Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry

Commonwealth Bank of Australia and its associated Australian entities (Group)

Round 3 Hearing – Loans to small and medium enterprises

Closing Submissions

PART A – PROPOSED FINDINGS

1. Counsel Assisting has made submissions that it is open to the Commissioner to make a number of findings of "misconduct" (as that term is defined in the Letters Patent) concerning the business overdrafts case study, and conduct falling below community standards and expectations in relation to the Bankwest business lending book case study. The proposed findings of misconduct include alleged breaches of the *Corporations Act 2001* (Cth) (**Corporations Act**) and the *Australian Securities and Investments Commission Act 2001* (Cth) (**ASIC Act**). This section of the submission sets out CBA's response to those submissions.

CASE STUDY: BUSINESS OVERDRAFTS

Simple Business Overdrafts

2. CBA accepts Counsel Assisting's summary of the evidence in the Simple Business Overdraft (**SBO**) case study at T3035.39 – T3036.16. CBA also agrees with Counsel Assisting's submission that no findings of misconduct or conduct falling below community standards and expectations are open on that evidence.

Overcharging of overdraft interest

A. Factual findings alleged by Counsel Assisting

3. CBA accepts Counsel Assisting's summary of the evidence on the overcharging of overdraft interest case study at T3036.22 – T3037.15 and T3037.23 - 29 subject to the following matters:

   (a) while the initial fix implemented by CBA in November 2013 is properly described as 'manual', CBA does not understand what is meant by, and does not accept, that the fix was 'low level' or that CBA did not inquire as to whether the scale of the problem was larger than one customer.[1] The fix

[1] T3036.35-36.

was not treated as being of low importance - the manual fix was put in place to address the problem for any customer who may be affected whilst a further system based solution was being developed and implemented and that system based solution, once implemented, effectively resolved the overcharging issue for over 95% of affected customers[2] (see further paragraphs 24 and 25 below); and

(b) Mr van Horen did not concede that at least 25,000 statements containing false or misleading representations as to the price of financial services were sent to affected customers[3] (this is addressed further at paragraphs 12 to 14 below).

B. Alleged findings of misconduct

B1. First alleged misconduct finding - Breach of s 12DA of the ASIC Act

4. On 15 May 2018, CBA notified ASIC that it had identified a breach of s 12DA of the ASIC Act in relation to representations made to some business customers concerning the interest charged on their Business Overdraft (**BOD**) and SBO facilities.[4] That view was formed on the basis that periodic statements issued to customers in relation to accounts impacted by the overcharging issue will have misled, or are likely to have misled, the account holder in relation to the amount of interest being charged.

5. In its notification to ASIC, CBA acknowledged that some periodic account statements provided to BOD and SBO customers will have misstated the rate of interest being charged. This acknowledgement by CBA is the only evidence before the Commission on which a finding of a breach of s 12DA of the ASIC Act can be based. Significantly, there is no periodic account statement in evidence before the Commission that could provide the factual foundation for a finding that a particular customer was misled, or likely to have been misled, in contravention of s 12DA of the ASIC Act. The evidence before the Commission mirrors the terms of the acknowledgment made by CBA in its letter to ASIC of 15 May 2018.[5]

[2] Exhibit 3.42 (CBA.9000.0042.0001) - Witness statement of Clive van Horen dated 15 May 2018 in response to Rubric 3-15 (**van Horen 3-15 Statement**) at [38(b)].

[3] T3037.29.

[4] Exhibit 3.42.7 (CBA.0517.0096.6000) - Exhibit CVH-6A to the van Horen 3-15 Statement at [63(a)].

[5] Together with Mr van Horen's acknowledgment that the notification had been sent identifying a breach of s 12DA of the ASIC Act (T2391.04-22).

B2. Second alleged misconduct finding – Breach of s 912D(1B) Corporations Act

6. CBA submits that the Commissioner should not make a finding that CBA contravened s 912D(1B) of the Corporations Act by failing to provide a written report to ASIC within the time prescribed.

7. Section 912D requires actual knowledge of a significant breach before the reporting requirement in s 912D(1B) is engaged. The legislature has expressly made it the responsibility of financial services licensees to determine the significance - and thus reportability – of a breach.[6] On its proper construction, whether a contravention of s 912D(1B) of the Corporations Act is alleged by reference to a failure to give notice *"after becoming aware"* of a breach or by reference to a failure to give notice *"as soon as practicable"*, a contravention is to be determined by reference to a finding that the contravener had:

   (a) actual knowledge of a breach or likely[7] breach; and

   (b) actual knowledge that that breach or likely breach was significant; and

   (c) despite that knowledge, the contravener failed to give notice to ASIC in accordance with s 912D(1B) of the Corporations Act.

8. There is nothing in the language of s 912D(1B) to indicate that anything short of actual knowledge is sufficient to engage the obligation. The terms of the provision only find support for a subjective construction of the obligation, in which neither reasonable foreseeability nor constructive knowledge, in the sense of knowledge of circumstances that would indicate the facts to an honest and reasonable person, play any part.[8]

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[6] The context to the creation of this responsibility has been summarised in a Treasury report in the following terms: *"Originally, AFS licensees were required to report all breaches to ASIC, regardless of severity. Such a requirement put a large regulatory burden on licensees, as well as an administrative burden on ASIC in having to deal with an influx of minor and insignificant reports. In that context, in 2003 a 'significance' test was introduced to provide a threshold for matters that were required to be reported to ASIC"* Commonwealth Treasury: ASIC Enforcement Review Position and Consultation Paper 1 - Self-reporting of contraventions by financial services and credit licensees, 11 April 2017, p 5. See also exchanges between Counsel Assisting and Ms Louise Macaulay from ASIC at T1906.15 – T1907.24 and the Commissioner and Ms Macaulay at T1907.27 – 45.

[7] It is important to note that "likely" breach has the very specific definition in s 912D(1A), being that *"a financial services licensee is likely to breach an obligation referred to in that subsection if, and only if, the person is no longer able to comply with the obligation"*. In other words, it is limited to a future breach that has not yet occurred.

[8] See eg *Harris v Commercial Minerals Ltd* (1996) 186 CLR 1 at 9-10. None of the common legislative drafting techniques (including those of a definitional type used in the ASX Listing Rules e.g Rule 19.12) to import an objective test into the provision have been employed, e.g. *"ought reasonably to know"* or *"ought to have been aware"* (see, eg, *Joslyn v Berryman* (2003) 214 CLR 552; *Neindorf v Junkovic* (2005) 222 ALR 631; *Allen v Chadwick* (2015) 256 CLR 148; *Dedousis v Water Board* (1994) 181 CLR 171). In that respect, section 912D may be readily contrasted with sections 947D and 1043A of the Corporations Act.

