



Our Reference: Y 0141  
1 January 2019

Ms Rowena Orr, QC  
Senior Counsel Assisting  
Royal Commission into Misconduct in the Banking,  
Superannuation and Financial Services Industry

[rowena\\_orr@vicbar.com.au](mailto:rowena_orr@vicbar.com.au)

Dear Ms Orr,

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

We have very serious concerns about how some aspects of this Commission have been handled by the Commissioner and, in some cases, Counsel Assisting.

Of particular concern we note the following:

1. Your findings and recommendations in respect of the conduct exhibited in the ANZ takeover of Landmark stand in stark contrast to the findings of Mr Hodge under the almost identical scenario of the CBA takeover of Bankwest. This is inexplicable.
2. To our knowledge, Mr Hodge reached his erroneous conclusions:
  - Without engaging directly with any meaningful cross-section of the Bankwest victims;
  - Without the assistance of independent banking experts to advise on the CBA's true motivation and machinations;
  - Behind "closed doors" with apparently no interaction with the relevant parties including the Ombudsman, Kate Carnell, who had already reviewed the matter in considerable detail and exposed unconscionable conduct.

Commissioner Hayne has suggested the circumstances were different. How so? This is quite obviously incorrect and studiously ignores its homogenous nature and clear and compelling parallels not to mention CBA's established patterns and propensity for appalling conduct as exposed elsewhere by the Commission.

3. Several critical and significant errors of fact in relation to the CBA/Bankwest issue have been made in the Commission's Interim Report. These errors have been drawn to the attention of the Commissioner, including supporting evidence, yet the Commissioner has refused to review these matters, let alone correct the errors. Frankly this is quite extraordinary. The Commissioner is formally on notice re these matters. (Refer my letters of 24 October 2018 and 4 December 2018 which are attached, and my previous emails and letters to the Commission.)

In particular, the Commission erred:

- In asserting my loan expired in November 2008 and as such I was "in default". This is wrong as my loan did not expire until 28 February 2009 (many other extremely pertinent details were also overlooked).
- Stating that CBA could not reduce the price paid for Bankwest through the deduction of impaired loans. This is clearly wrong. In my case the evidence provided to the Commission confirms CBA's failed attempt to achieve a \$47m impairment claim to reduce the price of Bankwest. This is a matter of indisputable record.
- Ignoring the \$1.6 billion "up front" discount applied to the Bankwest loan book and its very serious implications as to how CBA treated the matter and, in particular, the "inherited" Bankwest customers. Again, this is where senior, independent, specialist banking advice was sorely lacking.

Quite obviously the Commission's findings extrapolated from and/or based upon these factual errors are simply wrong. It also raises the question: what other errors have been made and will this bring the entire report into disrepute?

In essence, the Commission's "inquiry" into the treatment of Bankwest customers by CBA post take-over has not been completed properly. Independent, expert, banking advice has not been obtained, fundamental errors of fact have been made, seriously impacting findings, but were not corrected, and the additional time and resources offered by the Government to complete the inquiry thoroughly have been inexplicably rejected by the Commissioner. All this has occurred despite revelations that CBA is the standout "Gold Medal" performer when it comes to appalling conduct towards customers, right across CBA's business activities. Surely this speaks volumes?

We now share these very serious concerns with you in your capacity as Senior Counsel Assisting and put you on notice that you are now formally informed, and action needs to be taken prior to release of the Final Report.

We intend to take the handling of this matter to the highest Government authority.

Yours sincerely,



Rory F O'Brien

Attachments: Y 0098 Letter to Simon Daley 24 Oct 2018  
Y 0126 Letter to Commissioner Hayne 4 Dec 2018



24 October 2018

Our Reference: Y 0098

Simon Daley  
Solicitor Assisting  
Royal Commission into Misconduct in the Banking,  
Superannuation and Financial Services Industry  
[Simon.DaleyMR@royalcommission.gov.au](mailto:Simon.DaleyMR@royalcommission.gov.au)

Dear Simon

We acknowledge receipt of your letter of 21 October 2018.

It seems that our message is still not getting through. For the sake of absolute clarity:

1. We are not seeking to engage in "debate or discussion" with the Commissioner about the "reasons given in the report", nor his findings, nor are we seeking to debate or discuss the "processes or procedures" that were adopted. We fully accept these are all matters for the Commissioner and are his "call" and his responsibility entirely. Our concerns and issues in this regard are addressed and advised to the Commissioner in our letter of 17 October 2018.
2. What we are pointing out to the Commissioner is that he has made some serious errors of fact which have very profound implications upon his Interim Findings and Report. These are also spelt out in detail in my email of 18 October 2018 and Mr Wijeyeratne's email of 12 October 2018.

