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9 **Re State Bank of New South Wales v Commonwealth Savings Bank of Australia**
10 **Re Commonwealth Savings Bank of Australia (Cross-Claimant) v State Bank of**
11 **New South Wales (First Cross-Respondent) New South Wales (Second Cross-**
12 **Respondent) (1985) [1985] FCA 133 (23 April 1985)**

13 **FEDERAL COURT OF AUSTRALIA**

14 Re: STATE BANK OF NEW SOUTH WALES And: COMMONWEALTH SAVINGS BANK OF
15 AUSTRALIA

16 Re: COMMONWEALTH SAVINGS BANK OF AUSTRALIA (Cross-Claimant) And: STATE
17 BANK OF NEW SOUTH WALES (First Cross-Respondent) STATE OF NEW SOUTH WALES
18 (Second Cross-Respondent) (1985) 2 FCR 524 No. G248 of 1984 Contract - Estoppel -
19 Remedies

20 **COURT**

21 IN THE FEDERAL COURT OF AUSTRALIA NEW SOUTH WALES DISTRICT REGISTRY
22 GENERAL DIVISION Lockhart J.(1)

23 **CATCHWORDS**

24 Contract - Agreement of 1931 concerning amalgamation of Savings Bank Department of
25 the Government Savings Bank of New South Wales with the Commonwealth Savings
26 Bank of Australia - claim for share of profits payable pursuant to Agreement - cross-
27 claim for breach of Agreement - construction of clause 17 of Agreement - whether "a
28 Savings Bank" has been "established or conducted by or under the Government of New
29 South Wales".

30
31 **DECISION**

32 Introduction

33 This case concerns an agreement executed on 1 December 1931
34 between the Commonwealth Savings Bank of Australia ("the CSB"), the
35 State of New South Wales and the Commissioners of the Government
36 Savings Bank of New South Wales ("the Commissioners"). I shall refer to
37 the agreement of 1 December 1931 as "the Agreement".

38 2. Under the Agreement the CSB agreed to acquire from the
39 Commissioners the business and the whole of the assets of the Savings
40 Bank Department of the Government Savings Bank of New South Wales
41 ("the Government Savings Bank").

42 3. On 2 December 1931 the Agreement was approved by the
43 Treasurer of the Commonwealth of Australia. On 10 December 1931 it
44 was ratified by the Parliament of New South Wales by the Commonwealth
45 and State Banks Agreements Ratification Act 1931 (Act No. 62 of 1931).

46 4. Today we are accustomed to think of the CSB as a very large
47 bank; but it would be erroneous to assume that in 1931 it was larger than

1 the Government Savings Bank. The opposite is the truth. The Government
2 Savings Bank was an immense institution, the largest savings bank in
3 Australia and one of the most substantial institutions of its kind in the
4 English speaking world.

5 5. The Agreement was born during the Great Depression in Australia
6 and at a time of high political drama in New South Wales. In 1930 and
7 1931 the Government Savings Bank experienced the greatest decrease in
8 its deposit balances in its history. On 25 October 1930 the Bavin
9 government fell and the Labor government led by Mr. Jack Lang was
10 elected. The decline in the deposit balances continued. In February 1931
11 the State defaulted in payment of monies due by it to the Commissioners
12 relating to interest and deposits. Rumours concerning the safety of
13 deposits with the Government Savings Bank were rife. The traumatic
14 events of the previous eighteen months reached a climax on 23 April
15 1931 when the Commissioners suspended payment to the depositors and
16 failed to open the doors of the Government Savings Bank for business.
17 During 1931 discussions commenced between the Commissioners and the
18 CSB for the amalgamation of the Government Savings Bank or its Savings
19 Bank Department with the CSB. The discussions were broken off at one
20 stage but later resumed. The discussions between the two banks involved
21 not only the most senior officers of both bodies but, in addition, the Prime
22 Minister (Mr. Scullin), the Federal Treasurer (Mr. Theodore) and the
23 Premier and Treasurer of New South Wales (Mr. Lang). At one stage the
24 Premier of South Australia was also involved in the discussions.

25 6. The Agreement commenced to operate on 15 December 1931. On
26 that date the many branches of the Government Savings Bank reopened
27 as branches of the CSB. The changeover occurred overnight. On 14
28 January 1932 the CSB permitted unrestricted drawings by the former
29 depositors with the Government Savings Bank to whom payments had
30 been suspended on 23 April 1931. The crisis was over.

31 7. Thereafter, from 15 December 1931 until 19 January 1956 the
32 CSB was the only savings bank in New South Wales. It was not until the
33 1950's that savings bank licences were granted by the Commonwealth to
34 private institutions.

35 8. The Commissioners of the Government Savings Bank were
36 constituted a body corporate under s. 6 of the Government Savings Bank
37 Act 1906 (N.S.W.). The Commissioners were succeeded by the Rural Bank
38 of New South Wales which in turn was succeeded by the State Bank of
39 New South Wales. Sometimes I shall refer, for convenience, to "the State
40 Bank" meaning the Commissioners or the Rural Bank or the State Bank or
41 any two or more of them. At other times I shall use the corporate name
42 of the particular body concerned.

43 9. From 1932 until 1982 the profits of the savings bank business
44 carried on by the CSB in New South Wales were divided equally between
45 the CSB and the State Bank pursuant to the Agreement (clause 11).

1 10. In 1982 the CSB purported to rescind the Agreement on the
2 ground that the State of New South Wales had breached clause 17 of it
3 whereby the State had agreed that for so long as the CSB or its
4 successors carried on "the Savings Bank business in the State of New
5 South Wales no Savings Bank will be established or conducted by or
6 under the Government of New South Wales and the Government will in
7 every way aid and assist the Bank "(i.e. the CSB)" in its conduct of the
8 business and activities transferred to it by this Agreement".

9 11. The breach asserted by the CSB was the alleged involvement by
10 the New South Wales Government in activity of the State Bank in seeking
11 to gain control of two building societies and to establish close links
12 between the business of those societies and the business of the State
13 Bank. It was alleged that the New South Wales Government had become
14 involved, both directly and through the two building societies, in business
15 which was competitive with the savings bank business of the CSB.

