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Details of Filing

Document Lodged: Concise Statement
File Number: VID65/2018
File Title: AUSTRALIAN SECURITIES AND INVESTMENTS COMMISSION v
COMMONWEALTH BANK OF AUSTRALIA LIMITED
Registry: VICTORIA REGISTRY - FEDERAL COURT OF AUSTRALIA



A handwritten signature in blue ink, reading 'Warwick Soden'.

Dated: 30/01/2018 3:34:59 PM AEDT

Registrar

Important Information

As required by the Court's Rules, this Notice has been inserted as the first page of the document which has been accepted for electronic filing. It is now taken to be part of that document for the purposes of the proceeding in the Court and contains important information for all parties to that proceeding. It must be included in the document served on each of those parties.

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CONCISE STATEMENT

FEDERAL COURT OF AUSTRALIA
DISTRICT REGISTRY: VICTORIA
DIVISION: GENERAL

NO VID OF 2018

AUSTRALIAN SECURITIES AND INVESTMENTS COMMISSION

Plaintiff

COMMONWEALTH BANK OF AUSTRALIA

ACN 123 123 124

Defendant

A. INTRODUCTION

1. This claim relates to **CBA's** trading of negotiable certificates of deposit issued, and bank bills accepted, by Prime Banks,¹ (together, **Prime Bank Bills**) in the short dated securities market (**Bank Bill Market**) and to CBA's dealings with its customers and counterparties whose obligations to CBA were liable to be affected by CBA's trading.
2. Between 31 January 2012 and around October 2012 (the **Relevant Period**), CBA had a practice of, from time to time, trading Prime Bank Bills in the Bank Bill Market with the purpose of affecting the yield of Prime Bank Bills and the setting of the bank bill swap reference rate (**BBSW**) to its advantage, or to the advantage of one of its business units (**CBA Rate Set Trading Practice**), and to the disadvantage of parties to certain products who had an opposite exposure to the BBSW. Further CBA knew or believed that other Prime Banks, including ANZ, NAB and Westpac, also engaged in this trading practice (**Other Prime Banks' Rate Set Trading Practices**).
3. CBA did not alert or inform its customers and counterparties, when transacting with them or otherwise, of these trading practices or the risk that their obligations to CBA might be detrimentally affected as a result of them.

B. IMPORTANT FACTS GIVING RISE TO THE CLAIM

4. Bank Bills are instruments by which banks may borrow or lend funds for a short term. By selling a Bank Bill, a bank borrows funds. By buying a Bank Bill, a bank lends funds. Bank Bills entitle the holder to receive the face value of the bill on maturity and are traded at a discount to their face value, with the size of the discount representing the

¹ As designated by the Australian Financial Markets Association Limited (AFMA). CBA, ANZ, NAB and Westpac are and were at all relevant times designated Prime Banks.

amount of interest (or yield) payable on the bill. Accordingly, the higher the yield, the lower the price of the Bank Bills and vice versa.

