Introduction

I have previously made submissions to the Senate Economics Reference Committee's inquiry into the Performance of ASIC, submission number 422 and 281 with regards to the CBA takeover of Bankwest misconduct allegations. The content of my submission 281 was later used as a source of reference for the speech made by Senator Alan Eggleston in Federal Parliament on 25th March 2014 with regards to the unilateral termination of credit contracts by CBA during and after the purchase of Bankwest. I am not a member of any lobby groups or advocacy organisations and make this further detailed submission as a private citizen of Australia.

Terms of Reference

This submission addresses the terms of reference, as it relates to CBA/Bankwest's unconscionable use of non-monetary covenant defaults to terminate Bankwest commercial loans so that CBA could benefit from an impairment indemnity afforded to it during the Bankwest purchase in 2008.

Clawback Allegation & Denial

The central allegation of the CBA/Bankwest unconscionable conduct is that CBA had a financial motive to force Bankwest commercial loan customers into insolvency in order to obtain a discount on the purchase price from HBOS by way of an impairment indemnity - referred to as "clawback". CBA have repeatedly denied the allegations and added repeatedly "it is not in our interest to default customers" and "we work closely with customers in financial difficulties".

At the 2012 post-GFC Banking Sector Senate Inquiry Senator Williams asked of CBA "So there was no clawback? You are saying there was no reason to go and make the books look bad." to which the response was "Absolutely None" (Figure 6).

It is understood that as recently as mid-2014 CBA had issued a Bankwest Position Statement to both Labor and The Coalition categorically restating that no clawback motive existed. It is important to note that this Bankwest Position Statement was issued shortly after Mr Ian Narev stated he was "truly sorry" for the banks conduct during the financial planner scandal and subsequent cover-up.

"Clawback" Proof

Clause 4.2 of the 2008 Bankwest Share Sale Deed is titled "Adjustments to Initial Purchase Price". Subsection (d) is titled "Bankwest Adjusted Purchase Price" and contains a formula as follows.

(d) BankWest Adjusted Purchase Price

The BankWest Adjusted Purchase Price will be the Bankwest IPP subject to the following adjustments:

(i) If the Completion Net Fundamental Tier 1 Ratio is less than 6.25%, the BankWest Adjusted Purchase Price will be the Bankwest IPP decreased by the amount which is determined in accordance with the following formula:

Decrease = (6.25% x RWA) – NFE;

(ii) If the Completion Net Fundamental Tier 1 Ratio is higher than 6.25%, the BankWest Adjusted Purchase Price will be the BankWest IPP increased by the amount which is determined in accordance with the following formula:

Increase = NFE – (6.25% x RWA); or

(iii) If the Completion Net Fundamental Tier 1 Ratio is equal to 6.25%, the BankWest Adjusted Purchase Price will be the BankWest IPP.

Figure 1 - 4.2(d) Share Sale Deed - price adjustment formula

Note the following terms used in the above formula:

"IPP" refers to the Bankwest Initial Purchase Price.

"NFE" refers to Net Fundamental Equity - put simply, this is the bank's capital.

"RWA" refers to Risk Weighted Assets – put simply, this is the aggregate risk weighted value of all the loans on the balance sheet.

This formula is a calculation for Surplus or Excess Capital. By this I mean that any capital that APRA required CBA to hold against the loan book, CBA would not pay for. Any extra capital that was in excess of what APRA required to be held against the loan book, CBA would pay for. The line of delineation could be referred to as a "minimum threshold". The higher CBA could make this minimum threshold, the less CBA would pay for Bankwest.

CBA increased losses as such that nearly all the capital save for $26m was required to be held against the loan book. In order to reduce the result of the price formula CBA could reduce NFE or increase RWA or a combination of both. NFE can be reduced by increasing losses i.e. increasing impairments.

On the 20th Apr 2009 CBA issued a dispute notice which aimed at both decreasing NFE and increasing RWA. Clause 4.2(d)(Figure 1) is proof that a motive did exist for CBA to increase losses to decrease the price of Bankwest.

It was indeed in CBA's interest to crystallise losses prior to 19th Dec 2008. These losses could be incurred firstly, prior to the purchase on 19th Dec 2008 or secondly, **retrospectively after the purchase as long as the impairment date was successful backdated to 19th Dec 2008**.

This was the clawback first referred to in a 2009 article by Robert Gottliebsen (Figure 4).

Retrospective Losses

The question has been posed 'Why would CBA want to deliberately increase losses in a Bank it is buying?'

As CBA General Counsel Mr David Cohen stated at the 2012 Senate Inquiry "the way the clawback works is that CBA could only get benefit for impairments before 18th Dec 2008, any loans that became impaired after this the bank had to bear". This explanation is constructed in such a way referred to in law as deception by way of omission of material fact.

It was clearly not in CBA's interest to create losses in the CBA-owned Bankwest loan book, however it was certainly in CBA's interest to create losses identified after the purchase and then backdated to have occurred on a pre-acquisition date in the HBOS-owned Bankwest loan book, so that HBOS would actually bear the loss. i.e. **create retrospective losses in the HBOS-owned Bankwest loan book**.

On the 20th April 2009, the CBA triggered a dispute process which required Ernst and Young to audit a review of disputed loan book items immediately after the purchase. The goal of this review was to impair further loans after the purchase AND have the impairment date backdated to pre-19th Dec 2008. i.e. retrospective impairments. Essentially CBA planned to further increase losses immediately after the purchase. Again, through backdating the loan impairment dates the losses would be borne by HBOS and not CBA.

Return of Excess Capital

On 7th October 2008 HBOS PLC made an announcement to the ASX around the purchase price. It stated that CBA would pay $2.1 million cash for Bankwest in addition to a return of excess capital of $360 million. (Figure 5)

Consistent with the above statement, the CBA 2009 Half Yearly Report shows that CBA paid a cash consideration of $2.1 million and that a remaining consideration of $328m was yet to be paid (Figure 2). This shows a total consideration of $2.428 million.

The key point is that through increasing losses during the retrospective review, this remaining consideration was reduced from $328m down to $26m. This effectively represents a saving, (be it referred to as a purchase price reduction, consideration reduction, or 'clawback') of $302m.

In a letter to the Senate on 4th Jul 2013 Mr Cohen attempted to explain this as simply an estimation of capital and subsequent adjustment. Importantly, CBA made no reference to the fact that this capital adjustment was the result of increasing further impairment losses (of commercial loan customers) and backdating the impairment dates to 19th Dec 2008, which resulted in the losses being be borne by HBOS.

At the 2012 Senate Inquiry Senator David Bushby asked if there was any **offset** in anyway. (Hansard extract below).

