FEDERAL COURT OF AUSTRALIA

Australian Securities and Investments Commission v Commonwealth Bank of Australia (No 2) [2021] FCA 966

File number:	NSD 1275 of 2020
Judgment of:	**LEE J**
Date of judgment:	16 August 2021
Catchwords:	**BANKING AND FINANCIAL INSTITUTIONS** – assessment of pecuniary penalty – principles applicable to imposition of punitive orders requiring adverse publicity under s 12GLB of the *Australian Securities and Investments Commission Act 2001* (Cth) – form of adverse publicity notice – need to rethink form in which information is communicated to public – likely consequences of publishing an adverse publicity notice to a corporation's mobile application
Legislation:	*Australian Securities and Investments Commission Act 2001* (Cth) ss 12GLA, 12GLB *Australian Consumer Law* s 246(2)(d)
Cases cited:	*Australian Competition and Consumer Commission (ACCC) v Aveling Homes Pty Ltd* [2017] FCA 1470 *Australian Securities and Investments Commission v Commonwealth Bank of Australia* [2021] FCA 423 *Australian Securities and Investments Commission v Hellicar* [2012] HCA 17; (2012) 247 CLR 345 *Blatch v Archer* (1774) 1 Cowp 63 *Lenthall v Westpac Banking Corporation (No 2)* [2020] FCA 423 *Medical Benefits Fund of Australia Ltd v Cassidy* [2003] FCAFC 289; (2003) 135 FCR 1 *Precision Plastics Pty Limited v Demir* (1975) 132 CLR 362 *Quintis Ltd (Subject to Deed of Company Arrangement) v Certain Underwriters at Lloyd's London Subscribing to Policy Number B0507N16FA15350* [2021] FCA 19; (2021) 385 ALR 639 Financial Counselling Australia, "14% of Australians won't understand this press release, 22% will struggle with the numbers in it" (Media Release, 4 June 2014)

	<https://www.financialcounsellingaustralia.org.au/14-of-australians-wont-understand-this-press-release-22-will-struggle-with-the-numbers-in-it/> Revised Explanatory Memorandum, Financial Services Reform (Consequential Provisions) Bill 2001 (Cth)
Division:	General Division
Registry:	New South Wales
National Practice Area:	Commercial and Corporations
Sub-area:	Commercial Contracts, Banking, Finance and Insurance
Number of paragraphs:	71
Date of hearing:	29 July 2021
Counsel for the Applicant:	Mr D R Luxton
Solicitor for the Applicant:	Australian Securities and Investments Commission
Counsel for the Respondent:	Mr P Kulevski
Solicitor for the Respondent:	Clayton Utz

ORDERS

NSD 1275 of 2020

BETWEEN:	**AUSTRALIAN SECURITIES & INVESTMENTS COMMISSION** Applicant
AND:	**COMMONWEALTH BANK OF AUSTRALIA ACN 123 123 124** Respondent

ORDER MADE BY: **LEE J**

DATE OF ORDER: **16 AUGUST 2021**

THE COURT ORDERS THAT:

1. Pursuant to section 12GLB(1)(a) of the *Australian Securities and Investments Commission Act 2001* (Cth), within 30 days of this order, the Commonwealth Bank of Australia publish, at its own expense, a written adverse publicity notice in the terms set out in Annexure A (Written Notice) and, subject to further order, an audio-visual adverse publicity notice in the terms set out in Annexure B (Audio-Visual Notice), according to the following procedure:

   (a) the Commonwealth Bank of Australia will cause the Written Notice and the Audio-Visual Notice to be published on the following webpages maintained by them:

      (i) https://www.commbank.com.au/newsroom.html;

      (ii) https://www.commbank.com.au/

   (b) and ensure that each notice:

      (i) appears immediately upon access by a person to the landing page as a picture tile on the websites and application under the heading, "Notification of Misconduct by CBA"; and

      (ii) is maintained on the websites 90 days from the date of these orders.

2. By 27 August 2021 the respondent will provide to the Associate to Lee J, in a viewable media format, the proposed Audio-Visual Notice.

Note: Entry of orders is dealt with in Rule 39.32 of the *Federal Court Rules 2011*.

ANNEXURE A

MISCONDUCT NOTICE

Ordered by the Federal Court of Australia

The Federal Court of Australia found the Commonwealth Bank of Australia (CBA) provided false or misleading information to its customers.

On 6 April 2021, Justice Lee of the Federal Court ordered CBA to pay a penalty of $7 million to the Commonwealth for providing false or misleading information to 1,510 customers with Simple Business and Business Overdraft accounts.

CBA sent statements to the customers which showed that a particular interest rate had been charged. However, the statements were false or misleading because CBA had charged the customers interest at a significantly higher rate – often double the rate referred to in the statement. This happened in 12,119 account statements between 1 December 2014 and 31 March 2018.

By overcharging interest, CBA also broke the terms and conditions of its contracts with the customers.

