THE UNIVERSITY OF SYDNEY
Political Economy
School of Social & Political Sciences
Merewether Building
NSW 2006
AUSTRALIA

Fax: +61 9351 8596 Telephone: +61 2 9351 6617 Email: e.jones@usyd.edu.au

Committee Secretary
Senate Standing Committee on Legal and Constitutional Affairs
PO Box 6100
Parliament House
Canberra ACT 2600
legcon.sen@aph.gov.au

19 March 2009

Re: Inquiry into Australia's Judicial System, the Role of Judges and Access to Justice

Terms of reference:

a. the procedure for appointment and method of termination;
b. the term of appointment, including the desirability of a compulsory retirement age, and the merit of full-time, part-time or other arrangements;
c. appropriate qualifications;
d. jurisdictional issues;
e. the cost of delivering justice;
f. the timeliness of judicial decisions;
g. the judicial complaints handling system;
h. the interface between the federal and state judicial system;
i. the ability of people to access legal representation;
j. the adequacy of legal aid;
k. measures to reduce the length and complexity of litigation;
l. alternative means of delivering justice;
m. the adequacy of funding and resource arrangements for community legal centres;
n. the ability of Indigenous people to access justice; and
o. other matters relating and incidental thereto.

This submission will take advantage of the residual category 'o' (other matters relating and incidental thereto) generously and uncharacteristically provided by those determining the terms of reference. No doubt good taste has prevented the writers from acknowledging publicly that the delivery of justice in Australia might be inhibited by the existence of ill-education, incompetence, bias and complicity, even corruption, in the judiciary and the legal profession on which it rests. This unsavoury domain is the subject of this submission, with special reference to the prospects, limited, of gaining justice through the court system against any corporate member of the Australian banking system.

Inquiry into Australia's Judicial System, the Role of Judges and Access to Justice

Evan Jones

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I. The law: the sunny story and the dark side (bank litigation in particular)

Michael Rose, Chief Executive Partner at Allens Arthur Robinson, recently gave a rousing talk to the annual legal 'Managing Partners Forum'. Rose appeared somewhat miffed by the fact that Jim Spigelman, Chief Justice of NSW, had delivered a speech in early February urging that the current tough times bringing clients to lawyer's doors required that the legal fraternity display greater empathy towards them in their professional relationship. The implication of Spigelman's directive is that the legal profession had been somewhat less than professional in its client relationships during earlier better times. Said Spigelman:

> … [the] ethic of service, which emphasises honesty, fidelity, diligence and professional restraint will now resume its salience over the pursuit of commercial gain at the core of legal practice.

Oh, the perfidious pursuit of the filthy lucre! Rose begged to decline admittance of less than honourable motives. Said Rose:

> The values outlined by Justice Spigelman … have never departed the profession. Colleagues at Allens Arthur Robinson and in other firms like it understand that

> professionalism and professional values are central to the meaning and satisfaction we experience in our careers and the success of our firms. [etc.][1]

It may be the fact that Rose was peering through the rose coloured windows of the Forum's rigorously professional location of Byron Bay. But one would have to note that Rose evidently resides in a parallel universe. There are dedicated legals, motivated by the highest ethical scruples, but they are perennially found on the margins of the profession.

This submission is devoted to the arena of bank litigation, in particular that involving small businesses whose relationship with banks as borrowers has come into dispute. It is not a pretty arena, as justice for the weaker small business disputant is a rarity in Australia. Bank malpractice against small business borrowers is bread and butter stuff, and the legal profession is either a contributory party to this abuse, or complaisant in its inaction.

At least with respect to small business borrowers, banks are currently above the law. And they know it. The bevy of legal personnel in the banks' pay are devoted to maintaining this privileged status. The bench is generally complicit in the game. The only area in which banks have suffered redress for victims via the law is a handful of cases under 'disability' unconscionability, from Amadio (1983) to Ashton (2001), where at least solid precedents have been established.

