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Re: Competition within the Australian banking sector

Terms of Reference

Competition within the Australian banking sector, including:

- (a) the current level of competition between bank and non-bank providers;
- (b) the products available and fees and charges payable on those products;
- (c) how competition impacts on unfair terms that may be included in contracts;
- (d) the likely drivers of future change and innovation in the banking and non-banking sectors;
- (e) the ease of moving between providers of banking services;
- (f) the impact of the large banks being considered 'too big to fail' on profitability and competition;
- (g) regulation that has the impact of restricting or hindering competition within the banking sector, particularly regulation imposed during the global financial crisis;
- (h) opportunities for, and obstacles to, the creation of new banking services and the entry of new banking service providers;
- (i) assessment of claims by banks of cost of capital;
- (j) any other policies, practices and strategies that may enhance competition in banking, including legislative change;
- (k) comparisons with relevant international jurisdictions;
- (l) the role and impact of past inquiries into the banking sector in promoting reform; and
- (m) any other related matter.

Here follows a submission to the above Inquiry.

(Dr) Evan Jones

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Re: (a) the current level of competition between bank and non-bank providers; and (h) opportunities for, and obstacles to, the creation of new banking services and the entry of new banking service providers

The Road to the Current Unsatisfactory State

There is a curious lacuna in the terms of reference, viz. the current level of competition between bank providers, but one presumes that this vital issue is intended in the oblique phrasing of (a) or covered by the catch-all category (m).

The current dominance of the Big 4 in Australian (and New Zealand) banking, and their collective failings in serving the public purpose, is unacceptable. It is the result of uncritical deregulation, cynical privatisation and the craven tolerance of mergers and takeovers over the

last thirty years. Specialist institutions have disappeared. The second tier has been subject to ongoing predation. The Westpac takeover of St George was the last straw.¹

A brief coverage of the evolution of the banking sector post-deregulation is in the author's late 2009 'The oxymoron that is banking competition'.² A more extensive coverage of this evolution and its ideological and political backdrop is elaborated in my submission to this Committee's early 2009 Inquiry into Aspects of Bank Mergers. That submission in its entirety is directly relevant to the terms of reference of the current inquiry.³

The circumstances of the two bank takeovers in 2008 deserve further attention. Suddenly we have officialdom lamenting the lack of competition in banking when a mere two years ago the same officialdom was legitimising the Westpac takeover and the subsequent takeover of BankWest by the Commonwealth Bank of Australia. Here we have officialdom contemplating the establishment of a Fifth Pillar when we already had a fifth pillar in the making (St George). This is a scandal of the first order. The official reasons given were that the two takeovers were necessary for system stability reasons. That claim lacks substance. Either officialdom – the Treasurer, his staff, the central agencies, the competition and banking regulatory authorities – were collectively rather dim-witted about the state of play or these were political deals. Either inference, and no alternative inference seems possible, does not bode well for the personnel involved.

In particular, we have Mr Samuel, current chairman of the Australian Competition & Consumer Commission, publicly expressing doubts about the two takeovers for which he gave the stamp of expert authority. Of BankWest in particular, Mr Samuel is on record as saying: "The advice that we had at the time from both APRA and the Reserve Bank, I think, gave us absolutely no choice. We had to approve that merger."⁴ Senator Xenophon noted the same reservations by Samuel in his Minority Report in this Committee's *Report on Bank Mergers* (p.83). And on St George, it has been reported: "Meanwhile, the competition regulator, Graeme Samuel, admitted doubt on whether Westpac's takeover of St George would be approved had it occurred today. 'There's even a question ... that if Westpac were to seek to acquire St George today, rather than prior to

¹ Three articles by the author, written during and after the official deliberations, highlight the adverse consequences of the takeover: 'Why the St George Takeover Matters', *New Matilda*, 20 May 2008, <http://www.newmatilda.com/2008/05/20/why-st-george-takeover-matters>; 'Banks must be kept in check', *Canberra Times*, 13 October 2008, <http://www.canberratimes.com.au/news/opinion/editorial/general/banks-must-be-kept-in-check/1331800.aspx>; 'Big Banks Win As Labor Screws Small Business', *New Matilda*, 6 November 2008, <http://newmatilda.com/2008/11/06/big-banks-win-labor-screws-small-business>.

² *On Line Opinion*, 20 November 2009, <http://www.onlineopinion.com.au/view.asp?article=9717>.

³ That submission will no doubt be accessible from the Committee's archives. It can also be accessed at: http://sydney.edu.au/arts/political_economy/downloads/JonesSubSECBankMergersInquiry30109.pdf. That submission had the distinction of being the only submission held in camera (apart from one withheld at the request of its author), with not even the author's name available for public scrutiny. Critical reflections on past failings of the regulatory apparatus and the relevant personnel (the reason after all why an inquiry into bank mergers was necessary) have evidently to be handled with diplomatic sensitivity.

⁴ *Lateline Business*, May 2009, reproduced on 'Bank Competition Dead', *Inside Business*, 31 May 2009, <http://www.abc.net.au/insidebusiness/content/2009/s2585528.htm>.

the global financial crisis, whether we'd have the same view as what we had back then. I don't know the answer to that but I raise it as a question,' he told the ABC.”⁵

The ACCC's Public Competition Assessment of the proposed Westpac-St George takeover emphasised a claimed inconsequential effect on competition from the takeover; it did not emphasise the stability issue.⁶ For good reason, as the competition regulator's brief is to assess matters pertaining to competition. It turns out that the takeovers were approved by the competition regulator under pressure from elsewhere, yet a defense is written by the ACCC on other grounds – false premises. Taken at face value, the Assessments were rubbish, and here I was naively taking the assessments at face value. It was preferable, it appears, for the authors of these assessments to appear ill-tutored than to appear to be bereft of principle. The assessments are manufactured lies. What other reports from the ACCC can be trusted once it is clear that its integrity has been breached? The extraordinary significance of this abuse of legislated responsibility has slipped under the radar.⁷

Such is the unsavoury backdrop by which we arrive at the current dominance of the Big 4.

The Unsatisfactory State of Play in Figures

The Big 4 now account for:⁸

- 81.1% of household deposits (CBA & Westpac 44.2%)
- 67.0% of gross loans & advances (CBA & Westpac 49.4%)
- 87.2% of loans to households for housing (CBA & Westpac 56.7%)

The Big 4 possess, know they possess, and seek to exercise their market power, all grace of the long-term deregulation and privatisations of ill-informed and fiscally opportunist governments and permissiveness of the competition regulator. In particular, the current elevated status of CBA and Westpac has not been won by superior 'competitive' ability, but is courtesy of acquisitions, and additionally for the CBA its large deposit base being a continuing legacy of its previous status as the People's Bank.