16 12. The CSB asserted, in the alternative, that in 1982 it terminated
17 the Agreement, irrespective of the question of breach, on the basis that it
18 was terminable by any party upon the giving of reasonable notice.

19 13. The State Bank commenced proceedings in the Supreme Court of
20 New South Wales in 1983 (No. F12593 of 1983) for recovery of a one-half
21 share of the profits of the CSB's savings bank business in New South
22 Wales for certain years and payable pursuant to clause 11 of the
23 Agreement.

24 14. The State Bank instituted proceedings in 1984 against the CSB in
25 the original jurisdiction of the High Court of Australia. The High Court
26 remitted the matter to this Court. The State Bank's claim, which is based
27 on clause 11 of the Agreement, is for \$13,779,801.13 (being one-half of
28 the profits of the CSB's savings bank business in New South Wales
29 between 1 July 1981 and 30 June 1982 payable to the State Bank
30 pursuant to clause 11 of the Agreement), an account of profits or interest,
31 damages, and for a declaration that the State Bank has, and will in the
32 future have, further entitlements under clause 11.

33 15. By its amended defence and cross-claim the CSB alleges in
34 substance that the State and the State Bank established and conducted in
35 New South Wales a savings bank or savings bank business (if there be a
36 difference) many years after the execution of the Agreement through the
37 activities of the two building societies to which I referred earlier, and by
38 virtue of the State Bank's having offered flexible deposit accounts and
39 deposit facilities to the public on terms generally available only to banks
40 carrying on a savings bank business. Both the State and the State Bank
41 are said to be in breach of their respective obligations, express or implied,
42 to the CSB under the Agreement.

43 16. The CSB alleges that by reason of those breaches it lawfully
44 rescinded the Agreement, so far as the continuing obligations arising
45 thereunder are concerned, by letter dated 29 September 1982 or by filing

1 and serving its defence and counter claim in the Supreme Court
2 proceedings or by a letter dated 21 January 1986. In its cross-claim the
3 CSB claims damages, interest and declarations.

4 17. The CSB alleges, in the alternative, that it gave notice to the
5 State and the State Bank by the letter of 29 September 1982 or by a
6 letter dated 22 June 1983 terminating the indefinitely continuing
7 obligations under the Agreement on the assumption that any party could
8 terminate those obligations at any time upon reasonable notice to the
9 other parties.

10 18. Another allegation of the CSB is that the State and the State
11 Bank are estopped, by the operation of the doctrine of estoppel by
12 convention, from denying that the phrase "no Savings Bank" in clause 17
13 of the Agreement means "no savings bank business".

14 19. The CSB also alleges that the State Bank has committed the tort
15 of interfering with the contractual relations between the State and the
16 CSB by inducing or causing the State to breach its obligations under
17 clause 17. Other issues arise in the case to which I shall refer later.

18 20. Before it remitted the matter to this Court, the High Court
19 directed that certain preliminary questions of fact and law raised by the
20 pleadings be tried before other questions in the matter. At the request
21 and with the consent of the parties this Court later varied some questions
22 and added others.

23 21. The principal questions with which this case is concerned relate
24 to the interpretation of clause 17 of the Agreement and the question
25 whether the State breached its obligations thereunder.

26 22. Clause 17 provides:-

27 "17. In consideration of the Bank entering into this agreement the
28 Government agrees that so long as the Bank or its successors carries on
29 the Savings Bank business in the State of New South Wales no Savings
30 Bank will be established or conducted by or under the Government of New
31 South Wales and the Government will in every way aid and assist the
32 Bank in its conduct of the business and activities transferred to it by this
33 Agreement."

34 23. I heard the preliminary questions first and gave judgment on 23
35 April 1985. In those reasons for judgment I said that before finally
36 answering the questions then before me or making orders or declarations
37 I would stand the matter over for a short time to enable the parties to
38 consider my reasons and proposed answers. The matter was adjourned
39 until 27 May 1985 for that purpose. In the meantime, however, three
40 notices of motion were filed: one by the State Bank for an order that
41 judgment be entered in its favour for the amount claimed in the
42 statement of claim, namely, \$13,779,801.13 together with interest; a
43 second, by the State for an order striking out those paragraphs of the
44 CSB's cross-claim which raised questions that I proposed to answer

1 adversely to the CSB; and a third, by the CSB seeking the Court's leave
2 to amend its defence and cross-claim. Following a contested hearing I
3 gave further reasons for judgment on 28 May 1985 when I accepted
4 undertakings to the Court given by counsel for the CSB and made orders
5 including an order that the CSB be at liberty to amend its defence and
6 cross-claim and that it furnish in writing particulars of the allegations
7 made in the amended paragraphs of the defence and cross-claim. I
8 ordered that certain further questions of fact and law raised by
9 paragraphs (1)(b1) and (b2), 16A, 19A and 19B of the defence and
10 paragraphs 28A, 28B, 36A, 39A and 39B of the cross-claim be tried
11 before other questions of fact and law and that the hearing be fixed for 17
12 June 1985. In addition, I ordered that the State Bank's motion for
13 judgment and the State's motion to strike out be adjourned also to 17
14 June 1985.

15 24. The CSB amended its defence and cross-claim and furnished
16 particulars of the new allegations. On 17 and 18 June 1985 I heard
17 argument on the questions of fact and law raised by the new paragraphs
18 of the defence and cross-claim. I embarked upon this course because it
19 was in my opinion consonant with the terms and spirit of the orders of the
20 Chief Justice of the High Court of 8 December 1983 which, as I have
21 indicated, severed the trial of the issues in this matter.

22 25. In the result declarations were made by me on 13 August 1985
23 giving effect to my reasons of 23 April 1985. The declarations
24 encapsulated my answers to the questions which I had considered, and
25 are set out in the First Schedule to my present reasons for judgment.

26 26. I subsequently embarked upon the further hearing of this matter
27 to deal with the remaining questions (except quantum of damages and
28 questions related thereto). These remaining questions are now before me
29 for decision. They are essentially questions of interpretation of clause 17
30 and whether the State breached its obligations thereunder.

