Mr. John Hawkins
Committee Secretary
Senate Standing Committee on Economics
PO Box 6100
Parliament House
Canberra ACT 2600
Australia

Dear Sir,

re: Inquiry – Competition within the Australian banking sector.

I refer to your inquiry and forward on the enclosed disc my submission. The Executive Summary shows the approach of using Government Inquiries to identify bank corporate social responsibility, for your inquiry through the committees headings. The information mentioned is addressed to the competition within banking by analysing the way Government information and inquiries are adopted by the banks. These basic standards from where various banks' strategic competition can begin , if not enforced., allow the same banks to use the failure to comply as their strategic advantage, over the complying group.

Consequently the theme of the submission illustrates non- compliance and the strategic advantages for banks, commencing with the publication of the within mentioned Government Inquiries and Reports. Then court judgments identifying some of the stated problems with bank non- compliance. Many of these judgments taking 9-15 years to be published.

All the appendices are public documents and listed at the front of the submission, with the relevant reports also being published but not included because of volume. I thank you for the opportunity to make this submission and thank you for your considerations

Yours faithfully,

Submission to the Senate Economics Committee

through

The Committee Secretary

Senate Standing Committee on Economics

Parliament House

Canberra ACT 2600Australia

EXECUTIVE SUMMARY

This submission covers the Clearing House and three avenues of banking and Government interaction the “Report on 'Shadow Ledgers' and the Provision of Bank Statements to Customer “ Parliamentary Joint Statutory Committee on Corporations and Securities , October 2000 , Drought Support and in particular the banks behaviour in dealing with interest subsidies and the impacts of Native Vegetation Regulation and the advantage handed to banks when the Commonwealth allowed the $170,000 of compensation to be come part of the Bankruptcy estate of farmers when their financiers foreclosed. Attached are 20 appendices supporting the propositions including relevant reports to the Productivity Commission and the Senate inquiry in the “Australian Judicial System and the Role of Judges”which deals with the judicial attitude to persons necessarily defending bank actions. As a matter of observation when banks are knowingly in the wrong they appear to use incorrectly briefed third parties to force the disadvantaged to create a legal situation where they may win, if the matter proceeds to Court. This form of controlling unlawful acts was identified in White Industries where the situation was defined as abuse of process.

The submission identifies the incorrect interest pathways used by banks, the purposes, how they are appropriated to customers accounts and how the use of Non Accrual declaration pursuant to the Taxation Acts and APRA Guidelines are used to obtain Taxation relief at the same time appropriating any unlawful charges against a customers account to bankrupt the entity. The Queensland Government amended Sub Section 85 (2) of the Property Law Act 1974 to attempt to identify the practise. Identified as Misleading and Deceptive Conduct in Kay v NAB it was first shown in the Shadow Ledgers Inquiry in 2000. It was not until 2009 that the judiciary acted in relief. The ABIO had issued a Bulletin after Shadow Ledgers in 2000 clearly banks considered the situation an acceptable risk in practice. It now remains to be seen if banking practices adapt to this identified unlawful act.

Drought Support was not properly applied according to judgments in Blacker v NAB , Magill v NAB , McDonald v Holden and Kay v NAB since 1992. It appears interest subsidies were applied to accounts of recipients at capitalised rates when the subsidies in many cases were paid in advance for appropriation to interest. This was identified in Magill by the NSWCA in Equity as a prepayment of interest and in a Government Scheme so capitalised interest was unlawful. In this instance the Government may investigate and perhaps ultimately consider recovery of the overpaid portion of each subsidised account. It is reported the Commonwealth has an over excess legal staff and perhaps these people may investigate if the proposition has legs.

The third proposition deals with the popular title of Native Vegetation and once again the misapplication of interest in accounts to gain an advantage for banks claiming an entity is unviable. This proposition in MacDonald v Holden identifies how a Government Scheme funds can be appropriated to an entities banker by the possible misapplication of interest subsidies as stated in Magill. In this situation the Queensland Rural Adjustment Authority refused the Native Vegetation subsidy on the grounds of unviability. If McDonalds' accepted this situation they would be dispossessed by their bank claiming an unviable business and the $170,000 would be paid as leaving the land subsidy under the Drought Provisions and the bank would receive the funds. However the court found the applicants were not unviable on account of holding other properties and put aside the QRAA decision and ordered reconsideration. This indicates their bank could have bankrupted the applicant if funds had been allowed to follow the path to the applicants banker.

These circumstances when considered with the NZ taxation cases where 6 Australian Banks avoided $1.5 Billion of taxation for some time creating a smoke screen through 3 other jurisdictions using their own off balance sheet subsidiaries (conduits) in interest rate swaps and currency and share manipulation . At the same time in Ireland another Australian bank had sought taxation relief for its customers from the Irish DIRT which is an interest retention tax , claiming additional interest and fees from the affected clients. A combination of the circumstances above show a similar situation to Ireland of misusing customer accounts for profit against Government, applied across Banking both in Australia and offshore.

The Senate could take this opportunity to decide on the validity of allowing banks to accept individuals subsidies through threats of bankruptcy and unnecessarily ruling those businesses unviable. Especially with the Murray River situation allowing banks another opportunity to redistribute wealth and recapitalise at the expense of government imposed rural schemes for the purported benefit of the nation. It is clear unless banks are controlled by legislation customer entities are going to be displaced by the necessity of banks to satisfy institutional owners requirements for dividends. Consequently the Senate could recommend banks lose their Constitutional advantage and specific rules of evidence regarding discovery and validity of debt in all jurisdictions as accounts change consistently with time and debits and credits. APRA could amend it's Non Accrual Guidelines to identify the account credited with recoveries for follow up.