> *Senator Bushby: "Is that an absolute statement that there was no way in which, whether it be against the purchase price or in any other way, shape or form, losses or impaired loans*

> *that became apparent after the purchase date could be offset or claimed back from HBOS under any aspect of the agreement or the deal with HBOS?"*
>
> *Rob De Luca (Bankwest MD): "That is certainly our understanding, and obviously Mr David Cohen discussed that yesterday."*

What the CBA/Bankwest executives failed to clarify, was that after the purchase, the CBA could retrospectively impair customers and deem their impairment event dates to be pre-19th Dec 2008 which would thereby reclassify these impairments that were identified post-acquisition as pre-acquisition impairments.

Total Benefit

When this $300m "clawback" discount is added to the $1.3B upfront discount the total discount is $1.6B. We know that although settlement of the purchase occurred on 19th Dec 2008 the completion of the post purchase review pursuant to the share sale agreement didn't finish till early July 2009 (Figure 3). This is consistent with the CBA Chairman's comments at the 2009 AGM, that Bankwest provisions had been raised to $1.6b during the same time period.

Hence we can deduce that CBA received an effective discount of $1.6B on the price of Bankwest by simultaneously raising provisions for bad debts to $1.6b during the purchase period which ended in early July 2009.

Receiving a discount on an item that you are about to buy is like getting a "rebate". It is more accurately described as an "impairment indemnity". CBA effectively got these $1.6B in provisions "rebated" upfront. Having been indemnified for these losses CBA could then benefit from taking mortgagee in possession of the securities, personal guarantees and charging penalty interest / fees.

CBA's Conspiracy Theory Claim

CBA have previously labelled this matter a "conspiracy claim" from customers who have a "myopic belief that somebody other than themselves must be responsible for how events unfolded".

This is not a conspiracy by victims of the CBA. It is a plausible and indeed probable, explanation for this otherwise inexplicable behaviour of a bank forcing performing loans into default.

Conclusion - Accountability

The recent CBA financial planner scandal has shown that there is a culture of misconduct and cover up within CBA, at the very highest level. It has reduced public confidence in the banking sector in general. An organisations culture is created from the top-down. The CBA takeover of Bankwest was led by the then (2008) Head of Group Strategy, Mr Ian Narev.

At the 2012 Senate Inquiry the Senate Committee took on good faith that CBA were truthful in their denials of these allegations. This same Senate Committee would later find at the 2014 ASIC Senate Inquiry that their good faith in CBA was misplaced. Indeed even ASIC are now on record as to say that they have trusted the CBA too much.

On the basis of this new information tendered to the PJC, it appears that the CBA have committed large scale unlawful act and I ask that the Committee refer the matter of the CBA takeover of

Bankwest to the Australian Crime Commission or the Australian Federal Police for investigation in lieu of a Royal Commission.

Senate Committee Requested Tasks

1. **PJC Committee to request documents from CBA:**
   - **Share Sale Deed dated 8th Oct 2008**
   - **Share Sale Deed dated 22nd Oct 2008**
   - **Share Sale Deed dated 19th Dec 2008**
   - **Dispute Notice dated 20th Apr 2009**
2. **PJC Committee to refer the matter to the Australian Federal Police or Australian Crime Commission for investigation in lieu of a Royal Commission.**

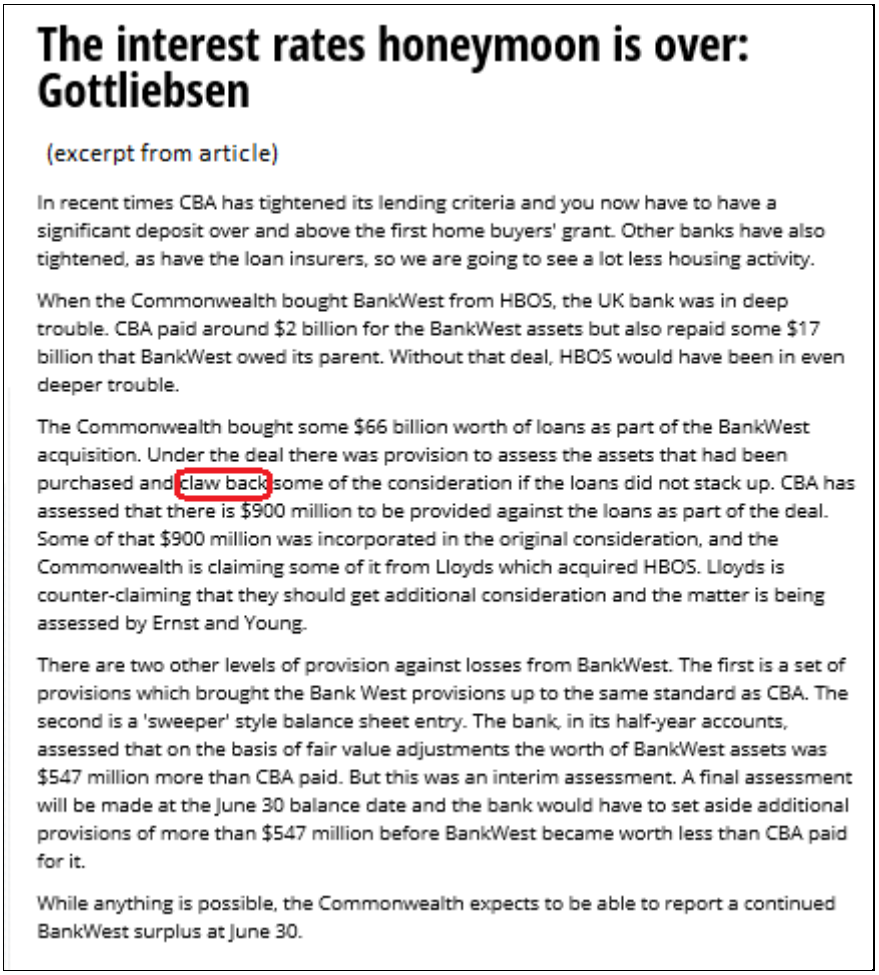
Appendix of Figures

Purchase consideration	$M
Cash paid	2,100
Provision for remaining consideration	328
Direct costs relating to the acquisition	31
Total purchase consideration	2,459
Provisional fair value of net identifiable assets acquired (see below)	3,771
Less: Preference share placement	(530)
Provisional discount on acquisition before tax	782

Figure 2 - CBA 2009 Half Yearly Report, page 47

- Ultimately, the parties were unable to agree on a number of items, including that the level of individual provisions reflected in the 19 December 2008 accounts were appropriate in all cases.
- Ernst and Young was appointed as the independent expert to determine these disputed items. Ernst and Young's determination was final and binding.
- We are aware of speculation that HBOS plc paid CBA some $200 million as a result of the price adjustment process. This is not correct. The purchase price adjustment process was finalised by early July 2009 and resulted in a small increase in the purchase price for Bankwest.

