Additional Comments by Senator Williams

1.1 The following is compiled in support of the committee's report and recommendations, and contains further recommendations.

1.2 The original catalyst for the Senate Economics References Committee's inquiry into the post-GFC banking sector was the concern surrounding the handling by Bankwest of its loan book. Evidence was beginning to emerge of Bankwest calling in its loans and the resultant selling up of many assets, some below market value. These issues were highlighted in a *Four Corners* television report, and this resulted in further allegations against the bank's practices. The Senate inquiry did not specifically target Bankwest but much of the evidence centred on its actions. It was disturbing to read and hear of people discovering their low doc loan application forms had been allegedly doctored to include inflated incomes and assets. It was also disturbing to hear and read of the "lend at all costs" attitudes to people who were at risk of being unable to repay. This practice has destroyed Australians lives. These and other issues are outlined below.

Receivers and section 420A

1.3 The conflict between receiver and borrower is partly addressed in committee recommendations 9.18 and 9.19.

1.4 Of great concern is the continued selling of assets by receivers for below market value. Section 420A of the *Corporations Act 2001* states:

> (1) In exercising a power of sale in respect of property of a corporation, a controller must take all reasonable care to sell the property for:
>
> (a) if, when it is sold, it has a market value--not less than that market value; or
>
> (b) otherwise--the best price that is reasonably obtainable, having regard to the circumstances existing when the property is sold.
>
> (2) Nothing in subsection (1) limits the generality of anything in section 180, 181, 182, 183 or 184.

1.5 However, evidence given to the inquiry suggests this provision is either being breached, ignored or not considered when receivers are selling assets. Evidence given by Mr Jim Neale to the Sydney hearing emphasised the non-compliance:

> Senator Williams: So you were in discussions to sell a property for $4 million after it was sold. After it was sold, it was valued at $3.58 million, to the best of your knowledge. What was it sold for?
>
> Mr Neale: My account was credited with $195,000, which was sale proceeds of $635,000 from the bloke I was talking to in order to sell it to in the first place, less $440,000 for the receivers.
>
> Senator Williams: So this bloke you were talking to in order to sell it for $4 million – did he actually buy the block?

Mr Neale: Yes.

Senator Williams: That is a pretty good discount.[1]

1.6 Similar evidence was given by Mr Sean Butler of Perth. Mr Butler and his wife owned the Lighthouse Beach Resort in Bunbury and in 2007 it was valued at $20 million. In 2009, the property was re-valued at $14.7 million, but five months later at the direction of Bankwest and a cost of $9,500 to the Butlers, the property was again re-valued at 22 per cent less than the $14.7 million. Mr Butler indicated the property was still profitable and he was able to meet interest payments on all loans.

> Mr Butler: In January, 2011, we had further discussions with Bankwest … In February 2011 we got a purchase offer for the Lighthouse Beach Resort at $14 million, that being 22 per cent higher than what the [r]evaluation was. In other words, we got an offer for it that was close to the original valuation. It has almost proved them wrong. At that point our business partner, himself a banker, advised that he would match the $14 million offer and buy that property. [2]

1.7 Eventually Bankwest appointed Taylor Woodings as receiver-managers:

> Mr Butler: … Meanwhile, amidst all this secrecy and deception, our business partner, a prominent banker himself, negotiated with Taylor Woodings without our knowledge to buy it for $9.5 million—$4½ million less than what he had offered just a few months before. We have been advised that this conduct is illegal. That is one property.
>
> Senator WILLIAMS: Were you a company?
>
> Mr Butler: Yes.
>
> Senator WILLIAMS: Under section 420A they must make the best effort to get the maximum price.
>
> Mr Butler: Yes.
>
> Senator WILLIAMS: And it did not go to auction?
>
> Mr Butler: No.
>
> Senator WILLIAMS: They had offers of $14 million and it was sold for $9.5 million?
>
> Mr Butler: Yes.[3]

Recommendation 1

1.8 That the Australian Securities and Investments Commission (ASIC) initiate a wholesale review into matters raised during the inquiry relating to

---

1 Mr Jim Neale, *Committee Hansard*, 10 August 2012, pp. 13–14.

2 Mr Sean Butler, *Committee Hansard*, 8 August 2012, p. 61.

3 Mr Sean Butler, *Committee Hansard*, 8 August 2012, p. 64.

breaches of the *Corporations Act 2001*, specifically section 420A and more broadly across the banking and insolvency industry.