It took action from the Australian Competition & Consumer Commission to achieve the victory in the courts on Ashton (under s.51AA of the Trade Practices Act). Since that minor victory, successive regulators have been missing in action. S.51AC (business to business unconscionable conduct) was belatedly legislated in 1998, partly as a consequence of disclosure of bank malpractice against small business customers in a seminal Parliamentary inquiry[2] No case was brought against banks by the ACCC under this section, ideal for the task. Responsibility for unconscionable conduct in the financial services arena passed to ASIC in March 2002 (with s.51AC replicated in S.12 of the ASIC Act), and only two cases (one minor, none relating to unconscionability against small business) have been brought against banks by ASIC since it acquired responsibility. Both the ACCC and ASIC have not only done nothing, they have been belligerent in their inaction (witness correspondence with this writer and correspondence to complainants of bank victimisation in my possession).

Regulators (and quiescent politicians) are part of the problem. But, as noted below in part II, legal culture is part of the problem and, in part IV, the courts are also part of the problem. It is possible that regulators are more reluctant to initiate action in support of litigation against banks given the lamentable record of partiality shown towards bank litigants in the courts.

II. Legal culture: a convenient but impoverished understanding of the commercial relationship

[1] The Spigelman speech was reported in the *Australian Financial Review*, 6 February 2009; the Rose speech was excerpted in the *Australian Financial Review*, 27 February 2009.

[2] House of Representatives Standing Committee on Industry, Science and Technology, *Finding a Balance: towards fair trading in Australia*, May 1997.

The delivery of justice through the courts is dependent on the recognition that the commercial relationship of business litigants is perennially rooted in unequal power and that this structured inequality is perennially leveraged to ill effect. Rather than acknowledging this inequality and its role in bringing parties in conflict to litigation, the legal system and the courts act perennially to legitimise the abuse of that inequality and to authorise injustice.

A key reason, apart from the tidal wave of lobbying in defense of the powerful (with the Law Council of Australia playing a longstanding, assiduous and frontal role for same), is the impoverished culture within the legal profession, substantially linked to an impoverished education. The *weltanshauung* of the legal profession has a black hole in recognising predation against business by business, practices that transcends legitimate norms of 'competition'. Power and power imbalance – entrenched in the marketplace and its cultural and legal trappings? Unthinkable, inconceivable. Literally inconceivable because the conceptual socialisation of lawyers precludes the issues or, at best, consigns them to the margins for consideration by the lesser mortals amongst their breed (Equity?). (The economics profession, the other key profession that staffs the regulatory agencies, is similarly so limited.)

A central theme in legal culture is that a contract is a contract is a contract, period. All parties are presumed to be rational, informed, and presumed to read the fine print (save for the supposedly rare constitutional disadvantage of disability, legislated from the common law into S.51AA of the Trade Practices Act in 1992, as noted above). The impersonal market has no favourites and takes no prisoners. Those who fall by the wayside are, by definition, those who deserve to fall by the wayside.

Problems arise with this simple ethos in at least three separate but related domains.

First, the law and the bench have trouble confronting a contract that is formally above board but binds parties unequally *whose relationship is rooted in asymmetry*. This phenomenon characterises the representative small business 'market' environment. Enter the franchisor-franchisee contract, shopping centre owner/manager and tenant, suppliers to corporate retailers or purchasers from corporate suppliers, etc. All contracts between bank lenders and small business borrowers are in this category. Indeed, many long-term supply relationships of small business with the big two retailers (Woolworths and Coles) are not embodied in written contracts because the big two know that the character of the relationship is as master and servant and the terms of the relationships are innately unconscionable. After the door-stopping three wise monkeys ACCC report that covered up rather than exposed the racket in retail[3], a recent newspaper article has neatly exposed the name of the game.[4] Quoting the author selectively:

> In an effort to extract an extra $500 million from suppliers, the Coles supermarket chain is threatening to remove some products if suppliers refuse to pay higher rebates. Buyers from Coles have been contacting suppliers to tell them of a 4 per cent increase

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[3] Australian Competition & Consumer Commission, *Report of the ACCC inquiry into the competitiveness of retail prices for standard groceries*, July 2008.
[4] Ari Sharp, 'Coles turns the screws on suppliers', *The Age*, 3 March 2009.