By way of example:

- On page 212 the Commissioner states: I “could not repay the loan on the due date.”. This is false as the loan was the subject of a “Facility Extension” and Bankwest had already agreed to extend the date to 15 January 2009 and 30 April 2009. (See Indicative Term Sheet of 27 January 2009). Interim payments on account were made under this agreed extension.
- On page 212 the Commissioner states I asked for “more funding to complete the project.”. This is false as the rollover loan, under the Facility Extension, was some \$100m *LESS* than the original loan following settlement of sales.
- On page 214 the Commissioner states I was “already in default.”. This is false as Bankwest had me in “Hold Over” mode pending full release of the new (reduced) facility being the subject of the Facility Extension. They kept me in this unacceptable “limbo” position for 6 months. In any event the original loan had already been extended as mentioned above.

- On page 214 the Commissioner states I was seeking a "new and larger loan.". This is false. I had agreed with Bankwest a "rollover" of the existing loan at a vastly *REDUCED* amount. (Circa \$100m less than the original loan).

There are other associated issues and implications flowing from this.

By not understanding the details of the financial dynamics and critical timing issues, the Commission has developed a badly skewed interpretation of the situation. In fact, the whole central issue has been missed as has the simultaneous, but clandestine actions of CBA in making a \$47m provisioning claim to reduce the Bankwest price whilst they were undertaking (at a snail's pace) the Facility Extension. The sheer delay of 6 months to confirm the loan advance was uncommercial and unconscionable, as it precluded me from making other commercial decisions whilst CBA prosecuted its claim against HBOS.

Quite obviously, had Bankwest/CBA advanced the promised funding on time and when needed in December/January it would have seen "all funds returned to the bank" but would have been totally at odds with their claim against HBOS and effectively negate that claim in its entirety. CBA simply could not make the advance and claim against HBOS at the same time.

In respect to Mr Wijeyeratne:

On page 215, the Commissioner states that the "[The discount on fair value] calculation goes nowhere and is not informative of anything".

He then:

- fails to discuss the \$983 million gain on acquisition derived from these calculations;
- fails to discuss CBA Chairman Dr Schubert's statement that this gain on acquisition was used to offset the impairment expenses;
- fails to identify this as an important motivator for CBA to aggressively foreclose on customers.

In both instances we believe the Commissioner has erred in respect to the basic and crucial underlying facts, and accordingly the findings are not sound nor correct.

As advised in our letter of 17 October 2018, "the Commission is on notice and has an opportunity to address these errors now." We ask you to reconsider.

Yours sincerely,



Rory F O'Brien

Attachment: Key failure of Hayne's small business investigation dated 23 Oct 2018

### Hayne:Improper purpose foreclosures are OK

Commissioner Hayne finds that it is acceptable for a bank to intentionally “decide” to “reduce exposure” to existing commercial loans and that this behaviour is “unsurprising” and is in line with community standards.

**This should be of concern to all borrowers. It is not acceptable to terminate existing customer loans due to a policy decision that is unrelated to the individual customers financial situation. i.e. Improper purpose.**

Second, soon after CBA acquired Bankwest it learned that Bankwest had adopted a very aggressive strategy in lending with respect to commercial property, particularly in the eastern states.<sup>30</sup> At the time of CBA's acquisition of Bankwest, 50% of Bankwest's 'non-retail exposures' were 'commercial property related'.<sup>31</sup> CBA's internal documents, particularly papers put to CBA's Executive Risk Committee, showed, unsurprisingly, that the CBA group sought to manage, and limit, the Group's exposure to commercial property lending. I say that is 'unsurprising' because, as Mr Cohen

Did CBA not know what they were buying when they bought Bankwest? If not, why is that the customers' fault?

<sup>27</sup> Transcript, David Antony Keith Cohen, 29 May 2018, 2726–7.

<sup>28</sup> Transcript, David Antony Keith Cohen, 29 May 2018, 2727.

<sup>29</sup> Exhibit 3.111, Witness statement of David Antony Keith Cohen, 17 May 2018, 28 [120].