The customers were overcharged interest totalling $2,238,554.94.

CBA acknowledges it took longer than it should have to rectify the issue after first being alerted to it by a customer complaint.

The customers have been remediated.

The Court ordered CBA to publish this Misconduct Notice.

Further information

For further information, visit ASIC's media release here. [*to be hyperlinked*]

See the Court's judgment here. [*to be hyperlinked*]

ANNEXURE B

The Audio Visual Notice is to be no longer than 60 seconds and meet accessibility requirements including embedded captions. It must also be accompanied by a link to the Written Notice as set out in Annexure A.

The content of the Audio-Visual Notice must include the following:

1. It must start with an image of the Federal Court crest and with the words "Misconduct Notice ordered by the Federal Court of Australia."

2. It must otherwise contain no or minimal graphics and images.

3. The rest of the audio must consist of the following script:

MISCONDUCT NOTICE

"*The Federal Court has ordered CBA to publish this Misconduct Notice.*

On 6 April 2021, the Federal Court ordered the Commonwealth Bank of Australia to pay a penalty of $7 million to the Commonwealth. This was for CBA's conduct in providing false or misleading information to 1,510 customers with Simple Business Overdraft and Business Overdraft accounts.

CBA sent statements to the customers which showed that a particular interest rate had been charged. However, the statements were false or misleading because CBA had charged the customers interest at a significantly higher rate – often double the rate referred to in the statement. This happened in 12,119 account statements between 1 December 2014 and 31 March 2018. By overcharging interest, CBA also broke the terms and conditions of its contracts with the customers.

The customers were overcharged interest totalling $2,238,554.94.

The Commonwealth Bank acknowledges that it took longer than it should have to rectify this issue after first being alerted to it by a customer complaint.

CBA has remediated the customers affected by this conduct.

This Misconduct Notice has been paid for by CBA pursuant to the Court's orders."

REASONS FOR JUDGMENT

LEE J:

A INTRODUCTION

1 The relevant facts relating to this penalty proceeding are set out comprehensively in *Australian Securities and Investments Commission v Commonwealth Bank of Australia* [2021] FCA 423 (**principal judgment** or **J**). These reasons assume a familiarity with that judgment and adopt its abbreviations.

2 In the principal judgment, I dealt with the balance of the relief sought by ASIC concerning the applicable penalty and related orders for the CBA's contraventions of statutory norms. Influenced by the CBA's cooperative conduct in the lead up to and throughout the litigation, I ordered that the CBA pay a pecuniary penalty of $7 million.

3 As for the adverse publicity notice sought by ASIC pursuant to s 12GLB of the *Australian Securities and Investments Commission Act 2001* (Cth), I was not satisfied that the proposed form of the notice, being that which has become customary in these types of cases, was utile: J [43]. In the light of the intended audience and statutory purpose, I indicated to the parties that the time had come to rethink the form in which this information is communicated to the public: J [44]. Both parties expressed no difficulties with the information being prepared and communicated in a different form and I was persuaded that this was an appropriate course to take. I therefore listed the proceeding for a further case management hearing on 28 April 2021, with the intention of giving the parties time to confer on the appropriate form of the punitive order as well as finalising an appropriate order as to costs: J [52]–[53].

4 At the case management hearing, the parties indicated that they had resolved the issue of costs. Further, I was informed that the CBA had come to an agreement with ASIC as to the manner and form of the adverse publicity notice; namely, that it would be appropriate to publish on the homepage of the CBA's website a written misconduct notice (reproduced at **Annexure A** to the orders) along with an audio-visual notice (reproduced at **Annexure B** to the orders) (together, the **Misconduct Notices**).

5 The residual issue between the parties concerned the efficacy of publishing the Misconduct Notices on the CBA's mobile banking app (**CommBank App**). Given the novelty of this proposed order, I directed the parties to file any further evidence or written submissions as to

the s 12GLB relief sought and listed the matter for substantive hearing on 29 July 2021. Hence, the final question relating to relief is to be determined on the basis of the findings made in the principal judgment, the evidence before the Court at both hearings, and the written submissions filed by the parties.

6 For the reasons that follow, and not without some reluctance, I have determined not to order the CBA to publish the Misconduct Notices on the CommBank App.

B SECTION 12GLB

7 The principled approach to making orders for an adverse publicity notice pursuant to s 12GLB of the ASIC Act has been the subject of very little judicial commentary. It is worth addressing it briefly here.

8 The power of the Court to order an adverse publicity order is found in s 12GLB of the ASIC Act. Section 12GLB appears, relevantly, in the following terms:

> **12GLB Punitive orders requiring adverse publicity**
>
> (1) The Court may, on application by ASIC, make an adverse publicity order in relation to a person who:
>
> (a) has been ordered to pay a pecuniary penalty under section 12GBB; or
>
> (b) is guilty of an offence under section 12GB.
>
> (2) In this section, an *adverse publicity order*, in relation to a person, means an order that:
>
> (a) requires the person to disclose, in the way and to third parties specified in the order, such information as is so specified, being information that the person has possession of or access to; and
>
> (b) requires the person to publish, at the person's expense and in the way specified in the order, an advertisement in the terms specified in, or determined in accordance with, the order.
>
> (3) This section does not limit the Court's powers under any other provision of this Act.