> in trading terms, the percentage of the cost of each item the supplier must pay back to the retailer. For many suppliers, this figure was in the mid-teens but it is being pushed closer to 20 per cent. …
>
> All the suppliers who spoke to BusinessDay declined to have their names or brands identified for fear of retribution, but all said they were being asked to increase the trading terms they offered Coles, with little or nothing in return. Already one major supplier of packaged goods has had 11 of its lines removed because it refused to participate, while another food supplier has had a significant number of lines removed. …
>
> Smaller suppliers are particularly vulnerable to Coles' new strategy. For some the issue can be fundamental to their survival, putting at risk jobs and local production. … Many suppliers can't afford to lose Coles or Woolworths as stockists because of their near duopoly.

Such a contract/relationship (within such an anti-competitive market environment) is thus the natural vehicle for ongoing unconscionable behaviour and the source of a replenishable pot of gold for the corporate with the whip hand. This booty source was most transparent in the retail sector where the big two retailers' reported net profits roughly matched (indeed, in the case of the inefficient Coles, was dramatically lower than) the reported 'discounts and rebates' extracted from their 'market' relationships, until a change in accounting standards allowed the retailers to redefine the discounts/rebates and hide their mass from public scrutiny.[5]

The bench has trouble confronting that the more powerful party to a formally above board contract will use its structured power *systemically* to profitable effect because its incumbents are beholden to the axiom that a contract is a contract is a contract.

But the mainstream law has two bites of the cherry. Whenever anything potentially unsavoury arrives, commerce is deemed to be legitimately a 'free-for-all'. Compare the odious decision in favour of the landlord and against the tenant under duress in Australian Competition and Consumer Commission v C G Berbatis Holdings Pty Ltd, HCA 18, 2003, under s.51AA of the Trade Practices Act. In terms of the parties involved, Berbatis is a minnow, but the principles elicited there are representative and transparent.

This from Gleeson CJ, representing the views of Gummow & Hayne JJ and himself:

> 11. One thing is clear, and is illustrated by the decision in Samton Holdings itself. A person is not in a position of relevant disadvantage, constitutional, situational, or otherwise, simply because of inequality of bargaining power. Many, perhaps even most, contracts are made between parties of unequal bargaining power, and good conscience does not require parties to contractual negotiations to forfeit their advantages, or neglect their own interests.

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[5] The non-reporting of the discounts/rebates mass began from 2002-03 for Coles and from 2005-06 for Woolworths.

> 16. … Parties to commercial negotiations frequently use their bargaining power to "extract" concessions from other parties. That is the stuff of ordinary commercial dealing. What is relevant to a commercial negotiation is whatever one party to the negotiation chooses to make relevant. And it is far from self-evident that when a landlord is considering a tenant's request to renew a lease, the existence of disputes between the parties about the current lease is commercially irrelevant to a decision as to whether, and on what terms, the landlord will agree to the request. …
>
> 17. Reference was earlier made to counsel's submission that there was here a disabling circumstance affecting the ability of the lessees to make a judgment in their own best interests. In truth, there was no lack of ability on their part to make a judgment about anything. Rather, there was a lack of ability to get their own way. That is a disability that affects people in many circumstances in commerce, and in life. It is not one against which the law ordinarily provides relief.

Gleeson et. al. are not interested in the structural subordination that characterises the landlord-tenant relationship, nor in the causal connection by which the landlord will 'use its structured power *systemically* to profitable effect', which produced the prior generalised dispute against the landlords to which the current victim was one party, which was then further leveraged by the landlord against the tenant in the context of a 'disabling circumstance'.

