Email to Group Members, 30 Sep 2023

Dear Group Members,

Walsh and ARG v CBA, Proceedings 2016/86790

We refer to the above class action proceedings that are presently before the Supreme Court of New South Wales.

We apologise that there has been a substantial delay in us being able to provide you with an update as to the claim and in relation to the proceedings generally.

We now provide you with an update to the claim, and with two documents that the Court has requested that we forward to you.

Update and resolution

These proceedings were commenced in 2016 by Peter Walsh and by the Australian Retirement Group, in circumstances in which ARG had obtained a loan for construction funding from BankWest.

The loan was obtained prior to the Global Financial Crises, in 2008.

In September 2008, circumstances arose concerning the parent company of BankWest, (HBOS), whereby HBOS decided that it would sell BankWest. The Commonwealth Bank presented itself as a suitable buyer. The acquisition required the approval of the Australian Government.

The transaction proceeded to completion in December 2008.

At the time of purchase by the CBA, the loan book of BankWest was more heavily skewed towards commercial lending, than were the loan books of many other Australian Banks.

Banking standards that applied to Australian Banks at the time, required the maintenance of certain capital adequacy ratios in relation to the risk weighted assets, (loans), of banking institutions, carrying on a business of banking within Australia.

It was alleged by Peter Walsh and by ARG, that following the purchase of BankWest by the CBA, that the CBA had caused BankWest to transfer the loans on its commercial loan book to the Credit Asset Management Department of Bankwest, whereby the ability of customers to comply with the strict terms of their loans was made as difficult as possible.

Many of these commercial loans were ultimately written off. Customers, including Peter Walsh and ARG claimed that they were aggrieved and sought

compensation. Many other customers were placed into bankruptcy. Other customers that were corporations, were either liquidated and / or were placed into receivership. The court lists at the time, and particularly before the Supreme Court of New South Wales, had a preponderance of BankWest cases amongst them, the likes of which have never been at any time prior, or since.

The Commonwealth Bank denied any and all legal responsibility or legal culpability for the events that followed, and the manner in which the loans on the commercial loan book customers of BankWest, were brought to an end.

A series of government inquiries followed in relation to the circumstances in which Bankwest was acquired by the CBA. Those inquiries drew various conclusions.

An inquiry conducted by the Office of the Australian Small Business and Family Enterprise Ombudsman viewed the actions of the CBA in some respects unfavourably. Other inquiries and including a Joint Parliamentary Inquiry of the Australian Government considered allegations as to whether there was a deliberate strategy by the CBA to cause Bankwest to "over-impair" loans in order to seek financial gain through a range of mechanisms after the acquisition of Bankwest.

After considering the evidence and the responses that the Joint Parliamentary Committee received, the Committee decided that it was not able to determine that there had been a deliberate impairment of loans that had been “solely motivated” by clawback provisions under the BankWest contract of sale and purchase, or as a consequence of other warranties, contained within the BankWest contract.

In 2019, the Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry delivered its report to the Governor General, and examined the issue concerning the acquisition of BankWest, by CBA.

As it happened, the Royal Commission had been established by the then Liberal Government in 2017, following at least 26 calls for it in the Australian Parliament. All of these calls had been rejected by the then Liberal government, as it then was.

The then treasurer, Scott Morrison, had rejected the calls for a Royal Commission on the basis that, according to him, ASIC was "a tough cop on the beat" and that the funding of a Royal Commission was an unnecessary extravagance. [The suggestion of the then treasurer in relation to ASIC, grossly dishonest as it was, is one that in all probability even ASIC would reject - as to its capacity to play any form of effective regulatory role in relation to matters such as those raised in these proceedings].

Notwithstanding, in December 2017, the Royal Commission was established by Malcolm Turnbull, Australia's then prime minister, (in the most reluctant of

circumstances), on about the morning after the Bank's themselves had requested that it be established.

The Commission's establishment was said by Malcolm Turnbull, to have been motivated as a consequence of the level of public disquiet across the sector. The Commissioner was however the choice of the government of the day. The Commission had been called, in part, and according to Mr Turnbull as the then Prime Minister of the day, to establish and or to determine whether or not the conduct of the Bank's in the Financial Services Sector was justified, or was unjustified in the controversy that had preceded it.

By its report handed down in February 2019, the Commission determined that the CBA deserved a clean bill of health in relation to the transaction concerning CBA's acquisition of BankWest, notwithstanding circumstances in which the CEO of the CBA at the time had been Mr Ian Narev, recruited across from the international firm of management consultants, McKinsey, and was appointed by CBA as the person responsible for the management of the acquisition of BankWest, by CBA.

McKinsey had previously published an article for the benefit of the banking and finance community styled – “Good Bye and Good Riddance - Excellence in managing wind down portfolios". The paper envisaged that where a banking institution had loans upon its loan book that it wished to have removed from the loan book, that they should all be managed into a bad bank area of the bank, where they could be examined for the purposes of finding an aspect of the loan in which there was a technical default, and in order that the banking customer relationship could be brought to an end.

ARG and CBA obtained an affidavit in the proceedings from an expert in securitisation, to the effect that this program had been introduced at BankWest at the instigation of CBA and for the purposes of purging BankWest of many of the loans that had been on the commercial loan book of BankWest, at the time, as they were loans which in the words of the CBA were loans of a kind that the CBA did not seek to remain associated with, (and although they had been performing loans).

The CBA formally denied the allegations of any form of "bad bank" having been established within BankWest at the time, although the CBA itself had used this term to describe the place to which a number of loans were sent.

It was in these circumstances that the matter was listed for trial in October 2022, but in circumstances in which Just Kapital had ceased funding the matter. Shine Lawyers who had acted for the Plaintiffs and the Group members for some time dropped out of the proceedings as they were no longer being funded, and the matter came to our Firm in circumstances in which there was no source of funding available.

