Senate Economics References Committee,
Suite SG.64,
P.O. Box 6100,
Parliament House,
Canberra
ACT 2600
Australia

RE: Submission to the Inquiry into the post-GFC banking sector

To whom it may concern,

This is my submission to the "Inquiry into the post-GFC banking sector". This submission deals simultaneously with reference points (d), (e) and (f) under the "Terms of Reference".

Summary

Government legislation and departmental policy has real-life consequences for all of us, and sometimes injustices are done, albeit as unforeseen consequences - such as the inadvertent creation of moral hazard or perceived conflicts of interest.

Such is my case; it is not a hypothetical scenario, but a real and ongoing injustice. I have kept the following story short (as best I can; it is complex), but I do rely on facts to demonstrate the effect of policy and legislation as it is worked out in real life - my life. Bear in mind that I am only sharing with you a 'single' example of the experience that I'm going through, I have many examples to share in the proper forum. The following is a real example of how a bank can wield power with impunity.

Essentially my submission is about the "asymmetry of information" and how it has been abused by banks leading up to, during and post-GFC with devastating effect on those unlucky enough to have been customers at that time.

I describe the effect of asymmetry of information; when the bank withholds information from a customer for its own advantage and to the disadvantage of its customer, to the point of destruction. In my case the bank refused to reveal information in its possession as at December, 2008 and continues to the present day to conceal that information.

I also discuss the flow-on effects of that bank's position and how it has unfolded in my case by a series of cover-ups by the bank and others, but always to the bank's advantage.

I conclude with a recommendation that I hope will be easy for this Inquiry to adopt. That is in order to prevent moral hazard and conflict of interest, that all banks (all mortgagees) must deal transparently with their customers and keep them informed, in writing, as information affecting the mortgagee will by default affect the mortgagors. This, to allow both the mortgagee and the mortgagor to make informed decisions, prepare strategically and to take timely actions for the benefit of all.

The bank that I was a customer of, did not keep me informed of its policy changes or its intentions regarding my status as a customer. If it had done so, then I could have made the necessary timely adjustments, strategies and actions to enable me to honour my commitments to the bank but also to make other arrangements.

Instead, the bank shut me down, fabricated false defaults (which I have never seen), appointed receivers and managers, sold my assets and now are sending me and others into bankruptcy. Yet I have done nothing wrong.

Background

I have (or had) a business (Property Development). In 2007 a bank provided debt finance to my company for the construction of a development. In December 2008 the bank withheld the funding (my final progress claim) even though we were close to completion and had pre-paid interest through to mid-2009.

The first cover up

In December 2008, the bank appointed instead an investigating accountant to report to the bank. On the basis of that report the bank decided to appoint a Managing Controller (Receiver/Manager) to my company, in June 2009.

My request to have access to that report was declined by the bank on the basis that it was privileged and subject to the Corporations Act. To date I have not seen that report and am unaware of its nature and contents. The bank has since alleged that it relied on the report to appoint the Managing Controller due to alleged defaults by my company.

It so happens that the Investigating Accountant was subsequently appointed as the Managing Controller of my company - the first conflict of interest that created the moral hazard.

The Managing Controller was appointed by the bank as an agent of my company, pursuant to some convoluted conveyancing legislation. As director of the company, I am now liable for the acts and omissions of the Managing Controller, even if those acts and omissions are kept hidden from me!!! Notwithstanding the above, the Managing Controller in reality did not act for me or in the interests of my company - he acted, and continues to act for the bank and for himself, gaining in excess of $250,000 in fees (an issue of concern for ASIC, ASIC Report 287, May 2012). Please refer to the explanatory note at the end of this letter (**Annexure A**).

The second cover up

Upon appointment, the Managing Controller duly lodged a "report as to affairs" of the company as required by s421A(1) and s421A(2)of the Corporations Act, with ASIC.