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Appendix 4 McDonald v Holden [2007] QSC 54 (15 March 2007)

Appendix 5 BNZ Investments Ltd and ors v The Commissioner of Inland Revenue [2007] NZCA 356 (21 August 2007)

Appendix 6 Swire , Mary: "Nz Banks Settlke Tax Dispute Over Stryctured Finance Transactions," **Tax News .com**, Hong Kong, 30 December 2009.
Westpac Banking Corporation v The Commissioner of Inland Revenue HC AK CIV 2005-404-2843 [2009] NZHC 1388 (7 Ocotber 2009).

Appendix 7 National Irish Bank and Anor v Companies Act [2007]
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Appendix 8 Report on 'Shadow Ledgers' and the Provision of Bank Statements to Customers October 2000.

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Appendix 10 Buckley , Ross P; Nixon , Justen; "The role of reputation in banking" 2009 *Journal of Banking and Finance Law and Practice . Volume 20 . Part 1.*

Appendix 11 Ferguson, Adele; "Trillions in risk lies under shell" *The Age,* 2 March 2010.

Appendix 12 Lipsky, Johm; "Reconsidering the International Monetary System" 28 August, 2010.

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Appendix 16 ABIO "Bad or Doubtful Debts and "Shadow Ledgers" *Bulletin 27* – December 2000.

Appendix 17 Drummond, Matthew; "NAB fee cuts yet to pay off" *Australian Financial Review* 20 July 2010.

Appendix 18 Hughes , Duncan; "Council seeks damages over debt instruments" *AFR 29/7/2010*

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Appendix 20 Productivity Commission " Drought Support Inquiry" Submission 87 26/8/2008. .

INTRODUCTION

The purpose of this submission is provide an insight into areas now considered needing reform. This Submission will follow the Terms of Reference and will not deal fully with many headings. However it will concentrate on providing a relationship between some regulatory process and legal considerations in various jurisdictions Government Schemes and Regulations including the relationships between Australia's bank statement policies and law and the Bankruptcy Act 1966 (Cth) with the application of interest rates to obtain a financial, administrative and legal advantage for bankers and credit providers.

These advantages come at the cost of depositors, customers, legislators, government, taxation, government schemes and the economy generally. Australia has always led the world in requiring accurate, correct bank statements from its financial institutions. However this correct appropriation to accounts may not be current bank policy or enforced by regulatory authorities. Australia has progressed through a series of financial institution investigations where the matter of correct bank statements and records for various purposes has been raised. A series of judgments commencing in 2001 have identified the incorrect nature of bank interest debits on statements produced for customers by identified institutions and the claiming of social responsibility by these corporate citizens towards their shareholders, customers and fixed interest fund providers.

It is argued that no Australian bankers are currently providing accounting services above regulation and established law and in some cases both present and in the past to lesser standards. It is identified by current judgments that the Australian Government may have provided funds to financial institutions servicing the rural sector, with claims in excess of those required by law through incorrect records and interest policies of those institutions. How this manner of possible legally unenforceable interest charges are being levied, to disadvantage bank customers enabling those customers to be bankrupted is examined. Using that process financial institutions can not be prosecuted and if a successful prosecution showing the interest to be unlawful is launched the Bankruptcy Court will rule on the quantum to offset the bankruptcy judgment, not against the initial incorrect evidence provided to the court by the financial institution. These facts were identified in 2000 and 2004 but still need enabling legislation for recoveries of unlawfully claimed interest in Government schemes and correction of incorrect bank statements and prosecution for false evidence bankrupting bank customers.

1. Competition within the Australian Banking Sector;

(a) the current level of competition between bank and non-bank providers.

All Australian banking and non-banking organisations are represented in the Australian Payments Clearing House Association Limited . The corporation is limited by guarantee Hereunder is the *company form* from the application by the corporation to the Australian Competition and Consumer Commission to provide its services to members 13 July, 2009**.(Appendix 1**)

Company Form

APCA is a public company limited by guarantee. This is not a common arrangement, but it provides for the participatory rights commonly associated with unincorporated associations.
In particular, this form of public company allows multiple categories of membership with different rights and obligations without the restrictions of share ownership, and the creation of a "capital base" by way of guarantee without the need for utilisation of current resources.
Previous shareholding arrangements were removed because the criteria for membership was based on institutional types (Le. the central bank, major banks, state and regional banks, offshore banks, building societies and credit unions) no longer reflected the current kinds of institutions participating in clearing activities. For example, Coles Group, Cashcard, MoneySwitch Limited and Woolworths are now members of the CECS, but were not eligible for the previous share membership of APCA, because they did not fali within one of the institutional groupings eligible to hold shares. The recent change to APCA's Constitution has been intended to open up membership to ali organisations engaged in the kinds of clearing activities APCA manages.

Structure

The members of the corporation are quoted hereunder with some members having varied charges for the use of the facilities of the APCA . These various charges are the Clearing House services, members use as a method of strategic differentiation in charges and benefits to their customers. Obviously the charges to members are common and this platform provides an opportunity to compare bank and non-bank facility charges. It is noted the Reserve Bank has reserved seats in each clearing service and other controlling groups and that in some instances the RBA does not exercise its rights. Consequently a clear opportunity for reporting and costs differentiation from the Australian Payments Clearing House Limited is for participation by another authority where the RBA withholds its participation.

While the investigation of costs for this service and its members process of sharing expenses and profits can not be explored, here it may be a source of investigation to identify the value committed to actual exchange costs for banking services including Eftos and Credit Card and other electronic

exchange services.