Figure 3 - 2012 Senate Inquiry, CBA Submission, page 21



The interest rates honeymoon is over: Gottliebsen

(excerpt from article)

In recent times CBA has tightened its lending criteria and you now have to have a significant deposit over and above the first home buyers' grant. Other banks have also tightened, as have the loan insurers, so we are going to see a lot less housing activity.

When the Commonwealth bought BankWest from HBOS, the UK bank was in deep trouble. CBA paid around $2 billion for the BankWest assets but also repaid some $17 billion that BankWest owed its parent. Without that deal, HBOS would have been in even deeper trouble.

The Commonwealth bought some $66 billion worth of loans as part of the BankWest acquisition. Under the deal there was provision to assess the assets that had been purchased and claw back some of the consideration if the loans did not stack up. CBA has assessed that there is $900 million to be provided against the loans as part of the deal. Some of that $900 million was incorporated in the original consideration, and the Commonwealth is claiming some of it from Lloyds which acquired HBOS. Lloyds is counter-claiming that they should get additional consideration and the matter is being assessed by Ernst and Young.

There are two other levels of provision against losses from BankWest. The first is a set of provisions which brought the Bank West provisions up to the same standard as CBA. The second is a 'sweeper' style balance sheet entry. The bank, in its half-year accounts, assessed that on the basis of fair value adjustments the worth of BankWest assets was $547 million more than CBA paid. But this was an interim assessment. A final assessment will be made at the June 30 balance date and the bank would have to set aside additional provisions of more than $547 million before BankWest became worth less than CBA paid for it.

While anything is possible, the Commonwealth expects to be able to report a continued BankWest surplus at June 30.

Figure 4 - Business Spectator article 2009

http://www.smartcompany.com.au/finance/9470-20090615-the-interest-rates-honeymoon-is-over-gottliebsen.html#

HBOS plc
7 October 2008

HBOS PLC ANNOUNCES THE SALE OF BANK OF WESTERN AUSTRALIA AND ST ANDREW'S AUSTRALIA

HBOS Australia Pty Ltd ("HBOSA"), a wholly owned subsidiary of HBOS plc ("HBOS" or the "Group"), has agreed the sale of part of HBOS's Australian Operations, namely Bank of Western Australia Ltd ("BankWest") and St Andrew's Australia Pty Ltd ("St Andrew's"), to Commonwealth Bank of Australia Limited ("CBA") for the equivalent of approximately A$2.5 billion (£1.2 billion). The businesses sold comprise the Group's Australian retail and business banking operations as well as its insurance and wealth management businesses. In addition to A$2.1 billion (£1.0 billion) of cash consideration for the sale, HBOS will receive a return of excess capital in BankWest of approximately A$360 million, together comprising A$2.5 billion of proceeds. CBA will also redeem preferred shares issued to the Group equivalent to their par value of A$530 million (£250 million).

Figure 5 – HBOS ASX Announcement, 7 October 2008

Senator WILLIAMS: So there was no clawback? You are saying there was no reason to go and make loans look bad?

Mr Cohen : Absolutely none. In fact, we were not in control of Bankwest as at 18 December 2008. So loans were impaired according to Bankwest's own classification as at that date. No classification by CBA was able to be made.

Figure 6 - Hansard, 2012 Senate Inquiry into the post-GFC Banking Sector

Introduction

This is my second submission to the Loan Impairment PJC Inquiry which relates to the CBA takeover of Bankwest in 2008 and specifically addresses CBA's assertions to the previous 2012 Senate Inquiry into the post-GFC Banking Sector that there was no "clawback" provision in the Bankwest purchase agreement incentivising CBA to foreclose on Bankwest customers who were not in financial difficulty. I am not a member of any lobby groups or advocacy organisations and make this further detailed submission as a private citizen of Australia.

Terms of Reference

This submission addresses the terms of reference, as it relates to CBA/Bankwest's unconscionable use of non-monetary covenant defaults to terminate Bankwest commercial loans so that CBA could benefit from an impairment indemnity afforded to it during the Bankwest purchase in 2008.

Clawback Evidence

Appendix A below contains a 5 page summary from a Forensic Accountant deemed to be an expert by the NSW Supreme Court and agreed to by CBA. The key paragraphs are highlighted but are essentially summarise in paragraph 27(b) of the forensic report which states that "**it was in the CBA's interest to require Bankwest to crystallise large losses as bad debts**." Paragraph 12 of the forensic report states that a "**'Claw-back Provision' was enshrined within the (Share Sale) deed**".

This clearly contradicts comments by Messer's Cohen, De Luca and Corfield to Senator's Williams, Eggleston and Bushby at the 2012 Senate Inquiry.

Court Testimony

In a recent court case involving another Bankwest customer Bankwest Bank Officer testified about his involvement in the "clawback" review. The following statement was taken from the court transcript of his testimony:

> *When this first came out it was quite a surprise. I guess in terms of the piece of work and we did the piece of work but it begged the question, why are we doing this and as we asked the question why. We were informed that there was some* ***clawback piece of work*** *required. I don't believe we were told at the outset."*

Barrister: "Just so it is clear, the piece of work was being undertaken on or about this date, that is 20 March 2009?"

"Yes."

Barrister: "And I think you said before, please correct me if I am wrong, but you completed this in about a week?"

"That's my recollection, yes."

From this court transcript we now know that there was in fact a review carried out after the purchase and this review was conducted for the purposes of a clawback – something CBA and Bankwest have repeatedly denied to the Senate.

This clawback review occurred around the 20th March 2009 and took about a week. Note that the dispute notice containing a list of customer's to be clawed back was dated 20th April 2009.

Combined with the forensic analysis of the Share Sale Deed there is more than sufficient evidence to show that CBA and Bankwest executives misled the Senate and in deed the Australian public.

CBA Chairman's denial of clawback

At the 2013 CBA AGM the CBA Chairman Mr David Turner made the following denial of the alleged Bankwest clawback motive.

> *"… there is a feeling somewhere or other that as a part of the Bankwest transaction we had a period after we bought the bank, a long period after we bought the bank that which we could somehow foreclose on debts and then reclaim from HBOS … and that is absolutely not right. Once the deal was completed and we had the bank that was the end of that. That was the end of that."*

The full video of this statement can be seen at the following link (watch from 3 min 20 seconds to 3 min 50 seconds)

https://www.youtube.com/watch?v=oo93PyhJQp4&list=UU_wwPNviMkdcrwQt3Sx3MKw

While Mr Turner denied there was a "long period" available he made no mention of a short period available to CBA in which to engage in the alleged conduct. Note from my previous submission that the Dispute Notice was issued on the 20th April 2009 – just 4 months after the purchase.