The Act at s421A(4) also allows the Managing Controller to withhold from ASIC, information that in the opinion of the Managing Controller, "*...would seriously prejudice: (a) the corporation's interests; or (b) the achievement of the objectives for which the controller was appointed, or entered into possession or assumed control of property of the corporation, as the case requires; if particular information that the controller would otherwise include in the report were made available to the public, the controller need not include the information in the report.*"

The Act at s421A(5) states that, "*If the managing controller omits information from the report as permitted by subsection (4), the controller must include instead a notice: (a) stating that certain information has been omitted from the report; and (b) summarising what the information is about, but without disclosing the information itself.*"

Attached to the "report as to affairs" to ASIC was a letter, pursuant to s421A(5) from the Managing Controller (to ASIC) stating that, "*Certain information has been omitted from the report as to affairs in relation to land and buildings. This information has been excluded as disclosing it may prejudice the company's interest and objectives of my appointment.*"

This is an understatement. The "report as to affairs" contains NO financial information at all but does include false information. It has been lodged simply to satisfy compliance requirements of the legislation and nothing more. Furthermore it is misleading to ASIC in that it withholds information that was known to the Managing Controller at the date of his appointment. That suits both the bank and the receiver.

ASIC therefore still has no idea as to the financial position of my company. Even the cash in the bank account has not been declared. So ASIC does not even know that the money has gone missing. It did not know that the money was there in the first place. There is no way that that information in the hands of ASIC would be "seriously prejudicial".

It also serves to keep the directors in the dark and information hidden for other purposes. And so the moral hazard started by the bank, is perpetuated.

The "*...objectives of my appointment...*" is of course a reference to the objectives of the bank, hence the secrecy.

The third cover up

Upon appointment of the Managing Controller, my company's bank account was seized and closed by the Managing Controller and the funds have gone missing.

S421(1) of the Corporations Act 2001, requires that a Managing Controller of property open and maintain an account, expressly for the purposes set out in s421(2), namely inspection of those records by others (such as the company directors).

Around June last year (2011) I became aware that the Managing Controller was selling my (company's) property. In October 2011, I made contact with him and requested access to the company's financial records pursuant to s421(2). He agreed to my request and proposed that I attend his office to inspect the financial records.

At the agreed place and time I attended the Managing Controller's office accompanied by a friend (to be my witness). I was told by the Managing Controller that there were no financial records for the company.

This came as a great surprise to me, as he had led me to believe that there were financial records to inspect - but there were none. The Managing Controller told me that he did not have to prepare and lodge financial reports to the ATO or anyone else; and that no financials had been prepared or kept, so there was nothing for me to see.

Despite my protests and repeated (written) requests I have no idea still, as to the financial status of my company.

Although my initial concern was for the missing funds from my company bank account (< $10,000) my real fear was about the proceeds of the sale of the company's largest asset - ultimately sold by the Managing Controller for about $3.5m, but valued at more than $11m last year. So where did the Managing Controller put the millions? There is no company bank account to show for it.

What has this got to do with ASIC? The fourth cover up

On 17 November, 2011 I lodged an online complaint with ASIC and promptly received a polite letter dated 21 November, 2011, acknowledging receipt of my complaint. Attached to the letter was a brochure "How ASIC deals with your complaint".

Under the heading "How we assess your complaint" is the following paragraph, it states, "*Generally we do not act for individual complainants and we will seek to take action only on those reports of misconduct or breaches of the corporations law that will result in a greater impact and benefit the general public more broadly.'*

I took that to mean that ASIC was only interested in big fish - large sharks. My question is this, "Do not large sharks start out as small sharks???" So who is out there trying to catch the small sharks? Of course when I read that public policy statement my heart sank - insolvency practitioners can read too, and the banks already know that ASIC will not investigate!

I recall that recently a Senate Estimates hearing noted that only 1 in 6 complaints to ASIC is investigated by ASIC and the question was put if it was due to a matter of resource availability. It is obvious that it is a matter of ASIC policy (not resources) that certain types of complaints will not be investigated, and the banking and IP cartel is well aware, given the background of a then ASIC Commissioner.