Members of the APCA as identified in its application to continue under sub section 91(c) "Trade Practices Act 1974."

ANNEXURE 1

Parties to the Proposed Arrangement

PARTIES OR POTENTIAL PARTIES TO

Australia and New Zealand Banking Group Limited
Australian Settlements Limited
Bank of Queensland Limited
Bank of Western Australia Limited
Bendigo and Adelaide Bank Limited
Cashcard Australia Limited
Citigroup Pty Limited
Coles Group Limited
Commonwealth Bank of Australia
Cuscal Limited
Indue Limited
MoneySwitch Limited
National Australia Bank Limited
S1. George Bank Limited
Suncorp-Metway Limited
Westpac Banking Corporation
Woolworths Limited

Hereunder is the scope of the clearing arrangements with an acknowledgement of competitive services opportunities. Clearly the Senate could investigate another capability or organisation to clear transactions and cheques to provide the competition necessary for providing these facilities. This will introduce a system of competition and could be provided by the RBA or other group for the purpose of reducing costs and satisfying a need to cause strategic management changes in accordance with the principles of competition.

Competition

Competition in payments clearing and settlement arrangements has a number of facets. These can be expressed in terms of:

- the ability of institutions to establish arrangements outside of the scope of prevailing arrangements;
- the ability of institutions to participate in prevailing arrangements;
- the ability of participating institutions to change commercial relationships they may have with other participants; and
- the ability of participating institutions to compete for business on an equal footing.

Scope of *Arrangements*

APCA's role is to oversee payments clearing and settlement arrangements within

Australia. However, APCA is not exclusionary. Nothing in the Constitution of APCA, the CECS Regulations nor the CECS Manual prevents payments clearing systems, including consumer-type electronic payments developing and operating outside of APCA. For example, in respect of consumer payment systems, clearing of credit card transactions is conducted under rules established by the various card organisations. ***(Appendix 1: Annexure 1 . Form C SS 91C "Trade Practices Act 1974" 13.7.2009.)***

At some point an investigation into the Australian Stock Exchange is necessary and consequently this involves increased International Monetary Fund processes in Australia . As part of this investigation and because of the necessary off shore involvement any application before Regulatory Authorities may request the accompanying establishment of another settlement service, increasing the ability for settlement both in Singapore (off shore) and Australia under current stock exchange rules. Clearly international settlement from Singapore would need to be exempt from Australian Bank Guarantees because of jurisdiction alone. The limited liability provides a system of limiting claims against members where mistakes may occur and could possibly be a disincentive to providing an adequate service.

(b) **The products available and fees and charges available on those products.**

All encompassing factors.

All Australian Deposit Taking Institutions compete for within borders deposits and it is this process that is stated increases the cost of capital It is necessary to identify if the Weighted Average Cost of Capital can vary in definition and that effects the published cost of funding at any one time.

- Perhaps the first priority for interest rate quotes should be the acceptance in legislation as opposed to accounting standards of a weighted cost of capital definition that involves existing loans initial rates as well as a weighting defined by legislation, similar to the annual statistics capital gains inflation figures with adjustment for Government accepted risk.

I note that M/s Kelly of Westpac in her annual meeting speech was requesting an opportunity to discuss behind closed doors costs of funds. It may be that figures produced are distorted by using current costs of capital raisings not allowing for existing funding to be replaced in a long term definable future time at an existing fixed advantageous rate.

- It is commonly believed Australian Resources Companies will not borrow from Australian Banks because of their policies and it could be the Senators consider the discovering of these reasons as part of this inquiry.

While incoming capital is important for the Balance of Payments the repatriation of investment returns are detrimental to the long term Balance of Payments. While the resources rent tax is one way of identifying and attempting to hold these funds in Australia, the long term benefit needs to be addressed by requiring changes in bank funds and risk weightings. In particular the cost of project funds can be lowered and international standing enhanced by a compensating taxation relief for locally funded projects. Because the banks borrow their funding off shore with particular current offshore rates at historical lows with parity A$ and US$ adjusted by the low rates a special purpose process for institutional investors may be required.

- Westpac and the Commonwealth Bank took the greatest advantage of the Reserve Bank funding for home mortgage loans in capital injection stimulus packages they are also now taking advantage of a projected cost of capital rise, that creates profit out of projected costs by allowing for interest rate rises, that may be unjustified as Reserve policies effect risk ratings, in particular inflation, especially for a guaranteed against risk banking system.

The two speed economy is being influenced by Australian Banks policies of lending. Australian banks identify with an attitude of moving to obtain a capital advantage from asset sales as soon as possible. Whilst they will argue losses against this situation, further parts of this submission will identify these figures may be rubbery at best and composed for taxation and legal process advantage.

- Australian banks increase interest rates stated as risk strategy when businesses or consumers are experiencing difficulties. Many of these difficulties can be lender imposed. Consequently the increased charges are to make borrowers unviable and force recoveries against mortgagees.

By considering the Australian Clearing House Association Limited categories for clearing payments the banking industry categories for business grouping can broadly be identified**.(Appendix 1)** Exceptional to this are the wealth management and facilities between the bank and its subsidiaries

and conduits such as Bill Facilities acceptors and savings and current accounts etc and other group processes. Commonly the banking contracts impose penalties for any process, where an opportunity may exist for the banker to advance income creation. This seriously stifles competition with imposed customer loyalty by fee for service, that may never be needed. Thus the complaint that fees for exiting contracts should be overridden by statute, where customers are disadvantaged and loyalty is imposed by disadvantageous contractual provisions, that may lead to customer bankruptcy. Unfortunately for all concerned Australian Bankers have the attitude any security is theirs and should be realised at any time deemed suitable. So Australia has seen a proliferation of processes that can be corrupted and legal processes designed to advance these inequities, especially and including guarantors and where mortgagees were not in default, but capital appreciation may advantage the bank.