Whether or not the banks are currently facing higher funding costs, and the jury is still out, the issue is the ready ability of the Big 4 to recoup potential funding cost increases. CBA CEO Ralph Norris claims: “The fact of the matter is I've got to run this business on the basis of it being

⁵ Eric Johnston, 'Funding costs to keep pressure on interest rates', *The Age*, 7 December 2009, <http://thebigchair.com.au/news/insight/cba-chief-new-warning>.

⁶ Australian Competition & Consumer Commission, *Public Competition Assessment: Westpac Banking Corporation – proposed acquisition of St George Bank Limited*, 13 August 2008, <http://www.accc.gov.au/content/index.phtml/itemId/501191>.

⁷ Perhaps a historian of competition regulation, though this species is now so rare as to be possibly extinct, might find it rewarding to re-examine the grounds on which the takeovers of Challenge Bank, the Bank of Melbourne and Colonial were approved.

⁸ Australian Prudential Regulation Authority. *Monthly Banking Statistics*, September 2010.

sustainable."⁹ No. CBA's rate of return on equity in 2009-10, in spite of its losses during the crisis, was 18.7%.

The Big 4 banks reported an aggregated \$20.7 billion in profits for 2009-10 (Westpac \$6.3 billion, CBA \$5.7 billion, ANZ \$4.5 billion, NAB \$4.2 billion) – up from \$13.7 billion in 2008-09. Reporters have claimed that this sum has been inflated by much writing back of previous provisions for bad debts. The claim seeks both to rationalise the scale of the profits and to imply that the banks got through the crisis relatively unscathed because of their perspicacity.

On the contrary. APRA statistics¹⁰ highlight that the bad debts bogey hasn't gone away. It is true that \$10.3 billion of bad debt provisions was returned to balance sheets in 2009-10 as 'cured loans' (c/f \$6.8 billion for 2008-09). But \$25 billion of 'new impaired assets' was provided for (c/f \$33.4 billion for 2008-09), and \$11.6 billion of impaired assets was written off (c/f \$6.9 billion for 2008-09). The latest Financial Reports for all Big 4 banks highlight that bad debt provisions increased (albeit not dramatically) as a percentage of loans and of equity.

So net profits for the Big 4 are up significantly, in spite of the direct effects of the crisis and the indirect effects of provision for impaired assets.

In 1959-60, the gross income of financial corporations in general as a percentage of total corporate income was 5.8 per cent; as a percentage of total business income, it was 2.4 per cent. By late 2006, the percentages had risen to 20 per cent and 15 per cent respectively, and have fluctuated around those levels since.¹¹ This trend of 'financialisation', with occasional blips, has been ever upward. Part of this 15 cents in every dollar of business income appears to constitute a private tax on all commercial activity.¹²

The Big 4 banks now appear to practice 'administered pricing'.¹³ This strategy was formalised by Du Pont after World War I when General Motors, over which it exercised control, was in danger of collapsing after the post-war recession. The banks price products so as to deliver a required profit mass or rate of return from current business activities – a privilege available only to firms possessing monopoly or cartelised oligopoly power. Adverse effects on profits are met by a renewed pricing structure oriented to regaining lost ground. Sustainability indeed.

The Problem is Deep-seated

⁹ Eric Johnston, "I'm where the buck stops": CBA chief defends rate rise', *Sydney Morning Herald*, 5 November 2010.

¹⁰ Australian Prudential Regulation Authority, Consolidated Group Impaired Assets – B5, Reserve Bank of Australia Statistics.

¹¹ Australian Bureau of Statistics, 5206.0, *Australian National Accounts*, Table 7: Income from Gross Domestic Product (GDP), Current Prices; Evan Jones, 'Welcome To The Age Of Financialisation', *New Matilda*, 3 June 2010, <http://newmatilda.com/2010/06/03/welcome-age-financialisation>.

¹² A comparable argument is made by David Richardson, *A licence to print money: bank profits in Australia*, The Australia Institute, March 2010.

¹³ The concept belongs to New Deal economist Gardiner Means. Both the concept and its author were the subject of (unsuccessful) demonisation by American orthodox economists, committed to the quaint notion that the market rules OK of necessity. C/f John M. Blair, *Economic Concentration: Structure, Behavior & Public Policy*, Harcourt Brace Jovanovich, 1972, Part IV.

We have already recently had several related inquiries by this same Committee – Bank Mergers, September 2009; Access of Small Business to Finance, May 2010 – more narrowly focused inquiries thankfully ‘got up’, but still courtesy of a political milieu dominated by the major political Parties that is unsympathetic to examinations on a larger canvas.

Marginal tinkering, or the drunk looking under the lamppost for his keys

Although there are some desirable (complementary) recommendations in these two reports, the general tenor is for marginal tinkering. Mealy-mouth aspects of the Majority and Labor Minority recommendations in the bank mergers report offset the stronger elements in both. The failings of the ACCC and the Treasury are excused. And so on. In the small business finance report the treatment of the Commonwealth Development Bank and its lessons for both small business and rural finance (Ch.6) is lamentable, representative of lazy kowtowing to establishment verities and to the powerful vested interests. The predecessors of these same vested interests opposed the CDB and its forerunners from the start; yet in spite of the CDB being constrained in its charter by the private banking lobby, it still managed to craft a successful niche in a notoriously difficult arena.¹⁴

Thus underlying sources of problems are avoided; sacrifices must necessarily be made to the vested interests; the concept of conceiving of structures satisfying desirable criteria, towards which recommendations might be addressed for long-term solutions, is anathema. Courageous political decisions taken in the past, from across the political spectrum, that ran counter to powerful vested interests are now an unknown ancient history to those members of the current political generation, the current bureaucracy, and the current regulatory authorities.

This is simply not good enough. Apart from the cowardice, the palliatives are akin to the drunk looking under the lamppost for his keys.

Tinkering with solutions may appear easier in the short term but may not address the problems that are agreed as problems.

For example, one, it has been mooted that an additional site of competition for the Big 4 might be found in the creation of a bank within Australia Post. A close scrutiny of the experience of New Zealand’s Kiwibank would be essential were this idea to move beyond the vague suggestion stage. However, the idea has drawbacks. Though the availability of multiple outlets has appeal, one can’t readily graft a bank onto a post office. It would be a savings bank at best, and there are already adequate options in the savings bank domain.

For example, two, there is a current push by the banks and their supporters for the allowance to issue ‘covered bonds’, currently banned. Submitting to this pressure would only serve to entrench the dominance of the Big 4, but would constitute a substantial threat to the system’s already tenuous integrity.¹⁵

¹⁴ The life and cynical execution of the Commonwealth Development Bank is described in Evan Jones, ‘A sorry saga of reform off the rails’, *Canberra Times*, 6 August 2001.