31 27. The documentary evidence is very great and many witnesses
32 were called. I set out in the Second Schedule their names and brief
33 descriptions of them. I find that all witnesses were truthful; some of them
34 impressed me, however, as being more reliable than others. My findings
35 reflect that conclusion where the evidence of a witness conflicts with that
36 of another and in particular where the evidence of witnesses conflicts with
37 documents. I have not adopted the course of stating my specific findings
38 of reliability each time a conflict occurs because the magnitude of the task
39 in this case would be too great and it would be a rather sterile exercise
40 since most of the relevant issues are determined ultimately by documents
41 rather than oral evidence.

42 28. At the outset I should say that in my findings of fact I shall
43 repeat a fair number of findings made in my reasons for judgment of 23
44 April 1985. This repetition is perhaps regrettable but it assists in reading
45 and understanding my present reasons as many of my earlier findings are

1 important to the issues presently before me. My findings of fact are made,
2 not in one complete part of my reasons, but when considering each
3 question, although there is of necessity some overlap. I take this course
4 because it enables the questions to be more readily considered and
5 understood.

6 Findings made on 23 April 1985:

7 29. It was common ground between the parties that evidence of the
8 factual background known to the parties at or before the date of the
9 Agreement, including evidence of the "genesis" of the transaction and of
10 the "aim" or "object" or "commercial purpose" of the transaction, is
11 admissible: *Prenn v. Simmonds* (1971) 1 WLR 1381 per Lord Wilberforce
12 at 1383-1385; *Reardon Smith Line Limited v. Hansen-Tangen* (1976) 1
13 WLR 989 per Lord Wilberforce at 995-997; *L. Schuler A.G. v. Wickman*
14 *Machine Tool Sales Limited* [1973] UKHL 2; (1974) AC 235 per Lord
15 Wilberforce at 261; *D.T.R. Nominees Pty. Limited v. Mona Homes Pty.*
16 *Limited* [1978] HCA 12; (1978) 138 CLR 423 per Stephen, Mason and
17 Jacobs JJ at 429; *Secured Income Real Estate (Australia) Limited v. St.*
18 *Martins Investments Pty. Limited* [1979] HCA 51; (1979) 144 CLR 596 per
19 Mason J at 605-606; *Codelfa Construction Pty Limited v. State Rail*
20 *Authority of New South Wales* [1982] HCA 24; (1982) 149 CLR 337 per
21 Mason J at 345-353; and *Hospital Products Limited v. United States*
22 *Surgical Corporation* (1984) 58 ALJR 587 In *Codelfa Construction Pty*
23 *Limited v State Rail Authority of New South Wales* (supra) Mason J. said
24 at 352:-

25 'Generally speaking facts existing when the contract was made will
26 not be receivable as part of the surrounding circumstances as an aid to
27 construction, unless they were known to both parties, although, as we
28 have seen, if the facts are notorious knowledge of them will be
29 presumed.'

30 30. What the Court must do is "to place itself in thought in the same
31 factual matrix as that in which the parties were": *Reardon Smith Line v.*
32 *Hansen-Tangen* (supra) per Lord Wilberforce at 997.

33 31. In some of the cases to which I referred the relevant passages
34 concerned the implication of terms, whilst other passages related to the
35 application of the parol evidence rule to agreements in writing; but it was
36 not disputed that the references were apposite in this case with respect to
37 the preliminary questions relating to the interpretation of the Agreement.

38 32. From 1906 the Commissioners conducted the Government
39 Savings Bank. At the time of the signing of the Agreement the
40 Government Savings Bank consisted of:- (a) a Savings Bank Department;
41 (b) a Rural Bank Department; (c) an Advances for Homes Department;
42 and (d) a Government Housing Department. Each department was
43 conducted separately from the others and this had been the position for
44 some years before 1 December 1931.

1 33. The Savings Bank Department engaged in the following activities
2 prior to the Agreement taking effect:- (a) the conduct of savings
3 accounts; (b) the receipt of deposits; (c) the crediting and paying of
4 interest; (d) the repayment of deposits in cash and, in the case of
5 accounts of lending societies, by cheques drawn on such accounts; (e) the
6 borrowing of money and receipt of advances from consolidated revenue of
7 the State; and (f) the investment of the funds of the Savings Bank
8 Department.

9 34. The Commonwealth Bank was established by the Commonwealth
10 Bank Act 1911 originally with two divisions, one dealing with savings bank
11 activities and the other with trading bank activities. The one entity carried
12 on the two types of banking business under the one Board and the one
13 corporate structure until the coming into operation of the Commonwealth
14 Bank (Savings Bank) Act 1927 (commencing 9 June 1928) which
15 established the Commonwealth Savings Bank as a body corporate with
16 the power to carry on the general business of a savings bank. There was
17 provision for the transfer of the assets and liabilities of the savings bank
18 business of the Commonwealth to the new corporation and other
19 consequential matters. Section 8 of that last mentioned Act amended the
20 Commonwealth Bank Act 1911-1925 by inserting a new s. 35E which
21 made provision for the CSB to be managed by a Commission consisting of
22 a Chief Commissioner and two other Commissioners with a provision that,
23 until appointment of the Commission, the CSB would be managed by the
24 Board of the then Commonwealth Bank of Australia ("the Commonwealth
25 Bank"), that the Governor of the Commonwealth Bank would have all the
26 powers and functions of the Chief Commissioner and that the Board of the
27 Commonwealth Bank would have all the powers and functions of the
28 Commission. At all material times the Board of directors and the Governor
29 of the Commonwealth Bank retained the powers of management of the
30 CSB conferred by s. 35E. The Governor of the Commonwealth Bank
31 during 1931 was Mr. E.C. Riddle and the Chairman of the Commonwealth
32 Bank Board was Sir Robert Gibson.