During the recent Drought and Productivity interest subsidies, banks commonly increased rates to the maximum under the scheme which was 2% about above then current rates. In order to gain an advantage the banks then charged their customers accounts with special fees and imposed penalties to maximise their profit against the account knowing the interest was subsidised to a maximum of 50%. The banks then claimed the right to the interest subsidy and in some courts in Australia it was ruled the bank had the right to refuse the subsidy. However in a Federal Court judgment **Blacker $ Blacker v National Australia Bank Limited [2001] FCA 987 (26 July 2001) . Conti J. (Appendix 2)** it was found NAB had no right to Government Scheme Subsidies and they belonged to the farmer. However these funds were legislated not part of the Bankruptcy estate of the recipient at the time but this was not considered the reason for judgment for the ownership question.

In a judgment **C H Magill & amp[2001] NSWCA 485; 1 Or v National Australia Bank Limited [2001] NSWCA 221 (13 August 2001) Maegher JA, Heydon JA, Ipp AJA,(Appendix 3)** sitting as the full court of the Equity Court of NSW found that Rural Government Schemes lenders were not entitled to claim capitalised interest. The banks continued to claim this interest from the Commonwealth and the farmer even though the drought and productivity interest was paid in advance. This allows the Commonwealth and farmers the option of claiming those funds be returned to consolidated revenue or possibly proceeding against the banks for return of the funds from the incorrect claims. It was stated in the Productivity Commission inquiry into Drought Support Draft Report in October 2008 at Page 143 that there were “differences between states in the way the ECIRS was assessed”. This allowed the banks to give incorrect claims their customers were unviable because the Rural Adjustment Authorities withheld payment on bank advice.

The Commonwealth increased the funds for farmers leaving the industry from $40,000 to $170,000 but made the sums available in Bankruptcy. At this time it became valuable to the banks to avoid the judgment in Magill v NAB and in the states like Queensland where banks controlled viability through the Queensland Rural Adjustment Authority incorrect quantums of debt secured the Commonwealth Funds. In 2003 the Productivity Commission investigated Native Vegetation identified that the compensation funds for affected landholders who left the industry. This would be incorrect for drought subsidy cases. At **(Appendix 4) McDonald v Holden [2007] QSC 54 (15 March 2007)** Holden was the CEO of the Queeensland Rural Adjustment Authority, the judgment ordered the authoity to re examine McDonald's $170,000 vegetation claim. The authority could not have called McDonalds' unviable without their bank's approval. On examination of the Court documents it may be the bank accounts of McDonalds were levied at the capitalised interest values.

In a judgment Kay v National Australia Bank limited [2010] (30 September 2010) it was found that a bank claiming interest outside of the contracts between the parties was misleading and deceptive. This allows the Commonwealth the opportunity to investigate return of any overpaid interest subsidies if overcharged by the banks between 1992 and 2010. A rough estimate is about 4/7 of all sums paid as interest subsidy but this is subject to individual circumstances.

It is noted that the legal departments of the Commonwealth are required to provide quotes for Government legal work but in this instance because of the long arms of the banks any staff retrenchments based on that policy could be avoided by following up this scenario to identify legs. I would respectfully suggest that an investigation separate to all departments except as mentioned be considered because these complaints have not been followed up by previous Rudd Ministers, without even knowing the facts ministerial staff denied the situation existed.

(c) **how competition impacts on unfair terms that may be in contracts.**

Competition has very little influence on unfair contracts because the whole of the industry eventually takes up the opportunity. Without examining individual contracts a definable contract for taxation was prosecuted in New Zealand where 6 Australian Banks were involved in avoiding taxation through a Repo contract where bank conduits (type of subsidiary) traded interest swaps between entities. These banks raised funds in New Zealand and avoided taxation by using security, then interest was claimed as a capital gain in USA and then as pre-taxed profits in the UK returning to NZ and Australia as tax free profits. But the court ruled because no third party held the security

interest was not tax deductible (amongst other reasons). Finally those persons that believed they had taxation free interest investments were no longer tax free and the banks were responsible for the tax payable. **BNZ Investments Limited and ors v The Commissioner of Inland Revenue [2007] NZCA 356 (21 August 2007).(Appendix 5)** . **Westpac Banking Corporation v The Commissioner for Inland Revenue HC AK CIV 2005-404-2843 [2009] NZAC 1388 (7 October 2009). (Appendix 6)**

At the same time in Ireland the NAB subsidiaries were offering tax avoidance schemes to Irish citizens where established bogus accounts, fictitiously named accounts, accounts were created as safe havens for funds avoiding taxation, special savings accounts avoiding taxation , with these customers accounts being improperly charged interest and fees. **National Irish Bank & Anor v Companies Act [2007] IEHC 102 (20 March 2007) (Appendix 7)** These court actions only ceased in 2007 and 2009..