9. As noted, on 15 May 2018, CBA notified ASIC of a significant breach under s 912D of the Corporations Act in relation to the overcharging issue.[9] The evidence before the Commission does not support a finding that CBA had actual knowledge of the breach and its significance at any time prior to that notification being made. Nor does the evidence support a finding that, fixed with that knowledge, CBA made a conscious decision not to report the breach to ASIC.

10. Rather, the evidence is as follows:[10]

(a) When it identified the overcharging issue, CBA understood that it had acted in error and that CBA's error had negatively impacted its customers. CBA also understood that breaches of contract as between CBA and affected BOD and SBO account holders had occurred. Accordingly, CBA proceeded to develop and implement a remediation program.

(b) Following the Financial Ombudsman Service (**FOS**) complaint in July 2016, when it became apparent that the overcharging issue was more significant than had been appreciated, each of the Institutional Banking and Markets (responsible for managing the BOD) and Retail Banking Services (responsible for managing the SBO) business units independently looked at the question of whether the issue required notification to ASIC and each concluded that the overcharging issue was not a breach that required notification under s 912D of the Corporations Act.

(c) In preparing for this round of the Commission hearings, CBA further reviewed the overcharging issue and, in doing so, identified that, in issuing periodic statements to BOD and SBO account holders affected by the overcharging, it had breached s 12DA of the ASIC Act, and that breach was significant for the purposes of reporting to ASIC under s 912D of the Corporations Act. As Mr van Horen said during the course of his examination:[11]

> *"…coming to prepare for the Royal Commission, clearly we gave this matter a whole lot more thought, considered different views. And it's now clear that there was a reportable breach, specifically around the statements misrepresenting what the interest rate … was or should have been."*

[9] Exhibit 3.42.7 (CBA.0517.0096.6000) - Exhibit CVH-6A to the van Horen 3-15 Statement.

[10] Exhibit 3.42.7 (CBA.0517.0096.6000) - Exhibit CVH-6A to the van Horen 3-15 Statement.

[11] T2391.16-21.

11. Not only was that evidence not contradicted, and nor could it be, it plainly represents a reasonable and rational explanation. Having regard to the actual awareness that is required to enliven the reporting obligation under s 912D, there is no evidence to support a finding that CBA contravened that obligation in relation to the overdraft overcharging issue.

B3. Third alleged misconduct finding – Breach of s 12DB(1)(g) of the ASIC Act

12. CBA did not breach s 12DB(1)(g) of the ASIC Act. There is no evidence before the Commission to sustain a finding of breach. As noted above in respect of the first alleged misconduct finding, the only evidence before the Commission supporting that alleged misconduct is CBA's own notification to ASIC on 15 May 2018 regarding a breach of s 12DA.[12] That notification did not acknowledge any breach of s 12DB(1)(g) of the ASIC Act. Further, and with respect, the basis on which Counsel Assisting submitted that a finding of a breach of s 12DB(1)(g) of the ASIC Act is open rests on a mischaracterisation of Mr van Horen's evidence. In closing, Counsel Assisting submitted:[13]

> *"Thirdly, as Mr van Horen's evidence demonstrated, each time that CBA sent a statement that said that the interest rate was 16 per cent, when in fact the interest rate being charged was much higher, CBA made a false or misleading representation as to the price of the financial services that CBA was providing. Mr van Horen conceded that at least 25,000 statements were sent. It might well be thought that it is open to find that the sending of each of those statements constituted a contravention of s 12DB(1)(g) of the ASIC Act…*" (emphasis added)

13. Mr van Horen's evidence went no further than acknowledging CBA's concession that it breached s 12DA of the ASIC Act by sending false or misleading statements to affected customers.[14] He made no concession of the type emphasised in the above extract. On the contrary, when it was put to Mr van Horen that there had been 25,000 instances of false or misleading representations, he answered:[15]

> *"Look, I think this feels to me like a very legal interpretation of the legislation. I absolutely couldn't agree – you know, I don't know enough about that to say yes.*"

[12] And an acknowledgement by Mr van Horen of that breach notification being sent: T2391.04-22.

[13] T3037.23-33.

[14] T2391.01-09.

[15] T2391.44-47.

14. Further, when the specific allegation of a breach of s 12DB(1)(g) of the ASIC Act was put to Mr van Horen, referring to statements concerning the price of the facility, he answered: *"I don't understand that. So you're asking me quite a legal question. I'm not going to be able to give you an answer to that*".[16] Accordingly, the summary submitted by Counsel Assisting in closing – that Mr van Horen conceded that 25,000 statements were sent containing false or misleading representations as to the price of the financial services – is incorrect.

15. There are important differences between s 12DA and s 12DB(1)(g) of the ASIC Act. Critically, a contravention of section 12DB(1) of the ASIC Act is, by virtue of s 12GB(1), an offence punishable on conviction by a fine[17]. Section 12DB(1)(g) of the ASIC Act provides:

> "*A person must not, in trade or commerce, in connection with the supply or possible supply of financial services, or in connection with the promotion by any means of the supply or use of financial services: … make a false or misleading representation with respect to the price of services*"

16. Relevantly, the provision requires:

    (a) there to be a false or misleading representation with respect to the price of services; and

    (b) that representation be made "in connection with" the supply or possible supply of financial services.

17. The use of the relational phrase *"in connection with the supply of financial services"* in s 12DB adds an element that CBA submits is not made out on the evidence before the Commission.

18. The impugned conduct is the provision of account statements to customers. While CBA accepts that the BOD and SBO overdraft facilities (and the related transaction accounts) are financial products,[18] and that a "*financial service*" is defined to include "*deal[ing] in a financial product*"[19] and "*provide a service…that is otherwise supplied in*

[16] T2392.12-14.

[17] The penal character of the provision raises the interpretative principle described in *Stevens v Kabushiki Kaisha Sony* (2005) 224 CLR 293 at 210-211 [45] namely, that in determining the correct construction of legislation, a Court is to have regard to its penal character.

[18] Because financial products include "*a credit facility within the meaning of the r*egulations" (see s 12BAA(k)) of the ASIC Act and "*any deposit taking facility made available by an ADI"* (see s12BAA(h)).

[19] Section 12BAB(1)(b) of the ASIC Act.

relation to a financial product",[20] CBA submits that any false or misleading representation in account statements provided to customers was not made in connection with the supply of financial services. CBA makes that submission for the following reasons.

19. Section 12BAB(7) of the ASIC Act prescribes the conduct that constitutes dealing in a financial product as constituting (relevantly): applying for or acquiring a financial product; issuing a financial product; varying a financial product; and, disposing of a financial product. The provision of account statements to BOD and SBO account holders does not fall within any of those forms of dealing.

20. The question that then arises is whether the account statement is a service that is otherwise supplied in relation to the BOD and SBO facilities (pursuant to s 12BAB(1)(g)). CBA submits that account statements provide customers with information concerning those products but do not, of themselves, constitute the provision of a service.