33 35. For several years prior to the signing of the Agreement Australia
34 was affected by the depression. The first indications of the changed
35 economic conditions which were affecting Australia appeared, so far as
36 the Government Savings Bank was concerned, in September 1929 when
37 an adverse movement in depositors' balances began, and continued
38 thereafter for a long time. In the financial year ended 30 June 1930
39 withdrawals exceeded deposits by 6,007,284 pounds, although the
40 addition of 2,679,949 pounds interest to depositors' accounts left a net
41 decrease of 3,327,335 pounds in depositors' balances for the year. In
42 addition to the generally adverse economic conditions prevailing at the
43 time several specific matters contributed to the overall decrease in
44 deposits at that time, namely, (i) the fall in wool prices at the sales in
45 September 1929; (ii) the stock exchange crisis in the United States; (iii)
46 the timber workers' strike of that year; (iv) the coal strike; (v) the
47 increase in fixed deposit rates in 1930; and (vi) the withdrawal of funds

1 by Savings Bank Department depositors for investment in Commonwealth
2 bonds, the issue of which closed in July 1930.

3 36. From 1 July 1930 the adverse movements in depositors' balances
4 increased, but there were no indications for some time of any disquietude
5 on the part of depositors operating as a reason for the heavy withdrawals
6 and decreased deposits. The flotation of the Commonwealth Loan in the
7 month of July accounted for the withdrawal of 1,151,749 pounds. The
8 usual withdrawal of interest added at 30 June decreased balances still
9 further. The decrease in depositors' balances for the month of July was
10 2,549,665 pounds followed by a decrease in August of 528,097 pounds
11 and 417,303 pounds in September: a total decrease of 3,495,065 pounds
12 for the first three months of the 1931 financial year.

13 37. Prior to 28 August 1931 the Government Savings Bank Act 1906
14 required the Commissioners to retain 20% of the Savings Bank
15 Department's funds in liquid form. Despite the substantial decrease in
16 deposits at that time, the Commissioners had managed to keep their
17 liquid resources in excess of the 20% statutory minimum. On 30 June
18 1930 a liquid 2,028,025 pounds in excess of the minimum was held in the
19 Savings Bank Department and an excess of 101,065 pounds was held in
20 the Rural Bank Department. Those excesses accrued as the fruits of a
21 conscious effort on the part of the Commissioners to liquidate their assets
22 as much as possible by placing matured fixed deposits at call and by the
23 sale of stock in anticipation of continuing heavy withdrawals.

24 38. In September 1930 an election campaign opened for the
25 Legislative Assembly of New South Wales. In the course of the campaign
26 statements by candidates and in political advertisements in October of
27 that year as to the fate of deposits in the Savings Bank Department in the
28 event of a victory by the Labor Party headed by Mr. J.T. Lang led to
29 further increased withdrawals. This occurred despite assurances by the
30 Commissioners that, under the Government Savings Bank Act 1906, they
31 were entirely free from political interference in their control and
32 administration of the Bank's funds. Nevertheless, depositors continued to
33 be uneasy and, in October, heavy withdrawals resulted in a decrease in
34 balances of 1,472,219 pounds.

35 39. In October 1930 the Commissioners informed the Commonwealth
36 Bank that they anticipated something in the nature of a run on the
37 Government Savings Bank on Monday 27 October 1930, following the
38 State elections. They told the Commonwealth Bank of their cash position
39 and enquired whether the Commonwealth Bank would come to their
40 assistance, if necessary, and to what extent. The Commonwealth Bank
41 informed the Commissioners that the request was then too nebulous to be
42 dealt with in a practical manner.

43 40. Although publicity in relation to the affairs of the Government
44 Savings Bank eased somewhat after the October elections, heavy
45 withdrawals continued in November and December of 1930. **After the**

1 **election of the Lang government in October 1930 depositors**
2 **continued to fear that the funds of the Government Savings Bank**
3 **might be used for the purposes of the New South Wales**
4 **Government.** The position of the Government Savings Bank was
5 aggravated in December 1930 with the flotation of the Commonwealth
6 Cash and Redemption Loan which resulted in unprecedented withdrawals
7 by depositors for investment in the loan. This added to the usual heavy
8 withdrawals for Christmas expenditure and resulted in a record 2,593,662
9 pounds decrease in balances for the month. Of this amount 1,840,500
10 pounds was invested in the Commonwealth loan through the Government
11 Savings Bank itself. An additional unknown part of the 2,593,662 pounds
12 was invested by brokers and other banks.

13 41. In February 1931 the State Treasury defaulted in the payment of
14 interest due to the Government Savings Bank on its investments and
15 deposits and failed to comply with a request for the repayment of some of
16 the Bank's call deposits. Those included 250,000 pounds principal due on
17 1 February 1931 and 432,514 pounds.16s.3d. interest due on 10 February
18 1931. Those two amounts represented part of a sum in excess of 7 million
19 pounds (there were also Fixed Deposits maturing at various dates at the
20 Treasury for 4,485,050 pounds, 1,945,000 pounds which was at call and
21 running on, and 682,514 pounds.16s.3d. overdue) which had until then
22 been supposed to form a very substantial part of the liquid resources of
23 the Government Savings Bank of New South Wales. Those deposits were
24 subsequently frozen and were not available to meet the Bank's liabilities.

25 42. The reason advanced by the New South Wales Treasury for non-
26 payment of these amounts was that the Commonwealth Government had
27 not paid moneys due by it to the State of New South Wales and it would
28 not make available other funds to the State for the purpose of enabling it
29 to make payments due to the Government Savings Bank.

30 43. During February 1931 the New South Wales Government also
31 outlined financial proposals including proposals for the reduction of
32 interest on government stock. **The monetary policy advocated by Mr.**
33 **Lang's Government involved an intention, publicly stated, not to**
34 **repay British bond holders the debts owed by the State; and Mr.**
35 **Lang advocated that the Commonwealth adopt a similar policy.** Mr.
36 Lang's plan was proposed at the Premier's conference of February and
37 March 1931. **A division of opinion arose throughout Australia about**
38 **Mr. Lang's monetary policy. It was opposed, amongst others, by**
39 **the Prime Minister, Mr. Scullin, and the Federal Treasurer, Mr.**
40 **Theodore. These and other matters led to an accentuation of fear**
41 **in the minds of members of the general public of New South Wales**
42 **concerning the position of the Government Savings Bank.**

43 44. During the Commonwealth Bank Board Meeting held in
44 Melbourne on 3, 4 and 5 March 1931, Mr H.D. Hall, a Commissioner of the
45 Government Savings Bank and its President, drew attention to the serious
46 loss of funds by his institution. Following his representations on 13 March

1 1931, the Commonwealth Bank offered to repay the fixed deposits which
2 the Government Savings Bank held with it (600,000 pounds) and to
3 discount those with other banks (2,300,000 pounds). However, the
4 Executive Committee of the Commonwealth Bank also pointed out that it
5 would not accept responsibility for the deposits of the Government
6 Savings Bank (approximately 60m pounds) by guarantee or otherwise.
7 This was in response to intimations by the Commissioners that nothing
8 less than the guarantee of the whole of their deposits would be of any
9 use. The offer of cash against the fixed deposits was accepted and almost
10 3,000,000 pounds in cash was provided by the Commonwealth Bank to
11 the Commissioners under this proposal.

