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### Details of Filing

Document Lodged: Non-Prescribed Pleading  
File Number: VID604/2016  
File Title: Australian Securities and Investments Commission v National Australia Bank Limited  
Registry: VICTORIA REGISTRY - FEDERAL COURT OF AUSTRALIA



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

Dated: 7/06/2016 5:22:47 PM AEST

Registrar

### Important Information

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## CONCISE STATEMENT

FEDERAL COURT OF AUSTRALIA  
DISTRICT REGISTRY: VICTORIA  
DIVISION: GENERAL

NO VID OF 2016

### AUSTRALIAN SECURITIES AND INVESTMENTS COMMISSION

Plaintiff

NATIONAL AUSTRALIA BANK LIMITED  
ACN 004 044 937

Defendant

#### A. INTRODUCTION

1. This claim relates to **NAB's** trading of negotiable certificates of deposit issued, and bank bills accepted, by Prime Banks,<sup>1</sup> (together, **Prime Bank Bills**) in the short dated securities market (**Bank Bill Market**).
2. ASIC contends that, on at least 50 occasions between 8 June 2010 and 24 December 2012 (the **Relevant Period**), NAB traded Prime Bank Bills in the Bank Bill Market with the intention and likely effect of influencing the setting of the bank bill swap reference rate (**BBSW**) to its advantage, or to the advantage of one of its business units, and to the disadvantage of parties to certain products who had an opposite exposure to the BBSW.
3. ASIC seeks declarations, pecuniary penalties, costs and ancillary relief against NAB: see section C below.

#### B. IMPORTANT FACTS GIVING RISE TO THE CLAIM

4. 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 observations submitted by nominated BBSW Panellists (including NAB) as to the yield at which Prime Bank Bills in each tenor were trading at 10:00am each trading day.
5. The BBSW was and is intended to express the mid-rate of the yield on 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 10:00am on a particular business day, the higher the BBSW would set, and vice versa.

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

Filed on behalf of the Applicant, ASIC

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6. The BBSW functions as a key reference rate and benchmark in Australian financial markets. The independence and transparency of the BBSW is a critical factor in ensuring the efficiency, integrity and good operation of those markets.
7. Almost all trading in the Bank Bill Market took place between about 9:55am and 10:00am 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 10:00am, 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 lower the yield and therefore lower the BBSW.
8. During the Relevant Period, NAB was a party to interest rate derivatives, lending transactions and deposit products (**BBSW Referenced Products**) in respect of which either NAB or the counterparty would have an obligation to pay an amount of money quantified by reference to the BBSW rate set in a particular tenor on a particular day. NAB's net revenue was therefore affected by movement in the BBSW in the relevant tenor (**BBSW Rate Set Exposure**).
9. During the Relevant Period, prior to the BBSW Rate Set Window, business units of NAB ascertained their BBSW Rate Set Exposure, which was either:
  - 9.1. a "long exposure", meaning that the particular NAB business unit's net revenue would (i) increase if the BBSW set at a higher rate on that day; and (ii) correspondingly, decrease if the BBSW rate set was lower; or
  - 9.2. a "short exposure", meaning that the particular NAB business unit's net revenue would (i) increase if the BBSW set at a lower rate on that day; and (ii) correspondingly, decrease if the BBSW rate set was higher.
10. During the Relevant Period, including on the occasions specified in the Originating Process, NAB traded during the BBSW Rate Set Window with an intention to affect the level at which the BBSW was set to favour NAB's BBSW Rate Set Exposure, or the BBSW Rate Set Exposure of a NAB business unit.
11. On each occasion set out in Annexure A of the Originating Process, a NAB business unit either:
  - 11.1. knew that it, or another business unit, had a substantial long BBSW Rate Set Exposure and sold Prime Bank Bills in the Bank Bill Market during the BBSW Rate Set Window with the intention of raising or maintaining the BBSW rate for the relevant tenor on the relevant day, or
  - 11.2. knew that it, or another business unit, had a substantial short BBSW Rate Set Exposure and purchased Prime Bank Bills in the Bank Bill Market during the BBSW Rate Set Window with the intention of lowering or maintaining the BBSW rate for the relevant tenor on the relevant day.

12. An example of an occasion of the type referred to at paragraph 11.1 above, occurred on 22 December 2011. Prior to the Rate Set Window on that day, traders in the Short Term Interest Rate Risk (**STIRR**) business unit (or "desk") of NAB knew that the desk had a long 90-day BBSW Rate Set exposure of \$1.89 billion. Mr Hermeet Najjhur, a trader in STIRR, sold 90-day Prime Bank Bills with a Face Value of \$620 million in the Bank Bill Market, comprising 82.7% of all sales of that tenor made through brokers on that day. That trading was conducted so as to cause the 90-day BBSW to be set higher, as recorded in statements made, including the following:

12.1. between Mr Najjhur and Michael Tsakiris, (a trader in STIRR), over instant chat message commencing at 8:10:53am (AEDT) on 21 December 2011:

Mr Najjhur: *we got 2 yards up tom.*

Mr Tsakiris: *Smash them out tom.*

12.2. between Mr Najjhur and Mr Tsakiris over instant chat message commencing at 8:20:43am (AEDT) on 22 December 2011:

Mr Najjhur: *i said aim to get 3s at 47.*

.....