<sup>30</sup> Transcript, David Antony Keith Cohen, 29 May 2018, 2738–9.

<sup>31</sup> Exhibit 3.116, 11 September 2009, Memorandum to Executive Risk Committee CBA, 1–2 [3.5].

Hayne says it is normal to reduce exposure of already existing commercial loans

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explained, banks seek to mitigate risk by diversification, limiting concentration in lending to particular industries and particular geographic areas.<sup>32</sup> To that end, CBA's Executive Risk Committee decided in December 2009 to introduce exposure caps for commercial property lending and to reduce Bankwest's property exposures.<sup>33</sup>

Hayne says CBA "decided" to reduce exposure to existing commercial loans, and that this is normal.

This is not acceptable behaviour.

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The Commission is in possession of an email dated 1st April 2009 between CBA/Bankwest executives. It discusses the need to 'actively' reduce exposure to commercial loans.

*"The quality of the Bankwest business asset book is poorer than original expectations and we are actively derisking the portfolio..... We are also repositioning the business bank to reduce the high exposure to commercial property and lowering the maximum potential single name exposures.", Royal Commission exhibit reference, CBA.0002.2092.4133.*

**Hayne:Improper purpose foreclosures are OK**

**Note: These are existing customer loans, not new loans. We are not arguing the banks' rights to limit future exposures and lending practices. This is normal. We are referring to the bank limiting CURRENT EXISTING exposures by appointing receivers.**

Commissioner Hayne finds that this is acceptable behaviour and falls within the standards of community expectations.

I would argue that most in the community are not aware of what Commissioner Hayne is asserting. If the community was aware, they would be outraged at this assertion.

Online article reference:

<https://www.businessinsider.com.au/bankwest-royal-commission-commercial-property-2018-5>



4 December 2018  
Our Reference: Y 0126

The Hon Kenneth M Hayne, AC QC  
Commissioner  
The Royal Commission into Misconduct in the Banking,  
Superannuation and Financial Services Industry

[simon.daleyMR@royalcommission.gov.au](mailto:simon.daleyMR@royalcommission.gov.au)

Dear Commissioner Hayne,

I refer to my submissions, PWF.0001.0001.2293 of 23 February 2018, POL.1000.0001.0260 of 14 October 2018, and all previous correspondence to the Commission.

Now that the Commission is drawing to a close, we wish to make the following observations. These observations highlight fundamental and pivotal questions that have not been adequately addressed by this Commission and remain unanswered:

1. In late 2008/2009, immediately following the takeover of Bankwest by CBA, some 1,958 Bankwest customers had their loans ruthlessly and capriciously foreclosed by CBA despite doing nothing wrong. In most instances, these were performing loans, with interest covered, and able to meet their loan obligations, repayments and commitments through the normal course of business. Basically, most of these people had their businesses and lives needlessly and totally destroyed by CBA's actions. The Commission interviewed only 4 of those victims. **WHY?**
2. Given the sheer number of customers, and the scale of appalling treatment suffered by these "inherited" Bankwest loan holders, they unsurprisingly formed a collective group known as "Bankwest Victims" and pushed Government to look closely into CBA's conduct. As a direct result of their actions, and constant appeals, they have instigated and been the central focus of:
  - The Senate Inquiry in 2010;
  - The PJC Inquiry in 2015;
  - The ASBFEQ Inquiry in 2017.

It is also the Bankwest issue that has been the central driving force behind this Royal Commission and which should have been the main focus of your investigation, particularly given its long history. The findings of the three previous inquiries pointed clearly to serious, if not unconscionable, misconduct by CBA surrounding Bankwest, yet your Commission finds nothing. This is way out of step with CBA's appalling conduct as exposed by the Commission in many other areas. The Commission is ignoring the well-established pattern. **WHY?**

This Commission has labelled our group “self-styled victims” and “agitators”. Of the nearly 10,000 submissions only 27 have been interviewed, of which only 4 relate directly to the Bankwest issue. In selecting only those four, the Commission has overlooked many (some 85%) far more compelling and significant cases, much more revealing and damning of CBA. This is quite obviously patently inadequate, unacceptable and frankly inexplicable, attracting widespread public and political criticism. The Commission failed to engage deeply and meaningfully with the Ombudsman, Kate Carnell, who had already undertaken significant forensic work and detailed investigation, resulting in damning and revealing findings on the Bankwest issue. **WHY?**