What Gleeson et. al. have performed is the excision of unconscionability *sui generis* as a relevant concept in commercial life. According to these learned gentlemen s.51 (and probably s.52) of the Trade Practices Act should never have been legislated. Gleeson et. al. pulled the same stunt with unconscionability's close relative, 'misuse of market power', in Boral Besser Masonry v ACCC, HCA 5, 2003. As with s.51, ditto for s.46 of the Trade Practices Act.[6]

Kirby J dissented in both Berbatis and Boral. Kirby's observation in Berbatis is pertinent:

> 65. Yet again the Court has before it an appeal concerning the application of the Trade Practices Act 1974. … Yet again this Court has a choice between affording a broad and beneficial application of the relevant provision of the Act, as opposed to a narrow and restrictive one.
>
> 66. In the proceedings at trial in the Federal Court of Australia, French J (the primary judge) found that the respondents had engaged in unconscionable conduct. … Given that the relevant factual findings are undisturbed and that the primary judge did not make any error of legal principle, this Court should affirm his Honour's judgment.

The 'conservatives' headed by Gleeson are supposed to be the embodiment of black letter law. Rather, thanks to minorities like Kirby, we find that the colour is a good deal more cloudy, and that the Gleeson brigade has been actively crafting judge-made law, reinforcing the entrenched legal profession culture that acts to favour the powerful against the weak.

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[6] Was it a coincidence that Gleeson CJ in a previous incarnation acted as counsel for BHP in the loss to the minnow Queensland Wire in the most celebrated victory against corporate capital in the history of s.46?

That legal culture is prejudiced towards the powerful is even more transparent in two more strident divergences between the myth and reality of the sanctity of contract. Thus:

Second, the law and the bench have trouble confronting the existence and implications of a contract that is *intrinsically unconscionable*. Consider section 5 of the National Australia Bank overdraft contract:

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

The bank's right to abrogate the contract at any time for reasons unknown is written into the contract! Here is an intrinsically unconscionable contract for the most fundamental of financial instruments underpinning commercial life. Does this status bother anybody in legal circles? Not a jot; the NAB and other banks continue to use this unconscionable contract unconscionably to good effect (c/f NAB v Goonan, 2001, no court case (NSW); NAB v Bernstrom, SC no 52 of 2001, unreported (Q'ld); Commonwealth Development Bank v Cassegrain, NSWSC 1317, 2002 (NSW); Westpac v Harwood, 2003-, no court case (Q'ld)).

Third, the bench also has trouble ruling against the more powerful party when that party *chooses to break the terms of a contract at will* (c/f CBA v Cooke, 1996-, unreported (Q'ld); NAB v Walter, VSC 36, 2004 (Vic); NAB v McMinn, 2001, QSC 5580 of 2001 (Q'ld); Westpac v Harwood, 2003-, no court case (Q'ld); Kay, Canli & Inak v NAB, 2004-, unreported (NSW)).

More than a limited education; transparent prejudice dogs the beatific delivery of 'justice' by the Australian bench. It appears that the sanctity of contract applies only to the weaker party.

It is thus understandable why the status of 'fiduciary duty' or of 'duty of care' appears so irregularly and is treated so derisorily in the law. A contract is apparently an arrangement entered into voluntarily by parties with full knowledge of the implications. With respect to the banking field at issue in this submission, the then venerable Professor Weerasooria (whose Banking Law Centre at Monash University was thoughtfully funded by the National Australia Bank, that inveterate supporter of worthy causes) could claim with assurance that "well established judicial decisions holding that the banker-customer relationship is basically a contractual relationship of debtor-creditor", and could point indubitably to the fact that "Banks owe no fiduciary or 'special duty' to customers".[7] Banks have evidently ceased to be banks and have become money lenders instead; but nobody has informed their customers.

The legal profession itself need to be re-educated (ditto the economics profession), but for this the established paradigms need an overhaul. Hell will freeze over before this happens in economics, and we want workable solutions tomorrow. Inveterate optimists might see some hope amongst the lawyers because of a number of independently minded and ethical persons in their ranks. Unfortunately, the latter grouping appears doomed to enjoy the status of a permanent minority.