Mr Najjhur: *what you reckon we aim for in set*

Mr Najjhur: *47*

Mr Tsakiris: *Yeah...*

Mr Najjhur: *and how much*

Mr Najjhur: *800*

Mr Najjhur: *clips of 20*

Mr Tsakiris: *Was going to say 700*

Mr Tsakiris: *So around there..*

Mr Najjhur: *ok will go in lateish.*

Mr Tsakiris: *I like to offer on in 100M*

Mr Najjhur: *yours in 500*

Mr Najjhur: *thanks i am done.*

Mr Tsakiris: *As 20 they will bid on..*

Mr Tsakiris: *So u are always giving the bid..*

Mr Najjhur: *yup.*

Mr Tsakiris: *Don't hold back though..*

Mr Tsakiris: *If its trading in little volume just keep pushing it*

Mr Najjhur: *yep*

Mr Tsakiris: *Who cares about 200M of stock*

Mr Tsakiris: *We have a 1.9B set*

Mr Najjhur: *yup*

.....

Mr Tsakiris: *Nice set at 47 :-)*

13. On 22 December 2011 the 90-day BBSW was set by AFMA at 4.47. NAB's trading had the effect or likely effect of causing the 90-day BBSW to set at a rate which did not reflect forces of genuine supply and demand, and of creating an artificial price for certain BBSW Referenced Products which were traded on a financial market in this jurisdiction ("**Traded BBSW Referenced Products**").

14. NAB represented to counterparties to BBSW Referenced Products with NAB, either impliedly or by its silence or non-disclosure, that the BBSW was an objective or independent reference rate whereas NAB engaged in trading of Prime Bank Bills in the manner described above, with the intention of affecting the BBSW to its benefit and to the detriment of such counterparties.

**C. SUMMARY OF RELIEF SOUGHT FROM THE COURT**

15. ASIC seeks declarations to the effect that NAB's conduct involved:
  - 15.1. transactions which created or were likely to create an artificial price for trading in Traded BBSW Referenced Products, in breach of s 1041A of the *Corporations Act 2001* (Cth) (**Corporations Act**);
  - 15.2. unconscionable conduct in relation to counterparties to BBSW Referenced Products with NAB, and other parties to a BBSW Referenced Product, who had an opposite exposure to the BBSW and who were not listed public companies in breach of s 12CB (for trading after 1 January 2012) and former s 12CC (for trading before 1 January 2012) of the *Australian Securities and Investments Commission Act 2001* (Cth) (**ASIC Act**);
  - 15.3. a pattern of behaviour in connection with the supply of BBSW Referenced Products which was unconscionable in all the circumstances in breach of s 12CC of the ASIC Act (before 1 Jan 2012) and s 12CB of the ASIC Act (after 1 Jan 2012);
  - 15.4. unconscionable conduct in taking unconscientious advantage of the special disadvantage of counterparties to a BBSW Referenced Product with NAB, and other parties to a BBSW Referenced Product, who had an opposite exposure to the BBSW and who did not and could not know that NAB might engage in the conduct described above, in breach of s 12CA of the ASIC Act;
  - 15.5. 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; and
  - 15.6. contraventions of s 912A(1) of the Corporations Act.
16. ASIC also seeks pecuniary penalties in respect of the contraventions of s 1041A of the Corporations Act and ss 12CA, 12CB (and s 12CC of the former ASIC Act), 12DB and 12DF of the ASIC Act, orders requiring NAB to implement a comprehensive compliance program for all involved in its trading in the Bank Bill Market, and costs.

**D. PRIMARY LEGAL GROUNDS FOR RELIEF SOUGHT**

17. **Market Manipulation:** The Traded BBSW Referenced Products were financial products traded on a financial market operated within this jurisdiction for the purposes of s 1041A of the Corporations Act. The price for trading in these products was calculated by reference to the BBSW. On the occasions identified in the Annexure to

the Originating Process, and in the circumstances set out above, NAB 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.

18. **Unconscionable Conduct:** The trading in Prime Bank Bills in the BBSW Rate Set Window on the occasions set out in the Originating Process amounted to conduct in relation to financial services or in connection with the acquisition or supply of financial services which was unconscionable in the circumstances which include the following:
  - 18.1. counterparties to BBSW Referenced Products with NAB, and other parties to a BBSW Referenced Product, entered into these products on the basis that the BBSW was an objective, independent and transparent benchmark;
  - 18.2. counterparties to BBSW Referenced Products with NAB, and other parties to a BBSW Referenced Product, did not and could not know that NAB traded Prime Bank Bills with an intention of affecting 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;
  - 18.3. NAB took advantage of its status as a Prime Bank and its position in the Bank Bill Market, in undertaking the trading described in 18.2;
  - 18.4. NAB knew of the circumstances in 18.1 and 18.2 and took advantage of its position with respect to counterparties to BBSW Referenced Products with NAB, and other parties to a BBSW Referenced Product, by not disclosing its conduct described in 18.2;
  - 18.5. NAB's conduct described in 18.3 was contrary to industry codes, including the AFMA Code of Ethics' requirement that AFMA members (including NAB) 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.
19. Further or alternatively, NAB engaged in a pattern of behaviour by trading Prime Bank Bills with the intention of affecting the price of BBSW Referenced Products which constituted unconscionable conduct in breach of s 12CB of the current, and s 12CC of the former, ASIC Act.
20. Further or alternatively, NAB engaged in conduct that took unconscientious advantage of the special disadvantage of counterparties to BBSW Referenced Products with NAB, and other parties to a BBSW Referenced Product, in the circumstances set out in 18.2 above in breach of s 12CA of the ASIC Act.
21. **Misleading or deceptive conduct:** NAB 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 NAB that the BBSW rate was an objective and independent reference rate, and / or by silence or not disclosing that NAB could

engage and / or would in the future engage in the conduct described above with the intention of benefiting itself, or one of its business units, in relation to the BBSW Referenced Products.

22. **Breach of Financial Services Licence:** NAB'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**

23. NAB's trading in Prime Bank Bills described above caused financial detriment or disadvantage to counterparties to BBSW Referenced Products with NAB, 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 NAB; and was likely to damage the reputation and operation of Australian financial markets.

Date: 7 June 2016



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