12 45. In late March 1931 there were discussions between the
13 Commissioners and the Commonwealth Bank in which the Commissioners
14 requested the Commonwealth Bank to take steps to restore confidence in
15 the Government Savings Bank and to provide further financial
16 accommodation.

17 On 27 March 1931 the New South Wales government announced its
18 decision not to pay interest to British holders of New South Wales stock.

19 46. On 9 April 1931 Mr. Hall informed the Premier, Mr. Lang, that in
20 view of the continued drain on funds of the Bank the only choices open to
21 it were to close its doors or to arrange amalgamation with the
22 Commonwealth Bank.

23 47. On 11 April 1931 Mr. Hall outlined to Mr. E.C. Riddle, who was,
24 as I said earlier, the Governor of the Commonwealth Bank, a proposal for
25 amalgamation. There followed an exchange of correspondence between
26 the Premier, Mr. Lang, and the CSB. In a letter of 21 April 1931 the
27 Premier approved negotiations being entered into with a view to
28 amalgamation. In that same letter Mr. Lang also indicated the desirability
29 of all the departments of the Bank being taken over because, although
30 the departments published separate balance sheets, there was no strict
31 separation of the staff engaged in the individual departments. The
32 Commonwealth Bank replied that it was willing to consider such a request
33 subject to a complete investigation of the affairs of the Government
34 Savings Bank being undertaken by its officers.

35 48. Following a meeting of the Executive Committee of the Board of
36 the Commonwealth Bank on 13 April 1931, Mr. Riddle informed Mr. Hall
37 that the Commonwealth Bank was prepared to consider amalgamation of
38 the two banks. On 22 April 1931 a public statement was made on behalf
39 of the Commonwealth Bank by Sir Robert Gibson stating that the Board
40 had received a communication late that evening from the Premier, Mr.
41 Lang, requesting that the Board of the Commonwealth Bank consider a
42 proposal to absorb the Government Savings Bank in the CSB; that the
43 Board had informed the Premier that it was prepared to investigate that
44 proposal and that if a satisfactory basis could be reached on which the

1 transfer could be effected the Board would submit its views to the Federal
2 Treasurer whose approval would be required.

3 49. The announcement in the press of the proposed amalgamation
4 precipitated a run on the Government Savings Bank. On 22 April
5 withdrawals for the day amounted to 1,678,313 pounds. The demand was
6 such on that day that the Bank had no alternative but to suspend further
7 payments. The Commissioners sent a letter to the Commonwealth Bank
8 disclosing that the Government Savings Bank would not reopen for
9 business from 23 April 1931. On 23 April the Government Savings Bank of
10 New South Wales did not open its doors for business. During that month
11 withdrawals had exceeded deposits by 4,140,569 pounds, making a total
12 decrease of 7,942,565 pounds since 1 January 1931 and of 16,388,814
13 pounds since July 1930.

14 50. When the Government Savings Bank closed its doors on 22 April
15 1931 its depositors' balances still exceeded 54 pounds million despite a
16 rundown in deposits of over 22.5m pounds in the previous 22 months. At
17 that time, the CSB throughout the whole of Australia held deposits of
18 approximately 48,555,304 pounds of which its deposits in New South
19 Wales were only 14,486,551 pounds, **so that in New South Wales the**
20 **Government Savings Bank had deposits which were four times**
21 **larger than those of the CSB. At 30 June 1929, immediately before**
22 **the onset in Australia of the Great Depression, the Government**
23 **Savings Bank had 1,012,122 active savings bank accounts with**
24 **balances aggregating 73,960,679 pounds representing 32.82**
25 **percent of all savings bank deposits in Australia at that time. It**
26 **operated out of 189 branches and 627 agencies and had assets**
27 **totalling 76,631,925 pounds making it the second largest savings**
28 **institution in the British Empire.** By comparison, at 30 June 1929, **the**
29 **CSB had deposits in New South Wales of 11,601,411 pounds -**
30 **one-sixth of the deposit base of the Government Savings Bank.** At
31 30 June 1931 the CSB operated out of only 24 branches compared with
32 the Government Savings Bank's 192. The CSB had, of course, additional
33 agencies principally in post offices, throughout New South Wales, but the
34 Government Savings Bank still retained 627 agencies at that time.

35 51. The erosion of the deposits of the Government Savings Bank over
36 the period following July 1929 until it closed its doors on 22 April 1931
37 was steady and practically continuous. It was in fact continuous after July
38 1930. Of course, a run down in deposits in consequence of the Great
39 Depression was experienced by all Australian savings banks including the
40 CSB. From 1 July 1930 to 30 June 1931, however, while the CSB's
41 deposits fell by 3.5 percent, and the deposits of the savings banks of
42 other States by 12.2 per cent, the deposits of the Government Savings
43 Banks fell by 24.7 per cent. In relative terms there was an immense
44 erosion of its deposit base and of its cash and liquid resources. However,
45 despite its predicament, no loss was recorded by the Government Savings
46 Bank other than for a fifteen day period between 15 December 1931 and

1 31 December 1931 at which time it was in the process of amalgamating
2 its Savings Bank Department with the CSB.

3 52. During the period from June 1929 to April 1931 when deposits
4 with the Government Savings Bank were falling, deposits with the CSB in
5 New South Wales actually grew, although elsewhere in Australia they fell.
6 **It is plain that money was being withdrawn from the Government**
7 **Savings Bank to be deposited with the CSB.** In the twelve months to
8 30 June 1930 the average weekly deposits of the CSB in New South
9 Wales were 210,000 pounds. This figure increased to 239,000 pounds in
10 the nine months to 31 March 1931 and to 780,000 pounds in the four
11 weeks to 27 April 1931.