Bankwest

1.9 In evidence to the inquiry, Bankwest maintained it worked with its clients and the problems only arose because of the economic circumstances, not through any inappropriate action of the bank: 'In cases where clients were impacted, we worked closely with them to try and improve their position'.[4] The major complaint about Bankwest from submissions and oral evidence was in relation to assets being revalued down when the business was clearly viable and meeting its commitments. Bankwest in its evidence defended its right to undertake valuations:

> CHAIR: So except for the contracted points of time or events or a customer clearly already being in difficulty, you would not undertake a valuation.
>
> Mr Corfield: We would not unilaterally be deciding in a given week, let's do a valuation on this.
>
> CHAIR: So you wouldn't sit down and say, 'Look, the GFC has happened. The value of hotels is suffering. We have some clients that have hotels. Let's go and send a valuer in to have a look at that just to see what is happening with their valuer.'
>
> Mr De Luca: As you know Mr Corfield stated, the terms and conditions provide us the ability to do a valuation update, let us say, on an annual or biannual basis, so at that point in time we may decide to do it earlier before the financial year finishes or after the financial year but within the terms and conditions. [5]

1.10 I believe that following the takeover of Bankwest by the Commonwealth Bank of Australia, Bankwest panicked and began having assets revalued. Bankwest had "begged" for business and targeted property developers on the eastern seaboard and hoteliers, but didn’t hesitate to "pull the plug" on those businesses after a rise in the LVRs. I question some of the valuations stated in the inquiry. The reasons for this action need to be scrutinised.

Recommendation 2

1.11 That the Australian Securities and Investments Commission (ASIC) review the purchase of Bankwest by the Commonwealth Bank of Australia and provide a report on compliance with all Acts and regulations.

---

4 Mr Robert De Luca, Managing Director, Bankwest, *Committee Hansard*, 10 August 2012, p. 50.

5 Mr Robert De Luca; Mr Ian Corfield, *Committee Hansard*, 10 August 2012, pp. 52-53.

Pressure to lend

1.12 In its submission to the inquiry, the Finance Sector Union of Australia (FSU) pointed to the pressure bank officers are under to meet lending targets. The Union points out that '[c]ommissions and bonuses, as well as access to annual pay increases are built into performance pay systems that are designed to drive aggressive lending behaviour'.[6] The FSU stated that its members are concerned enough to have run three campaigns within their own banks about their lending targets, addressing unreasonable targets and the fact that 'employees were expected to make up their targets for any periods of absence from work including annual leave and sick leave'.[7] I believe this lies at the heart of what I regard as reckless lending.

1.13 Evidence was given by Mr Geoffrey Reiher of the time he was seeking finance for the purchase of the Grand Hotel at Cobar:

> We were pursued by Bankwest, taken to lunch and, in a whirlwind deal, we had finance for the hotel. We had tried other financial institutions and failed. They were talking a long-term commitment of 20 years and they were committed to helping out and making sure we got through the tough times.[8]

1.14 However, when the GFC struck, the bank was not so cordial:

> The hotel was doing up to $25,000 a week in the good times and through the GFC we went down to probably $11,000 a week. In that time the hotel bar takings actually went up 10 per cent; our downfall was gaming. From that we managed to get it back up to about $18,000 a week, until our termination. We had a valuation of the hotel done probably six or eight months prior to the termination of our agreement with Bankwest. That is when the hotel was down at its worst and we were asking for a revaluation. That never came to fruition.
>
> In the closing stages of our commitment with Bankwest, probably in the last three months, through telephone conversations with some of their senior officers they made it quite clear that they did not want our business and they basically told us to go somewhere else if we could.[9]

1.15 Mr Reiher reiterated the bank had changed the rules to get his business:

> Senator WILLIAMS: How much was the hotel valued at when you went to buy it?
>
> Mr Reiher: $2 million—$1.8 million.
>
> Senator WILLIAMS: How much did you request the loan for?