21. Accordingly, the requisite relational connection between the impugned representation and the supply or possible supply of financial services, as defined under the ASIC Act, is not established on the evidence.

22. Further, and in the event that CBA's above submissions as to the application of the elements of s 12DB(1)(g) to the facts of the overdraft interest case study are not accepted, CBA notes that s 12GB(1) where it relates to s 12DB(1) is an offence:

    (a) requiring proof beyond reasonable doubt;[21] and

    (b) to which the defence of mistake of fact is available.[22]

23. As to the standard of proof, CBA submits that this elevated standard serves to underscore why, on the evidence before the Commission, it is not open to find that CBA has breached s 12DB(1)(g) of the ASIC Act.

24. As to the defence of mistake of fact, CBA submits that it is open to the Commissioner to find on the evidence that, at the time statements of account were sent to affected

[20] Section 12BAB(1)(g) of the ASIC Act.

[21] Sections 2.2 and 13.2 of the *Criminal Code*. The ASIC Act provides no different burden of proof in relation to contraventions of s 12DB (but expressly states a person who contravenes the section is guilty of an offence).

[22] While as a strict liability offence (see s 12DB(3) of the ASIC Act) there is no requirement to prove intention, knowledge, recklessness or negligence in a prosecution for a breach of section, section 9.2 of the *Criminal Code* provides that a person is not criminally responsible for an offence that has a physical element for which there is no fault element if "*at or before the time of the conduct constituting the physical element, the person considered whether or not facts existed, and is under a mistaken but reasonable belief about those facts*".

customers, CBA was operating on the mistaken but reasonable belief that fixes had been put in place to remedy the error. Specifically, the evidence was that:

(a) Having first become aware of the issue in August 2013, CBA's incident management team had introduced a manual process to resolve the overcharging issue. The process was aimed at identifying and removing incorrect pricing before it affected any BOD and SBO accounts. While this manual control was in place, work continued to develop a system-based solution to prevent the incorrect pricing from occurring.[23]

(b) A coding change in the system was implemented in May 2015 to address the root cause for the overcharging issue in respect of both SBOs and BODs. This coding change was aimed at ensuring that the SAP system applied correct pricing. Once the coding change was implemented, CBA's understanding at the time was that the overcharging issue was resolved.[24]

(c) Following implementation of the technical solutions, CBA considered that the work to implement system solutions for the overcharging issue was complete.[25]

25. As matters transpired, CBA's belief in the efficacy of the measures that had been implemented was mistaken. But that belief was, in the circumstances, reasonable. This was not a case in which CBA knew of the existence of a systemic problem and simply ignored it. CBA had identified the issue and believed that the measures that had been devised and implemented to address it (or at least manually detect and remediate those instances pending the systems fix) had been effective and therefore did not countenance the possibility that account statements were being sent to customers that incorrectly stated the amount of interest being charged. CBA thought, mistakenly, that the manual and system fixes were in place to ensure that customers were correctly charged one interest rate sourced from one system. Accordingly, if the Commission is otherwise satisfied that sufficient evidence exists to find that the elements of s 12DB of the ASIC have been satisfied to the criminal standard (which CBA submits is not open), that finding should not be made having regard to the mistaken belief under which CBA was operating throughout the period of overcharging.

[23] van Horen 3-15 Statement at [30].

[24] van Horen 3-15 Statement at [31].

[25] van Horen 3-15 Statement at [33].

CASE STUDIES: BANKWEST BUSINESS LENDING BOOK

Project Magellan

26. Through examination of internal Bankwest and CBA documents, and the evidence of Mr David Cohen, Counsel Assisting submitted that it would be open to the Commission to conclude that the following became apparent to CBA in the period of approximately 18 months after it purchased Bankwest:

    (a) there were indications of serious problems with the quality of the Bankwest business loan book;

    (b) there were indications of significant problems, with the diversity of the Bankwest loan book;

    (c) there were indications of problems with business functions, including loan management by Bankwest;

    (d) there were indications of problems with aspects of the risk management function, including provisioning.[26]

27. Counsel Assisting concluded that the evidence Mr Cohen gave (namely, that as the above risks came to light following the acquisition, CBA took steps to address the risks), was entirely consistent with internal documents produced to the Commission.[27] One of those steps was implementing Project Magellan.

28. CBA agrees with Counsel Assisting's submissions that:

    (a) Project Magellan was primarily concerned in the first instance with impairment and provisioning;

    (b) it is open to the Commission to conclude that, a task of the nature of Project Magellan was necessary to address the risks that CBA and Bankwest had identified in the Bankwest business loan book following the acquisition of Bankwest. Counsel Assisting submitted that in this context, the focus of Project Magellan on reviewing part of the loan book that had not been identified up until that point in time as troublesome or impaired in order to consider whether further provisioning needed to be made for accurate

[26] T3045.10 - T3046.2.

[27] T3046.4-9.

reporting of the Group's end of financial year accounts, seems both prudent and responsible.[28]

29. Finally, CBA adopts Counsel Assisting's submission that a review of the documentary evidence produced to the Commission has not revealed any evidence that Project Magellan was intended to be, or was intended to be part of, a process of deliberately defaulting loans against Bankwest customers.[29]

Customer cases

30. It was in the context of Counsel Assisting's consideration of the Bankwest business lending book that the Commission heard evidence concerning four former customers of Bankwest who had made various allegations concerning Bankwest's conduct in relation to their respective loan agreements.

31. Counsel Assisting has submitted that it is not open to the Commissioner to find that CBA engaged in misconduct in relation to any of the four witnesses, being former Bankwest customers Messrs Kelly, Doherty, Weller and Stanford.[30]

32. CBA agrees with that submission.

33. Counsel Assisting has also submitted that it is open to the Commissioner to find that *"the conduct of CBA in relation to each of the four witnesses involved errors of communication and transparency, which are below community standards and expectations"*.[31] CBA accepts that, in the limited respects identified in paragraphs [41], [54], [80] and [83] below, the quality of its communications with, or the level of transparency shown toward, each of Messrs Weller, Doherty and Stanford fell below community standards and expectations. CBA submits, however, that, other than in those limited respects, its conduct in relation to those witnesses did not fall below community standards and expectations.

Mr Weller

34. Counsel Assisting submitted that the evidence of Mr Weller raised *"three main issues"*: (1) *"the shortening of the term of the facility through a series of variations to the facility"*; (2) *"the lack of transparency around the final valuation of the hotel"*; and (3) *"the relationship between the breaches of financial covenants and the entry into*

[28] T3046.23 - 35.

[29] T3047.2 - T3047.5.

[30] T3052.28 - 30.

[31] T3052.30 - 34.

the deed of forbearance".[32] Each of these issues is addressed in turn below, in light of Counsel Assisting's submission that it is open to the Commissioner to find that CBA's conduct involved errors of communication and transparency.