¹⁵ The covered bonds move involves an attempt to redefine liabilities as assets, and to leverage liabilities for greater borrowing (with dangerous implications for the post-default creditor hierarchy). It is no wonder that the option is denied by the Banking Act, and opposed by APRA.

For example, three, the claim that variable rate mortgages are unconscionable or dangerous is a diversion. Variable rate mortgages are a reasonable ‘product’; the problem is the capacity of the Big 4 to vary the rates in scale and timing at their discretion.

For example, four, the urging from some quarters for a control over major bank ‘price signalling’, even if from admirable motives, is an impossible, unworkable project.

For example, five, the suggestion that the banks should abolish exit fees is a diversion. Exit fees *per se* (apart from questions of scale) are a reasonable charge. Other inhibitions to switching lenders nevertheless deserve attention. When a small business/farmer borrower is effectively trapped with a lender who is threatening foreclosure along with the (currently gratuitous) demand to ‘find another lender’, there is a *de facto* cartel operating in which no other lender will intrude on the present lender’s fiefdom. Moreover, small business/farmer borrowers are often unhappy with their lenders, but are loathe to attempt to switch because of the reasonable presumption that the alternatives are no better. In addition, the profoundly subordinate relationship that small business/farmers have with their lenders induces further caution in attempting to switch lenders.¹⁶ But all these reasons behind the difficulty of switching are not linked to any readily alterable mechanism; rather they are linked to a lack of lenders both in sufficient numbers and with sufficient integrity. St George offered precisely such an alternative, but this alternative proved to be intolerable to the Big 4’s collective complaisance. In short, behind the switching problem is the larger problem.

The problem is deep-seated

The problem is large scale and systemic. We have four mega corporations, *allfinanz* institutions, with octopus-like coverage of the entire Australian financial sector, and hence of the entire Australian economy. They are effectively a law unto themselves. They lobby governments into submission. They dictate terms to the legal profession with their unsurpassed expenditure on legal opinion and litigation. And so on.

The problem is the environment that facilitated this outcome – as noted above, it is the result of uncritical deregulation, cynical privatisation and the craven tolerance of mergers and takeovers over the last thirty years. From the perspective of the most astute at the time, the whole point of deregulation, always obscured, was not ‘greater competition’ but to facilitate a resurgence to dominance of the (then) trading banks in the Australian financial sector – and what a brilliant success.

Who in authority has the courage to look at the big picture, a bit of history and draw the evident implications? It is instructive that John Hewson, godfather of the push for a banking inquiry in the late 1970s (leading to the establishment of the Campbell Committee) when an advisor to Treasurer John Howard, has changed his tune. He wrote in the *Australian Financial Review* on 13 August: "As one who has spent much of his professional life fighting for deregulation and reform of our financial system to give our banks many of the freedoms and structures that they now enjoy, I am embarrassed that I have contributed to breeding this sort of arrogance and

¹⁶ I am familiar with a Western Australian small business recently foreclosed by the National Australia Bank, in which the bank’s hostility was aroused when the customer disclosed that they intended to factor their customers’ indebtedness to them for lack of adequate support from the bank. Banks can even warn off a threatened customer’s suppliers, contractors, advisors, etc., which dramatically imperils a customer’s viability.

behaviour." In July 2009, six well-known economists, of varying political persuasions, called for a new broad financial system inquiry. Even Ian Harper, longtime close friend of the banks (and some time holder of bank-funded Professorial Chairs), supported that call. The establishment and its financial media cheer squad has readily derided critics as 'loopy', 'ratbags', 'populists', etc. This list of heavyweights cannot be so labelled.

A convenient mis-story of unilateral progress

Nobody is casting a beady eye on the entire post-deregulation system. Perennially, 'failings' of the pre-deregulation system are thrown up. For example, even as strong a bank critic as *Sydney Morning Herald* journalist Ian Verrinder has recently penned a representative denunciation of the past:¹⁷

If you envisage a rosy future of government-regulated, artificially low rates, you'd be wise to take a peek into the past, to the days before financial deregulation. Your bank never had quite enough cash to lend you, at least not at the official rate. But the affiliated credit company down the road had heaps and could make up the shortfall with a loan at about twice the regulated rate offered by the bank.

Apart from a neglect of then alternative sources of credit, there is no acknowledgements of the positive dimensions of the post-World War II age of banking regulation (there were no financially-induced crises). Equally as significant, criticism of the past is used de facto to avoid a critical examination of the present. In effect, the present system might have its 'blips', but this is the price 'we' (the generic public) pay for a generally admirable system.

The past is not used for critical reflection (in particular, the Australian financial system pre-World War II has been written out of history), but simply to be used as a bogeyman. It's all black/white, evil/good.

Particular failings of the post-deregulation system are rarely acknowledged; they are even more rarely examined. More, the failing are never aggregated and examined systemically. Past inquiries into the banking sector have contributed to this neglect, of which more below. Some examples – the foreign currency loan scandal; the early 1990s recession we had to have; ongoing malpractice by the Big 4 against small business/farmer customers; and the orgy of intemperate lending leading up to the 2008 crisis. The latter phenomenon, although consistently documented in pieces by journalists, is regularly denied in official circles.¹⁸ The after-effects are still being felt, and reported upon in pieces, and are still being ignored in their aggregate implications in official circles.

Pushing back the market concentration through divestment?

On market concentration, the horse has already bolted out of the long-open door. A principled partial means of dealing with the undue concentration would be the forced divestment by Westpac and the CBA of St George and BankWest. Takeovers tolerated on unprincipled

¹⁷ Ian Verrinder, 'More trouble ahead? You can take that to the bank', *Sydney Morning Herald*, 25 November 2010.

¹⁸ The broader picture of financial system failings leading to the 2008 crisis is outlined in Evan Jones, 'The Crisis and the Australian Financial Sector', *Journal of Australian Political Economy*, No.64, Summer 2009-10, pp.91-116. http://www.jape.org/component/option.com_remository/Itemid,26/func.fileinfo/id,129/

grounds, the idea of divestment on principled grounds can hardly be considered mad. Senator Xenophon mooted the idea in his Minority Report within the Bank Mergers Report (1.15ff.). But of course hell with freeze over before that sensible suggestion could be taken seriously, not least because the same foxes are still running the henhouse.¹⁹

Errant bank portfolios

The Australian banks did pretty well considering, goes the mantra. As per usual, the downside is discounted or ignored, even though the problems are still on the balance sheets (as well as off the balance sheets). There are the ill-considered loans to the companies that a modicum of intelligence would have shunned – ABC Learning, Allco Finance, Babcock & Brown, Lehman Brothers Australia, Commander Communications. There are the ill-considered loans to the cowboy boom-and-bust commercial development sector, with Centro as Exhibit A – by December 2008, domestic banks held 86% of \$190 billion of commercial property exposure.²⁰ There are the ill-considered loans to the hotel sector. There are the ill-considered margin loans for leveraged speculation. There are the ill-considered loans to the innately dodgy Management Investment Schemes.