---

6 FSU, *Submission 156*, p. 6.

7 FSU, *Submission 156*, p. 6.

8 Mr Geoffrey Reiher, *Committee Hansard*, 10 August 2012, p.1

9 Mr Geoffrey Reiher, *Committee Hansard*, 10 August 2012, p.1

> Mr Reiher: $1.35 million.
>
> Senator WILLIAMS: You said in your opening statement that the bank shifted the goalposts to get the loan through. What do you mean by that?
>
> Mr Reiher: The valuation—I think they were loaning 80 per cent at the time.
>
> Senator WILLIAMS: So, in other words, if something was worth a million dollars they would lend $800,000?
>
> Mr Reiher: Yes. We did not fit the criteria. We fell short. I do not know the number but we did fall short by a small margin. It was said over lunch that we will just move the rate to fit you in.[10]

1.16 Following a revaluation, Mr Reiher said Bankwest appeared to want to end the agreement:

> Senator WILLIAMS: Are you saying that, for there to be an agreement, Bankwest said, 'Forget the 20 years as originally proposed; we'll set you up in a five-year loan where you'll pay the whole lot back in five years'?
>
> Mr Reiher: The way it was put to us, he said they would make it basically a five-year loan so that we could not make the payments. They wanted out; they did not want anything to do with us.[11]

1.17 It is my view that banks should not abandon a client when the loan-to-value ratio blows out. If a borrower is able to make interest payments, the banks should be encouraged to show patience and tolerance.

Default interest rates

1.18 A number of submissions pointed to the trap of high default interest rates. Mr Sean Butler pointed out his default interest rate with Bankwest was 18.81 per cent if not repaid as agreed.[12] Where people are in financial trouble and miss repayments, the default interest rate can be too large a burden to overcome and the business or investment is doomed. Whilst the bank is entitled to retrieve its principal and interest, the excessive penalty interest rate is of concern. It was put to Bankwest in the inquiry that the higher penalty rates may in fact lead to a huge tax saving for the bank:

> Senator WILLIAMS: … Is it tax deductible for the bank if you have got a loss on a customer where they owe you a million, it compounds out to $1.2 million with these higher rates and you sell the asset for a million and you are $200,000 short. Is that $200,000 tax deductible?
>
> Mr De Luca: The interest income is income. It is not a tax deduction. It is income.

---

10 Mr Geoffrey Reiher, *Committee Hansard*, 10 August 2012, p. 2.

11 Mr Geoffrey Reiher, *Committee Hansard*, 10 August 2012, p. 4.

12 Mr Sean Butler, *Submission 111*, p. 2.

Senator WILLIAMS: But isn't that $200,000 loss on your books? If you have got a customer who on your book owes you $1.2 million and you have sold him or her up and cleaned them out or whatever for one million and there is a loss of $200,000, is that loss tax deductible?

Mr De Luca: The loss is. The loss is, not the interest income.

Senator WILLIAMS: By having huge default interest rates, surely that builds that amount to a situation where in some cases or in many cases of these bad loans that leads you to a greater tax deduction. Would that be the case?

Mr De Luca: Firstly it is in our interests actually to make profits, not to actually have losses. As Ian [Corfield] alluded to, also our interest there is aligned with the customer's where the customer is actually able to take it and actually able to pay to service their debt. As Ian alluded to, we negotiate and work with the customers on a case-by-case basis on what the right default rate is.