These practices were carried on in Australia pursuant to the banks mortgage contracts . In these contracts the banks undertake to provide the accounting backup to the receivers activities but in fact the Federal Court will not order discovery in Bankruptcy even when a Commonwealth inquiry identified incorrect bank statements are being provided to courts. The inquiry was the "**Shadow Ledgers Inquiry" of 2000 by the Parliamentary Joint Statutory Committee on Corporations and Securities.(Appendix 8)** The judgment showing the facts as shown in the Committee report and a judgment of misleading and deceptive conduct is **Kay v National Australia Bank Ltd. [2010] NSWSC 1116 (30 September 2010).(Appendix 9).**

For ten years courts have ruled bank statements showing the incorrect interest debits were correct in law including all the circumstances above. Consequently the failure of the legislature to support common law and equity on bank accounting to customers and courts has led to a government Inquiry Report being ignored both by the banks and by enforcement authorities such as ASIC. In the meantime two banks NAB and ANZ have admitted corrupting corporate cultures. The reality the banks have had over 100 years to create self serving contracts and accounting and with the courts accepting statements as correct evidence without discovery. Mistakes in bankruptcy and other unlawful acts by bankers are inevitable.

Perhaps the committee should commence an investigation into the Financial Ombudsman's Office and its method of operation. In two applications to the Ombudsman, accounts of persons with incorrect bank statements forcing them into bankruptcy have been treated differently even though

Section 126 of the Bankruptcy Act 1966 purports to extend the Banking customer contract in Bankruptcy.

Altogether it appears all banks tend to take advantage of illegalities and expect court support to restrict legal rights, normally available to appearing parties especially discovery of customers account details and in guarantee actions discovery of the accounts of the guaranteed party, to the guarantor. **(Appendix 10) (Buckley Ross P., Nixon Justen Page 13 "The role of reputation in banking" 2009 :** ***Strong prudential regulation enhances the value of promises of banks and poor prudential regulation and weak internal governance standards decrease the value of a promise from a bank."***

In order to stop the corruption of accounts and to control receivers the Queensland Government in November, 2008 extended Section 85 (2) of the Property Law Act 1974 to include receivers advising mortgagees of sale details putting aside the banks rights pursuant to the contract. It was shown that a bank and receiver withheld documents showing a receiver had sold livestock outside of his authority and then charged the bank customer with stealing the same mortgaged goods.

(d) The likely drivers of future change and innovation in the banking and non-banking sectors.

This submission indicates that legislation is the common base denominator and that any operations above that standard are to obtain strategic differentiation of banking and associated services. The facts above show that to expect banks will operate ethically as a whole is unrealistic.

(e) the ease of moving between providers of banking services.

While bankers and DTI s would submit they do not restrict movement between institutions the reality most contracts are created to discourage movement of customers in particular payout clauses trap customer loyalty. **(Appendix 10) (Buckley Ross P., Nixon Justen Page 13.**

(f) the impact of large banks considered too "big to fail"on profitability and competition.

Attached is an article **Ferguson ,Adele; "Trillions in risk lies under shell"** ***The Age*** **March 2,2010.(Appendix 11)**. This article explains the *NAB has liabilities of $100 billion and a further $60 billion more in liabilities than assets within the zero to three month maturity band.* This article explains the Over The counter trade in derivatives was $69.9 billion to June 30 , 2009 and exchange transactions of $26.6 billion. In March the latest Reserve Bank Bulletin showed all banks consolidated group off- balance -sheet business stood at $13 trillion at September 30 ,2009. It does not compare with the net equity of the banks and the Australian economy at about one trillion and US at $14 trillion. Australian banks have $13 trillion of exposure. **Ferguson ,Adele; "Trillions in risk lies under shell"** ***The Age*** **March 2,2010 (Appendix 11)**

If a fraction of these funds become due or something goes wrong the Australian Banking industry will not be able to cope. Should the Government consider regulating the Over the Counter trading in derivatives and securities.

(g) **regulation that has the impact of restricting or hindering competition within the banking sector, particularly regulation imposed during the global financial crisis**.

As the influence of the GFC reduces in capital markets the problem in Australia is the outbreak of trade wars using currency and international taxes such as carbon taxes. **(Appendix 12 ; Lipsky, Johm; Reconsidering the International Monetary Fund" 28 August 2010.)**The processes of the International Monetary Fund to stop currency induced protectionism and greater market access is now paramount. With India imposing a Carbon Tax on all coal the prospect of other nations imposing trading taxes, sanctioned as a carbon tax, looms. The carbon tax replaces lost repatriated income from Indians's working in Australia and Balance of Payment income lost because Australia has imposed visa and working conditions previously ignored. Consequently banking competition is restricted by the high $A and has a potential to be further restricted by foreign students avoiding visa problems to study in other countries. The deposit funds are particularly dependent on Bank account guarantees and these impose a reason to deposit and maintain funds in the system..

The government may need to avoid the depositors guarantee to increase funds utilisation and so impart a change in bank attitude. However risk in Australia is measured in part by Non Accruals and income to debt ratios. But the method of bank security realisation where banks impose incorrect interest charges to force persons to bankruptcy not only shows up in personal dealings of the affected person but also in statistical measurement of these matters. Thus it is not unusual to see

banks vary their non-accrual reserves in order to preserve cash with taxation immunity where at a later date the write down is reversed at the banks pleasure.