Reducing the term of the facility by variation

35. In 2005, Mr Weller, through a corporate entity, entered into a facility in the amount of approximately $3 million with Bankwest to finance the purchase of the Nambucca Hotel in Macksville, NSW.[33] The term of the facility was 15 years, with a 2 year interest-only and fixed interest period.[34] In 2008, the facility limit was increased to approximately $3.7 million (with an interest-only period of 24 months),[35] to allow Mr Weller to buy out his then business partner in the hotel.[36]

36. In around mid-2010, the interest-only period and fixed interest period expired.[37] At that time, Mr Weller indicated (and Bankwest accepted) that he would have difficulty meeting his principal and interest payments in full pursuant to the terms of the facility.[38] Accordingly, Mr Weller and Bankwest entered into negotiations to vary the facility on terms that were acceptable to both parties.[39]

37. Although Mr Weller wished to maintain the original facility expiry date (being 8 June 2023), the interest pricing for a term of that length, which included a long-term finance premium, was unattractive to him.[40] He expressly declined an offer from Bankwest of a varied facility with an expiry date of 8 June 2023 and higher interest rates,[41] and ultimately accepted an offer of a varied facility with a reduced term of 1 year, which he had requested, and lower interest rates.[42]

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[32] T3049.28-33.

[33] Exhibit 3.101.01 (CBA.4000.0074.7964) - Exhibit PNC-1 to Exhibit 3.101 (CBA.9000.0055.0001) - the Witness Statement of Peter Nathaniel Clark dated 27 May 2018 in response to Rubric 3-24 (**Clark 3-24 Statement**).

[34] Exhibit 3.101.01 (CBA.4000.0074.7964) at .7965 and .7966 - Exhibit PNC-1 to Clark 3-24 Statement; Exhibit 3.97(WIT.0001.0039.0001) - Witness Statement of Stephen Francis Weller dated 21 May 2018 in response to Rubric 3-24 (**Weller Statement**) at [28].

[35] Exhibit 3.101 - Clark 3-24 Statement at [14]; Weller Statement at [28].

[36] Exhibit 3.101.23 (CBA.4000.0074.7955) - Exhibit PNC-22 to Clark 3-24 Statement.

[37] Weller Statement at [28].

[38] Exhibit 3.101.50 (CBA.4000.0075.1597) at .1599 -Exhibit PNC-49 to Clark 3-24 Statement.

[39] Exhibit 3.101.55 (CBA.4000.0074.8001) - Exhibit PNC-54 to Clark 3-24 Statement; Exhibit 3.101.56 (CBA.0001.0318.1880) - Exhibit PNC-55 to Clark 3-24 Statement; Exhibit 3.101.57 (CBA.0001.0318.1887) - Exhibit PNC-56 to Clark Statement; Exhibit 3.101.60 (CBA.4000.0074.8041) - Exhibit PNC-59 to Clark Statement; Exhibit 3.101.61 (CBA.0002.1959.7331) - Exhibit PNC-59A to Clark Statement; Exhibit 3.101.64 (CBA.4000.0074.8062) - Exhibit PNC-62 to Clark Statement.

[40] Exhibit 3.101.61 (CBA.0002.1959.7331) - Exhibit 59A to Peter Clark 3-24 Statement.

[41] Exhibit 3.101.60 (CBA.4000.0074.8041) - Exhibit PNC-59 to Clark 3-24 Statement.

[42] Exhibit 3.101.61 (CBA.0002.1959.7331) - Exhibit PNC-59A to Clark 3-24 Statement; Exhibit 3.101.62 (CBA.0001.0318.1910) at .1911 - Exhibit PNC-60 to Clark 3-24 Statement.

38. In oral evidence, Mr Weller, when asked why the term of the facility was reduced to 1 year, stated *"I have no idea"*.[43] In this regard, Mr Weller's recollection of events is imperfect, as demonstrated by the contemporaneous documentary evidence referred to above (at paragraph 37). Mr Weller was offered refinance for a 13 year term, however the term of the facility was reduced to 1 year at Mr Weller's request.[44]

39. CBA submits that the Commissioner should not find that CBA's conduct in relation to reducing the term of Mr Weller's facility *"involved errors of communication and transparency, which are below community standards and expectations"*.[45] CBA communicated with Mr Weller in relation to the reduction of the term of the facility in a clear, cooperative and transparent manner.

Transparency concerning the final valuation

40. In November 2012, Bankwest commissioned a valuation of the Nambucca Hotel (**2012 Valuation**).[46] Mr Weller was not provided with a copy of this valuation.[47] In oral evidence, Mr Clark accepted that the valuation was one of several relevant factors considered by Bankwest in deciding whether or not to renew Mr Weller's facility when it expired in January 2013.[48] Mr Clark also accepted that the making of significant decisions in relation to customers on the basis of valuations which the customer had not seen reflects a lack of transparency.[49] Mr Clark also accepted that providing the 2012 Valuation to Mr Weller would have been *"a fair thing to have done"*.[50]

41. Accordingly, CBA accepts that the failure to provide Mr Weller with a copy of the 2012 Valuation reflects a lack of transparency. Mr Clark's evidence was that it is no longer CBA's policy to withhold valuations from customers who have paid for valuations, except in certain limited circumstances, for example, if it could affect the sale price.[51]

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[43] T2624.39-40.

[44] Exhibit 3.101.62 (CBA.0001.0318.1910) at .1911 - Exhibit PNC-60 to Clark 3-24 Statement.

[45] T3052.30-34.

[46] Exhibit 3.101.103 (CBA.0700.0001.2764) - Exhibit PNC-101 to Clark 3-24 Statement.

[47] T2626.38.

[48] T2681.40-T2682.6.

[49] T2682.18 -20.

[50] T2683.8-10.

[51] Exhibit 3.101 Clark 3-24 Statement at [225(b)]; T2682.8–9.

Entry into the deed of forbearance

42. In September 2012, Bankwest met with Mr Weller to discuss the forthcoming expiration of his facility in January 2013.[52] Bankwest made clear to Mr Weller that he would need to reduce the debt on the facility by way of a *"significant equity injection"* if the facility was to be renewed.[53] Mr Weller indicated a willingness to reduce the debt by selling some of the Nambucca Hotel's gaming machine entitlements (**GME's**) and also a house in Sydney.[54] In December 2012, Bankwest met again with Mr Weller to discuss these matters.[55]

43. By the time his facility expired on 10 January 2013, Mr Weller had not sold the GME's or the house, or otherwise reduced his debt to Bankwest.[56] On 25 January 2013, Bankwest and Mr Weller entered into a deed of forbearance which required Mr Weller to pay to Bankwest the proceeds from the sale of the GME's by 28 February 2013, and the proceeds from the sale of the house by 15 April 2013.[57] The first draft of the deed was provided to Mr Weller on 8 January 2013,[58] two days before the expiry of the facility. In oral evidence, Mr Clark expressed the view that the timing was *"unfortunate"* and *"doesn't seem very fair"*,[59] but explained that the deed *"was both for our benefit and for the client's benefit to codify, if you like, the agreement between the two parties"*, in circumstances where the facility was to expire but the bank intended to refrain from taking any immediate enforcement action.[60] In that regard, Mr Weller was informed shortly after the draft deed of forbearance was provided that it was to be returned in *"2 weeks"* and that there was *"no immediate enforcement action planned"*.[61]

44. Mr Weller did not comply with the terms of the deed of forbearance.[62] From this time, the borrower was in monetary default and the facility remained in arrears until the appointment of receivers[63] (contrary to Mr Weller's evidence that he was never in

[52] Weller Statement at [57].