The second tier banks were also involved in such ill-considered loans – precisely because, being second tier, they felt it necessary to emulate the Big 4 on the terms of the reigning culture of lending practices loose in both scale and direction. This issue is relevant to the inquiry's central concern with banking competition because the current weakness of the second tier (apart from predatory takeovers, as above) is linked to the disproportionate adverse effects on that tier of poor lending practices. It is no use increasing numbers of institutions if they merely become lambs to the slaughter in the next round of ill-considered lending in an inappropriate hegemonic culture. No doubt Bendigo & Adelaide Bank management thought that lending to 'investors' in Great Southern MIS would contribute to its 'sustainability' (Ralph Norris' word); ditto Bank of Queensland to the 'investors' in Storm Financial. It's the Big 4-dominated culture and the regulatory tolerance that is to blame.

The phenomenon of the *adverse* effects of 'competition' in an underlying inappropriate culture has been well treated by economist Steve Keen (in the context of securitised-mortgage lending frenzy and the subsequent reduction of mortgage lending competitors).²¹

The motto: look behind concerns of 'competition' for the bigger picture. The pre-deregulation era had portfolio requirements specific to specific financial institutions – ah, but that was in the discredited era that it is no longer permissible to examine. The ravaging and the subsequent death of the iconic State Savings Bank of Victoria (as with the Savings and Loans fiasco in the US) is emblematic of the phenomenon of regress rather than progress in our understanding of how financial systems work.

¹⁹ It is instructive that BankWest remains a separate legal entity, making it an easier target for divestment!

²⁰ This was the backdrop to the move to create the thankfully aborted 'Ruddbank' from which private bank lending mistakes would be propped up by the public purse. C/f Carolyn Cummins, 'Commercial property a big hole for Big Four: NAB', *The Age*, 21 April 2009, <http://business.theage.com.au/business/commercial-property-a-big-hole-for-big-four-nab-20090420-acok.html>.

²¹ Steven Keen, 'More banks, more problems', *Business Spectator*, 10 November 2010, <http://www.businessspectator.com.au/bs.nsf/Article/Banks-competition-regulation-debt-mortgage-lending-pd20101109-B23E8?>

The banking/wealth management merger and its downsides

Then there is the fostered fusion (with two fortunate exceptions – ANZ/NML and NAB/NML-AXA) of the banking and insurance cum wealth management sectors. This development has also enhanced the current dominance of the Big 4. This is another arena in which officialdom supposedly wants more competition but fosters its antithesis.

Dysfunctionality prevails in this merger, partially acknowledged in the specifics but ignored in the aggregate. Again, a merger ordained by the Great God Deregulation, so who are we mere mortals to critically examine the after effects?

Have any of the banks been buying their own shares, via their wealth management arms, to prop up their ailing share price?

The Big 4 have managed to take top seats at the grand racket that is compulsory superannuation and its strategically opaque and deliciously exploitative fee structure. Then there is the fostered culture at the coal face of retail banking that pressures bank clerks into opportunist salespeople, flogging products questionably packaged. Add the unconscionability, born of incompetence married to hubris, in the wealth management (sic) domain that flourished in the boom years, courtesy of the Big 4's culture of untouchability.

The last has been most manifest in the practices of the CBA's subsidiary Colonial First State. In October 2008, it froze redemptions to investors; upon re-opening after a 12-month close-down, it froze redemptions again in January 2010.²² CFS, in partnership with its parent, engineered a package of facilities on a large scale that allowed the previously inconsequential regional financial adviser Emmanuel Cassimatis to turn Storm Financial into an ongoing nightmare for its 'investors'. Learning nothing from the Storm Financial imbroglio (save for the desirability of upping the CFS advertising budget), the CBA's related subsidiary Commonwealth Financial Planning (CFPL) has been found belatedly to be employing staff engaged in giving 'inappropriate advice'.²³

* * *

The above dimensions are selected to highlight that the concern to reduce the dominance of the Big 4 demands a more fundamental examination of the current structure and operations of the Australian financial system. One needs to start from another starting point. Rather than ask, how to patch up the current system, one needs to ask, *what kind of financial system do we want?*

Re: (c) how competition impacts on unfair terms that may be included in contracts

²² CPFL is a subsidiary of the CBA for purposes of profit but not, it appears, for losses.

²³ c/f Mike Taylor, 'Commonwealth Financial Planning enters compensation program', Money Management, 3 November 2010, <http://www.moneymanagement.com.au/news/commonwealth-financial-planning-enters-compensatio#comments>. The comments beneath this online article, highlighting untoward practices systemic rather than accidental, provide salutary reading. I am familiar with a New South Wales low income retired couple who invested their savings with CFPL in 2007, electing for what CFPL's Product Disclosure Statement claimed was a '100% medium risk option'. Only belatedly and accidentally did they discover that 60% of their funds were placed in a 'high risk option'. They have been unable to obtain redress for this unconscionable action.

Unconscionability in the banking sector

The originator of this component in the terms of reference deserves congratulation. A blunt answer to the question in (c) may be found in Submission No.16 – “Competition has very little influence on unfair contracts because the whole of the industry eventually takes up the opportunity.” Quite. Unconscionability is a system-wide phenomenon and deserves to be examined systemically.

The strong statement by the author of said submission deserves qualification. The stronger are the Big 4, the more their immunity from accountability. They set the standard, and the anti-social culture filters down from there. With respect to small business/farmer relationships, in particular, all four major banks have engaged in malpractice, typically without redress. If the big boys can get away with certain practices, why not lesser institutions?²⁴ Thus an adverse system-wide culture can be at least partially spawned by an environment that has allowed a handful of powerful banks to rise and to dominate the sector.

And the adverse system-wide culture? The garden variety retail home mortgage contract, now of extraordinary complexity, can incorporate unconscionability, which hasn't bothered the monetary authorities or regulators to date.²⁵

The lender – small business/farmer relation is one of profound asymmetry, a subordinate relationship in which the borrower operates at the almost complete discretion of the lender. The issue is covered briefly in my submission (part VI) to this Committee's inquiry into bank mergers.²⁶ From that submission:

Indeed, the big four's treatment of their SME constituencies has verged on the scandalous. The arena is pervaded by bank staff incompetence and indifference (a byproduct of financial deregulation that has produced staff cuts and rapid staff turnover at the pointy end of lending appraisal and management), and even malpractice, generally a result of head office pressures. The extent of unconscionable conduct is underappreciated because its coverage is anathema to a cowardly media management, and the relevant regulators prefer to take an ostrich stance to the problem.