Conclusion

At the 2012 Senate Inquiry the Bankwest victims had little or no evidence of the clawback and as a result the Senate Committee understandably took as a matter of good faith CBA's assertions that there was no clawback benefit for the CBA. Since then there is now irrefutable proof that there was in fact a clawback benefit advanced to CBA during the Bankwest purchase. This means that the CBA and Bankwest executives who testified at the 2012 Senate Inquiry have misled the Senate Committee. Keep in mind that CBA have just been caught misleading the 2014 Senate Inquiry in relation to the financial planner scandal.

The conduct of CBA throughout these many scandals has led to a loss of trust in the financial sector. This trust will not be repaired whilst Australian's are aware that the executives involved in misconduct will repeatedly escape punitive action. If there is no deterrent then there is no incentive to rectify the misconduct. For this reasons outlined in this submission I ask that the Committee refer the CBA/Bankwest executives to Privileges Committee on the grounds that evidence has hereby been presented to the Committee that they misleading the Senate Committee in 2012.

PJC Committee Requested Tasks

1. **PJC Committee to refer Messer's David Cohen, Ian Corfield and Rob De Luca to the Privileges Committee on the grounds that they misled the 2012 Senate post-GFC Banking Sector Senate Inquiry as to the existence of a clawback provision in the Bankwest purchase documents.**
2. **PJC Committee to question Mr David Turner as to whether at the 2013 AGM he misled the shareholders by way of omission of material fact.**
3.
4.
5. **PJC Committee to request from CBA the court transcript from testimony of Bankwest Bank Officer**

Introduction

This is my third submission to the Loan Impairment PJC Inquiry which relates to the CBA takeover of Bankwest in 2008. I am not a member of any lobby groups or advocacy organisations and make this further detailed submission as a private citizen of Australia.

Terms of Reference

This submission addresses the terms of reference, as it relates to CBA/Bankwest's unconscionable use of non-monetary covenant defaults to terminate Bankwest commercial loans so that CBA could benefit from an impairment indemnity afforded to it during the Bankwest purchase in 2008.

Evidence of a Further Warranty that Forms Motive for CBA Misconduct

My previous submission details the clawback mechanism available to the CBA around the Initial Purchase Price of Bankwest. The end result of the upfront and clawback price discounts gave CBA a total discount on the purchase price of $1.6 Billion, impacting on a group of Bankwest commercial-loan customers in late 2008 through until early 2009.

This leads to the key question:

Why would CBA continue to wrongly foreclose upon Bankwest customers in the years subsequent to the 'clawback' review and subsequent price adjustments which had been settled in July 2009?

Hundreds of Bankwest commercial loan customers were foreclosed upon by the CBA in the period from late 2009 through to (as late as) 2013, well after the sale settlement in July 2009. CBA would have the Senate believe that this was merely as a result of a 'book review' (known as Project Magellan) and that CBA had no clawback-type motive to wrongly force these customers into default.

At the 2012 Senate Inquiry in response to questioning from Senator Williams, Bankwest executive Mr Ian Corfield confirmed the timing of Project Magellen saying "… at that point it was the start of 2010 …". He then continued with the bank's standard narrative that customers were in financial difficulty and were therefore foreclosed on. These customers have all stated that they were **not in any financial difficulty**. If that is the case then there needs to be a motive to foreclose on these customers after 2010 just as we have now seen there was a clawback and indemnity motive to foreclose on the 2008/09 group of customers.

Analysis of the Share Sale Deed

Figure 1 shows that clause 16.2 of the 2008 Bankwest Share Sale Deed essentially allows for a 12 month "Warranty" of the condition of the Bankwest loan book as at the date of sale (19th Dec 2008).

16.2 Time limits for Warranty Claims

The Seller's Guarantor is not liable in respect of a Warranty Claim unless:

(a) the Buyer or a Buyer Nominee has given the Seller and the Seller's Guarantor notice describing in reasonable detail each fact, matter or circumstance giving rise to the Warranty Claim and stating why such fact, matter or circumstance gives rise to a Warrantee Claim and including an estimate of the amount (to the extent then known) of the Warrantee Claim (Claim Notice) no later than 20 Business Days after the Buyer first becomes aware of that fact, matter or circumstance and of the fact that it constitutes a breach of Warranty and the Buyer agrees to provide any Claim Notice within such period;

(b) in relation to Warranty Claim other than for a Title Warranty or Tax Warrantee the Claim Notice is received by the Seller's Guarantor no later than 1 year after Completion;

(c) in relation to a Warranty Claim for Tax Warranty, the Claim Notice is received by the Seller's Guarantor no later than 7 years after Completion; and

(d) within 6 months after the Claim Notice is received by the Seller or the Seller's Guarantor (as the case may be) either the Warranty Claim has been satisfied or settled or the Buyer or a Buyer Nominee has commenced legal proceedings against the Seller or the Seller's Guarantor (as the case may be) in respect of the Warranty Claim.

Figure 1 - Clause 16.2, 2008 Bankwest Share Sale Deed

Figure 2 shows the "Seller's Guarantor" defined as HBOS plc (UK) - not to be confused with the "Seller" HBOS Australia.

Parties HBOS Australia Pty Ltd (ACN 070 002 587) of Level 27, 45 Clarence Street, Sydney New South Wales, 2000 (Seller)

HBOS plc (registered in Scotland No. SC218813) of The mound, Edinburgh, EH1 1YZ, United Kingdom (Seller's Guarantor)

Commonwealth Bank of Australia (ACN 123 123 124) of Level 2, 48 Martin Place, Sydney, New South Wales (Buyer)

Figure 2 - Page 1, 2008 Bankwest Share Sale Deed

Figure 3 shows the maximum amount that the CBA could claim by way of the Warranty.

16.8 Maximum recovery

The maximum aggregate amount recoverable by the Buyer and the Buyer Nominees from the Seller and the Seller's Guarantor in relation to all Claims is the amount of the Initial Purchase Price.

Figure 3 - Clause 16.8, 2008 Bankwest Share Sale Deed

Figure 4 shows that the Initial Purchase Price for Bankwest and St Andrews is $2.1b of which $2.037b is apportioned as the Initial Purchase Price of Bankwest.

4.1 Initial Purchase Price

(a) The initial purchase price payable for the Shares is $2.1 billion (Initial Purchase Price).

(b) The Initial Purchase Price will be apportioned as follows:

(i) $2.037 billion payable for the BankWest Shares (Bankwest IPP); and

(ii) $63 million payable for the St Andrew's Shares (St Andrews IPP); and

(iii) $2 payable for the HBOSGS Shares (HBOSGS IPP).