12 53. On 23 April 1931 the Commonwealth Bank appointed its Deputy
13 Governor, Mr. H.T. Armitage, to make an investigation of the position of
14 the Government Savings Bank and it informed the Premier of New South
15 Wales that the Commonwealth Bank was prepared to provide assistance
16 to necessitous depositors with the Government Savings Bank subject to
17 the passing of the necessary enabling legislation.

18 54. On 29 April 1931 the Parliament of New South Wales passed the
19 Government Savings Bank (Amendment) Act 1931 (Act No. 14 of 1931)
20 enabling the Commissioners to make arrangements with the
21 Commonwealth Bank for advances for the relief of necessitous depositors
22 (s. 2). That Act also authorised the Commissioners to make arrangements
23 with the CSB or the Commonwealth Bank for amalgamation and for the
24 transfer of the whole or any part of the assets, liabilities and business of
25 the Government Savings Bank upon such terms and conditions as may be
26 agreed between the Commissioners, the Commonwealth Bank and/or the
27 CSB and the Treasurer of New South Wales (s. 3). The Act provided (s. 3)
28 that no such arrangement shall take effect until ratified by Parliament. By
29 s. 7 it was provided that, until 31 December 1931 or an earlier date
30 appointed by the Governor of New South Wales, the right of any depositor
31 or customer in any department of the Government Savings Bank to
32 receive payment of any part of his deposit or interest thereon or to
33 receive interest on any stock or debentures issued by the Bank shall be
34 deemed to be suspended. Section 8 empowered the Governor, if
35 authorised by both Houses of Parliament, by proclamation to direct that
36 the Bank or any department thereof shall be wound up.

37 55. On 4 May 1931 the Government Savings Bank reopened its doors
38 for the sole purpose of making payments to necessitous depositors with
39 funds provided by the Commonwealth Bank. Total payments to such
40 depositors amounted to 1,745,000 pounds.

41 56. On 30 April 1931 the report of the Deputy Governor of the
42 Commonwealth Bank was considered by its Board and the basis of an
43 amalgamation agreement was prepared. On 28 May 1931 a letter was
44 sent to the Premier of New South Wales signed by Sir Robert Gibson
45 setting forth the Board's views on the proposal for amalgamation. The

1 letter stated, inter alia, **that the Board did not contemplate the**
2 **absorption of the Rural Bank Department or the Advances for**
3 **homes Department or the Government Housing Department. The**
4 **letter also stated that the CSB could not take over the Rural Bank**
5 **Department as it had no power to do so under the relevant**
6 **legislation and that the Board had no intention of seeking to**
7 **acquire such power. Were the Rural Bank Department to be**
8 **absorbed, it would have to be by the Commonwealth Trading Bank**
9 **Department.** However, the letter said that the Board would, if desired,
10 authorise an investigation of the affairs of the Rural Bank Department and
11 give further consideration to the question of its absorption. A draft of the
12 agreement proposed by the Board was attached to the letter, a copy of
13 which was also sent to the President of the Government Savings Bank,
14 Mr. Hall.

15 57. The Commissioners objected to certain of the terms of the draft
16 agreement. Those objections were set forth in a communication dated 11
17 June 1931 to the Premier of New South Wales. On 15 June 1931 the
18 Premier replied to Sir Robert Gibson's letter, mentioning various matters
19 in the proposed agreement which were objectionable, enclosing the
20 Commissioners' recommendations in relation to the draft agreement and
21 concurring in their views.

22 58. On 20 June 1931 a meeting took place in Melbourne between the
23 Prime Minister (Mr. Scullin) the Premier of New South Wales (Mr. Lang)
24 the Premier of South Australia (Mr. Hill) the Chairman of the Board of the
25 Commonwealth Bank (Sir Robert Gibson) and the Governor of the
26 Commonwealth Bank (Mr. Riddle). At that meeting, the Premier of New
27 South Wales made new proposals for the reopening of the Government
28 Savings Bank with funds to be provided by the Commonwealth Bank of up
29 to 9 million pounds. The representatives of the Commonwealth Bank
30 refused to consider the proposal and on 22 June 1931, at the request of
31 Mr. Lang, they agreed that the Premier's objections to the terms of the
32 amalgamation agreement should be the subject of further negotiations
33 between the representatives of the Commonwealth Bank and the
34 Commissioners. These negotiations commenced immediately in Melbourne
35 and on 10 July 1931 a further draft agreement was submitted to the
36 Commissioners. On 14 July 1931 the Commissioners reported to the
37 Premier of the New South Wales on the terms of the proposed
38 amalgamation in which they said that the draft agreement represented
39 the best conditions they had been able to obtain and included concessions
40 granted as a result of their negotiations. The Commissioners
41 recommended to the Premier the acceptance of the agreement as they
42 saw no alternative except the liquidation of all the departments of the
43 Bank. They said:

44 'we are of the opinion that the alternative would be a state-wide
45 calamity necessitating many years of liquidation while a breach with the
46 Commonwealth Bank would involve an immediate liability for the

1 payments already made to necessitous depositors totalling approximately
2 1,400,000 pounds.'

3 59. On 21 July 1931 the Board of the Commonwealth Bank wrote to
4 the Premier, Mr. Lang, stating, inter alia, that nearly two months had
5 passed since the Chairman's letter of 28 May had been sent to him and no
6 finality had been reached with reference to the amalgamation proposals.

7 60. The letter also stated:

8 'according to press reports it is understood that your government will
9 lay the proposed Agreement before the Parliament of New South Wales
10 for discussion prior to the acceptance or otherwise by your government.'

11 61. The letter then said that such a course would be contrary to the
12 spirit of the negotiations for amalgamation and that such action would
13 automatically close any further negotiations. The Board also indicated its
14 reluctance to continue to carry on indefinitely the temporary financing
15 arrangement for the relief of the depositors of the Government Savings
16 Bank. It said:-

17 'The provision of funds for this purpose has reached a point which
18 was never contemplated by the Board of the Bank and the Board cannot
19 see its way to allow this to continue.'