In short, the SME market is profits fodder for the four big banks, the product of a deeply unbalanced relationship. The bank wants profits with minimal input (just give us security over your assets, especially the family home, and go away); the SME firm wants competence, commitment and integrity. In many instances the bank meets few or none of the firm's expectations.

²⁴ I am familiar with comparable malpractice amongst lesser institutions. In 2005, a private mortgagor suffered an unagreed switching of facilities by lender Perpetual limited (in conjunction with Macquarie Mortgages), leading to property possession, without redress. A Sunshine Coast builder was foreclosed unconscionably by the Bendigo Bank following the establishment of a 2001 development loan with that bank. A provincial Queensland commercial laundry business was defaulted unconscionably by Suncorp in 2005, leading subsequently to defalcation against the company by the bank-appointed manager/receiver.

²⁵ C/f Annette Sampson, 'Not all contracts are fair', *Sydney Morning Herald*, 8 March 1995; 'Hidden in the fine print', *Sydney Morning Herald*, 24 September 2001;.

²⁶ See fn.3.

However the issue is dealt with more systematically in my submission to the 2009 Inquiry into Australia's Judicial System, the Role of Judges and Access to Justice by the Senate Standing Committee on Legal and Constitutional Affairs.²⁷

The asymmetric power of the bank lender via the 'contractual' relationship is manifest on at least three distinct levels. In the language of the submission (addressed to the supportive role of the legal profession and the judiciary in entrenching bank lender power over the borrower) (p.4ff.):

First, the law and the bench have trouble confronting a contract that is formally above board but binds parties unequally *whose relationship is rooted in asymmetry*. This phenomenon characterises the representative small business 'market' environment. ... Such a contract/relationship (within such an anti-competitive market environment) is thus the natural vehicle for ongoing unconscionable behaviour ...

The bench has trouble confronting that the more powerful party to a formally above board contract will use its structured power *systemically* to profitable effect because its incumbents are beholden to the axiom that a contract is a contract is a contract. ... Whenever anything potentially unsavoury arrives, commerce is deemed to be legitimately a 'free-for-all'. [C/f *Westpac v Potts*, Q'ld SCA, 657 of 1988, 1992; *ACCC v Berbatis*, HCA 18, 2003] ...

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

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

The bank's right to abrogate the contract at any time for reasons unknown is written into the contract! Here is an intrinsically unconscionable contract for the most fundamental of financial instruments underpinning commercial life. ...

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

The potential for (and actuality of) major bank malpractice is thus a function of broader forces – regulatory inaction (see below) and a legal culture steeped in a social Darwinist mentality (accompanied by a finely honed sensibility amongst the legal profession for where the main chance in income arises).

²⁷ The submission was held in camera but is available from the author or at http://www.blumeaumu.org/files/JonesSenateLegConCommeSub309%20_1_.pdf.

Two recent positive developments have run counter to regulatory inaction and judicial complicity. First, ASIC, after initial prevarication and dissimulation, has chosen to take on the banks involved in fuelling the Storm Financial ‘production line’. Second, a judge has elected to decide for the business customer against the bank, in *Kay v NAB*.²⁸ In his judgment, Rothman J noted: “From day one of the contract, NAB was in breach ... NAB continued in breach for the duration of the contract.” (par.75) Nevertheless both these developments are compromised.²⁹

Moreover, the banks involved in the Storm case remain unrepentant, not least the bank with the biggest involvement, the CBA. The CBA has promised restitution for its admitted failings, but delivered nothing of the kind, highlighting that the crocodile tears were to be a means of forestalling substantive restitution. The Storm Investors Action Group has claimed that many of its members have been left embittered by their experience with the Commonwealth Bank resolution scheme.

So also the NAB remains unrepentant.³⁰ The Rothman judgment was partial, weak given the evidence, with *Kay et. al.* left to engage in ongoing mediation over terms of compensation. The NAB has learnt nothing from previous judicial strictures (mostly in guarantor cases).³¹

So the banks which exist courtesy of a government licence, with attendant implicit and explicit guarantees underpinning their profitability, delight in thumbing their noses at the public source of their privileges. And the taxpayer funded regulators and judicial system have to devote precious resources to dealing with this anti-social hubris.

The collectivity of the post-Wallis monetary and financial regulatory authorities has let gaps emerge in the regulatory structure. The Australian Prudential Regulation Authority has within its charter the right to intervene and examine a bank’s internal operations. It has exercised that right on only one occasion – that of NAB in 2004 following the NAB’s trading desk scandal (and only then because it had been found asleep over the HIH/FIA collapse).³² APRA then highlighted a dysfunctionality of NAB’s *culture*, which the NAB subsequently promised to fix. It didn’t keep that promise, and the NAB is deserving of another investigation by APRA. Ditto the CBA.

As noted above, the ACCC, in league with APRA, the Treasurer’s office and the federal Treasury, gave the imprimatur in 2008 to transparent anti-competitive takeovers.

Successively, the ACCC and ASIC have declined to carry out their legislated responsibilities regarding unconscionability in financial services. Since s.51AC (business to business unconscionability) was legislated into the Trade Practices Act in 1998, no action under this section (nor under s.52) was taken by the ACCC when it had coverage for financial services

²⁸ *Kay v National Australia Bank* NSWSC 1116, 30 September 2010.

²⁹ Ian Verrender highlights that ASIC’s preferred option is a negotiated deal that gives victims only a partial payout, as with the ASIC agreement with ANZ over Opes Prime. ‘Welcome to Australia, land of bloated rogues’, *Sydney Morning Herald*, 30 November, 2010, <http://www.smh.com.au/business/welcome-to-australia-land-of-bloated-rogues-20101129-18dzf.html>.

³⁰ Letter from the NAB’s ‘Office of the Customer Advocate’ to this author, 9 August 2010, in response to my letter to Cameron Clyne, NAB CEO, 29 July 2010. I am familiar with ten current cases of what the evidence indicates to be unconscionable conduct by the NAB against small business/farmer customers.

³¹ These strictures are documented in Evan Jones, ‘Illusion and Reality at the National Australia Bank’, October 2010, http://sydney.edu.au/arts/political_economy/downloads/JonesIllusion&RealityatNAB1010.pdf.

³² APRA, *Report into Irregular Currency Options Trading at the National Australia Bank*, March 2004.