[7] *Australian Banking & finance Law Bulletin*, 15, 9, April 2000.

III. Foreign currency loan litigation: exhibit A for the prosecution

Mainstream legal culture is no better demonstrated than in the litigation ensuing from the 'foreign currency loan' saga of the 1980s, that most disgraceful episode in Australian banking history that is yet to find its chronicler.

In the context of the chaos that ensued from financial deregulation, three of the big four Australian banks (the NAB excepted), substituting daring-do for experienced staff and adequate resources, actively marketed a toxic product denominated in stronger currencies (typically the Swiss franc) to unsophisticated, typically small business, borrowers.

In the ensuing litigation, many of the learned bench excelled themselves in an equally toxic combination of ignorance, laziness, arrogance and prejudice to deliver judgements for the banks. Caring little for the specific character of the bank lender / borrower relation, or for understanding the hideously complex detail of the foreign currency loan specifics (without this neglect inhibiting them from making *obiter dicta* interjections to demonstrate their technical prowess), their Honours relied on that bedrock axiom (requiring no homework) that a contract is a contract is a contract.

In this writer's humble opinion, litigation and judgements falling into the above category included: David Securities v Commonwealth Bank, NSWFC G234 of 1988 (Hill J); Ralik v Commonwealth Bank, NSWSC 050261 of 1989 (Cole J); Commonwealth Bank v Mehta, NSWCA 40407 of 1990 (Samuels, Meagher, Waddell JJ); Dwyer v Commonwealth Bank, NSWSC 50463 of 1990 (Staff AJ); and Dwyer v Commonwealth Bank, NSWCA 40663 of 1991 (Sheller, Clark, Handley JJ).

The grandfather of judgements in this category is the appeal of Westpac v Potts QSC FCA 657 of 1988, 1992 (de Jersey, Dowsett JJ). This wretched judgement topped a wretched process. de Jersey's 2000-word judgment was centred on a proposition lifted from a High Court judge, Deane J., in Council of the Shire of Sutherland v Heyman, HCA 41, 1985, rejecting a house-owning couple's claim for negligence against their Council:

> Indeed, in a competitive society, the infliction of pure economic loss upon another will commonly be concomitant of the successful pursuit of personal advantage by the way of lawful conduct in that there can be discerned, in many commercial and financial transactions, a correlation between the attainment of personal gain for one's self and the sustainment of economic loss by another.

The original judgement was dubious, de Jersey's opportunist plagiarism scandalous. As exemplified by Gleeson et. al. in Berbatis, pervasive inequality of bargaining power is necessarily pissed against the wall unless it is leveraged into the unequal pursuit of advantage (the biblical parable of the talents comes to mind). In de Jersey's hands, Westpac plays by the law of the jungle; we oversee the law of the jungle; and the hapless Potts is quite inappropriately a very sore loser.

Such sentiments fortunately did not monopolise the outcome of all foreign currency loan litigation. A shining beacon is Pincus J in Thannhauser v Westpac, FCA 608, 1991, in which the judge performs the spadework essential to understanding the case before him. So also Rogers J in the trial hearing of Mehta v Commonwealth Bank, NSWSC 50023 of 1989. Rogers, atypically, bothered to read the discovered CBA documents (the infamous 'G' documents) and discern their implications.

It is, however, instructive that the rot established by the diligence of Pincus and Rogers JJ (Mr Rose's professionalism and professional values to the fore) was not allowed to spread. The Pincus Thannhauser judgement for the borrower was followed in a mere four months, not by accident, by the de Jersey/Dowsett Potts judgement for Westpac. The dangerous number of foreign currency loan cases going against Westpac (Chiarabaglio, Spice, Ferneyhough and Thannhauser) was thus circumvented, and henceforth Westpac was home free (the borrower was subsequently crucified in Drambo). Complementing the marginalisation of Pincus, the Rogers Mehta judgement for the borrower was trashed in the Court of Appeal (as above). More, Rogers had his knuckles rapped in the legal academic literature for diverging from mainstream legal culture.[8]

IV. The extensive dark side of current litigation involving banks

A narrow disciplinary education and training, reinforced by ruthless socialisation mechanisms, has produced a narrow disciplinary culture.