Senator WILLIAMS: You have not answered the question. If that money goes out, because the debt explodes by a very high interest rate level, then the more that goes out the more you have on your books that has not been repaid, so is that tax deductible? Yes, it is.

Mr Corfield: Technically, yes. If it causes a further loss then it would be tax deductible but, as we have said, those interest rates simply reflect the additional costs that are in the business. So the reality of what is happening through the PNL of the business is that actually we are no better off; in fact, we are worse off from customers that fall into this.

Senator WILLIAMS: I am seeing a situation here where the Australian Taxation Office might look at this and say, 'Okay, this loan has gone bad. You're sad about it and the client is sad about it.' But then when you can put up interest default rates to 18 or 20 per cent when official cash rates are at 3½ per cent and you can put that on your book, that is a big tax deduction, because that last 12 months of the dying period of the loan allows you to actually escalate your losses very quickly. You know you are going to lose dough. You know they have fallen over. I am not blaming Bankwest. Obviously, with this you can go right around the banking industry in Australia. Doesn't that allow you a greater tax deduction come the end of the year of doing your books?

Mr De Luca: As Ian alluded to, technically yes.

Senator WILLIAMS: You can determine the interest rate which then determines the level of loss. That is a pretty good business deal, isn't it?

Mr Corfield: Except the biggest cost at that point is actually the additional capital that we are holding against that business, so there is not some great benefit to us in jacking the interest rates up at that point because we are carrying that additional capital cost in any case.[13]

13 Mr Robert De Luca; Mr Ian Corfield, Bankwest, *Committee Hansard*, 10 August 2012, p. 58.

1.19 The above evidence confirms my belief the penalty (default) interest rates should be capped as indicated in recommendation 3.

Recommendation 3

1.20 That the Australian Bankers' Association conduct an industry education campaign urging its members to re-evaluate their systems of incentives to curb aggressive lending. Further, that the Association consider an industry standard whereby its members are required to act in the best interests of the client generally, and by capping penalty (default) interest rates at no more than 50 per cent higher than the interest rate of the loan.

Low-doc and no-doc loans

1.21 Low-doc loans are good for self-employed people who are unable to provide documentation such as pay slips. There is no doubt they fill a void in the loans market.

1.22 But from evidence given to the inquiry it is clear there have been cases where loan application forms (LAFs) have been altered after being signed by the borrower. Whether this was by a broker acting to a bank's criteria or a by a bank officer themselves is unproven.

1.23 The President of the Banking and Finance Consumers Support Association, Ms Denise Brailey, claimed it was widespread:

> Ms Brailey: The banks provided commissions for mortgage manager, mortgage originators and mortgage introducers that came down in a chain to employing brokers. The brokers copped the full brunt of the blame that they were falsifying loan application forms … The four majors are in there. They are all responsible through a series of emails from banks to brokers, instructing the brokers how to get their deals across the line – 'make the deal fit' was their usual interpretation. They targeted older people, carers, people on parenting allowance and the aged pension.
>
> * * *
>
> We have the loan application forms from over 400 people in the last six weeks, During that time, not one of them is a clean document—each one has been fraudulently dealt with.
>
> * * *
>
> CHAIR: What you are saying is that those applications were doctored after they had looked at them?
>
> Ms Brailey: That is right. I have complained to each of the Chairmen and CEOs of the banks involved …
>
> CHAIR: They knew they were getting a loan though

> Ms Brailey: But they did get the loan; the banks will argue that they got the benefit of the loan—however, there was a sustainability factor: there was never any affordability criterion in the process.[14]

