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When banks decide to pull the plug

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The banking sector was a distressing omission from pre-election agendas. Labor's finance spokesperson, Steve Conroy, was shoved to the rear in the bipartisan bull's roar to Fortress Australia.

Labor's banking policy emphasises retail banking, but the small business sector deserves attention. Major bank practices towards small business and the family farm range from the insouciant to the malicious, with parlous effects. This environment has been facilitated by comprehensive indifference to bank practices by borrower representative bodies, regulatory authorities and political parties.

Let us construct a composite case, involving elements that have been applied to farmer and small business clients.

A significant recent practice is that of pulling the plug on clients though they are not in default on payments. The process involves demanding repayment of an overdraft at short notice. In one New South Wales rural case in 1998, the repayment deadline was a mere three working days away. The client inevitably fails to make the payment, the bank 'issues demand', and the client goes into default.

The overdraft instrument is technically repayable at call, but this technicality is being abused increasingly. If the instrument was employed systemically in this fashion, the *raison d'etre* of the entire Trading Bank system would collapse.

Manipulation of the overdraft is complemented by an enhanced inequality structured into contractual arrangements. In the last decade, banks have tightened contracts, incorporating sections that give the banks extraordinary discretion to change the loan terms at will. This issue received rare publicity in a *Sydney Morning Herald* article on September 24, albeit solely with regard to home mortgages.

The defaulted client is then forced into an asset structure. Investigative accountants may be called in, formally to investigate the viability of the client's business. However, the 'investigative accountant' changes hats and later arrives as a receiver, armed with details of the client's business that were divulged under the pretext of an impartial evaluation of the business' prospects.

The asset restructure process has an arrangement for mediation, product of past dissent against bank practices. Yet the mediation process remains unequal. Mediation agreements are written by bank personnel, clients are under duress to sign them, and the documents contain 'release' clauses that sign away clients' rights regarding past grievances.

In one 1997 Queensland rural case, the mediator urged the farmer to accept the bank's foreclosure because it had the upper hand, even though the bank manager had

engineered the client's 'default' through diversion of funds intended for the account. In a subsequent Supreme Court litigation, the Judge ruled in favour of the bank because the mediation release clause nullified any consideration of malpractice.

Then comes the stage of asset valuation. An internal valuation will put a low value on the property, often given general confirmation by an external valuer. It appears that respected valuers are prepared to compromise their integrity for the sake of continuing bank business. The low value triggers the bank's demand. A property over which a bank has security will then be sold off at below market prices.

In a 1996 Queensland case, a bank issued demand peremptorily, arranged the contract and price of a doctor client's three medical centres, then appointed receivers to legitimate the process. Alternatively, if a client is still in control of the sale process, the bank will interfere by attempting to influence the agent and potential buyers.

Why would banks want to sell secured assets for less than maximum price? Partly, the bank recoups more of the sale price than is dictated by the original loan through discretionary charges. Partly, there appears to be a desire to retain a residual debt on the client's account (which can be as low as $1), to retain leverage over the client. On occasions when a client initiates legal action, the bank will preempt the action by initiating a bankruptcy petition.

In the meantime, the bank may have decided to write off part of the value of the client's loan. The opportunity to write off a loan portion became available with the 1992 Taxation Laws Amendment Act (No.3), one of a dog's breakfast of tax concessions arising out of Labor's *One Nation* statement.

This change has opened the door to discretion relating to the tax treatment of a bank's loan book, and has provided a substantial opportunity for tax evasion. Write-offs can be effected without sale of secured assets.

The courts are not impartial places for aggrieved bank clients. There is a structural imbalance in the scale of resources available to fight a legal dispute. Moreover, litigating clients will typically lack adequate documentation regarding their case as the bank will have ceased to provide statements on the nature of the debt. Documents that are obtained may be doctored copies of originals.

Dogged complaints by some aggrieved customers belatedly led to a hearing by the Parliamentary Joint Statutory Committee on Corporations and Securities in August 2000. A Commonwealth Bank spokesman at this inquiry claimed that 'there has been little purpose in providing information that the customer may perceive as incorrect and may further inflame the dispute'. This fatuous claim is vitiated by the perennial failed attempts of clients to achieve 'discovery' of documents basic to their case.

A bank will go into a court with its own version of debt and have the court accept the details as gospel. The bank's case can be assisted by bank officers committing perjury. During hearings on foreign currency loans in the late 1980s, a Westpac employee was considered by the Foreign Currency Borrowers' Association to be a serial perjurer. The rural Queensland case mentioned above includes perjury by a bank officer. The Queensland Court of Appeal recently turned down the borrower's

appeal, ignoring the context of the perjury.

The judicial and regulatory system is failing aggrieved bank clients. The Report of the 1991 Martin Banking Inquiry marginalised the submissions that outlined similar accounts of injustice. The major banks have used the era of self-regulation to good effect.