[53] Weller Statement at [58].

[54] Weller Statement at [58]; Exhibit 3.101.120 (CBA.0001.0328.0177) at .0181- Exhibit PNC-117 to Clark 3-24 Statement.

[55] Weller Statement at [63]-[65].

[56] Clark 3-24 Statement at [149]-[154].

[57] Exhibit 3.101.110 (CBA.0001.0318.0494) at .0506 - Exhibit PNC-107 to Clark 3-24 Statement.

[58] Clark 3-24 Statement at [148].

[59] T2683.31-34.

[60] T2683.20-21.

[61] Exhibit 3.101.105 (CBA.0001.0328.0013) at .0015 - Exhibit PNC-103 to Clark 3-24 Statement.

[62] Clark 3-24 Statement at [161].

[63] Clark 3-24 Statement at [54].

default of any monetary payments owed under the facility[64]). On 5 March 2013, Bankwest informed Mr Weller by letter that he had breached the terms of the deed and that, consequently, the forbearance period was at an end.[65]

45. In oral evidence, Mr Weller appeared to suggest that his facility was not renewed because *"there was insufficient time to roll over the loans"*.[66] However, that evidence is inconsistent with the contemporaneous documentary record referred to above. Nor is it correct to say that a breach of non-financial covenants led directly to the deed of forbearance. The deed of forbearance itemised the borrower's Defaults of the Facility, namely four breaches of non-financial covenants, the failure to repay the loan at expiry, failure to pay interest on 21 January 2013, and various breaches of the Facility Agreement.[67] Bankwest did not take action on the basis of the breaches of financial covenants by the borrower, which were present from the Facility's inception in 2005.[68]

46. CBA submits that the Commissioner should not find that Bankwest's conduct in relation to the deed of forbearance *"involved errors of communication and transparency, which are below community standards and expectations"*.[69] Bankwest communicated clearly with Mr Weller about its expectations concerning the renewal or extension of his facility, and commenced discussions in that regard some four months prior to expiration. Upon expiration, the bank communicated to and agreed with Mr Weller the terms upon which it was willing to forbear. Mr Weller was unable to satisfy those terms.

Mr Doherty

47. Counsel Assisting submitted that *"the focus of [Mr Doherty's] case study was upon the use of valuations…by Bankwest in its decision-making with respect to the facility"*.[70] Counsel Assisting drew particular attention to Bankwest's decision in 2008 to provide a facility to Mr Doherty's business to finance construction costs (**Construction Facility**) of a hotel and retail development in Hobart (**Inner Collins**), and Bankwest's decision in 2011 not to renew or extend the Construction Facility.[71]

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[64] See Counsel Assisting's summary of Mr Weller's evidence at T3049.6-9.

[65] Exhibit 3.101.113 (CBA.4000.0074.1183) - Exhibit PNC-110 to Clark 3-24 Statement.

[66] T2627.15-16; and see Weller Statement at [65].

[67] Exhibit 3.101.110 (CBA.0001.0318.0494) - Exhibit PNC-107 to Clark 3-24 Statement.

[68] Exhibit 3.101.98 (CBA.0001.0318.0351) - Exhibit PNC-96 to Clark 3-24 Statement.

[69] T3052.30-34.

[70] T3050.13-16.

[71] T3050.13-16.

Change in approach to valuation

48. The Construction Facility was secured, in part, by a mortgage over Inner Collins and an adjacent hotel, known as Hadley's Hotel (**Hadleys**).[72]

49. In 2008, in deciding to offer the Construction Facility, Bankwest relied upon a 2008 valuation of Hadleys and Inner Collins which assumed that some of the units within Inner Collins would be developed and sold as strata titled residential units, rather than retained as part of the hotel (**2008 Valuation**),[73] a *"mixed use"* valuation. Bankwest provided Mr Weller with a copy of the 2008 Valuation.[74]

50. In 2011, Bankwest obtained a further valuation of Hadleys and Inner Collins (**2011 Valuation**).[75] Bankwest instructed the valuer to value Inner Collins *"in one line"*.[76] Mr Clark accepted that this was a different valuation approach to that which the bank had adopted when it decided to offer the Construction Facility.[77] The valuation was completed in July 2011. Mr Doherty was not provided with a copy of this valuation.[78]

51. Mr Clark did not know on the basis of his review of the file why Bankwest changed its approach to valuing Inner Collins.[79] However, he stressed that the change in valuation approach was not the cause of Bankwest's decision to not extend the Facility.[80]

52. The documentary record indicates that the change in the bank's approach to valuing Inner Collins was consistent with a change in Mr Doherty's strategy for the development and realisation of Inner Collins. At the time of the 2008 Valuation, it was Mr Doherty's intention to develop and sell the top floor of Inner Collins as residential penthouse units.[81] By the time of the 2011 Valuation, however, Mr Doherty was *"looking at and thinking very seriously of going with"* a proposal to retain both Hadleys

[72] Exhibit 3.102.7 (CBA.0001.0320.6600) - Exhibit PNC-7 to the Witness Statement of Peter Nathaniel Clark dated 27 May 2018 in response to Rubric 3-25 (CBA.9000.0054.0001) (**Clark 3-25 Statement**); Exhibit 3.102.21 (CBA.4000.0077.0893) - Exhibit PNC-20 to the Clark 3-25 Statement; Exhibit 3.102.25 (CBA.0001.0319.3606) - Exhibit PNC-24 to the Clark 3-25 Statement.

[73] Exhibit 3.102.5 (CBA.0001.0319.4980) at .4984 - Exhibit PNC-5 to the Clark 3-25 Statement ; Exhibit 3.102.6 (CBA.4000.0041.0785) - Exhibit PNC-6 to the Clark 3-25 Statement at .0788, .0798; T2687.1-9.

[74] T2637.42-45.

[75] Exhibit 3.102.23 (CBA.4000.0078.1880) - Exhibit PNC-22 to the Clark 3-25 Statement.

[76] Exhibit 3.102.23 (CBA.4000.0078.1880) at .1993 - Exhibit PNC-22 to Clark 3-25 Statement.

[77] T2687.4-10; T2688.14-15.

[78] T2689.31.

[79] T2688.15.

[80] T2695.20-37. See further at paragraph 58 below.