1.24 The same issue was identified by Mr Lucas Vogel in his submission:

> The bank made a $600,000 loan to us without a signed application form.
>
> a. This means we were never afforded the opportunity to check and verify the basis upon which the loan was subsequently approved.
>
> b. Dependent children (2 of) were not recorded in the banks computer record (or the records were altered) resulting in a reduction in calculable living expenses thus skewing the banks serviceability calculations in favour of the loan approval.
>
> c. Income was attributed to my non-working wife using the ABN-for-a-day mechanism. This subterfuge had two benefits (to the bank), firstly it improved the apparent serviceability of the loans, and secondly it removed my wife as a dependant thus skew the serviceability calculations further in favour of the loan approval.
>
> d. The bank holds and relies solely on a Low-Doc declaration form which was supplied blank to my wife for signing. Examination of that document clearly shows two or three distinctly different hand writings, only the signature of which is belonging to my wife. In other words the document was altered post signing. We know this because the income and asset figures entered on that document bear no resemblance to reality and match numbers detailed on a prior date within the banks file notes.[15]

1.25 It is imperative this issue be addressed.

Recommendation 4

1.26 That the Australian Securities and Investments Commission (ASIC) conduct an investigation into low-doc and no-doc loans to determine if loan application forms as held by the Banking and Finance Consumers Support Association have been fraudulently completed. Further, that if ASIC determines that a criminal investigation is warranted, the matter be referred to the Director of Public Prosecutions.

Recommendation 5

1.27 That the government review the relevant legislation relating to low-doc and no-doc loans to ensure that the legislative framework currently in place adequately regulates these types of loans.

---

14 Ms Denise Brailey, Banking and Finance Consumers Support Association, *Committee Hansard*, 8 August 2012, pp. 44, 45.

15 Mr Lucas Vogel, *Submission 198*, p. 13.

Payment of GST to the Australian Taxation Office

1.28 There were allegations that GST from the sale of assets by a receiver were not passed on to the Australian Taxation Office. This matter was raised during the appearance of the Bankwest executives:

> Senator WILLIAMS: Why has Bankwest been so reluctant, because the receivers were selling these joints up and giving you all the money after their fees, to hand over the GST component to the Australian Taxation Office?
>
> Mr De Luca: I am not aware that we have been.
>
> Senator Williams: Let me make you aware of it. Lauderdale Projects Pty Ltd and the Bank of Western Australia—the sale went through for $9 million. Bankwest agreed to the sale contract. There was $900,000 of GST. So the sale price was $9.9 million. The receiver gave Bankwest $9.9 million. If Lauderdale did not get the $900,000 they could not pay the Australian Taxation Office in their quarterly or monthly BAS. You held on to the money. You would not hand over that $900,000. So what happened? The parties—and Bankwest agreed to this—called in a bloke called Ron Merkel, a former judge. You agreed to abide by Mr Merkel's decision as an expert. It was not a mediation. Mr Merkel ruled these were the issues. 'Bankwest held a recent mortgage over the property. A dispute now exists between Bankwest and Lauderdale as to whether the GST amount is payable to Bankwest or to the Australian Taxation Office. Bankwest was required to discharge its mortgage over the property. Bankwest and Lauderdale have agreed to resolve this dispute.' He made a decision. He said, 'The amount payable to Bankwest is to enable Lauderdale to pay GST. Accordingly, the GST amount is required to be paid by the stakeholder to Lauderdale to enable it to meet its liability to the Australian tax office in respect of GST.' He gives court cases as examples. He said, 'The GST amount is properly to be regarded as an expense occasioned by the sale rather than as part of the purchase price payable to the bank by the sale.' He went on to say that, 'The special circumstances describe a clear intention on the part of the purchase of Bankwest and Lauderdale that the GST amount was to be paid to Lauderdale.' He went on to say that 'Bankwest as secured creditor under its mortgage and charges is not entitled to the GST amount in priority to the ATO as of date of completion of the sale or at any time thereafter and the payment of the GST amount to Bankwest without making provisions for the payment to the Australian Taxation Office of the GST due on the sale of the property will in the circumstances of the present matter be unlawful'. I put it to you that these receivers who have sold up so many of your customers have collected the GST component, and I believe you still have a lot of it to the tune of probably hundreds of millions of dollars. Why did that have to go on for a couple of years? Why did you have to get Justice Ron Merkel to hear this case? When you got that $9.9 million, you clearly knew that $900,000 was the GST component. Why would Bankwest not hand that over to the ATO?
>
> Mr De Luca: I am not aware of that matter. I am happy to look into that one for you.