5. During the Relevant Period, the trading of Prime Bank Bills in the Bank Bill Market informed the setting of the BBSW. The BBSW was set on the basis of views submitted by nominated BBSW Panellists (including CBA) as to the yield at which Prime Bank Bills in each tenor were trading at around 10:00am each trading day.
6. The BBSW was at all relevant times intended to express the trimmed, average mid-rate of the observed best bid/offer for Prime Bank Bills for each relevant tenor and to measure forces of genuine supply and demand in the interbank lending market. The higher the yield at which Prime Bank Bills were trading at around 10:00am on a particular business day, the higher the BBSW would set, and vice versa.
7. The BBSW functions as a key reference rate and benchmark in the financial markets in Australia, the independence and transparency of which is, and was, a critical factor in ensuring the efficiency, integrity and good operation of those markets.
8. Almost all trading in the Bank Bill Market took place between about 9:55am and 10:05am on each Sydney business day (**BBSW Rate Set Window**). The sale by a Bank Bill Market participant, in sufficient volumes, of Prime Bank Bills in a particular tenor during the BBSW Rate Set Window was likely to increase the yield at which Prime Bank Bills of that tenor were trading at around 10:00am to a level higher than it would otherwise have been, and so influence the submissions by BBSW Panellists and therefore raise the level at which the BBSW for that tenor set that day. Conversely, the purchase of sufficient volumes of Prime Bank Bills was likely to decrease the yield to a level lower than it would otherwise have been, and therefore lower the level at which the BBSW for that tenor set that day.
9. On each Sydney Business Day during the Relevant Period, CBA was a party to interest rate derivatives, lending transactions and deposit products (**BBSW Referenced Products**) in respect of which either CBA or the counterparty would have an obligation to pay an amount of money quantified by reference to the rate at which BBSW set in a particular tenor on that day. The profit or loss of CBA, and/or its business units (including the business unit known as "Interest Rate Swaps"), was therefore affected by movement in the BBSW in the relevant tenor on that day (**BBSW Rate Set Exposure**).
10. During the Relevant Period, prior to the BBSW Rate Set Window, business units of CBA ascertained their BBSW Rate Set Exposure, which was either:
 - 10.1. a "long exposure", meaning that the particular CBA business unit's profit would (i) increase if the BBSW set at a higher rate on that day (and any loss would decrease); and (ii) correspondingly, decrease if the BBSW set at a lower rate (and any loss would increase); or
 - 10.2. a "short exposure", meaning that the particular CBA business unit's profit would (i) increase if the BBSW set at a lower rate on that day (and any loss would decrease); and (ii) correspondingly, decrease if the BBSW set at a higher rate (and any loss would increase).

11. From time to time during the Relevant Period, including on the occasions specified in the Originating Process, CBA traded during the BBSW Rate Set Window with the purpose of affecting:

11.1. the yield at which Prime Bank Bills in the relevant tenor were trading at around 10:00am;

11.2. the views of BBSW Panellists as to the yield at which Prime Bank Bills in the relevant tenor were trading at around 10:00am, and the submissions made by those BBSW Panellists based on those views; and

11.3. the level at which the BBSW was set in the relevant tenor;

to favour CBA's BBSW Rate Set Exposure in that tenor, or the BBSW Rate Set Exposure of a CBA business unit in that tenor.

12. On each of those occasions, a CBA business unit knew that it, or another business unit, had a substantial BBSW Rate Set Exposure and sold or bought Prime Bank Bills in the Bank Bill Market during the BBSW Rate Set Window with the purpose of affecting the BBSW rate for the relevant tenor on the relevant day to favour that exposure.

13. Further, on each Sydney business day in the Relevant Period CBA entered into and offered to enter into BBSW Referenced Products with customers and counterparties who were not participants in the Bank Bill Market in circumstances where it knew or believed: that it had in the past engaged in the trading practice referred to above, and that it was likely to engage in the practice in the future; that other Prime Banks also engaged in similar practice; that entities who were not participants in the Bank Bill Market would not, or were unlikely to, know of the practice; that if it or other Prime Banks engaged in the practice in the future, that such conduct would pose a material risk of financial detriment to its counterparties; and where it took no steps to, and did not, inform its counterparties or customers of the practice nor its likely engagement in the practice in the future nor the risk that the practice posed to the financial interests of those counterparties.

14. CBA also represented to counterparties to BBSW Referenced Products with CBA, either impliedly by its use of BBSW in its reference rates, or by its silence or non-disclosure, that the BBSW was an objective or independent reference rate whereas from time to time CBA engaged in trading of Prime Bank Bills in the manner described above, with the purpose of affecting the BBSW to its benefit and to the detriment of such counterparties and further believed that other Prime Banks did so as well.

15. The fact that CBA traded with the purpose of affecting BBSW in a manner favourable to it (including preventing or restricting BBSW moving in a manner contrary to its interests) was known by senior management of CBA.