[81] T2634.18-46.

and Inner Collins and operate them as hotels.[82] As Mr Doherty accepted under cross-examination, his strategy in respect of Inner Collins changed over time.[83]

53. The evidence also establishes that by 2011, Bankwest disfavoured selling its security assets in a piecemeal fashion.[84]

54. CBA accepts that the failure to provide a copy of the 2011 Valuation to Mr Doherty reflects a lack of transparency. As stated at paragraph 41 above, CBA's current policy is now to provide valuations to customers who have paid for them (except in certain limited circumstances). CBA also accepts that Bankwest's failure to communicate to Mr Doherty the bank's rationale for commissioning the 2011 Valuation on an *"in one line"* basis reflects a lack of transparency. (It is not suggested, however, that Bankwest was required to justify to Mr Doherty its decision to adopt an *"in one line"* valuation.)

Decision not to renew or extend

55. In July 2011, the Construction Facility expired.[85] In his statement, Mr Doherty accepted that this was the expiry date for the Construction Facility.[86] However, in oral evidence, Mr Doherty sought to suggest that he had understood, from the time the Construction Facility was offered in 2008, that although the facility expiry date was initially 30 June 2011[87] and later amended to 31 July 2011,[88] the facility would be renewed or extended to 2013.[89]

56. Mr Doherty's contemporaneous conduct, however, indicated that he understood that the Construction Facility would expire in 2011 and might not be renewed or extended. He accepted that from as early as February 2011, he had been actively pursuing refinance from a third party, Tasmanian Perpetual Trustees (**TPT**), in anticipation of the expiration of the Construction Facility.[90] In March 2011, Harry Kelly, one of Mr Doherty's colleagues, sent an email to Bankwest in which he acknowledged that

[82] Exhibit 3.99.16 (RCD.0024.0013.0209) at .0210 - Exhibit MED-16 to Exhibit 3.99 - Witness Statement of Michael Edwin Doherty dated 24 May 2018 in relation to Rubric 3-25 (**Doherty Statement**).

[83] T2658.46-2659.28.

[84] T2659.24-28.

[85] Doherty Statement at [81].

[86] Doherty Statement at [81].

[87] Exhibit 3.99.04 (RCD.0024.0013.0089) at .0175 - Exhibit MED-04 to the Doherty Statement; Exhibit 3.102.7 (CBA.0001.0320.6600) at .06685 - Exhibit PNC-07 to the Clark 3-25 Statement.

[88] Exhibit 3.102.25 (CBA.0001.0319.3606) at .3622-23 - Exhibit PNC-24 to the Clark 3-25 Statement.

[89] T2640.23-47; T2653.42 - T2654.6.

[90] T2659.4-15; see also Exhibit 3.102.19 (CBA.0001.0319.2870) at .2878-79 - Exhibit PNC-18 to the Clark 3-25 Statement.

Bankwest *"may not have the appetite"* for restructuring the facility upon expiry and *"may wish to quit the connection entirely"*.[91] Bankwest communicated to Mr Doherty in clear terms that the obtaining of refinancing was essential as it no longer wished to support the development.[92] Mr Doherty was unable to obtain refinancing by the time the Construction Facility expired.

57. Following the expiration of the Construction Facility, Bankwest supported Mr Doherty's business for a further 5 months until January 2012 (despite issuing formal notices of default throughout November and early December 2011[93]). By late December 2011, however, Inner Collins was still not open for trading and required substantial rectification work,[94] Mr Doherty's business was *"struggling … to have enough money to meet its commitments"*,[95] the TPT refinancing proposal had fallen through,[96] the ATO had initiated winding up proceedings against Hadleys Pty Ltd[97] (which entity was the mortgagor of Hadleys and Inner Collins,[98] contrary to Mr Doherty's evidence[99]), and Mr Doherty had informed Bankwest that he intended to appoint a voluntary administrator.[100] In January 2012, Bankwest appointed receivers.[101]

58. As Mr Clark explained in oral evidence, the 2011 Valuation was not the reason why Bankwest ultimately decided not to renew or extend the Construction Facility.[102] Although a consequence of the 2011 Valuation was that the loan-to-value (**LVR**) ratio in respect of the facility exceeded the LVR covenant, a formal breach notice was never issued by Bankwest.[103] The contemporaneous material shows that Bankwest endeavoured to support Mr Doherty during the whole of 2011, in the face of increasing pressure from other creditors. The "trigger" for the appointment of receivers was Mr

[91] See Exhibit 3.99.14 (RCD.0024.0013.0204) at .0204-0205 - Exhibit MED-14 to the Doherty Statement.

[92] T2653.29; T2654.8-13.

[93] Exhibit 3.102.32 (CBA. 0001.0319.5636) - Exhibit PNC-31 to the Clark 3-25 Statement; Exhibit 3.102.33 (CBA. 0001.0319.5778) - Exhibit PNC-32 to the Clark 3-25 Statement; Exhibit 3.102.38 (CBA. 2002.0001.2934)) - Exhibit PNC-37 to the Clark 3-25 Statement.

[94] Doherty Statement at [80].

[95] T2654.15-21.

[96] Exhibit 3.102.39 (CBA.3502.0001.1574) at .1574 - Exhibit PNC-38 to Clark 3-25 Statement.

[97] Exhibit 3.102.39 (CBA.3502.0001.1574) at .1575 - Exhibit PNC-38 to Clark 3-25 Statement..

[98] Exhibit 3.102.6 (CBA.4000.0041.0785) at .0821 - Exhibit PNC-6 to the Clark 3-25 Statement.

[99] T2660.18-20.

[100] Exhibit 3.102.35 (CBA. 0001.0319.5891) - Exhibit PNC-24 to the Clark 3-25 Statement; T2656.27-37.

[101] Exhibit 3.102 - Clark 3-25 Statement at [78]-[79].

[102] T2695.20-37.

[103] T2693.39 - T2694.12.

Doherty's stated intention to appoint a voluntary administrator to the entity which was the registered proprietor of the land.[104]

59. Accordingly, CBA submits that the 2011 Valuation was not the cause of Bankwest's decision not to extend the Facility. Mr Doherty said he was exploring refinances *"throughout 2011"*.[105] The bank's conduct regarding the decision not to renew or extend the Construction Facility did not involve "errors of communication and transparency, which are below community standards and expectations".[106]

Mr Kelly

60. This case study relates to two companies, Wildlines Pty Ltd (**Wildlines**) and Silversun Corporation Pty Ltd (**Silversun**). Evidence was given by Mr Michael Kelly (**Mr Kelly**), a director and minority shareholder of both Wildlines and Silversun (together, the Companies). The Companies were both special purpose corporate entities, comprising of syndicates of sophisticated investors.

61. Wildlines and Silversun entered into loan agreements with Bankwest in 2007. The purpose of the loans was to enable each of the Companies to acquire rural land in Western Australia. The intention of the Companies was to have the respective properties re-zoned and, in the case of Wildlines, sub-divided, and to sell the land for a profit.