Considering the situations above the control of the system to provide security to debtors and depositors requires open investigation of how banks account for non-accrual items and enforcement proceedings. With increased interest debits to non-accrual accounts the customer is disadvantaged creating a taxation advantage for the particular bank. With no incentive for the bank to correctly account and construct records their Taxation write off in the account is reinforced by spreading the accounting of the recovered funds across various account entities. Thus the funds accounted as interest against non-accrual accounts is not advised to the entity concerned. By this method incorrect accounting of interest is not detected by courts and if correct law is followed then some actions at least are based on incorrect evidence of debt. This debt when going to the Bankruptcy Court is not examined by that court and consequently the entity is bankrupted. When eventually proof of the misleading and deceptive conduct is obtained the Bankruptcy Court refuses to allow the entity out of bankruptcy because it is insufficient to satisfy the debt. If this involves asset sales then underselling the assets ensures the entity remains bankrupt with the financial institution gaining the advantage of incorrect accounting. This is particularly common in high asset value low cash ratio businesses. It commences with non-accrual declarations pursuant to the Taxation Acts. While APRA has attempted to ensure this process is contained unfortunately they have failed. An example of the process in action is **Kay v National Australia Bank Ltd. [2010] NSWSC 1116 (30 September 2010).(Appendix 9).**

Thus increasing interest to non-accruals supposedly for risk and claiming the taxation benefit from the write down of uncollected funds allows the bank to gain taxation advantage from paper write downs. But also supplies a chain where funds travelling through conduits can be credited to accounts in realisation without taxation to be accommodated in capital accounts , allowing banks to bankrupt unsuspecting borrowers without discovering the true facts. (Appendix 5: BNZ Investments Limited and ors v The Commissioner of Inland Revenue [2007] NZCA 356 (21 August 2007) is a discussion of taxation discoveries in the NZ cases against Australian Banks involving $1.5.billion.

(h) opportunities for, and obstacles to, the creation of new banking services and the entry of new banking service providers.

In a Productivity Commission hearing into Drought Aid a proposal for a specialist Rural Bank

financed by the funds held by the commercial banks deposits of Farm Management Deposits of $2.9 Billion in 2008 and a sum of $500 million from each of the 4 pillars. This proposal was not carried forward in the Commission's evidence or report but the NAB made a similar submission for another purpose to then Prime Minister. The process can be justified as the funds are being held for a public purpose. However with the judgements in Kay, Magill, Blacker and McDonald all appended the proposition that the Commonwealth could recover funds paid to incorrect claims from the financiers receiving and claiming the incorrectly accounted funds. Thus tier one capital may be obtained from existing funds owing to the Commonwealth if the incorrect accounting proposition is correct in law and pursued.

Banking in Australia is a mature industry and there must be a reason to create a bank such as above to put to better use private funds saved for a public purpose without taxation until recovered for that purpose. The major obstacle to new service providers is the Australian process of contracting customer loyalty not just through mortgages but also credit cards and other products, pursued by committing the customer to debt and controlling reduction by incentive to maintain the debit balance in the account. The debt being able to be written off through non accrual items and the value of funds justified by discounting , interest and fees are capitalised so the value to the bank customer of any increased credit card limit is illusionary.

Perhaps the first process is to create an incentive for another clearing house and then considering the propositions in the 2008 Commonwealth International Monetary Fund Report by the Treasurer, look to proceed to establish more commodities exchanges. The increased volumes of transactions would create a situation worthy of establishing off shore banks especially Asian and those attached to Metals Trading. Australia needs to take the opportunity to turn its primary industries and natural resources to Tertiary Industries and quickly before the incentive and opportunity passes. It is appropriate that an Asian Exchange even if in subsidiary to the London Exchanges can offer an equivalent London Inter Bank Offer Rate with better ettlement facilities in Australia as A$ is now a well recognised internationally traded currency and gold production is about its peak.

(i) **Assessment of claims by banks of cost of capital.**

As stated previously the Commonwealth needs to establish a definition of costs of capital. The current all industry weighted cost of capital considers risk and current rates where that is rising and inflation is rising the current definition works considerably to distort the true current costs of capital held by a bank. Banks can distort capital and cash reserves by simply adjusting recoveries and write

downs to non accruals in their accounting.

To demonstrate the facts the Senate need only resort to the share price deals and institutional funding now of the major Australian players and cash incentives to buy those shares extended by banks to increase capital in 2007 – 8 and 9. The risk is now non existent for a majority of deposits and should itself be removed or downgraded and the guarantee of Government intervention recently exercised and now withdrawn needs discounting to risk propositions. In all the circumstances any risk provisions in an Australian Bank attached to costs of funds, needs to be covered by statutory definition. It is noted that Basel 3 expects higher capital adequacy ratios but that aside Australian Banks need to be better governed , especially considering the following,
NAB Stamp Duty refunds., and admitted corporate culture problems.
CBA and BOQ Storm,
Westpac foreign currency,
NAB fees refunds and current off balance sheet liabilities.
ANZ corporate culture problems.
All of the 4 pillars and some other large banks involved in international interest swaps through conduits to avoid taxation,
Possible misuse of government Schemes both drought and productivity where the capital appreciation and wealth transfer created abnormal dividends for shareholders that are now expected and banks try to continue at the expense of customers.

None of these activities were expensive for the banks and all were used incorrectly to create extraordinary profits. If banks wish to be supported by the community then the attitude must change from a feudal approach to Australian (society) and demanded what is best for the banks is best for Australia to a service industry where it sits on the scale of business classification.

Australian Banks have been capitalised by tax dodge schemes identified in Australia and offshore by cheap funds from offshore, through funds obtained during the productivity drives and redistribution of wealth processes. Consequently credibility as to defined capital raising costs are entitled to be treated with scepticism and rated unbelievable. The reality is Australian Banks shares are held more by institutions and they demand certain returns and switch executive interest from customer to shareholder. A good comparison is the NAB drive for customers strategy, against CBA shareholder interest in raising interest rates for profit purposes only.

(j) any other policies, practices and strategies that may enhance competition in banking including legislative change.

This question if specific to banking rather than Deposit Taking Institutions requires many changes in legislation. The changing of the Reserve Bank status has caused a problem in regulation and the inclusion of Australian Prudential Regulation Authority as a secret investigator without publication of results could both be changed. The RBA to controlling and publishing bank tier 1 capital sources and APRA to be satisfied of due process. The current practise of one officer in APRA and RBA handling the one bank is not transparent. NAB claims its Board and APRA have their trading outside what could be described as normal insolvency rules in hand. (Appendix11). Yet NAB dismissed all customer claims to solvency and based its decisions on consultants with customers, even now and expects relevant government authorities to accept the proposition when consultants are shown to be incorrect.