20 62. The Board requested a reply signifying acceptance or otherwise
21 by 25 July 1931. The deadline was later extended to 12 noon on 27 July.

22 63. However, the New South Wales Government was unwilling to
23 accept the terms sought to be imposed for the repayment by it of
24 substantial liabilities owed by the State to the Savings Bank Department
25 which the State Treasury had stated was beyond the capacity of the State
26 at that time. The draft agreement was not accepted by the Government of
27 New South Wales and negotiations ceased automatically.

28 64. With the breakdown of negotiations on 27 July 1931, payments
29 to necessitous depositors ceased and the Government Savings Bank again
30 closed its doors.

31 65. The Government Savings Bank (Further Amendment) Act 1931
32 (Act No. 34 of 1931) was passed on 27 August 1931 and assented to on
33 28 August 1931. Under Part II of the Act, a new Board of five
34 Commissioners to be appointed by the Governor was established in place
35 of the old Board of three, who were to cease to hold office upon the
36 commencement of the Act.

37 66. Part III of the Act provided that, after its commencement, the
38 Savings Bank Department was to be administered in two divisions, to be
39 known as the Savings Bank Department (Old Business Division) and the
40 Savings Bank Department (New Business Division). All assets and
41 liabilities of the Savings Bank Department as at the date of
42 commencement of the Act were to be administered in and belong to the
43 Savings Bank Department (Old Business Division) and all deposits

1 received after the commencement of the Act and the investments thereof
2 were to belong to the Savings Bank Department (New Business Division):
3 s. 23A(1)(a). No moneys, investments or assets belonging to the New
4 Business Division were to be liable to any claim against or relating to the
5 Old Business Division or any other department of the Bank: s. 23(1)(b).
6 Separate accounts were to be kept and separate balance sheets compiled
7 in respect of each division: s. 23A(1)(c). The Commissioners were to
8 apportion between each division the costs of administration of both
9 divisions in an equitable manner: s. 23A(1)(d). The Commissioners were
10 prohibited from opening savings bank accounts in the Old Business
11 Division: s. 23A(2)(c).

12 67. In respect of the assets of the Old Business Division, all deposits
13 in that division together with interest credited on 1 July 1931 were
14 deemed to be capitalised and repayable only at the option of the
15 Commissioners in a manner to be authorised, such deposits to carry
16 interest at a rate to be fixed by the Commissioners: s. 23A(2)(a).

17 68. Although Act No. 34 of 1931 continued the moratorium on the
18 liabilities of the Old Business Division of the Government Savings Bank,
19 the new s. 74 provided in effect that no moratorium proclaimed under the
20 Act shall take away the right of any depositor to receive payment of any
21 of his deposit or interest at any time after 31 December 1933 or the right
22 of any person to receive payment after that date of money or interest
23 secured by any stock or debentures issued by the Bank. It also provided
24 that nothing contained in the Act shall suspend from any time after 31
25 December 1933 any liability of the Crown arising from guarantees
26 referred to in the Government Savings Bank Act 1906.

27 69. The New Business Division of the Government Savings Bank of
28 New South Wales opened for business on 7 September 1931 and for a
29 while the Commissioners hoped that it would be able to trade out of its
30 difficulties and generate sufficient new deposits to enable the release of
31 the old depositors' balances. The business transacted, however, was
32 relatively small. It became apparent to the Commissioners that growth in
33 the New Business Division would not be sufficient to enable the old
34 balances to be released within the foreseeable future. The Commissioners
35 explored various avenues for the purpose of reopening the Bank and
36 permitting unrestricted operations on the Old Business Division accounts,
37 including attempts to raise loans overseas, but to no avail. By the end of
38 October 1931 depositors' balances in the New Business Division reached
39 560,608 pounds.8s.7d and accounts numbered 64,714.

40 70. On 21 October 1931 the Government Savings Bank announced
41 that negotiations would reopen with the Commonwealth Bank during the
42 following week. At Board Meetings of the Commonwealth Bank held on 4,
43 5 and 6 November 1931 a subcommittee, which included representatives
44 of the Government Savings Bank, was formed for the purpose of evolving
45 some practical basis for amalgamation of the two institutions. In addition,
46 negotiations continued at a high political level and involved the Prime

1 Minister, the Federal Treasurer and the Premier of New South Wales. On 9
2 November 1931 two draft agreements (one providing for the
3 amalgamation of the Savings Bank Department of the Government
4 Savings Bank with the CSB and the other providing for the amalgamation
5 of the Rural Bank Department of the Government Savings Bank with the
6 Commonwealth Bank) were handed to the Premier with a covering letter
7 stating that, in the opinion of the Commissioners, these agreements were
8 a distinct improvement upon those previously submitted, and
9 recommending acceptance by the Government of New South Wales.

10 71. The negotiations concluded successfully. Two agreements were
11 signed on 1 December 1931. One was the agreement in suit for the
12 amalgamation of the Savings Bank Department of the Government
13 Savings Bank with the CSB (the parties to which were the State of New
14 South Wales, the Commissioners and the CSB). The other agreement
15 provided for the amalgamation of the Rural Bank Department of the
16 Government Savings Bank with the Commonwealth Bank (the parties to
17 which were the State of New South Wales, the Commissioners, and the
18 Commonwealth Bank). I shall refer to the last mentioned agreement as
19 "the Collateral Agreement". By reason of s. 35D of the Commonwealth
20 Bank Act 1911-1927 the agreements required the approval of the
21 Commonwealth Treasurer. They were also expressed to be subject to
22 ratification by the State Parliament of New South Wales (clause 18 of the
23 Agreement and clause 14 of the Collateral Agreement). The
24 Commonwealth Treasurer approved the agreements on 2 December
25 1931. The Parliament of New South Wales passed the Commonwealth and
26 State Banks Agreements Ratification Act (Act No. 62 of 1931) which was
27 assented to on 10 December 1931. The Act ratified both agreements (s.
28 4) and conferred all requisite authorities to give full effect thereto (s. 5).
29 The Agreement appears in the First Schedule to that Act and the
30 Collateral Agreement appears in the Second Schedule.