62. The Wildlines loan agreement was for a term of two years. This term was believed by Wildlines to be a sufficient period to enable the re-zoning and sub-division to occur (which process was anticipated to take 15-18 months).[107] The Silversun loan agreement was for a term of three years. Silversun sought the loan term of three years when applying for the loan, with the intention of having the land re-valued at the expiry of the term in anticipation of the land value increasing.[108] Mr Kelly, a former Bankwest employee with extensive experience in property finance,[109] advised the Companies in the negotiation of the initial terms of the facilities.[110]

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[104] Exhibit 3.102.35 (CBA.0001.0319.5891) - Exhibit PNC-34 to the Clark 3-25 Statement.

[105] T2659.9.

[106] T3052.30-34.

[107] Exhibit 3.88.1 (RCD.0024.0014.0001) at .0002 - Exhibit MLK-01 to Exhibit 3.88 (WIT.0001.0043.0001) - Witness Statement of Michael Lawrence Kelly dated 24 May 2018 (**Kelly Statement**).

[108] Exhibit 3.88.41 (RCD.0024.0014.0087) at .0088 - Exhibit MLK-41 to the Kelly Statement.

[109] Mr Kelly's evidence at T2556.3 - T2556.16.

[110] Mr Kelly's evidence at T2557.14 - T2557.18.

63. Both Wildlines and Silversun experienced delays in having their respective properties re-zoned. Bankwest and the Companies negotiated and agreed six extensions of the Silversun loan agreement, and five extensions of the Wildlines loan agreement.[111] The Companies refinanced their respective loan facilities with Bendigo and Adelaide Bank in 2012, and the property developments appear to have been successful.

Was the Bank's conduct motivated by wanting to 'exit' the facilities?

64. Counsel Assisting summarised the effect of Mr Kelly's evidence as follows:

(a) After expiry of the Wildlines and Silversun loan facilities, the interest rate margin on each of the facilities was increased, and only short-term extensions of the facilities were offered. Further, the LVR for the Wildlines facility was reduced, and the limit of the Silversun facility was reduced.[112]

(b) The increases in interest margin, reduction to the LVR for the Wildlines facility and reduction to the limit of the Silversun facility was for the purpose of encouraging the Companies to exit the facilities, in circumstances where the Bank had communicated to Mr Kelly that it was looking to reduce its exposure to property development.[113]

65. CBA agrees that as at mid-2009 Bankwest, as it was entitled to do, wished to reduce its exposure to specialised property development, such as 'land banking' (a description which Mr Kelly accepted certainly applied to the Silversun development, and which could apply to the Wildlines development).[114] Bankwest acted openly and transparently in this regard, informing Mr Kelly in writing of its intention as soon as a policy to that effect had been adopted within Bankwest.[115] CBA submits that the Commissioner should not find that Bankwest's conduct in this regard "involved errors of communication and transparency, which are below community standards and expectations".[116]

66. The terms offered by Bankwest when negotiating the extension of the Wildlines and Silversun facilities were not solely motivated by a desire that Bankwest 'exit' the facilities.

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[111] T2581.12 - T2581.16.

[112] T3047.37 - T3047.44

[113] T3047.42 - T3047.47

[114] T2557.36 - T2557.40.

[115] T2595.46 - T2596.12; Exhibit 3.88.12 (RCD.0024.0014.0016) - Exhibit MLK-12 to the Kelly Statement.

[116] T3052.30 - 34.

67. From 1 September 2009, the Wildlines facility had expired. From 1 September 2010, the Silversun facility had expired. Bankwest was under no obligation to extend the facilities at all. If Bankwest wished to 'exit' the facilities, it could have done so by not extending the facilities, and taking enforcement action if the Companies had failed to repay the facilities.

68. Bankwest never gave serious consideration to taking enforcement action.[117] Rather, Bankwest granted a total of eleven extensions to the loan facilities during a period where it was apparent that no other financier (including 'second tier' lenders) was willing to refinance the facilities.[118] This was notwithstanding the fact that Bankwest wanted to reduce its exposure to commercial property. Bankwest's repeated extensions of the loan facilities are not consistent with Bankwest having a *"policy… to exit at the end of the term"*[119] at all costs, but instead demonstrated Bankwest's willingness to keep extending the facilities until it was practical to exit them.[120]

Bank's explanation of interest rate changes

69. Counsel Assisting submitted in closing that Mr Brett Perry was unable to identify any contemporaneous guidelines or models relied on to explain the various interest rate changes that were being applied to the Wildlines and Silversun facilities.[121]

70. It is correct that Mr Perry was not able to identify the models or guidelines applied by the Bank when it was negotiating the extension of the Wildlines and Silversun facilities. As a consequence, Mr Perry was not able to explain how each of the specific interest rate margins offered by Bankwest to the Companies when negotiating each of the eleven extensions of the facilities was calculated.

71. However, this is not the same as being unable to explain the fact that the interest rate margins offered by the Bank generally increased during the period 2007 to 2012.

72. Both the initial terms offered by Bankwest at the initiation of the facilities and the terms offered when extending the facilities were negotiated with Wildlines and SIlversun on a commercial arms-length basis. The change in those terms reflected the fact that

[117] T.2609.37 - T.2609.39.

[118] Exhibit 3.88.40 (RCD.0024.0014.0085) - Exhibit MLK-40 to the Kelly Statement; Kelly Statement at [71]. As discussed below, the indicative offer from ANZ dated 15 April 2011 (forming part of Exhibit 3.93.61 (CBA.0517.0096.3671) - Exhibit BRP-61 to the Witness Statement of Brett Robert Perry dated 18 May 2018 in response to Rubric 3-26 (CBA.9000.0052.0001) (**Perry 3-26 Statement**)) was highly conditional and included pre-conditions requiring the development application to be approved and Wildlines achieving $6.871m in pre-sales.

[119] T3048.15 - T3048.16.

[120] T2596.16 - T2596.18.

[121] T3048.20 - T33048.23.

market conditions changed significantly during the period 2007 to 2012. The changes in the market during this period are demonstrated by the unwillingness of any other lender to refinance the facilities.[122] Mr Perry's review of the Bankwest files revealed that there was an indicative offer from ANZ. It is clear that the interest rate margins offered by Bankwest were compatible with those offered by the market[123] – and were expressly acknowledged by the Companies (on one occasion) to be *"very fair"*.[124]

73. Once the market had improved in 2012, the Companies refinanced the facilities. Bankwest effectively supported both Wildlines and Silversun through the Global Financial Crisis by granting extension of the facilities, until the Companies were able to refinance the loan facilities in an improved market.

Did CBA provide inconsistent information regarding default interest rates?