C. SUMMARY OF RELIEF SOUGHT FROM THE COURT

16. ASIC seeks declarations to the effect that CBA's conduct involved:

16.1. transactions which created or were likely to create an artificial price for trading in some BBSW Referenced Products, in breach of s 1041A of the *Corporations Act 2001* (Cth) (**Corporations Act**);

- 16.2. transactions which had, or were likely to have, an effect of creating a false or misleading appearance with respect to the market for, and or the price for trading in, some BBSW Referenced Products in breach of s 1041B of the Corporations Act;
- 16.3. unconscionable conduct in relation to counterparties to BBSW Referenced Products with CBA, whose obligations reset on 3 February 2012, 9 February 2012 and 15 March 2012 who were not listed public companies in breach of s12CB of the *Australian Securities and Investments Commission Act 2001* (Cth) (**ASIC Act**);
- 16.4. unconscionable conduct in taking unconscientious advantage of the special disadvantage of counterparties to a BBSW Referenced Product with CBA whose obligations reset on 3 February 2012, 9 February 2012 and 15 March 2012 and who did not and could not know that CBA might engage in the conduct described above, in breach of s 12CA of the ASIC Act;
- 16.5. unconscionable conduct by entering into BBSW Referenced Products with counterparties that were not participants in the Bank Bill Market in breach of s 12CB of the ASIC Act and / or s 12CA of the ASIC Act; misleading or deceptive conduct, false or misleading representations, or conduct liable to mislead, in breach of s 1041H of the Corporations Act and/or s 12DA of the ASIC Act, s 12DB(1)(a),(e) and (g) of the ASIC Act, and/or s 12DF of the ASIC Act;
- 16.6. a system of conduct or pattern of behaviour in connection with the supply of BBSW Referenced Products which was unconscionable in all the circumstances in breach of s 12CB of the ASIC Act;
- 16.7. a failure to do all things necessary to ensure that the financial services provided by CBA were provided efficiently, honestly and fairly within the meaning of s 912A(1)(a) of the Corporations Act;
- 16.8. a failure to have in place adequate arrangements for the management of conflicts of interest arising in relation to activities undertaken by CBA in the provision of financial services covered by its AFS licence in contravention of s 912A(1)(aa) of the Corporations Act;
- 16.9. a failure to comply with the financial services laws in contravention of s 912A(1)(c) of the Corporations Act;
- 16.10. a failure to ensure its representatives complied with the financial services laws in contravention of s 912A(1)(ca) of the Corporations Act; and
- 16.11. a failure to ensure that its representatives were adequately trained, and were competent, to provide financial services, in contravention of s 912A(1)(f) of the Corporations Act.

17. ASIC also seeks:

- 17.1. pecuniary penalties in respect of the contraventions of ss 1041A and 1041B of the Corporations Act and 12CA, 12CB, 12DB and 12DF of the ASIC Act,
- 17.2. orders requiring CBA to implement a comprehensive compliance program for all involved in its trading in the Bank Bill Market, and
- 17.3. costs.

D. PRIMARY LEGAL GROUNDS FOR RELIEF SOUGHT

18. **Market Manipulation/False or Misleading Appearance:** Some of the BBSW Referenced Products that were interest rate derivatives (**Traded BBSW Referenced Products**) were financial products traded on a financial market operated within this jurisdiction for the purposes of ss 1041A and 1041B of the Corporations Act. The price for trading in these products was calculated by reference to, or was influenced by or derived from, the BBSW.
19. On the occasions identified in the Originating Process, and in the circumstances set out above, CBA engaged in trading of Prime Bank Bills with the effect, or likely effect, of causing the BBSW to set at an artificial level, in turn creating an artificial price for Traded BBSW Referenced Products. By reason of that trading and/or CBA's failure to inform the market that it had traded with the purpose of affecting the yield at which Prime Bank Bills traded, the views and submissions of BBSW Panellists as to the yield at which Prime Bank Bills were trading, and the rate at which BBSW set, and/or its failure to inform the market of CBA's practice of trading, from time to time, with that purpose, CBA's conduct had the effect or likely effect of causing or creating a false appearance with respect to the market for and/or the price for trading in the Traded BBSW Referenced Products.
20. **Unconscionable Conduct:** The trading in Prime Bank Bills in the BBSW Rate Set Window on each of the dates set out in para 16.3, having entered into BBSW referenced products with an exposure to BBSW on those dates, amounted to conduct in relation to financial services or in connection with the acquisition or supply of financial services which was unconscionable in all the circumstances which include the following:
 - 20.1. counterparties to BBSW Referenced Products with CBA, entered into these products on the basis that the BBSW was an objective, independent and transparent benchmark or was one that was not subject to the risk of manipulation by CBA or other Prime Banks;
 - 20.2. counterparties to BBSW Referenced Products with CBA did not and could not know that CBA had a practice of trading Prime Bank Bills with a purpose of affecting the yield of Prime Bank Bills so as to affect the level at which the BBSW set to advantage itself, or one of its business units, in relation to the BBSW Referenced Products to their detriment;
 - 20.3. counterparties to BBSW Referenced Products with CBA, did not and could not know that CBA believed, and acted on the basis that, other Prime Banks had a practice of trading Prime Bank Bills with a purpose of affecting the yield of Prime Bank Bills so as to affect the level at which