1. The most important advocate for better legislation to competition is a change in Bankruptcy rules to allow discovery of debt beyond an initial court judgment.
2. A Commonwealth Property Law Act requiring discovery of all bank statements and a dispute process requiring investigation of any identifiable incorrect debits.
3. A fixed interest penalty if that is to be allowed or
4. in the alternative reduced interest impost on redemption of a contract for borrowed funds.
5. An approach that recognises entrepreneurial activities by refusing interest rate changes to accounts with arrears under a specified time.
6. A change in legislation to allow banks having a corrupting corporate culture to immediately be able to charged criminally by those demonstrating their disadvantage.
7. Legislation to immediately takeaway the proposition that staff only can be charged criminally if the matter involves a jail sentence. This is now too wide for the safety of persons dealing with banks.
8. Takeaway the presumption the opponents to banks are only there to deny payment. It can be shown that banks have refused payouts on accounts to bankrupt customers, to hide the fraud of the customers accounts. Even going so far as to claim the persons criminally breached the mortgage whilst withholding the evidence their appointed receiver had sold property owned by third parties to avoid the customers defence.
9. The current constitutional and legal bias has skewed legal authorities to a frame of mind where judges act as disciplinary prefects rather than open minded applicators of the law.
10. Where a bank has admitted a corporate culture involving deception then immediately in any

legal proceeding the bank losses its right to presumptive evidence absolutely.

11. The Financial Ombudsman's processes were changed to allow banks greater access to officers handling complaints because banks were losing too many complaint decisions. Then changed for the Ombudsman's staff to make the decisions about complaints.
12. Bank belief that what is good for the banks is good for Australia and they are given constitutional rights to make and break, with prosecution immunity, has now come to a cross roads with current community concerns with corporate social responsibility. The reality is bank's are corporations with special rights in law and as such are required to act with absolute propriety. The identified legal defiances shown at (i) are only a fraction of the breaches of law and ethics as recognised breaches of community standards between 1974 with the "Trade Practices Act " and today.
13. Thus to level up the playing field an enforced code of ethics and accepted standards are required beyond Trade Practices , the ombudsman needs to be re-regulated and a more transparent application brought forward, where the officer handling the investigation does not make the ombudsman's decisions.
14. Incorrect evidence or facts given to courts or tribunals by banks brings immediate dispute resolution practices under a legislated code. The banking industry code is removed from the control of the current Code Enforcement Structure because they do not investigate complaints against the Banking Code of Practice.
15. A Commonwealth Property Law Act needs to require recoveries to be completely and adequately recorded and all documents catalogued and handed to dispossessed mortgagees at conclusion of sales. This is perhaps the most uncomplicated but most necessary recommendation of all.
16. Mediations involving bankers need to be defined and legislated in appropriate standards perhaps similar to the NSW Farm Debt Mediation Act.
17. Australian Banks behaving badly offshore should be penalised where the behaviour includes financial disadvantage whether to the foreign Government such as taxation or to customers as is shown at (appendix 7). This penalty is necessary to enforce the banks responsibility to society and Australia's trading reputation.
18. There has crept into Australian Banking an attitude of the banks control society and have absolute control of all facets of society at their wish including Government. Senior bank executives are paid well to accept responsibility and they don't There is only one Senior Executive attached to an Australian Bank and he was their subsidiary CEO who has been disciplined by statute since 1974 and yet many problems have emerged based around criminal acts by subordinates and it has been shown the CEO knew of the situation.

(appendix 7).

(k) Comparisons with relevant international jurisdictions.

There are several world models similar to Australia including UK, Canada some ways USA. In that regard we can learn some lessons from America and not upgrade our Building Societies to the point of supplying finance as happened with Freddie Mac and Fannie May, to create the GFC by extending credit and redistributing the losses. ANZ and NAB (appendix 11) are overwhelmed with derivatives both on balance sheet and off from purchasing those derivatives. It has been shown the competitiveness in USA banking has not solved the problem of incompetence because all banks play follow the leader.

So a bad idea might do the rounds once and then again and again as different organisations lead the industry. While all these jurisdictions followed Basel and IMF policies this did not stop their cash flow credit creation problems affecting Australia. So in today's international and global banking environment problems can be exported. So the comparison to other banking jurisdictions is not important as setting, controlling and enforcing Australia's own rules of operation and governance. (appendix 7)

(l) the role and impact of past inquiries into the banking sector in promoting reform;.

Past inquiries can take many forms from Parliamentary Committees to Senate and Joint Committees. It is fact that courts do not regard inquiries as obligatory or indicative in process or evidence of wrongdoing or necessary to adjust court procedures. In a submission **(No.36)** to the **Senate Legal and Constitutional Affairs Committee inquiry into "Australia's Judicial System, The Role of Judges Inquiry"(Appendix 13)** an unidentified Executive Summary discusses the role in the courts of Judges when dealing with the facts disclosed in the Productivity Commission Government Drought Support Draft Report of 2008 disclosing different states interpretation of unviability and subsidies, and the Productivity Commission into Native Vegetation and compensation, and the Parliamentary Joint Statutory Committee for Corporations and Securities 'Shadow Ledgers " Inquiry 2000.

NSW courts made all quoted judgments, except McDonald v Holden a Queensland judgment stating the Queensland Rural Adjustment Authority were using the incorrect definition of unviability in government schemes.