74. Mr Perry accepted that there was an inconsistency in what was told to Mr Kelly in a meeting in 24 January 2011 (**January Meeting**), and what was communicated to Mr Kelly in an email of 28 February 2011 (**February Email**), in relation to the charging of default interest on each of the facilities during a period in which the loans had expired and the extension of the loans was being negotiated.

75. The effect of the inconsistency is that Mr Kelly was told in the January Meeting that the Bank would charge a reduced default interest rate, being the applicable default interest rate of 18.81% less a negative margin of 10% (**Reduced Default Rate**). The February Email stated simply that the applicable default rate was 18.81%, without making any reference to applying any discount to that rate. Further, for a short time the full default rate was applied to the facilities, however, an adjustment was later made to correct it.

76. CBA submits that the inconsistency between the January Meeting and February Email and the subsequent discrepancy between rates charged, whilst understandably troubling to the Companies at the time, is not of great significance in circumstances where the detriment to the Companies was later rectified by an adjustment. Bankwest was under no obligation to apply the Reduced Default Rate, and its conduct in this respect is consistent with Bankwest working with the Companies in a co-operative manner after the expiry of the loans. CBA submits that the Commissioner should not

[122] Mr Kelly's evidence at T2563.26 - T2563.28.

[123] ANZ Indicative Term Sheet dated 15 April 2011, which forms part of Exhibit 3.93.61 (CBA.0517.0096.3671) at.3679 - Exhibit BRP-61 to the Perry Statement. The Indicative Term sheet offers an interest rate for the refinancing of the Wildlines facility of BBSY + 3.25% (being the interest rate plus the annual line fee), but imposed pre-conditions not sought by Bankwest, namely that the development application be approved and Wildlines achieving $6.871m in pre-sales (see Exhibit 3.93.61 at .3682).

[124] Exhibit 3.93.14 (CBA.4000.0074.8630).

find that Bankwest's conduct in this regard involved errors of communication and transparency, which are below community standards and expectations.

Mr Stanford

77. The fourth Bankwest case study was that of Mr Brendan Stanford who operated the Coronation Hotel. Counsel Assisting submitted that the Stanford case study *"concerned CBAs reliance on non-monetary default clauses to exit a connection which was being financially maintained, and also the use of investigative accountants."*[125] In this case study, the Commission heard evidence from both Mr Stanford and also from Mr Cohen. Mr Stanford and his brother Michael Stanford entered into a banking relationship with Bankwest in 2006 to purchase the hotel. Messrs Stanford borrowed $1.2 million to assist with the purchase price of $1.6 million. In 2010, CBA became concerned about the falling value of the hotel.[126]

Non-monetary default clauses

78. During 2010 and 2011, Bankwest sent Messrs Stanford a number of letters notifying them of breaches of certain non-monetary covenants contained in their facility agreement (including breaches of reporting requirements, and Debt Service Ratio and Interest Coverage Ratio covenant breaches).[127]

79. It was Mr Cohen's evidence that non-monetary defaults are a powerful indicator of *"trouble to come"* with a facility. The Stanfords' non-monetary defaults were relied upon as signs that although principal and interest payments were being maintained there was an underlying risk of future monetary default with the facility.[128]

80. Mr Cohen accepted that Bankwest should have had a more fulsome discussion with the Stanfords about why the bank formed the view that the sale of the hotel was the only viable option to enable repayment of the loan, including a direct discussion about the bank's reliance on non-monetary defaults as a warning sign.[129] Mr Cohen

[125] T3051.13 - T3051.15.

[126] T3051.15-20.

[127] Exhibit 3.111 (CBA.9000.0045.0001) - Witness Statement of David Cohen dated 17 May 2018 in response to Parts C to H of Rubric 3-13 (**Cohen 3-13 Statement**) at [172] and [178]; Exhibit 3.111.108 (CBA.0001.0285.1231) - Exhibit DC-104 to Cohen 3-13 Statement; Exhibit 3.111.109 (CBA.0001.0285.1232) - Exhibit DC-105 to Cohen 3-13 Statement; Exhibit 3.111.114 (CBA.0001.0285.1276) - Exhibit DC-110 to Cohen 3-13 Statement; Exhibit 3.111.115 (CBA.0001.0285.1277) - Exhibit DC-111 (CBA.0001.0285.1277) to Cohen 3-13 Statement.

[128] T2780.45 - T.2781.4; T2800.3 - T2800.4; T3051.27 - T3051.30.

[129] T2798.10 - T2799.43.

accepted that community expectations today would require that the bank have a more open and transparent engagement with the Stanfords.[130]

81. Mr Cohen gave evidence that the use of non-monetary defaults in this way is not an easily understood concept, and is therefore not necessarily embedded in community expectations which may focus on the fact that payments are continuing to be made.[131] For reasons that are dealt with in response to the general questions posed by the Commissioner, CBA submits that the reliance on non-monetary defaults as an indicator of the potential need to exit the connection with the Stanfords in this way should not in itself be deemed behaviour that falls below community standards and expectations.

Investigative Accountants

82. On 15 August 2011, Bankwest, by its lawyers Gadens, engaged investigative accountants, PPB Advisory, to inspect the books and records of the Stanfords for the purpose of investigating the trading position of the Hotel Business and to report to Bankwest (**Report**).[132] There is no evidence that the Stanfords were notified by Bankwest of the appointment of PPB Advisory (but they were informed by PPB Advisory of their appointment). The Stanfords were not provided with a copy of the Report; and were required to pay the fees incurred by PPB Advisory in its preparation of the Report.[133]

83. Mr Cohen accepted in evidence that it was unfair to appoint an investigative accountant without first having consulted the Stanfords[134] and unfair to require the Stanfords to pay for the Report within seven days without providing the Stanfords a copy of the Report.[135] In addition, Mr Cohen accepted that it was unfair to require the Stanfords to confirm within seven days whether they accepted that there had been a material adverse change in the financial condition of the hotel, both because the timeframe was unfair and because it was unfair to ask the Stanfords to confirm that finding without seeing the investigative accountant's Report on which the finding was based.[136]

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[130] T2799.41-42.

[131] T2800.1 - T2800.9

[132] Cohen 3-13 Statement at [180]; Exhibit 3.111.119 (CBA.4000.0037.4936) - Exhibit DC-115 to Cohen 3-13 Statement.

[133] T2786.29-34; T2789.45-46; Exhibit 3.111.122 (CBA.0517.0074.0003) - Exhibit DC-118 to Cohen 3-13 Statement.

[134] T2786.45 - T2787.19.

[135] T2790.42 - T2791.2.

[136] T2789.40 - T2789.46.

84. As acknowledged by Counsel Assisting in closing, CBA's policy regarding the appointment of investigative accountants has changed since Bankwest's dealings with the Stanfords. The current policy requires the bank to provide 30 days' notice for payment and requires parts of the investigative accountant's report to be provided to the borrower.[137]

8 June 2018

[137] T2789.42 - T2790.7.