Figure 4 - Clause 4.1, 2008 Bankwest Share Sale Deed

The net effect of these clauses are that under the Warranty provisions of the Share Sale Deed and separate to the Price Adjustment clauses the CBA was able to claim from HBOS for impaired assets not provided for by HBOS in the Draft Audited Finalisation Accounts. These Claim Notices were to be issued to the Seller (HBOS Aust) or the Seller's Guarantor (HBOS plc UK) and could have continued until the Maximum recoverable amount was reached as per Clause 16.8. By this I mean provided that the CBA made a Claim for an impaired asset within 20 days of its knowledge of an impairment and 12 months of the completion of the purchase of the Bankwest Shares the CBA had an unlimited amount of time in which spread out the foreclosures over the following years. It is possible that after a certain amount of individual claims CBA would effectively buy Bankwest for nothing. These Claims (made well after the purchase date) needed to argue that regardless of the present day condition of the customer's loan, they were nonetheless impaired as at 19th Dec 2008 or earlier. **The bank then went about engineering this retrospective impairment by manipulating the non-monetary default covenant provisions embedded within commercial loan contracts.**

This explains why many customers were bemused as to why CBA would foreclose on them in this 2010/2013 period (when they were not in financial difficulty) and claim that these customers were "impaired" prior to 19th Dec 2008. Why wouldn't CBA simply leave these currently performing loans alone? The answer lies in Clause 16 of the Share Sale Deed which makes it more **profitable for CBA to foreclose on these customers** and make a Warranty Claim knowing that CBA may well end up buying Bankwest for free. As many of these customers are not in financial difficulty it is more profitable for CBA to charge penalty fees and then asset strip these customers using the bank's Receivers. In these circumstances CBA benefitted by these Claims whilst the loss incurred rested in HBOS and ultimately the British Tax Payers who bore the cost of the British Government Bailout of HBOS.

In further support of this proposition, it is important to note that HBOS plc UK reports it was still recording massive losses in Australia even after Bankwest was sold. It needs to be confirmed whether these losses were recorded as a result of Warranty Claims pursuant to Clause 16.2. If so, it is quite possible that having invoked the Clawback clause 4.2 and the Warranty Clause 16.2 CBA may have bought Bankwest for nothing.

HBOS impairments in Ireland and Australia

(£m)	Ireland	Australia
2008	491	345
2009	2,949	849
2010	4,264	1,362
2011	3,187	1,034
Total 2008-11	**10,891**	**3,590**
2008 loan book (£bn)	30.7	13.0
Impairments/Loans (%)	**35.5**	**27.6**

Source: HBOS 2008 full year results press release and Lloyds Banking Group Annual Report & Accounts

Figure 5 – UK Parliament Report into HBOS 2012

Conclusion

The Share Sale Deed between CBA and HBOS for the acquisition of the shares in BankWest had two key provisions that entitled CBA to make claims from HBOS for assets that CBA could subsequently review then argue were impaired prior to its acquisition of the shares in BankWest.

- The first method was a price adjustment mechanism which was the primary subject of the 2012 (Bankwest) post-GFC Banking Sector Senate Inquiry;
- The second mechanism, and less discussed, involved the warranty provisions of the Deed and enabled CBA to make claims on impaired assets to the full value of the purchase price paid by CBA to HBOS, provided that the claim (s):
    - Were not provided for in the Audited Draft Balance Sheets for BankWest provided by HBOS to the CBA on 19 February 2009;
    - Was an individual claim having a minimum value of $5m on combined claims having a minimum value of $30m;
    - The claim (s) were not known to the CBA at the time of or prior to the execution of the Deed;
    - Were notified to HBOS within 20 days of the CBA having knowledge of the claim and within 1 year of the execution of the Deed.

It is contended that it was for this motivation that the CBA continued with its aggressive foreclosures on the BankWest Commercial loan book well beyond the conclusion of the price adjustment mechanism adjudicated by Ernst & Young in July 2009 and extracted judgements through the court system, if not against the borrowers then against the guarantors, including an attestation that the loan provided was impaired prior to 19 December 2008.

PJC Committee Requested Tasks

1. **PJC Committee to request from CBA all Claim Notices issued pursuant to Clause 16 of the 2008 Bankwest Share Sale Deed.**
2. **PJC Committee to request (for purposes of cross-checking) from HBOS Aust and HBOS plc UK all Claim Notices received from CBA pursuant to Clause 16 of the 2008 Bankwest Share Sale Deed.**

Introduction

This is my fourth submission to the Loan Impairment PJC Inquiry which relates to the CBA takeover of Bankwest in 2008. I am not a member of any lobby groups or advocacy organisations and make this further detailed submission as a private citizen of Australia.

Terms of Reference

This submission addresses the terms of reference, as it relates to CBA/Bankwest's unconscionable use of non-monetary covenant defaults to terminate Bankwest commercial loans so that CBA could benefit from an impairment indemnity afforded to it during the Bankwest purchase in 2008.

Level of Persons Responsible

It is important to note that misleading representations have been made by the highest-level executives at the CBA and Bankwest, including:

- David Turner - Chairman - CBA
- Ian Narev –Chief Executive Officer – CBA
- David Cohen - Group General Counsel – CBA
- Rob De Luca –Chief Executive Officer – Bankwest
- Ian Corfield – Former Chief Executive – Business Banking BankWest
    - (Now Chief Executive – New Day UK)
- Suzanne Tindall – Former Head of Reputation and Strategy Bankwest
    - (Now Director Consulting - PWC New Zealand)

It should be of concern to both the Parliament and the Australian public if such levels of bank executives are found to have acted in-concert to both intentionally orchestrate and conceal the gross misconduct.

Persons Responsible

It is commonly accepted that CBA CEO Ian Narev orchestrated the Bankwest takeover when he was CBA's Head of Group Strategy in 2008. Figure 1 below shows a screen image of Ian Narev's profile on the CBA website as at 22nd Jan 2014. Note that it states that "He (Ian Narev) led the Group's $2.1 billion acquisition of Bankwest in 2008".

Group Executive Profiles

Ian Narev

Managing Director and Chief Executive Officer

Mr Narev commenced as Managing Director and Chief Executive Officer on 1 December 2011

Ian joined the Group in May 2007. From then until January 2009, he was Group Head of Strategy, with responsibility for corporate strategy development, mergers and acquisitions and major cross-business strategic initiatives. He led the Group's $2.1 billion acquisition of Bankwest in 2008, as well as the Group's investment in Aussie Home Loans.

From January 2009 until September 2011, Ian was Group Executive, Business and Private Banking, one of the Group's six operating divisions, with responsibility for small and medium enterprise business banking, agri banking, private banking and the CommSec retail brokerage and margin lending businesses. The division's annual profit after tax is approximately $1 billion. It has approximately 200,000 business customers, 1 million trading customers, and 15,000 private banking customers, and employs more than 4,000 people.