The following judgments and Appendix number are identified with each inquiry.

1. Parliamentary Joint Statutory Committee for Corporations and Securities 'Shadow Ledgers " Inquiry 2000.

Kay v National Australia Bank Ltd. [2010] NSWSC 1116 (30 September 2010). (Appendix 9).

2. Productivity Commission Government Drought Support Draft Report of 2008 disclosing different states interpretation of viability.

(Appendix 9)

(Appendix 4) McDonald v Holden [2007] QSC 54 (15 March 2007)

Blacker & Blacker v National Australia Bank Limited [2001] FCA 987 (26 July 2001) . Conti J.
(Appendix 2) it was found NAB had no right to Government Scheme Subsidies

C H Magill & amp[2001] NSWCA 485; 1 Or v National Australia Bank Limited [2001] NSWCA 221 (13 August 2001) Maegher JA, Heydon JA, Ipp AJA,
(Appendix 3) Government Farmer Schemes did not attract capitalised interest.

3. Productivity Commission Inquiry into Native Vegetation and farmers previously receiving drought interest subsidies.

Appendices 2,3,4,9.

4 By comparing appendix 13 and appendices 2,3,4,9, it can be seen that the courts have not dealt consistently with banking decisions. This inconsistency may have contributed to the rural and business suicide rate especially when it is identified that the Queensland Rural Adjustment Authority was using the incorrect measure of viability beginning in 1992.

If the defined interpretations had been placed to the inquiry outcomes in 2003 and 1992 when legislation was put in place would there have been different interpretations amongst states? The role of Government must now include more care when proposing legislation so that the legal interpretation of the judiciary is limited when proposing Government Schemes. The facts that banks take every opportunity to obtain any possible Government funds goes back to the strength of the binding legislation under which they operate.**(Appendix 10) (Buckley Ross P., Nixon Justen Page 13 "The role of reputation in banking" 2009 :** ***Strong prudential regulation enhances the value of promises of banks and poor prudential regulation and weak internal governance standards decrease the value of a promise from a bank."***

5. **Appendix 14 is a copy of the Social Impact Assessment commissioned by the Commonwealth as part of drought policy considerations.** This document was prepared after an open and public inquiry into hardship. It provides a corollary with the social impacts of financial hardship caused by the incorrect legal interpretation of the drought aid. In 1992 Minister Collins laid down the Regulations for Productivity and Drought aid. These regulations were not judicially interpreted as to viability until 2007 (appendix 4). The judicial interpretation was different to the interpretation of the Queensland Rural Adjustment Authority and the Victoria Rural Authorities but similar to the NSW interpretation. Consequently many rural and small and medium enterprises in Queensland and Victoria were called unviable by banks, and sold up. When in fact they would now not be unviable by definition. This can be identified as bad judicial and legislative practices.

(m) Any other related matter

By April 2005 at a Council of Australian Government Meeting in Darwin Minister Truss stripped Queensland of $36M in Fees and transferred many Commonwealth Schemes to Centrelink including the Sugar Industry Schemes. **Appendix 15 is a "Courier Mail" Brisbane report of the circumstances**. He also identified corrupting activities but the Queensland Rural Adjustment Authority were still operating an incorrect viability definition in 2007. **(Appendix 19; Productivity Commission "Impacts of Native Vegetation and Biodiversity Regulations" Submission 21, 7.7.2003)** Even as late as 2009 it appeared the definition of viability had not changed within the QRAA this gave the banks the opportunity to make viable businesses unviable by their refusing subsidy payment defined unlawful in 2001 (appendix 2) **(Appendix 20 ; Productivity**

Commission; "Drought Support Inquiry" Submission 87 , 26/8/2008.).

Also in 2000 the ABIO now Financial Ombudsman issued a Bulletin explaining how use of incorrect bank account statements in style, issue and content could lead to misleading and deceptive conduct decisions going against the banks with operating procedures to avoid the decisions. It was not until 2009 that a Supreme Court judgment (appendix 9) confirmed this assessment. **(Appendix 16) is a copy of the Parliamentary Joint Statutory Committee Report into "Shadow Ledgers" 2000.**

When a member of the public can make submissions on previous knowledge of Bank behaviour that Australian Banks will not act in the spirit of legislation and may seek to unlawfully escalate interest charges then banks have adopted a culture of catch me if you can and rely on slippery tactics. **Appendix 17 is a copy of an article by Drummond , Matthew; "NAB fee cuts yet to pay off"** ***The Australian Financial Review P. 41,*** **29 July 2010**. On the same page is an article of how Over the Counter trading in derivatives (Collateral Debt Obligations) through banker ABN Ambro with NSW Local Government Bodies, was proceeding to court.**(Appendix 18- Hughes, Duncan; "Council seeks damages over debt instruments"** ***The Australian Financial Review" P. 41, 29 July, 2010.)***

Conclusion

These slippery tactics have identified Australian Banks to the customer and a common observation by bank shareholders is "We do not like what the banks do, but we like the dividends and share values" which equates to not in my back yard, friend. Whilst there are only two million mortgage holders in Australia the ripple effect could be expected to influence about ten persons per mortgage bringing in 20,000,000 persons. Some of these persons have fixed interest investments and consequently appreciate interest rate increases. Banking behaviour therefore cuts across society with winners and losers in dividends and interest rates. This throws particular requirements on banking business strategy and costs of operations against margins. By legislating and requiring enforcement of the above identified corporate responsibilities with changes including legal standing for banks, society can be satisfied the margin and strategic business conditions of its banks are concentrated on business performance, not slippery tactics.