It came as no surprise to me then to receive another letter from ASIC, declining to investigate my complaint.

It seems to me that the banking and IP cartel is well aware that it has protection from ASIC and gets a free kick every time a mug like me is silly enough to lodge a complaint. As long as ASIC is complicit in the abuse of the corporations law then the IP cartel will continue to exploit the moral hazard with impunity. Why? Because they know that ASIC will not investigate for individual complainants like me.

In 2003 ASIC brought two Managing Controllers to the CALDB for misconduct in similar circumstances to mine (ASIC Publication 03-254). Also, ASIC Regulatory Guide 106 (Policy Statement) "*Controller duties and bank accounts*" from 5 July 2007, is still current and at RG 106.10 clearly sets out what is legally required of the Managing Controller. I brought this to the attention of ASIC in my complaint, to no avail.

The banking and IP cartel carries on business as usual because it is aware that there's no-one out there to guard against the moral hazard. ASIC knows that this activity is going on but has done nothing to stamp it out. How could I say such a thing? The absence of an enforcement agency is a form of negligence that facilitates the misappropriation of property and millions of dollars, and is tacitly sanctioned by ASIC.

ASIC does not have to wait for government sanction to pursue misconduct. ASIC could easily and voluntarily establish its own enforcement agency - give it a net with a smaller mesh and empower it to go catch the rest of the sharks before they get the chance to do more harm, and prevent them from becoming larger sharks. Maybe the net just has a big hole in it.

As I see it, these white collar crimes can be resolved without major expense and as a 'desk-top' exercise.

My problem now is that $3.5m has gone missing from my company, but legally I am responsible for it. There are no financial records available for me to inspect and all information has been denied to me - a complete cover up; started by the bank, maintained by the receiver and aided and abetted by ASIC policy and the corporations law.

The combined effects of the various policy and legislation has been to mislead me and to frustrate me as director of my company, while holding me liable for the destruction of my business by the Managing Controller who is protected by the Corporations Act (and by ASIC) and funded by the bank. Both the bank and the Managing Controller are above any scrutiny and are able to secretly deal with the funds.

I have been advised that as long as the GST is paid, then the government is not interested in my plight or the actions of the Managing Controller, even if he was illegally appointed.

The ASIC brochure (already mentioned above) suggests that in the alternative I may pursue my rights privately. I have investigated this further and have found out that in the very rare event that others have taken such action, ASIC intervenes in the proceedings (again to protect the perpetrators), often shutting down the prosecution (See Worrell [2010] FCA 934).

Because all of my funds have been illegally seized I do not have the means to prosecute the Managing Controller privately (as suggested in the ASIC brochure). He also happens to be funded by a really big and influential bank that is preparing the final nails for my bankruptcy coffin, even as I write this letter. There is nowhere that I can turn - the government is useless and my recent experience with courtroom bias was devastating.

As at May 2012, three and a half years on, my business is still in receivership; I have already been effectively bankrupted for more than three years while hung out to dry, have been misled and deceived by operators who are protected by ASIC policy and corporations law. It seems that the net is not designed to catch 'misconduct' generally, which allows the banking and IP cartel to swim straight through.

Conclusion
How have I addressed the terms of reference that I identified at the beginning?

(d) My submission sets out the impacts of the bank's lending practice (again I've only given you the one example) during and after the GFC (which to me is set at September, 2008, Lehmann Bros).

(e) My submission addresses the broader issue of transparency between mortgagee and mortgagor - the customer (mortgagor) to be legally regarded as a stakeholder (maybe equity partner) in the mortgagee. This would have far-reaching implications in the finance industry.

(f) My submission addresses other relevant matters by demonstrating how banks are able to recruit protection under the guise of legitimate actions in order to conceal malfeasance. The involvement of the IP cartel and ASIC is designed as a scheme to create a mirage of credibility, as justification for the bank's dubious actions.

