
Extract of infringement notice issued to CBA

The Facts

On or by 13 November 2008, CBA was aware that its expected LIE for the full financial year ending 30 June 2009 was estimated to be \$1,867 million.

On 13 November 2008 CBA released an announcement to ASX entitled 'Commonwealth Bank of Australia—September Quarter 2008 Trading Update' in which CBA stated, among other matters:

the Group's exposure to Lehman Brothers, Allco Finance Group Limited and ABC Learning Centres Limited will result in significantly higher first half provisions' and 'Full year Impairment Expense is expected to be between 40 and 50 basis points, with the majority in the first half.

On 16 December 2008, CBA attempted a \$2 billion capital raising, including an institutional placement at \$27 per share, managed by Merrill Lynch.

In the afternoon of 16 December 2008, Merrill Lynch offered to CBA to make confidential soundings of major CBA shareholders to ascertain interest in this placement. Merrill Lynch undertook the confidential soundings and advised CBA of the outcome.

By about 3pm on 16 December 2008, following the completion of analysis in relation to its projected LIE for 2009, CBA was aware of a document entitled 'Credit Quality Analysis', which showed that CBA's projected LIE to gross loans and acceptances for the financial year ending 30 June 2009 would equate to about 61 basis points, with the majority in the first half.

By reason of foregoing, from about 3pm on 16 December 2008, CBA came into possession of the following information:

[CBA] expects ... the full year loan impairment expense to gross loans and acceptances is now expected to be around sixty basis points, with the majority in the first half [for the financial year ending 30 June 2009]' (the Information).

About 3:59pm on 16 December 2008 CBA forwarded the Information to Merrill Lynch in a draft media release in the course of discussions about its attempted capital raising.

About 7:10pm on 16 December 2008, CBA forwarded an announcement to ASX entitled 'Commonwealth Bank Capital Raising' in which CBA stated that it had completed a \$2.0 billion capital raising, including an institutional placement at \$27 per share, which had been managed by Merrill Lynch. It also stated that:

the full year loan impairment expense to gross loans and acceptances is now expected to be around sixty basis points, with the majority in the first half” (the 16 December Announcement).

At about 7:14pm on 16 December 2008, ASX released a CBA announcement entitled ‘Commonwealth Bank Capital Raising’, which stated, among other matters, that:

the full year loan impairment expense to gross loans and acceptances is now expected to be around sixty basis points, with the majority in the first half” (the 16 December Announcement).

On 17 December 2008 ASX sent a letter to CBA (ASX Aware Letter). The ASX Aware letter referred to the 16 December 2008 Announcement and asked CBA, among other matters, whether it considered that information in the 16 December 2008 Announcement was material, when it first became aware of the same and to confirm that CBA was in compliance with ASX Listing Rule 3.1. The ASX Aware Letter requested CBA provide a response in a form suitable for release to the market.

On 18 December 2008 CBA released an announcement to ASX which stated that:

‘Sixty basis points of estimated average gross loans and acceptances would be approximately \$2.5 billion’ and that ‘... our previously advised forty to fifty basis point [for impairment expenses] which would approximate \$1.7–\$2.1 billion.’

On 19 December 2008 CBA responded to the ASX Aware Letter of 17 December 2008, stating that CBA became aware of the LIE as reported in the 16 December 2008 Announcement on 16 December 2008.

The Contravention

This Infringement Notice has been issued because ASIC has reasonable grounds to believe that CBA contravened subsection 674(2) of the Act in the period from 3.00pm or shortly thereafter on 16 December 2008 to 7.10pm on 16 December 2008 (at which time CBA released the 16 December Announcement to ASX), in that:

- (a) CBA is an entity to which subsection 674(2) of the Act applies.
- (b) At 3pm on 16 December 2008, CBA was aware of the Information.
- (c) Listing Rule 3.1 of the ASX Listing Rules requires CBA to immediately tell ASX of the Information once CBA is or becomes aware of any information concerning it that a reasonable person would expect to have a material effect on the price or value of its securities. ASIC is of the view that CBA was required to tell ASX of the Information when it became aware of it at about 3pm on 16 December 2008.

- (d) The Information was information that a reasonable person would expect, if it were generally available, to have a material effect on the price or value of securities of CBA, because:
- On 13 November 2008, CBA announced that its 2009 full year impairment expense was expected to be between 40 and 50 basis points.
 - From about 3pm on 16 December 2008, CBA was aware that its 2009 full year LIE was expected to be \$2,494 million, an increase of about \$600 million over its expected LIE as at 13 November 2008. CBA was aware at this time that the expected LIE to gross loans and acceptances had increased to around 60 basis points.
 - Unless offset by other factors, the increase in CBA's expected LIE to gross loan and acceptances for the financial year ending 30 June 2009 from between 40 and 50 basis points to around 60 basis points was capable of adversely affecting CBA's forecasted end of year net profit by between 5% and 7%.
 - Having regard to the financial and economic conditions prevailing at the time, there was a heightened interest in the market regarding impairment of bank loan assets and bank profitability.
 - In the afternoon of 16 December 2008, Merrill Lynch made confidential soundings of major CBA shareholders to ascertain interest in a capital raising on that day.
- (e) By reason of the matters referred to in paragraph (d) above, if it were generally available, the Information would, or would be likely to, influence persons who commonly invest in securities in deciding whether to acquire or dispose of CBA securities.
- (f) From 3pm on 16 December 2008, ASX Listing rule 3.1A (the exception to ASX Listing rule 3.1) no longer applied to the Information because, in view of the matters referred to in paragraph (d) above, a reasonable person would have expected the Information to be disclosed to ASX.
- (g) Consequently, from 3pm on 16 December 2008, ASX Listing Rule 3.1 required CBA to tell ASX of the Information.
- (h) Between 3pm and 7.10pm on 16 December 2008, the Information was not generally available.
- (i) CBA did not tell the ASX of the Information until about 7.10pm on 16 December 2008.