Prior to joining CBA, Ian was a partner of McKinsey & Company, the global consulting firm. He worked in McKinsey's New York, Sydney and Auckland offices from 1998-2007. He became a global partner in 2003, and from 2005 until his departure in 2007 was head of McKinsey's New Zealand office. Prior to joining McKinsey, Ian was a lawyer specialising in mergers and acquisitions.

Ian holds Masters of Law degrees from Cambridge University (International Corporate Law), where he was the top student in his year, and New York University (International Relations), where he was a Hauser Scholar. He also holds undergraduate degrees in English and Law from the University of Auckland, where he was Editor-in-Chief of the Law Review.

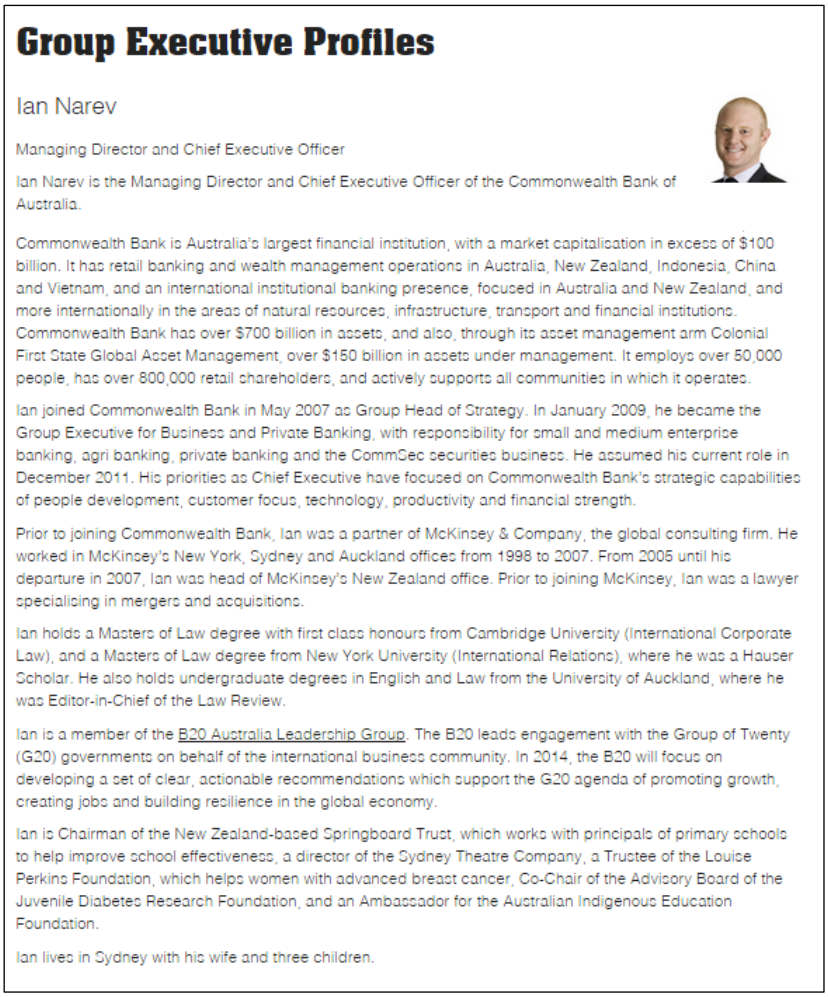
Ian is a member of the B20 Australia Leadership Group. The B20 leads engagement with the Group of Twenty (G20) governments on behalf of the international business community. In 2014, the B20 will focus on developing a set of clear, actionable recommendations which support the G20 agenda of promoting growth, creating jobs and building resilience in the global economy.

In the not-for-profit sector, Ian is Chairman of Springboard Trust, which works with principals of low-decile primary schools in South Auckland to help improve school effectiveness, a Trustee of the Louise Perkins Foundation, which helps women with advanced breast cancer, and our Ambassador for the Australian Indigenous Education Foundation.

Ian is 46 and lives in Sydney with his wife and daughters.

Figure 1 - CBA website profile of Ian Narev, 22 Jan 2014

Figure 2 below shows a screen image of Ian Narev's profile on the CBA website as at 22 Aug 2014. It is interesting to note that the reference to Bankwest has been removed.



Group Executive Profiles

Ian Narev

Managing Director and Chief Executive Officer

Ian Narev is the Managing Director and Chief Executive Officer of the Commonwealth Bank of Australia.

Commonwealth Bank is Australia's largest financial institution, with a market capitalisation in excess of $100 billion. It has retail banking and wealth management operations in Australia, New Zealand, Indonesia, China and Vietnam, and an international institutional banking presence, focused in Australia and New Zealand, and more internationally in the areas of natural resources, infrastructure, transport and financial institutions. Commonwealth Bank has over $700 billion in assets, and also, through its asset management arm Colonial First State Global Asset Management, over $150 billion in assets under management. It employs over 50,000 people, has over 800,000 retail shareholders, and actively supports all communities in which it operates.

Ian joined Commonwealth Bank in May 2007 as Group Head of Strategy. In January 2009, he became the Group Executive for Business and Private Banking, with responsibility for small and medium enterprise banking, agri banking, private banking and the CommSec securities business. He assumed his current role in December 2011. His priorities as Chief Executive have focused on Commonwealth Bank's strategic capabilities of people development, customer focus, technology, productivity and financial strength.

Prior to joining Commonwealth Bank, Ian was a partner of McKinsey & Company, the global consulting firm. He worked in McKinsey's New York, Sydney and Auckland offices from 1998 to 2007. From 2005 until his departure in 2007, Ian was head of McKinsey's New Zealand office. Prior to joining McKinsey, Ian was a lawyer specialising in mergers and acquisitions.

Ian holds a Masters of Law degree with first class honours from Cambridge University (International Corporate Law), and a Masters of Law degree from New York University (International Relations), where he was a Hauser Scholar. He also holds undergraduate degrees in English and Law from the University of Auckland, where he was Editor-in-Chief of the Law Review.

Ian is a member of the B20 Australia Leadership Group. The B20 leads engagement with the Group of Twenty (G20) governments on behalf of the international business community. In 2014, the B20 will focus on developing a set of clear, actionable recommendations which support the G20 agenda of promoting growth, creating jobs and building resilience in the global economy.

Ian is Chairman of the New Zealand-based Springboard Trust, which works with principals of primary schools to help improve school effectiveness, a director of the Sydney Theatre Company, a Trustee of the Louise Perkins Foundation, which helps women with advanced breast cancer, Co-Chair of the Advisory Board of the Juvenile Diabetes Research Foundation, and an Ambassador for the Australian Indigenous Education Foundation.

Ian lives in Sydney with his wife and three children.

Figure 2 - CBA website profile of Ian Narev, 22 Aug 2014

CBA denials, and false and misleading statements

CBA's public relations narrative has been to imply that Bankwest and its customers were to blame for the massive impairments and CBA simply cleaned out a bad Bankwest loan book. For ease of reference I have collated all the public comments below.

