

13 July 2017

ATT: Mark Fitt
Senate Economics References Committee
PO Box 6100, Parliament House
CANBERRA ACT 2600

Dear Mark,

Re: Inquiry into Consumer Protection in the Banking, Insurance & Finance Sector

Thank you for your letter dated 6 July 2017. I note the contents of the submission from the Holt Norman Ashman Baker Action Group (HNAB-AG) and in particular, the reference to the Timbercorp hardship program and their comments about my role.

Generally speaking, the comment of HNAB-AG that my role was to “explain” the settlement deeds is correct, although their assertion that this did not amount to “giving advice in the person’s best interest” is, with respect, not accurate.

For completeness, detailed below is my role in providing advice to applicants to the Timbercorp hardship program.

My primary role was to provide legal advice to persons referred to me by the hardship program who had reached in-principle agreements with the liquidator as to the settlement of claims against them and related court proceedings. The settlements were negotiated through the Timbercorp hardship program following which the applicants would be asked to sign settlement deeds and associated documents, including consent orders disposing of court proceedings.

I was not involved in those negotiations and nor did I provide advice to applicants regarding the negotiations or whether they should agree to any settlement proposals.

My role was to ensure that applicants understood the terms of the settlement agreements, including the settlement deeds, the authorities, the statements of financial circumstances and the consent court orders. I would discuss the terms of the settlement deeds, which typically ran for up to 15 pages, and answer any questions regarding the effect of any clauses.

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In particular, I would explain:

- the operation of any caveats over properties;
- the finality of the agreements;
- the circumstances under which claims and court proceedings could be reopened by the liquidator;
- the operation of the default clauses;
- the scope of the confidentiality clauses;
- the finalisation of court proceedings and;
- the terms of payments, including instalment payments.

At the outset, I would routinely explain my role to applicants, namely that I was providing them with legal advice as to the terms and conditions of the settlement agreements but I was not providing legal advice as to whether they should or should not enter the agreements.

I would tell them that my fee was paid by the liquidator but that I was bound by the legal profession rules to provide them with independent legal advice.

On a number of occasions, I was asked by applicants to request that the settlement deed be amended or that the terms be renegotiated and I passed these requests on to the hardship program to be relayed to the liquidator. I am aware that the terms and conditions of the agreements or the payment terms were altered in some cases.

Contrary to the assertion by HNAB-AG, I did not reiterate or support the liquidator's views as to the validity of the alleged debts, the offers made or the program itself.

At the conclusion of the advice, I would write to both the Timbercorp hardship program and the applicants confirming the conclusion, the applicants' instructions as to what they proposed to do and offering further advice if needed.

I have provided legal advice as to settlement agreements to approximately 90 applicants.

In addition, I have provided legal advice to approximately 15 persons who are in the hardship program as to:

- proposals by the liquidator for substituted service of court proceedings;
- proposals by the liquidator for extensions of time for service of court proceedings;
- the proposed uplift of court proceedings to the Victorian Supreme Court by the Court and the liquidator's response.

In each case, I provided legal advice to the applicants as to what the liquidator was proposing, the court procedures and their options.

I advised the applicants that my role was to explain the processes and the options to them but that I was not providing legal advice as to what they should do and if they wanted legal advice as to what action they should take, they should seek external legal advice.

I routinely advised the applicants that my fee was paid by the liquidator but I was bound by the legal profession rules to provide them with independent legal advice.

Finally, I have received approximately five referrals direct from the liquidator under the direct negotiation program they have in place with some debtors who did not qualify under the hardship program.

The same processes have been followed as above with respect to the advice I have provided to each such person. At the conclusion of the advice, I would write back to the liquidator and the persons confirming that advice had been provided (without informing the liquidator of any details of that advice), the persons' instructions as to what they proposed to do and offering further advice if needed.

In summary, whilst it is correct of HNAB-AG to say that under the hardship program my role was to "explain" the settlement deed, in doing so I was providing legal advice as to the settlement, including the terms and conditions of the settlement deed.

I believe that the advice provided was and is in the best interests of the applicants to assist them to understand the nature and extent of the agreements.

It is a matter for the Committee to decide whether that legal advice model was sufficient in the circumstances for the Timbercorp hardship program.

Yours sincerely,

John Berrill
Principal
BERRILL & WATSON LAWYERS