But one infers a more fundamental inhibition to the delivery of justice. Perennially in evidence, perhaps even embedded, is the service of power. Staff of the key corporate regulatory agencies absorb the imperative, consciously or sub-consciously; ditto elected political representatives.

Ditto the legal profession, both on the bench and before it. Fertile ground for this proposition is in litigation involving the banks. This facet was resplendent in foreign currency loan litigation, as noted. The report of the 1991 Martin inquiry into the banks effectively delivered a free hand to bank discretionary behaviour[9]; bank malpractice continued, ably facilitated by bank legal teams, with much of it being legitimised in the courts.

It is instructive that (as reported in late 2008) two banks have by far the largest contingent of in-house lawyers of any company in Australia. NAB and the CBA share the honours with 100 in-house lawyers each, dwarfing even the mining behemoth BHP Billiton with 30 in-house lawyers.

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[8] Details of this in-house imbroglio are covered in Evan Jones, 'The Foreign Currency Loan Experience in 1980s Australia with particular reference to the Commonwealth Bank of Australia: bank documents, bank culture and foreign currency loan litigation', *Working Papers*, ECOP 2005-3, School of Economics & Political Science, University of Sydney, December 2005:
http://www.arts.usyd.edu.au/departs/political/PDF/ejon7226/Evan%20Jones2.pdf

[9] House of Representatives Standing Committee on Finance and Public Administration, *A Pocket Full of Change: Banking and Deregulation*, A.G.P.S., November 1991.

Externally, selected law firms are kept afloat by bank business. Moreover, banks attract the more talented members of the bar, because the banks are perennial litigants and well-resourced litigants. With the carrot comes a rather unsavoury stick (the existence of which is a well-kept secret) – work for the other side and you're dead meat.[10] Later, many barristers are elevated to the bench via a sterling career representing banks.

One can speculate about causes but, on the bench, judges have been known:

- to tolerate false testimony from bank officers or bank counsel (NAB v Kabwand/Somerset, Q'ld FCA, G65 of 1986; foreign currency loan hearings pervasively, especially involving Westpac's Queensland Manager International Business Development)
- to accept doctored bank documentation (fabricated manager-customer interview diary notes in particular – e.g. NAB v Kabwand/Somerset; Westpac v Potts, Q'ld SCA, 657 of 1988, 1992, as above)
- to accept at face value discretionary bank claims of customer indebtedness (universal)
- to not merely tolerate but entrench the ludicrous somersault in which the legal obligation of a receiver/manager to the mortgagor (the bank customer) is converted to the natural right of the bank to employ the receiver/manager as collaborator in the demise of the mortgagor (c/f Spender J in NAB v Freeman, Q'ld FCA 244, 2002)
- to pull dubious legal 'precedents' out of the hat to justify deciding in favour of the bank party to proceedings, and to hell with the evidence (Westpac v Potts)
- to preside over litigation involving a bank which they have represented as counsel before being elevated to the bench – more, in delivering judgment in favour of that bank (in Queensland alone, de Jersey (now CJ), Chesterman J and Kiefel J (now elevated to the High Court))[11]
- to preside over litigation involving a bank with whom they have a current personal banking relationship (perennial, but de Jersey CJ as exemplar; also Dowsett J in Westpac v Potts)
- as a subset of the above, to preside over litigation involving a bank with which they have a current substantial material interest (NAB v Walter, VSC 36, 2004)[12]
- to preside on a regular basis over hearings involving a bank at a level that would normally be beneath one's seniority (in particular, de Jersey CJ presiding over summary judgement hearings, viz. NAB v Troiani, QSC 77, 2001; NAB v Bernstrom, QSC 52 of 2001)
- to utilise inappropriately the 'summary judgement' mechanism in bank litigation, thus to legitimise bank foreclosure practices by denying due process to the foreclosed borrower (as above)

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[10] There are exceptions. One individual currently presiding in a State Supreme Court, and displaying a particularly generous interpretation of bank motives in customer dealings, had previously acted for bank victims in the progress of his career.