#1 Misleading Statement to Media

ABC News Interview

In an ABC News interview with Tikky Fullerton, Ian Narev stated that one of the problems that Bankwest faced was that "… it had done a lot of lending that was not prudent lending …" – apparently putting the blame at bad customers.

(Watch from 4 mins 10 secs to 4 mins 50 secs)
https://www.youtube.com/watch?v=-nv2MsesCMw

#2 False and Misleading Statement Before Senate Inquiry

2012 Senate Inquiry – David Cohen's clawback denial to Senator Williams

At the 2012 Senate Inquiry into post-GFC Banking Sector CBA General Counsel flatly denied the existence of any clawback.

Senator WILLIAMS: "So there was no clawback? You are saying there was no reason to go and make loans look bad?"

Mr Cohen**:** "**Absolutely none**"

#3 Misleading Statement by way of Omission of Material Fact Before Senate Inquiry

2012 Senate Inquiry – David Cohen's assertion that CBA paid an "ADDITIONAL" $26m for Bankwest

At the 2012 Senate Inquiry David Cohen tried to obfuscate the existence of the clawback by asserting that CBA paid an "ADDITIONAL" $26m after the post purchase review. I have discussed in my first submission to this inquiry that CBA were supposed to pay an additional $328m but as a result of the clawback this was reduced down to an "ADDITIONAL" payment of $26m – a clawback saving of $302m.

Senator WILLIAMS: "Just going back to the takeover of Bankwest, Mr Cohen, what did you pay for it—$2.1 billion, was it?"

Mr Cohen**:** "Yes."

Senator WILLIAMS: "Was that the final price? When you went through the loan book, did you find that there were impaired loans there, obviously not in good shape? You had a warranty claim then and you could actually go back to Lloyds and reduce that off that price—is that correct?"

Mr Cohen**:** "The way it worked was that we settled the sale on 18 December 2008—"

Senator WILLIAMS: "For how much?"

Mr Cohen**:** "For $2.1 billion. Then there was a period during which we and HBOS inspected the loans in Bankwest, and then adjustments would be made based on that inspection. That inspection looked at the status of loans as at 18 December 2008. The process took about three months to work through. Each side made submissions. We had an independent expert, one of the large accounting firms, actually adjudicate on it, and it looked through each loan. **At the end of the day, we paid about a further $26 million**."

Senator WILLIAMS: "You got that off the price?"

Mr Cohen**:** "**No. We paid it additionally.**"

#4 Misleading Statement by way of Omission of Material Fact Before Senate Inquiry

2012 Senate Inquiry – David Cohen's explanation of the "clawback"

At the 2012 Senate Inquiry into post-GFC Banking Sector CBA General Counsel gave an explanation which omitted important information that CBA could clawback loans after the purchase provided that they could argue an impairment event existed prior to 19th Dec 2008. In law this type of deceit is referred to as '*deception by way of omission of material fact*'.

Mr Cohen: "The so-called 'claw-back' arrangement is straightforward. Simply put, the purchase price paid by CBA could increase or decrease, depending on the number of distressed loans at the time CBA completed the acquisition on 18 December 2008. CBA could only reduce the purchase price for loans that were distressed at the time of sale on 18 December 2008. Any loans that became distressed after that purchase date became a

liability that Bankwest and CBA had to bear. CBA had no right to recoup any of those losses from HBOS."

#5 Misleading and Evasive Statements Before Senate Inquiry

2012 Senate Inquiry – Robert De Luca and Ian Corfield misleading statements to Senator Bushby

At the 2012 Senate Inquiry Senator Bushby asked whether there was an "offset" or "any other way" of reducing the purchase price. The Bankwest executives carefully avoided answering the question. My previous submission has discussed that there was an offset mechanism used.

CHAIR: "You raise the issue of the so-called clawback or the warranty. I know it is primarily an issue for the Commonwealth Bank, but you raised it in your submission and in your opening statement. You say:

Any losses that Bankwest incurred in its dealings with customers post acquisition date were borne by Bankwest and could not be 'clawed back'.

That is consistent with the evidence we received from the Commonwealth Bank yesterday. Is that an absolute statement that there was no way in which, whether it be against the purchase price or in **any other way, shape or form, losses or impaired loans** that became apparent after the purchase date could be **offset or claimed back** from HBOS under any aspect of the agreement or the deal with HBOS?"

Mr De Luca**:** "That is certainly our understanding, and obviously Mr David Cohen discussed that yesterday."

CHAIR: "He did, but I did not ask him that question quite that way. I just accepted what he said, which I still do—'This is the price and we had to pay an extra $26 million after doing what we did.' What I am trying to work out is whether there is something that we have missed, because there do seem to be a lot of issues raised."

Mr Corfield**:** "I was working in the business at that point in time and there were absolutely no operating instructions that would have given you any other sense than what they would have said yesterday."

#6 False and Misleading Statement Before Senate Inquiry

2012 Senate Inquiry – Senator Eggleston's question to David Cohen

At the 2012 Senate Inquiry Senator Eggleston asked whether CBA gave direction to Bankwest to impair loans. David Cohen gave a response that was intended to make the Senate Committee believe CBA gave no specific directions to Bankwest to impair loans. The Dispute Notice of 20th April 2009 shows otherwise. It contains a list of 41 names of customers that CBA wish to impair, and 26 customers that CBA wish to increase impairment provisions on. This dispute notice is signed by **David Cohen**.

Senator EGGLESTON: "Did you provide direction as to what Bankwest should be doing in terms of realising the value of properties that they may have had mortgages on, and suchlike?"

Mr Cohen**:** "No. We did not give direction as to how Bankwest should deal with a particular loan, for example, or give direction as to what price a particular security property should be sold for."

Senator EGGLESTON: "So you are saying Bankwest operated completely independently in terms of the way it sought to recover finance from loans given for various properties and businesses?"

Mr Cohen**:** "That is right. CBA's awareness was at a high-level, a managerial level, but **we did not delve into individual cases**."

#7 Omission of Material Fact Before Senate Inquiry

2012 Senate Inquiry – CBA submission

The following statement appears in CBA Submission No. 81 to the 2012 Senate Inquiry. The submission is anonymous. The ultimate responsibility for the content lies with the CEO, Ian Narev. The statement below is misleading by way of its omission of material facts. At no point in the submission do CBA inform the Senate Committee that CBA could claim on bad debts post-acquisition provided that CBA could argue that they were impaired before 19th Dec 2008, regardless of the current state of the loan – an important fact the Senate Committee were trying to ascertain at the time.

- CBA paid for the independently determined value it acquired in Bankwest, and Bankwest, under CBA ownership, has borne any losses it has subsequently incurred from loans that were not assessed to be impaired or in default as at 19 December 2008.