31 72. On 15 December 1931 all branches, previously of the
32 Government Savings Bank, reopened as branches of the Commonwealth
33 Savings Bank. Thereafter and until 19 January 1956 the CSB was the only
34 bank carrying on savings bank business in New South Wales. As I said
35 earlier, it was not until the 1950's that provision was made for the grant
36 of authorities by the Commonwealth to private banks to carry on savings
37 bank business in Australia.

38 73. The amalgamation of the Savings Bank and the Rural Bank
39 Departments of the Government Savings Bank represented the fourth in a
40 series of amalgamations by the CSB or the Commonwealth Bank of State
41 savings institutions. They were, successively, the Government Savings
42 Banks in Tasmania (by agreement dated 19 June 1913 as varied by
43 agreements dated 23 December 1918 and 4 January 1922); in
44 Queensland (by agreement dated 22 June 1920); and in Western
45 Australia (by agreement dated 15 August 1931).

1 74. The Tasmanian, Queensland and Western Australian
2 amalgamation agreements all made provision for sharing profits and
3 losses of the savings bank business in the particular State. The
4 Queensland and Western Australian agreements each provided that it was
5 to subsist for a period of 25 years with an option of the Government of
6 the State to continue the arrangement for a further period not exceeding
7 an additional 20 years; i.e. a total maximum life for each agreement of 45
8 years (Queensland agreement, clause 21; Western Australian agreement,
9 clause 15). All three agreements were matters of public record when the
10 agreement with which this case is concerned was executed.

11 75. Not long after the Agreement was executed it was varied: first in
12 1935 and later in 1937. An agreement was signed on 26 March 1935 by
13 Rural Bank of New South Wales (which succeeded the Commissioners of
14 the Government Savings Bank), the CSB and the Commonwealth Bank. It
15 varied the obligations imposed by clauses 3, 4, 9 and 12 of the
16 Agreement and clauses 9 and 12 of the Collateral Agreement (relating to
17 the Rural Bank Department). The agreement of 26 March 1935 was
18 ratified by Act of the New South Wales Parliament, The Commonwealth
19 and State Banks Agreement Ratification Act 1935 (No. 28 of 1935): s. 3.

20 76. The second variation to the Agreement was made in 1937 by
21 agreement dated 30 November 1937, the parties to which were the State
22 of New South Wales and the CSB. It was ratified by the New South Wales
23 Parliament by the Commonwealth and State Bank Agreement Ratification
24 Act 1937 (No. 41 of 1937): s. 2. The effect of the 1937 variation was in
25 essence to extend dates for payment of certain monies due by the State
26 of New South Wales to the CSB pursuant to clause 5 of the Agreement by
27 a further 20 years so that the last payments by the State of New South
28 Wales to the CSB in discharge of its liabilities would have been made on
29 31 May 1977.

30 77. The signing of the Agreement in December 1931 was the
31 culmination of many months of considerable difficulties for the
32 Government Savings Bank. Buffeted by a wave of public reaction to
33 policies of the Lang government, faced with the pessimism generated in
34 the public mind by the depression, its liquid resources practically
35 depleted, the Government Savings Bank had either to amalgamate with
36 the CSB or face the winding up of its affairs over many years with
37 disastrous consequences to the public.

38 78. It was submitted by counsel for the CSB that at all material
39 times, especially December 1931 prior to the signing of the Agreement,
40 the Government Savings Bank was hopelessly insolvent. Counsel for the
41 Commissioners and the Solicitor-General for the State submitted to the
42 contrary. I did not find it necessary in my earlier reasons for judgment to
43 resolve this particular question. There is no doubt, however, that during
44 1931 the Government Savings Bank of New South Wales was in a
45 precarious position. Clearly, its predicament was a lack of liquid resources
46 to meet a demand on liabilities to depositors of over 54m pounds, a figure

1 in excess of the entire note issue in Australia at the relevant time. But I
2 rejected the argument that the amalgamation embodied in the Agreement
3 was nothing but a rescue operation by the CSB at the behest of the
4 Government Savings Bank. The CSB was controlled by a Board which was
5 conscious of its responsibilities to its depositors and customers. It
6 conducted the negotiations which led to the signing of the two
7 agreements in December 1931 with responsibility. The CSB made its own
8 enquiries and actuarial calculations of the value of the assets and
9 liabilities which it would assume by taking over the Government Savings
10 Bank. Its Board reached a conclusion that it was feasible to amalgamate
11 the Savings Bank Department of the Bank with the CSB and to
12 amalgamate the Rural Bank Department with the Commonwealth Bank
13 itself. The two agreements were both business and political arrangements
14 that served the interests of the nation as well as those of the State of
15 New South Wales and the financial interests of both the Government
16 Savings Bank and the CSB. It is true that the assets of the Government
17 Savings Bank did not enable it to meet a run on the Bank of the
18 magnitude which occurred during the months preceding April 1931. It
19 must be remembered, however, that the Government Savings Bank
20 continued to make profits during those difficult times.

21 79. The amalgamation of the second largest savings bank in the
22 British Empire with the CSB took place over one day and one night. One
23 day the CSB had deposits of 48m pounds and the next day it had 104m
24 pounds. These, of course, were liabilities; but it was also taking over
25 assets together with a going concern constituted by the Savings Bank
26 Department of the Government Savings Bank with all its attendant
27 buildings, staff and organisation to administer its assets and liabilities. By
28 January 1932 the balance of the old deposits with the Savings Bank
29 Department which had been taken over were released so that the crisis
30 passed. Notwithstanding the high political drama and emotion that
31 surrounded the events culminating in the takeover in December 1931
32 there was, at the same time, calm and objective judgment of the facts
33 and commercial realities of the proposals which ultimately emerged as the
34 terms of the two agreements of December 1931. Although a very large
35 part of the assets of the Government Savings Bank consisted of securities
36 held in or guaranteed by the Government of the State of New South
37 Wales, it is plain that much of the crisis of 1931 that led to the making of
38 the December 1931 agreements had its genesis in politics and the general
39 unease felt by persons, especially in New South Wales, about the safety
40 of their investments in the Government Savings Bank. It is well known,
41 even today, that the stability of banks and other financial institutions is a
42 sensitive matter and rests rather delicately on the psychology of the
43 investing public.

44