3. Through the course of the Commission hearings, it has been clearly established beyond any doubt, and is now a matter of public record that:
  - CBA was the “gold medal performer” in terms of appalling customer treatment;
  - CBA was guilty of very serious operational breaches on 53,000 occasions facilitating money laundering, drug and firearms importation, and faced the biggest fine in Australian corporate history;
  - CBA failed, at Board level, to act appropriately in many areas including not taking Board Minutes relating to serious matters, viz auditing, unjustified awarding of executive bonuses and have likely breached the Corporations Act;
  - CBA has publicly admitted that “they placed profits before customers’ interests” and the former CEO, Mr Narev, counselled the current CEO to “temper his sense of justice” in this regard. This is outrageous and speaks volumes. If this is CBA’s proven ethos, then surely it applies to Bankwest?
- In general terms, it is clear that of the “Big 4” CBA is the standout in terms of the scale and seriousness of its bad conduct towards its own customers, which has been variously described as “appalling”, “shocking” and “outrageous”. In any event there is absolutely no doubt that profits (and more specifically, massive executive bonuses) came well before the interests of customers. Obviously “inherited” customers, from a much smaller takeover target, viz Bankwest have little or no standing with CBA and were treated accordingly. **WHY?**
4. Despite **ALL THE ABOVE** the entire Bankwest issue was totally dismissed by Mr Hodge in a short opening address to the Commission on Day 20 of the hearings (21 May 2018 Round 3 Hearings). This was despite interviewing only 4 of the Bankwest victims. Not only was this shocking to the vast majority of victims who were not even, questioned, consulted nor interviewed let alone examined by the Commission, but to many astute observers, including leading lawyers, commentators and politicians. This stimulated both the Federal Government and Opposition to offer a time and resource extension to allow for a proper investigation, yet the Commissioner inexplicably ignored this bipartisan offer. The Bankwest issue was inexplicably dismissed with the actions of CBA described as “prudent” by Mr Hodge. **WHY?**
5. It seems extraordinary for the Commission to find so much consistently appalling, unprofessional and greedy executive conduct at CBA, a wrap-sheet worthy of the worst corporate crooks and emanating from the very highest level right across the giant CBA operation, yet as a glaring exception the conduct surrounding the Bankwest takeover which has driven four previous inquiries was, according to this Commission, Snow White, squeaky clean, perfectly acceptable and indeed “prudent” **WHY?**

6. Given the heinous and inexplicable treatment of the Bankwest victims by CBA, those victims understandably searched for a reason why the CBA did what it did. The actual treatment of the inherited Bankwest customers and the capricious and ruthless foreclosing of their loans is a matter of fact and beyond doubt so why did CBA do it? This is the burning question examined by many victims and consultants with the addressing of which appearing in some of the submissions to the Commission. There were two possible motives put forward:
1. Clawback of the Bankwest purchase price (in my case it is a matter of incontrovertible fact that CBA was making a clawback price reduction claim for \$47m whilst simultaneously deliberately delaying the urgently needed reduced loan rollover);
  2. Capital Reserve Ratio considerations.
- Comprehensive submissions were made with the request that the Commission engage the services of suitably qualified, independent, banking experts to examine these most crucial central and complex issues. It is also essential to appreciate that these two motives were the assessment of the victims after almost a decade of review. They were not proffered as the only motivations behind CBA's conduct as there well may be other factors at play. The real issue is that this central subject demands a very high level technical and forensic, detailed examination by the appropriately qualified and truly independent experts. To our knowledge this crucial investigation did not occur and further the Commission refused point blank to address our requests in this regard, nor even to confirm or deny, whether or not such experts were used in making its central determination about Bankwest. This is very odd to say the least. **WHY?**
7. Following the above inadequate examination of the CBA Bankwest conduct and associated flawed findings in the Interim Report, several Bankwest victims wrote to the Commission advising of serious and fundamental errors of fact by the Commissioner in reaching his conclusion in dismissing the Bankwest issue. Despite several formal written attempts to get the Commissioner to review these serious errors and associated incorrect conclusions, we were advised that no review would be considered, and the flawed finding stood as published. Frankly a refusal to review glaring factual mistakes which have been notified in writing (with the proof attached) is outrageous conduct by a Royal Commission. **WHY?**
8. The Commissioner has stated repeatedly that his job is to "Inquire". On any interpretation, particularly given the above, this Commission has *NOT* properly inquired into the conduct of CBA in relation to the Bankwest takeover and treatment of the inherited Bankwest customers. This total lack of meaningful engagement with submitters, apparent absence of independent expert review and a willingness to merely accept CBA's glib explanation against a backdrop of well-established and proven regular and indeed entrenched appalling behaviour elsewhere is beyond comprehension. There has been almost no interaction with victims whatsoever and the 4 case studies chosen are not at all representative of the core of the issue.
- The Commission has turned a blind-eye to what has been the central driving force behind the establishment of this Commission and what should have been the standout central focus of the inquiry and investigation. An investigation that requires and indeed demands the highest level of independent expert forensic analysis. None of this has happened despite Government offers for an extension of time and resources to allow the opportunity to review the matter and look at it properly. **WHY?**
- It is obvious that this Commission is anxious to remove the entire CBA/Bankwest takeover and associated treatment of customers as an issue. Could it be that the nature of the conduct itself and scope of possible compensation are so heinous and significant that it may well threaten the stability of the CBA itself and/or impact the Australian economy? In any event the attempts by this Commission to sideline this most crucial issue are transparent and the victims of CBA's conduct will not be letting this rest nor those who facilitate the continuation of the injustice.