The problems that I have described above could have been avoided very simply; All of it flowed from the bank's intention to keep secrets from me. What has shocked me during this experience is how everything appears to be set up to protect the bank. The bank appointed a Receiver/Manager yet did not have to account to anyone for that drastic action, and still has not accounted or disclosed.

The Corporations Act actually allows the Managing Controller (even if illegally appointed) to withhold information from ASIC, the very organisation set up and in place to monitor and enforce. How on earth can ASIC function if information is withheld?

Furthermore and the real pity as I see it, is that the bank had access to information regarding the state of global financial affairs; the board met in June 2008 and changed the company policy regarding de-leveraging its exposure to the property market, a policy that is still being implemented; the bank did not have sufficient funds locally to meet its funding commitments (by December 2008, had to go to the US Federal Reserve to beg for billions of dollars); but did not inform me as a customer, thereby denying me the opportunity to protect my business so that I could honour my commitments to the bank. Meanwhile the bank continued to draw on the interest payments while denying me my funding. The receiver was appointed the month after the pre-paid interest was exhausted.

Instead of informing me and treating me like a customer, I have been treated like a criminal, disgraced and humiliated, and robbed of millions of dollars in the process.

By the time I found out about the bank's intentions it was too late. That is unconscionable conduct by the bank, and I with others have suffered and had to pay dearly for it.

I can only hope that banks can be forced in some way to be transparent in their dealings with customers and I hope that given the seriousness of what I have described that it will be reflected in the Inquiry's findings and recommendations. Motherhood statements and band-aids are inadequate.

Yours faithfully,

Name withheld
31 May, 2012

ANNEXURE A

Duties of Receivers (as Managing Controllers) – VERSION 1

Mortgagees have been using the appointment of a Receiver as a device to protect them from any liability including 'wilful default' when going mortgagee in possession. A mortgagee ensures that the mortgage is drafted with a clause that provides that if appointed, a Receiver acts as an agent of the mortgagor and not of the mortgagee. The mortgagor and not the mortgagee then becomes liable for the acts and omissions of the Receiver, because the mortgagor has agreed in the terms of the mortgage that the Receiver is nominated as the agent of the mortgagor.

When the Receiver is an agent of the mortgagor, the mortgagee can place the receiver in control of the mortgaged premises without rendering himself liable as being in possession. The Receiver is not appointed for the benefit of the mortgagor but for the purpose of realising the security held by the mortgagee. The Receiver does not have a fiduciary obligation to the mortgagor but does have a fiduciary relationship with the mortgagee and a duty to keep the mortgagee informed of his progress, this is a contradiction.

Duties of Receivers (as Managing Controllers) – VERSION 2

The appointment of a Receiver by a mortgagee began in the nineteenth century as a conveyancing device designed to assist the position of the mortgagee. It became standard practice for drafters of mortgages to insert an express power to appoint Receivers as agents of the mortgagor such that the mortgagor would be liable for the acts, omissions or defaults of the receiver. This was done in response to the 'almost penal' liabilities of a mortgagee in possession under the general law. Mortgagees in possession were liable to account on the basis of "wilful default" which meant that mortgagees were accountable not only for what they received but what they should have received but for their own default.

When the Receiver is an agent of the mortgagor, the mortgagee can place the Receiver in control of the mortgaged premises without rendering himself liable as being in possession. The appointment has the additional advantage that the mortgagee is not liable for acts of the Receiver who is nominated as the agent of the mortgagor. The power of appointment given to the mortgagee is irrevocable because the mortgagor has granted it to the mortgagee for value.

The appointment of a Receiver as agent of the mortgagor (as written into the instrument under which the Receiver is appointed) puts the Receiver in a rather unusual position. The receiver is not appointed for the benefit of the mortgagor but for the purpose of realising the security held by the appointor (the mortgagee).