Figure 3 - CBA submission, 2012 post-GFC Banking Sector Senate Inquiry

#8 Misleading Statement to the Senate Inquiry by Way of Omission of Material Fact

2012 Senate Inquiry – Bankwest submission

The following statement appears in Bankwest Submission No. 80 to the 2012 Senate Inquiry. The submission was written by Bankwest Chief Executive of Strategy and Reputation, Ms Susanne Tindal. Note that once again the statement refers to "post acquisition" impairments but conveniently omits the material information that CBA could claim on bad debts post-acquisition provided that CBA could argue that they were impaired before 19th Dec 2008, regardless of the current state of the loan – an important fact the Senate Committee were trying to ascertain at the time.

The CBA submission sets out the facts relating to the sale agreement the CBA entered into to purchase Bankwest. There is some public conjecture that the sale agreement provided an incentive for the CBA and Bankwest to manufacture defaults and losses on Bankwest customers to achieve a purchase price benefit. This conjecture is incorrect. Any losses that Bankwest incurred in its dealings with customers post acquisition date were borne by Bankwest and could not be "clawed back". Accordingly it is not in Bankwest's interests, and it makes no commercial sense, for it to manufacture defaults on customers or to cause or increase losses on lending deals.

Figure 4 - Bankwest submission, 2012 post-GFC Banking Sector Senate Inquiry

#9 Misleading Statement to the Senate

David Cohen's 2013 Letter to the Senate

In a letter to the Senate dated 4th July 2013 David Cohen stated that these allegations were "conspiracy claims" from customers who have a "myopic belief that somebody other than themselves must be responsible for how events unfolded". The intent of these statements are to mislead the Senate Committee into believing that these customers are irrational conspiracy theorists who are looking to blame the bank for their own financial problems.

> The Document is a continuation of conspiracy claims made by various former customers of Bankwest raised at, and dealt with by, the Senate Economics References Committee Inquiry into the Post-GFC Banking Sector in August 2012 (**Inquiry**).

Figure 5 - 4 Jul 2013, Letter to the Senate

> Those former customers find the truth as provided by CBA to the Inquiry inconvenient because it does not fit their myopic belief that somebody other than themselves must be responsible for how events unfolded. Inconvenient to those former customers as it may be, it is nevertheless the truth.

Figure 6 - 4 Jul 2013, Letter to the Senate

#10 Misleading Statement to the Senate by way of Omission of Material Fact

David Cohen's 2013 Letter to the Senate

In his letter to the Senate dated 4th July 2013 David Cohen issued a categorical denial, however in keeping with other statements he conveniently omits the material fact that although CBA could not claim any post acquisition bad debts, CBA could however make post acquisition claims on loans that CBA could deem to have an impairment event prior to 19th Dec 2008 and that this retrospective impairment process occurred after the purchase – an important fact the Senate Committee were trying to ascertain at the time.

> For completeness, CBA categorically denies that any form of separate or collateral financial benefit was advanced to CBA prior to acquisition that would compensate it for any post acquisition impairments.

Figure 7 - 4 Jul 2013, Letter to the Senate

#11 Misleading Statement by way of omission of material fact

CBA AGM 2013 Chairman David Turners denial of clawback

At the 2013 CBA AGM the CBA Chairman Mr David Turner made the following denial of the alleged Bankwest clawback motive.

> *"… there is a feeling somewhere or other that as a part of the Bankwest transaction we had **a period after we bought the bank, a long period after we bought the bank** that which we could somehow foreclose on debts and then reclaim from HBOS … and that is absolutely not right. Once the deal was completed and we had the bank that was the end of that. That was the end of that."* (CBA 2013 AGM video 3 min 20 seconds to 3 min 50 seconds)

Notice how he makes the mistake of mentioning *"a **period** after we bought the bank"* and then immediately corrects himself and says "a **long period** after we bought the bank" all the while making sure not to mention the **short-term** clawback opportunity the bank had. This seemingly innocuous slip-of-the-tongue gives an important insight into the CBA's intent to deceive its shareholders.

Later Mr Turner again denies any "*long term clawback*" and once again carefully avoids mentioning any short-term clawback.

> *"There is that illusion about having this sort of **long term clawback** which we don't have …"*

(CBA 2013 AGM video 3 mins 34 seconds to 3 mins 40 seconds)
The full video of this statement can be seen at the following link.
https://www.youtube.com/watch?v=oo93PyhJQp4&list=UU_wwPNviMkdcrwQt3Sx3MKw

As CBA Chairman, Mr Turner is in a position where he either knows about this clawback evidence or if he doesn't, his position is as such that he ought to know about this information. If he knew about the clawback evidence then he has intentionally deceived the shareholders. If he did not know about this clawback information then his position is such that he ought to have known about this evidence and he has recklessly deceived the shareholders (known as reckless intent).

Both, intent and reckless intent are encapsulated by Corporations Act section 184(1) "Good Faith. Use of Position. Use of Information". It is irrelevant which form of intent applies – either way, his comments may contravene section 184(1) which is a criminal offense when enlivened by "directors and other officers".

Corporations Act section 184

http://www.austlii.edu.au/au/legis/cth/consol_act/ca2001172/s184.html

#12 False and Misleading Statement to Shareholders

CBA AGM 2013 CEO Ian Narev's denial of clawback

At the 2013 CBA AGM the CBA CEO Ian Narev alleged Bankwest clawback.

> *"The line that we have somehow put people in hardship in order to have a gain for the Commonwealth Bank is categorically wrong."*

The full video of this statement can be seen at the following link (watch from 9 min 30 seconds to 9 min 48 seconds)
https://www.youtube.com/watch?v=oo93PyhJQp4&list=UU_wwPNviMkdcrwQt3Sx3MKw

Conclusion

It is my view that the information I have submitted to this Inquiry combined with the above misleading statements, denials, material omissions of fact constitute a premeditated web of deceit by the CBA & Bankwest executives created with the intent to lead the Senate Committee and media to the false conclusion that CBA had no motive to foreclose on Bankwest commercial loan customers during and after the takeover. I put to the PJC Committee that the extent of the deception and the

gravity of the misconduct it aims to conceal requires that those executives involved be referred to the Privileges Committee with the aim that they be charged with misleading the Senate.

Similarly the misleading statements to the shareholders by relevant executives and board members should be referred to ASIC for investigation and prosecution.

PJC Committee Requested Tasks

1. **PJC Committee to summon and question Ian Narev with regard to the allegations of unconscionable conduct during and after the Bankwest takeover.**
2. **PJC Committee to summon and question David Turner with regard to the allegations of unconscionable conduct during and after the Bankwest takeover.**
3. **PJC Committee to refer all executives mentioned herein to Privileges Committee.**