(1998 – March 2002), nor by ASIC under the equivalent sections of the ASIC Act since it acquired responsibility for financial services business to business unconscionability in March 2002. I am in possession of copies of correspondence from the ACCC and ASIC to small business complainants consistently advising them that no action will be taken regarding their complaints.³³

Neither APRA nor the Australian Taxation Office monitors the banks' decision-making processes regarding the determination of Bad and Doubtful Debts. APRA guidelines are permissive. But the banking sector has been granted extraordinary discretion in this process by a closeted section of the omnibus Taxation Laws Amendment Act (No 3) 1992 which enabled banks to effect a partial debt write-off (that is, before the realisation of securities) and to claim an income tax deduction on that amount.³⁴

Finally, the industry-funded Financial Ombudsman Service is limited in its charter but potentially partisan on the margins. Its charter is predictably limited to complaints arising from retailing banking, and in that arena it has established a positive track record. This record is not unblemished, however.³⁵ However, the arena of small business/farmer bank customer complaints is undesirably grey and treacherous. With the FOS' predecessor, the ABIO, small business was (understandably) omitted from its charter. Latterly, the parameters for queries have been marginally extended and are now imprecise. As a consequence, some aggrieved small business borrowers waste their time making supplication to the FOS, only to be turned away. Inextricably, ASIC perennially advises complainants to itself to direct their complaints to the FOS. But this domain not only offers time wasting but also further adversity. I am familiar with a Victorian rural retailer who has taken their complaint against their bank to the FOS, only for the FOS to act de facto as the bank's agent – appropriating customer details and offering in return responses lacking credibility from the said bank.

In short, unfair contracts and unconscionable abuse of contracts by bank lenders is widespread in the banking sector. The dominance of the Big 4 is only one factor in an environment with several key determinants, but the power of the Big 4 with respect to the other elements (the regulatory authorities, the law, the political domain) inhibits a functional response to ongoing dysfunctional dimensions in Australian lender-customer relations.

Re: (1) the role and impact of past inquiries into the banking sector in promoting reform

Lessons of past inquiries into the banking sector (or how we got here from there)

³³ Evan Jones, 'Business to business unconscionability – ASIC missing in action', October 2010, http://sydney.edu.au/arts/political_economy/downloads/JonesASIC&Unconscionabilty1010.pdf.

³⁴ John Salmon & Evan Jones, 'Shadow Ledgers and the Default Process in the Australian Banking Sector', April 2010, p.12, http://sydney.edu.au/arts/political_economy/downloads/SalmonJonesBankDefaultAccountingRevised.pdf.

³⁵ A complainant to the FOS over CFPL's unconscionable misdirection of that investor's funds (see fn.23) has been accused of lying (FOS response, 30 July 2010), thus turning the victim into the guilty party. The same complainant had previously received a series of negative responses from ASIC, including one dated 13 March 2009 with the proposition: "Further, I advise that ASIC does not generally provide comment on whether a particular document or course of conduct complies with the Act, *as such comment can be highly detrimental to the reputation of the entities involved*, and cannot be justified in circumstances where, for various reasons, ASIC decides not to prosecute the matter." (emphasis added)

The last inquiry to offer decent insight into the financial sector in Australia was the 1935-37 Royal Commission Appointed to Inquire into the Monetary and Banking Systems at Present in Operation in Australia. That inquiry critically examined the failure of a private sector dominated banking sector to serve the public interest. And what an appropriate motif for the present age! That was a mere 75 years ago. That inquiry (in the context of Depression, World War and the earlier expropriation of the People's Bank by private interests) provided the impetus for the 1945 Banking Act and the Commonwealth Bank Act, which underpinned the post-War era of regulation.

The landmark in banking inquiries was, of course, the 1979-81 Campbell Inquiry. Apart from useful data in the Interim Report, the stellar reputation of the Campbell Report is undeserved. The report's opening paragraph reads: "The Committee starts from the view that the most efficient way to organise economic activity is through a competitive market system which is subject to a minimum of regulation and government intervention." The rest of the 800 pages is effectively an elaboration on the opening theme – what else can one expect when the outcome of the inquiry is determined *a priori*? Some of the claims – for example, regarding government-owned and/or specialist banks – are so impoverished, indeed devious, as to be scandalous. The Committee omitted an examination, even cursory, of the evolution of the banking sector leading to the post-War regulatory structure. To have done so would have immediately vitiated the bald claim in the opening paragraph. That the post-War regulatory structure was now creaking was self-evident, but to have examined the reasons for that structure's existence (and to have charted its successes) would have required that the Committee consider the necessity for regulatory reform rather than regulatory disbandment. A conscious ignoring of the past was crucial for the strategic agenda. We are now reaping the wind.

The Campbell report bequeathed us abolition of specialist (including government-owned) institutions, market-based banking regulation (generally confined to hands-off prudential regulation), and market-based monetary policy (generally confined to manipulation of the cash rate). The abolition of specialist institutions has been a significant mistake (but elaboration on that subject requires another essay). The over-dependence on prudential regulation has produced failings – lack of control over credit excesses (indeed contributing to it by the discounting of capital requirements on residential mortgage lending), lack of control over bank tendencies to illiquidity; lack of control over off-balance sheet manoeuvres – but the attraction to the system (not least because of Basel-based global legitimation) remains undiminished. The ludicrous over-dependence on the single short term cash rate instrument has produced manifest failings – a fundamental enhancing of boom and bust (rather than offsetting it); an enhancement of the inevitable structural/sectoral/spatial inequalities – but the attraction to the system remains undiminished.

The 1984 *Australian Financial System* report by the [Vic] Martin Review Group effectively facilitated the Hawke Labor Government 'taking ownership' of the Campbell report agenda.

The 1990 House of Representatives Standing Committee on Finance and Public Administration inquiry was a product of public dissatisfaction, backbench disquiet and not least an attempt to head off the one-man crusade of Democrat Senator Paul McLean who was sullyng the sanctity of Parliament with masses of documentation from aggrieved major bank customers.

The [Stephen] Martin report did desirably concern itself with banking concentration (Ch.6), noting that the deregulation years had brought the Big 4 to market dominance. The Committee declined to succumb to the industry's siren song that competition was raging; indeed, it presciently raised the concern that things might be getting worse, with the threat of 'group dominance' of the entire finance system because of the latter day appearance of 'financial conglomerates' (8.23). The Committee recommended that any threatened future takeovers be subject to a 'substantial lessening of competition' test and subject to strong vetting by both the Treasurer and the Trade Practices Commission. The report implicitly highlights that in banking, as with other key sectors, the cynical weakening of s.50 of the Trade Practices Act in 1977 brought permanent damage to those sectors so affected. Under the impossibly high bar of the 'market dominance' test, the National Bank acquired CBC Sydney and the Bank of New South Wales acquired the Commercial Bank of Australia, both in 1981. The Martin report thus recommended that the appropriate test for banking takeovers should be that which was originally written into the 1974 Act. As it happened, the original stronger test was restored to the Act in a 1993 amendment, and under the new 'pro-competitive' Chairman Allan Fels. Ironically (tragically?), the industry-wide predation and consolidation proceeded apace, producing the magnificent edifice that we enjoy today.