> Senator WILLIAMS You had better look deep because I am sure that there are going to be other people looking into it as well. This is the thing that this committee must do as a regulator—make clear regulations seeing that in the case of receivers selling up commercial properties that have the GST component that that component goes to the proper authority, which is the Australian Taxation Office, and is then handed on to the states. I am very concerned about this issue about why there was a legal fight. It was not in a court room but both parties agreed to abide by the decision made by Ron Merkel. He makes it quite clear in the matter that Bankwest retaining this money is unlawful. As I said, I think this has been going on in a widespread fashion.
>
> Mr Corfield: We are obviously committed to meeting all of our obligations. In any receivership there are normally many creditors. Quite often it is complex to work through exactly what the position is, but—
>
> Senator WILLIAMS: The GST component is very simple. It is not complex. You sold the property for $9 million; you received $9.9 million. You did not want to give up the $900,000 to the tax office. It has gone on for years until, finally, an independent expert has made a judgement. What I am saying to you is this: I believe the receivers have done this right through your network of selling these commercial properties up and I believe you are hanging onto a lot of GST components of those sales. I want to go through those sales, contracts and collections of money you have had to see if there is a GST component there because, if you hang on to the money, the ATO will go after the business the receiver has sold up and they will bankrupt it. They will lose out with the Australian Taxation Office while you retain the money. To me, that is very wrong and very un-Australian. I want you to go through that. No doubt there will be other people going through and checking this very issue. As regulators we need to be assured that this loophole is patched right over.
>
> Mr De Luca: That is something we will obviously look into. It is not widespread. We have not got other—
>
> Senator WILLIAMS: It is not widespread?
>
> Mr De Luca: Not that we are aware of. [16]

1.29 Whilst this allegation could not be proved, those in the insolvency industry should be reminded of their obligation under the *A New Tax System (Goods and Services Tax) Act 1999* (GST Act):

> Under the GST Act, liquidators, receivers, managers and administrators are all collectively referred to as "representatives of incapacitated entities." Such representatives are personally liable for any GST payable on taxable supplies that are made by a company post appointment. The ATO ranks as an unsecured creditor in respect of pre-appointment liabilities. This means that the ATO is at risk that it will not recover pre-appointment GST

16 Mr Robert De Luca; Mr Ian Corfield, Bankwest, *Committee Hansard*, 10 August 2012, pp. 54–55.

liabilities in full. However, if a representative is personally liable for the GST liability that arises post appointment, the ATO is likely to recover its GST liability on post appointment supplies in full.[17]

Summary

1.30 Australia has a strong banking system. There is no dispute the cost of funds had been for some time increasing, but evidence to the inquiry suggests it has now plateaued. Compared to the number of loans approved each year, the number from which problems arise is very small. But what this Senate inquiry has revealed is problem areas in risky lending which in some cases lead to the loss of an asset and a severe effect on lives. The above recommendations combined with those in the Committee report should address many of the shortcomings.

1.31 If elected to government, the Coalition will undertake a full root and branch inquiry of our financial system. That inquiry should also address the imbalance between Authorised Deposit-taking Institutions (ADIs) and non-ADIs, whereby ADIs receive a government guarantee on deposits, but no such surety is given to non-ADIs.

Senator John Williams
Senator for New South Wales

17 Ashurst Australia, 'GST update for insolvency practitioners, *GST Bulletin*, August 2012, www.ashurst.com/page.aspx?id_content=8192 (accessed 28 November 2012), p. 1.