[11] Queensland Supreme Court judge Fryberg has also acted for banks on his way to the bench, but (to this writer's knowledge) he has not presided over litigation involving banks.

[12] Dodds-Streeton J belatedly admitted to ownership (in trust) of 8,000 NAB shares, then worth approximately $250,000. Unphased, her Honour claimed 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).

- to selectively edit transcripts of court hearings to excise statements made in court from the record (CBA v Muirhead, QSC 1452 of 1994; NAB v Bernstrom; NAB v McMinn, QSC 5580 of 2001)
- to instruct court officials to alter or destroy transcripts of court hearings, or to prevent access of same to litigants (CBA v Muirhead; NAB v Troiani; Freeman v Jefferson Stevenson (trustee in bankruptcy), FCA Q7009 of 2003)

Most regularly, judges consistently decline to demand adequate bank discovery, but rather tolerate the steadfast reluctance or refusal of banks to discover documentation crucial for the liquidated customers to adequately mount their case against their former lender. Ditto a bank's strategic discovery of documents too late for them to be of use in the liquidated customer's court case.[13]

A rare case in which the bench did not tolerate customary bank practice regarding discovery is salutary regarding bank malintent – Balmford J in NAB v Petit-Breuilh, VSC 291, 2000:

> 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 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.
>
> 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.

V. Some humble suggestions

The deep prejudice of the court system against small businesses in litigation with banks needs immediate attention. Any small steps are better than none, to highlight to the judiciary (and to the broader legal profession) that it is on notice. Some suggestions:

a. One needs some means of making and enforcing demands that bank lenders facing litigation from their former small business customers engage in full and early discovery of material relevant to the litigant's account and to the ensuing process of default and liquidation of customer assets (including the never discovered bank customer 'realisation account') and possible bankruptcy of the former customer. If Balmford J. in NAB v Petit-Breuilh sees the pertinence of full discovery and can demand it, why not all his colleagues?

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[13] C/f Westpac v Potts, as above. Westpac's counsel handed over 250 pages of documents, all of which were of long provenance, to the counsel of foreign currency loan victim Lionel Potts at 5.30 pm on the Friday (1 November 1991) before the Westpac appeal slated for the Monday morning (4 November).

b. One needs some means of mandating that judges enforce the law that a receiver/manager is the agent of the mortgagor and not of the mortgagee.

c. A number of procedures need to be established to head off the prospect of a presiding judge displaying bias against a litigant against a bank. For example:

- No judge who has been elevated to the bench after a considerable time spent in his barrister years acting for banks should be permitted to preside over litigation involving banks.
- The banking connections (in all dimensions) of judges should be publicly declared and available on record. No judge should be permitted to preside over litigation involving any bank with which s/he has any connection.
- The bench must demand that bank claims regarding the quantum of residual debt be fully documented and sourced (including full disclosure of both mainframe and shadow ledger records)[14], and that such documentation be early available to the subject of such claims and be subject to the right of counter-claim.
- The summary judgement mechanism should be rendered inadmissible for use in bank litigation cases.
- Tampering with court transcripts, other than corrections mutually agreed by all parties, should be a criminal offense; ditto the prevention of access by litigants to court transcripts.

[14] The perfidious role of the parallel 'shadow ledger' record system created for bank customers subject to default is examined in John Salmon & Evan Jones, 'Shadow Ledgers and the Default Process in the Australian Banking Sector', ms, April 2008.