Concerns for increasing concentration and lessening competition apart, the weighty Martin report was a fizzer. It downplayed the profound crisis in rural finance (Ch.16); it comprehensively white-washed the foreign currency loans scandal, to which myriad submissions and hearings were addressed (Ch.17); it pilloried whistleblowers on bank unconscionability and fraudulent practices – in particular, Senator McLean and bank victim consultant John Salmon (Ch.18).³⁶ The Committee process exhausted all concerned with the adverse dimensions in banking, in effect cutting off alternative avenues for dissent and redress. McLean was hounded out of Parliament. In effect, the banks took the outcome as giving them *carte blanche* for business as usual, save for a pumping up of the 1989 Ombudsman scheme and the creation of a Code of Banking Practice (1993-96), which was to be honoured mostly in the breach.

It is not surprising, then, that when the newly elected Howard Government, responding to its voter base, got up an inquiry into the hazardous environment facing small business, the relationship of that constituency with its bankers would figure in the inquiry. The House of Representatives Standing Committee on Industry, Science and Technology reported in May 1997. The Reid report, bipartisan, was a standout example of what a Parliamentary inquiry can achieve.³⁷ The failings of the 1991 Martin report are directly reflected in the complaints from small business regarding their financiers (Ch.5), over which hovered the ghost of Paul McLean.

The Reid report achieved some ready formally significant results. A franchising code of conduct was inserted into the Trade Practices Act; ditto, the insertion of s.51AC relating to business to business unconscionability. And a Small Business Commissioner position was established within the ACCC. Formally significant results, that is. An effective franchising code of conduct is still a work in progress, courtesy of a hostile franchisor lobby. The Small Business Commissioner position has elicited no greater understanding of or support for small business within the ACCC.

³⁶ McLean described the report as "a whitewash from beginning to end". Paul McLean & James Renton, *Bankers and Bastards*, Hudson Publishing, Hawthorn, 1992.

³⁷ *Finding a balance: towards fair trading in Australia*, A.G.P.S., May 1997.

And the magnificent s.51AC (or its equivalent in the ASIC Act), as noted above, has never been harnessed for use by the regulator in the financial services arena.

Simultaneously with the Reid inquiry, Howard and Costello launched the large-scale Wallis Committee inquiry, resulting in the Financial System Inquiry report of March 1997. It dominated contemporary media attention, and has received little but kudos since, but (as with Campbell) its untarnished reputation is undeserved.

Its views on competition are insipid (Ch.10). It kowtows to the contemporary prestige of contestability notions (and recommends the abolition of the then ‘six pillars’ policy), and claims all manner of potential breaking down of barriers to competition across products, space, etc. Yet it tacitly acknowledges the ongoing dominance of the majors, and the failure of foreign bank entry to dent this dominance. In spite of this evidence, it has faith that the promises of contestability theory will ultimately be mirrored in reality, and (inconsistently) offers a prayer that the ACCC will maintain an effective watch over developments. This stance (or lack of one) provides the direct precedent to the current Big 4 dominance, and the ongoing tolerance of that dominance.³⁸

The Wallis report at least, unlike Campbell, offered a historical perspective (Ch.14) but it was a correct-line deterministic story ratifying the inevitability of the Campbell-designated deregulatory agenda. The treatment of the past is consistent with its dominant theme – the revolutionary pressure of market forces (combined with now unprecedented technological developments) in breaking down barriers to unified markets. There is an admirable intention embodied in Wallis, given its presuppositions – that regulation should accommodate itself to (and harness?) the inevitable. But two problems become embedded in Wallis.

First, what is ‘inevitable’ is taken too much for granted, effectively constraining regulatory possibilities. The fusion of banking and insurance / wealth management is taken as inevitable. Securitisation is given a blank cheque. The whole panoply of sophisticated financial instruments is de facto given an imprimatur. And so on.

Second, the regulatory intention is naively attached to clean-lines purist solutions. Wallis labels its solutions ‘specialist’ institutions but they are rather a hybrid of new forms of specialism (APRA’s prudential regulation) while abolishing other forms of specialism (sectoral regulation – insurance – or customer-specific regulation – as for retail banking customers and retail investors, etc.). Wallis desirably acknowledges a number of failings (albeit a partial list) of the post-deregulation financial system and implicitly acknowledges the necessity for ongoing revisiting of regulations because of the dialectical interaction of evolving system and evolving regulation (noting in particular the dramatically increased demands, post-deregulation, for a functional regulation for retail financial customers). But this acknowledgement is inconsistent with its *a priori* commitment to the Campbell ‘market-based’ regulatory structure. Hence we get a continuation of a number of institutions, but whose failings on their own turf (as above), not least the over-burdened and in some areas incompetent ASIC, leave ongoing debilitating gaps in

³⁸ It is salutary that the Wallis inquiry was initiated to fulfil the Government’s obligations under the Competition Principles Agreement (App.D), arising from the totalitarian application of the roadmap arising from the wretched 1993 Hilmer report, *National Competition Policy*, in which all economic and social interaction in Australia was to be subject to competition although (as with the Campbell report) the character of this universal elixir was left undefined.

financial regulation in both system stability and customer protection. But because the Wallis report has blessed the present arrangements (which have been merely reinforced post GFC), the debilitating gaps remain.

A postscript is desirable on account of financial system related inquiries. In 1997, the Howard Government, responding belatedly to the complaints of a neglected constituency, initiated a small-scale inquiry into regional banking services by the House of Representatives Standing Committee on Economics, Finance and Public Administration.³⁹ With the National Party now a spent force, the regions and the rural sector were a natural source of depredation for the major banks to recover some of their self-inflicted losses from the late 1980s excesses and the early 1990s recession. The banks cynically cut a swath through regional and rural branches.⁴⁰ The banks could also take heart from the fact that there was now bipartisan indifference from successive governments for regional and rural development initiatives. Alas, clamour by the casualties led to the banks being dragged before the inquiry to explain themselves. The banks duly made a minor *mea culpa*, the report acknowledged that times they are a-changin', and the caravan moved on. The banks have subsequently thrown a few crumbs to the outback whingers, but they have by now established the admiral principle that whatever minor concessions they make to 'public interest' concerns will be on their own terms.

The banks enjoyed extraordinary privileges before World War II. The 1945 Acts constrained those privileges – although, frankly, not unduly. It was up to them to rise to the new forms of competition. The private banks, and their newly formed lobby, sought rather to fight to restore their pre-War privileges (which even Menzies, as well as Fadden of course, was opposed to). The entire period since 1945 can be understood as a long term project by private banking (now enhanced by the privatised CBA) for industry-wide dominance on its terms. That project has been achieved – precisely why this inquiry has been initiated.