the BBSW set to advantage themselves to the detriment of persons with opposite exposure;

- 20.4. CBA took advantage of its status as a Prime Bank and its position in the Bank Bill Market, in undertaking the trading described above;
 - 20.5. CBA knew, believed, ought reasonably to have expected or known of, or were recklessly indifferent to the circumstances in 20.1 and 20.2 and took advantage of its position with respect to counterparties and potential counterparties to BBSW Referenced Products with CBA, by not disclosing its conduct described in 20.2;
 - 20.6. CBA's conduct was contrary to industry codes, including the AFMA Code of Ethics' requirement that AFMA members (including CBA) not carry out trading that (i) would interfere with normal supply and demand factors in the market for a financial product, (ii) had the potential to create artificial markets or prices, or (iii) was not based on a genuine trading intention.
21. Further, CBA engaged in conduct that took unconscientious advantage of the special disadvantage of counterparties to BBSW Referenced Products with CBA, in the circumstances set out in 20 above in breach of s 12CA of the ASIC Act.
 22. Further or alternatively, on each Sydney business day during the Relevant Period, CBA, in trade or commerce, engaged in unconscionable conduct by entering and offering to enter into BBSW Referenced Products with customers or counterparties, other than Prime Banks, knowing or believing that CBA would likely engage in a practice detrimental to the financial interests of its counterparties and that other Prime Banks would in its belief likely do so as well, without informing its counterparties of that practice or of its belief, their likely continuation in the future or the risk they posed to its counterparties in breach of s 12CB of the ASIC Act and / or s 12CA of the ASIC Act.
 23. Further or alternatively, during the Relevant Period, CBA engaged in a system of conduct or pattern of behaviour by trading Prime Bank Bills with the purpose, of affecting:
 - 23.1. the yield at which Prime Bank Bills in the relevant tenor were trading at around 10:00am;
 - 23.2. the views of BBSW Panellists as to the yield at which Prime Bank Bills in the relevant tenor were trading at around 10:00am, and the submissions made by those BBSW Panellists based on those views; and
 - 23.3. the level at which the BBSW was set in the relevant tenor;which constituted unconscionable conduct in breach of s 12CB of the ASIC Act.

24. **Misleading or deceptive conduct:** CBA engaged in conduct that was misleading or deceptive, made false or misleading representations and engaged in conduct liable to mislead, by representing to counterparties and potential counterparties to BBSW Referenced Products with CBA that the BBSW rate was an objective and independent reference rate that was not subject to manipulation or attempted manipulation by either

CBA or other Prime Banks, and / or by silence or not disclosing that CBA could engage and / or would in the future engage in the conduct described above with the purpose of benefiting itself, or one of its business units, in relation to the BBSW Referenced Products.

25. **Breach of Financial Services Licence:** CBA's conduct in the Bank Bill Market and in connection with the financial products and services referenced to the BBSW also breached its obligations as a financial services licensee under s 912A(1) of the Corporations Act.

E. ALLEGED HARM

26. CBA's trading in Prime Bank Bills described above caused financial detriment or disadvantage to counterparties to BBSW Referenced Products with CBA, was likely to cause financial detriment to any person who was a party to any BBSW Referenced Product with an opposite BBSW Rate Set Exposure to CBA; exposed them to material and undisclosed risk; and was likely to damage the reputation and operation of Australian financial markets.

Date 30 January 2018



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Glenn Owbridge
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for and on behalf of the Australian Government Solicitor
Lawyer for the Applicant