9. At the recent hearings CBA CEO, Matt Comyn, wrote to Chairperson Catherine Livingstone saying we:

*“need to do a review of Bankwest to ensure there is consistency and alignment”*

This raises two very crucial questions:

1. Consistency and alignment with **WHAT?** and,
2. If CBA’s original ”story” or “explanation” about the Bankwest issue was entirely factual, truthful, transparent and acceptable/reasonable Bank practice, then **WHY** was there any need at all for a “review” at the highest level of the CBA to “ensure” the new story to the Royal Commission was “consistent” and “aligned” with the original “story”?

Surely this tells you something was going on.

10. The submission process itself was forced upon victims via a restrictive, standardized on-line format that could not possibly convey the full story. No interviews, no opportunity to amplify the facts were granted, yet final judgements by the Commission have been made based upon this very limited information.

Even worse, of the 43 complaints received by the Commission in relation to Bankwest, only 4 were examined, i.e. 91% were not even interviewed, let alone examined in any face-to-face detail nor adopted as test cases. **WHY?**

11. Simply because some complaints were dealt with previously by the Court, that does not constitute a right for this Commission to abdicate its responsibility “to inquire”. The courts are a totally unfair forum for victims to fight massive banks for very obvious reasons. This is very well understood in the community at large and it is disingenuous in the extreme for the Commission to pretend otherwise. The hidden facts of the Bankwest takeover by CBA only came to light after the Parliamentary Joint Committee: *Loan impairments* and must be properly addressed by this Commission and must be examined thoroughly.

It is unacceptable for this Commission to effectively ignore Kate Carnell’s ASBFEQ inquiry and the PJC and it must enquire beyond the obvious restrictions of the court process.

12. In short, the Commission could not possibly properly “investigate” let alone reach a valid and correct interpretation of the Bankwest issue without:

1. Interviewing in depth many more submitters/victims than the 4 chosen, ie 91% not consulted;
2. Obtaining appropriate independent expert banking advice and undertaking a thorough forensic review;
3. Engaging closely with the Ombudsman who had already completed much of the leg-work through her own investigation;
4. Reviewing the findings of Hon Philip Ruddock following the PJC and Senate Inquiries in relation to unconscionable conduct;

5. Taking up the Government's offer of more time and resources to complete the investigation properly;
  6. Taking heed and giving proper weight to the clearly established, if not entrenched, appalling behavioural patterns emanating from the highest levels at the CBA.
13. During the course of Mr Comyn's and Ms Livingstone's testimony last week, it became abundantly clear that many of the most serious problems at CBA occurred under the management of their predecessors Messrs Turner, Narev and Norris. They were directly responsible for the Bankwest takeover and treatment of customers. Despite the obvious need for these parties to be called to account and be examined by the Commission they have been let off scott-free. **WHY?**

In this regard the work of the Commission in respect of the Bankwest issue falls way short of the standards expected and required of a Royal Commission and indeed public expectation.

Please take this submission as formal notice of our protest and advice that we intend to take matters further with the highest possible authorities including the incoming Labor government who is strongly supportive of a proper investigation into this matter.

Yours sincerely,



Rory F O'Brien