That achievement has been facilitated by the long term loss of native intelligence. The post-1945 regulatory structure (and its historical building blocks of specialist financial institutions) was erected by people raised in the school of hard knocks – with hands-on experience of various industrial/commercial sectors, and of Depression and War (the central banker H.C. Coombs as exemplar). By the late 1960s, a succeeding generation of public servants and policy-makers enjoyed no hands-on experience; their tertiary economics education would at least have exposed them second-hand to hard won lessons from the past, albeit they were now also being exposed to the wave of new theories and new ideologies on how market economies were to be regenerated by clearing away all the encrusted imperfections. By the 1990s, the new generations of public servants and policy-makers (including the heavyweights of Treasury and the Reserve Bank) have similarly enjoyed no hands-on experience, but their tertiary economics education had now been cleansed of reference to history. Economic history was now history (it had ceased to exist), and the core syllabus had abolished messy institutional detail, save for the reified universality of the rickety post-Campbell regulatory apparatus.⁴¹ Everything was now in perfect working order.

³⁹ The Hawker report, *Regional Banking Services: Money too far away*, March 1999.

⁴⁰ Admittedly, the now fully privatised CBA under David Murray did the same across low income suburbs in the major cities.

⁴¹ C/f the lamentable Olivier Blanchard & Jeffrey Sheen, *Macroeconomics*, Australasian edn, Prentice Hall, 2004.

Conclusion

Simple stories gleaned from ivory-towered thinkers, ideology and vested interests have impeded lateral thinking regarding how present unsatisfactory elements in the Australian financial system may be dealt with.

With herculean detachment, we might ask ourselves “What kind of financial system do we want?” Certain desired criteria might be established, but would be necessarily broader and more socially conscious than Treasurer Howard’s criteria for the Campbell inquiry – that of ‘efficiency’ and ‘national economic prosperity’ but within the Government’s ‘free enterprise objectives’. The second criterion is a motherhood statement, the third is an ideological constraint, and the first, although important, has been narrowly interpreted. The casualties of boom and bust, of exclusion and of malpractice have been excluded from the calculus.

The inhibition to market power, given the fundamental significance of the sector, would be high amongst those desired criteria. From this prior perspective, the current dominance of the Big 4 as self-serving financial conglomerates is simply unacceptable.

Thus instead of concentrating purely on marginal tinkering to offset the dominance of the Big 4, one might consider the downsizing of the Big 4, in the public interest. (The dismantling of the obscene aggregate of ‘earnings’ by the Big 4 CEOs, now running at \$44 million, would constitute a symbolic diminution to scale of these pigs at the trough.)

One notes as a general premise that the dominance of the Big 4, trading as growth stocks, presents a fundamental threat to the future public interest.⁴² A recent article highlights the greater public interest in these institutions operating and trading as yield stocks, to inhibit potential inappropriate expansion and subsequent instability.⁴³

As for downsizing, one could start with the divestment of insurance / wealth management from the Big 4, the fusion of which no defensible argument has ever been mounted.⁴⁴ Share-broking subsidiaries could readily be hived off. And so on.

One could complement downsizing imperatives with renewed portfolio restrictions and constraints on dangerous product ‘innovations’. Perhaps the straight-out banning of margin lending for share market speculation? Perhaps the banning of (other than specialist) bank dealing in particular derivative instruments?

This downsizing vision could also see the supported re-emergence of a range of more specialist institutions. One important arena is that of small business and non-corporate rural finance

⁴² The same concern goes for the status of the two major retailers, Woolworths and Coles.

⁴³ Bernard Keane, ‘Hockey gets it rights on banks’, *Crikey*, via *Business Spectator*, 22 October 2010, <http://www.businessspectator.com.au/bs.nsf/Article/banks-interest-rates-government-politics-economy-pd20101021-AF5N6?OpenDocument&src=kgb>.

⁴⁴ It is noteworthy that the main inroads into trading bank market shares in the post-War period (in terms of finance sector assets) were not the perennially touted finance companies or building societies but life offices and pension funds (figures cited in Wallis report, p.578). Life offices also had active residential mortgage divisions in competition with the banks. So how has competition been enhanced by the acquiescence to the consolidation of these sectors?

(classically mislabelled as ‘agribusiness’), its special character obliterated by Campbell and now characterised by an oppressive feudal overlordship of lender over borrower.

But in addition, one should naturally seek to ensure that the current regulatory apparatus functions according to the roles formally demanded of it. For example, that APRA intervenes more aggressively to correct dysfunctional and anti-social bank cultures; that it aggressively curbs off-balance sheet activity of the banks; that it examines the manner in which the banks establish impaired asset provisions and impaired asset write-offs. And in particular, that the systematic neglect of bank unconscionability against small business/farmer customers successively by the ACCC and ASIC be urgently addressed.

In conjunction with this head-on broadside on major bank power, there is some tinkering that seems appropriate.

In general, all mechanisms of public support that benefit the major banks unequally should be systematically examined and withdrawn. For example, the recent wholesale guarantee was priced unequally (the major banks paying 70 basis points whereas the second tier and credit unions paying 100-150 basis points); the government should consider retrospectively reimbursing the second tier and credit unions for costs associated with the differential.

More generally, the massive central bank support for the banking sector with the onset of the GFC, enjoyed unequally by the Big 4, demands to be comprehensively wound down. As noted in the RBA’s 2008 annual report:⁴⁵

To ease tensions in the domestic money market, the Bank made increased use of repurchase agreements (repos) using domestic assets rather than foreign assets (in the form of foreign exchange swaps). The major increase was in the Bank’s holdings of securities issued by authorised deposit-taking institutions (ADIs) acquired under repo, which rose from around 40 per cent of the Bank’s portfolio of domestic securities to around three-quarters. In September and October 2007, the Bank also expanded the range of collateral eligible for open market operations, to include residential mortgage-backed securities (RMBS) and asset-backed commercial paper (ABCP). At end June 2008, RMBS and ABCP purchased under repo amounted to \$3.3 billion, about 6 per cent of the domestic portfolio.

Pull the plug on everything that goes to the Big 4, even if it involves reverse discrimination.

Finally, as one particular and little known example, the government should be induced to repeal post-haste the relevant section of the Taxation Laws Amendment Act (No 3) 1992 (as noted above) which enables banks at their complete discretion to effect a partial debt write-off and to claim an income tax deduction on that amount. This facility was originally granted to save the major banks from bankruptcy, it benefits unequally the major banks, and its repeal is long overdue.

⁴⁵ RBA *Annual Report* 2008, ‘The Balance Sheet and Operations in Financial Markets’, <http://www.rba.gov.au/publications/annual-reports/rba/2008/html/balance-sheet.html>.