It will be recalled that all Group Members were circularised by our Firm seeking input as to whether there was a source of funding available, or whether Group

Members would wish to fund the action in order that it could proceed. No Group Member or other funder came forward with a suitable proposal although there was discussion with a number of Firms that expressed an interest – no particular funder however crossed the line.

To this end, the proceedings and prior to hearing proceeded to mediation between the Plaintiffs and CBA. His Honour Justice Jacobson, (retired Federal Court Judge), acted as the mediator and at which a provisional settlement was arrived at, the essential terms of which are set out in the documents that accompany. David Rayment SC accompanied by Mr Andrew Smorchevsky, assisting as his junior counsel, appeared at the mediation for the Plaintiffs.

At the mediation, a settlement was arrived at and in circumstances in which the Plaintiffs had no funding to go to hearing and the CBA was aware that the Plaintiffs had no funding to go to hearing.

For these reasons, the settlement that was arrived at has been a limited one. Regrettably, it will not provide a financial return to Group Members. It will however provide a limited benefit to Group Members that become bound by it. The limited benefit is that the Bank will agree that, to the extent that it has not commenced proceedings against Group Members to date in relation to Group Member loans, it will not now commence proceedings against them.

The Bank has also agreed that in the case of any Group Member seeking to opt out of the settlement, that they remain free to do so, and that the CBA will not seek to raise a defence that their claim is the subject of a defence under the Limitation Act, if the limitation period expired in the period in which these proceedings have been underway. The Limitation Act generally provides for the bringing of proceedings within 6 years. The CBA has agreed to relax this requirement for all Group Members that do not wish to be bound by the terms of the current proposed settlement – although any Group Member wishing to bring their own proceedings ought do so promptly and should seek any necessary advice, urgently.

The settlement arrived at provides for a payment for legal expenses, which makes provision for payment of some of the Plaintiffs costs, (only). At this stage, the actual costs run into the millions of dollars. Most of the Plaintiff's current legal expenses and the costs in bringing the claim will now in fact have to be written off, as part of the price in achieving the settlement.

The proposed settlement arises in the circumstances in which the litigation was unable to have been funded and carried on. It yields a far more preferable result to what would have otherwise been the alternative. That alternative was that the proceedings would have been dismissed and a verdict would have been entered for the CBA at hearing, and that would have bound all other Group Members, (unless they had opted out).

For these reasons, the settlement is recommended by this Firm to the Group Members. If it be the case that a Group Members wishes to bring proceedings

that they can fund or organise the funding for, or a number of Group Members wish to opt out of the proceedings either in isolation or together, then that option remains available to them and they are free to pursue it.

Whilst it is fully appreciated that this position may not be warmly received by many Group Members, where funding was sought by this Firm after the failure of Just Kapital to meet its contracted arrangements, and in the events in which Shine Lawyers ceased to act in the proceedings, it is the best result that was available.

Group Members should be assured that the provision that the settlement makes for costs will not see anything like the costs of the Plaintiffs being recovered in full, and that this Firm has maintained the proceedings for some years with no funding at all. At the same time, there has been considerable exposure to costs which will not be recovered in full.

In many respects, it is accepted that the outcome that the settlement provides for in no way provides recompense for the financial destruction and devastation that it is alleged that the CBA's conduct subject of these proceedings caused, but in circumstances in which the costs of litigation and the ineffectiveness of government and institutions of government to deliver what the Plaintiffs would say is the essential function of government, (to provide protection and civility to its citizens), has not been achieved at all in the matters subject of these proceedings.

Under the proposed settlement however, any Group Member that would wish to opt out of the settlement and who wishes to bring their own proceedings, may take their own legal advice and in which case the Group Member must return a completed copy of the Opt Out Notice to this Firm, and / or provide it to the Registrar of the Supreme Court of New South Wales, on or before 31 October 2023.

In every other case, and where a Group Member elects not to opt out, you need not do anything further, and you will become bound by the benefits or the disadvantages of the settlement, as the case may be.

In this case we have also had to struggle with the likes of some stand out candidates whose names we chose not to mention - one who claimed to have been a chairman of the Commonwealth Bank, and who indicated that he alone knew the formula as to how to prosecute and win the case against the Bank, and another who claimed to have information for the benefit of the class action which he intended to provide to the Group Members - if he could receive a percentage payment from the fruits of the action.

Suggestions he would have to show the colour of his information were firstly unheeded by him until, after several years, he agreed to provide what boiled down to nothing more than an assertion that CBA did not legally acquire Bankwest, because CBA didn't seek CBA shareholders' approval before acquiring

it. That information was about as useful as a child's pop gun at a machine gun fight.

Unfortunately the position remains that in litigation money talks, and with enough money, bullshit walks. When it does, there is often no stopping it. At least with respect to the above stand out candidates, they remain free to opt out and perhaps try their own case theory in any such case as they elect to bring against the Bank.

Other Group Members, and if they have access to funds, can also consider bringing their own hopefully saner and more considered and separate proceedings, and applications.

It is in these circumstances that, whereas our best efforts have not been able to and were not able to bring about an alternative outcome, we are regretful of the fact that this is so. The present settlement has been the best as could be arrived at. It provides limited protections to all Group Members. It also provides opportunity for others to bring their own proceedings, if they wish to do so.

As we understand matters, the CBA continues to say that for those that say they have legitimate grievances against the Bank, that they should feel free to bring their cases to the Bank, and the Bank shall hear their voice; although we have heard that type of language recently ruminating from the nation's capital, and note that it will be non binding and advisory, only.

Yours faithfully,

Trevor Hall.

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