aggregation went into The Land on 16 May. It is desultory, especially in terms of pictorial representation of water infrastructure and of the current good feed for livestock. More, the advertisement unusually plays down the property with the disclaimer

'Interested parties please note that the irrigation infrastructure and development may require maintenance.'

(The advertisement is now accessible on the web.)

Sale of the property is by tender (i.e. secretive) and tenders close 14 June, a ridiculously short period for potential purchasers to obtain contracts, formalise funding and make submissions.

The dimensions of the process of sale of the Priestley properties point naturally to the prospect that the aggregation will be sold under value, to a friendly party, and that this outcome is the NAB's clear intention. The properties are sandwiched between two agglomerations owned by the same family. This family has also recently made a successful offer for the property of the only mutual neighbours. The Priestley alluvial flood plain properties receive inundation from four water sources – the Macquarie and Barwon Rivers and the Marthaguy Creek and Castlereagh Rivers. Their water flow is not dissimilar to that of the famed Cubbie Station itself. The properties are thus a highly attractive asset to the neighbours, and a purchase under value would be manna from the god in heaven that is the National Australia Bank.

> The NAB has been pulling this 'sale under value' stunt for so long that proceeding in this manner has become second nature. It's a racket – the practice is embedded in the corporate culture of the bank – and it is institutionalised theft against the borrower.

The resources devoted to this kind of customer takedown are significant. Ultimately, it may have been more profitable for the bank to treat such customers professionally for mutually beneficial outcomes. It appears that the entrenched deficiency in sectoral competence, administrative incompetence, sadism and corruption must be nurtured — regardless of the resulting effect on the bank's efficiency, balance sheet and reputation. Confront the irony when one next reads an advertisement from the National Australia Bank extolling its own virtues on small business / family farmer lending.

The revised 2013 Code of Banking Practice is 72 pages long. It is bureaucratic mumbo jumbo and it is meaningless. The operative Code of Banking Malpractice is zero pages, undocumented, and all those who matter (including the legal profession and the judiciary) subscribe to it. The Priestleys were valued customers under the former, lambs to the slaughter under the latter.

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