9 For an understanding of the Court's task, it is necessary to first appreciate the purpose of an order made pursuant to s 12GLB. ASIC's written submissions drew the Court's attention to the Revised Explanatory Memorandum to the Financial Services Reform (Consequential Provisions) Bill 2001 (Cth), which provides (at [3.16]–[3.18]):

> *Punitive and non-punitive orders*
>
> 3.16 The Bill will repeal section 12GE, which currently allows the Court to make orders requiring a person that has contravened a provision of Subdivision D to

> disclose information within their possession or to publish an advertisement as specified in the order. In place of section 12GE, the Bill inserts new sections 12GLA and 12GLB dealing with punitive and non-punitive orders.
>
> 3.17 Section 12GLA will enable the Court to make a non-punitive order in relation to a person who has engaged in contravening conduct. A non-punitive order includes a community service order, a probation order, an order requiring the disclosure of information and an order requiring an advertisement to be published.
>
> 3.18 Section 12GLB will enable the Court to make punitive orders requiring adverse publicity against a person who is guilty of an offence under section 12GB. An adverse publicity order may require a person to disclose information that they have in their possession or have access to. A person who is guilty of an offence under section 12GB may also be required to publish, at their own expense, an advertisement publicising the fact that they have breached Division 2 of Part 2, along with details of any remedial action they have been required to undertake.

10 For the purposes of resolving the present matter, it suffices to say that, as I indicated at J [46], it is clear from the heading of s 12GLB that the provision relates to a punitive order which seeks to publicise relevant information.

11 It can be seen that the statutory purpose of the provision is two-fold.

12 *First*, an order made pursuant to this provision is to serve a punitive purpose. So much was made clear by Stone J in *Medical Benefits Fund of Australia Ltd v Cassidy* [2003] FCAFC 289; (2003) 135 FCR 1 (at 20 [48]):

> The addition of ss 86D and 12GLB to the TPA and the ASIC Act respectively have expanded the Court's power by expressly providing for punitive orders; see Explanatory Memorandum, *Trade Practices Amendment Bill (No 1) 2000*, Item 24 and Revised Explanatory Memorandum, *Financial Services Reform (Consequential Provisions) Bill 2001*, 3.16-3.18.

13 Similar to the imposition of pecuniary penalties for wrongful corporate conduct, the purpose of an adverse publicity order "does not just serve the notion of deterrence but also represents a condign curial response to what has occurred": J [30].

14 *Secondly*, for the reasons set out in the principal judgment (at [46]–[48]), s 12GLB also serves a broader purpose. Given the paucity of judicial authority on s 12GLB of the ASIC Act, the CBA relied on the authority of *Australian Competition and Consumer Commission (ACCC) v Aveling Homes Pty Ltd* [2017] FCA 1470, in which McKerracher J provided commentary on the purpose of a corrective notice pursuant to s 246(2)(d) of the *Australian Consumer Law* (**ACL**). Relevantly, his Honour stated (at [58]–[60]):

> 58. The Court has the power to make orders for the publication of corrective

> notices: s 246(2)(d) ACL. That power should be used protectively to inform the relevant markets of the outcome of the litigation so that those in the market have at least a broad understanding of how the contravener has had to change their conduct: *Australian Competition and Consumer Commission v On Clinic Australia Pty Ltd* (1996) 35 IPR 635; *Australian Competition and Consumer Commission v Real Estate Institute of Western Australia Inc* (1999) 95 FCR 114 (at [49]).
>
> 59. **The purpose of a corrective notice is to protect the public interest in dispelling incorrect or false impressions created by contravening conduct, alert the consumer to the fact of contravening conduct, aide the enforcement of primary orders and prevent repetition of contravening conduct**: *Australian Competition and Consumer Commission v SMS Global Pty Ltd* [2011] FCA 855 (at [128]); *Medical Benefits Fund of Australia Ltd v Cassidy* (2003) 135 FCR 1 (at [49]-[52]).
>
> 60. The parties have agreed that a corrective notice to be published on Aveling's website for the specified number of days is appropriate, and the form of that notice. The proposed notice serves to alert affected consumers and to educate industry.
>
> (Emphasis added).

15 Although the commentary of McKerracher J in *ACCC v Aveling Homes Pty Ltd* was directed towards a non-punitive order pursuant to a statute different from that under consideration, it is relevant to explaining the broad purposes, transcending penal considerations, involved in the present case.

16 Crucial to the realisation of the statutory purpose is the audience to which the information is proposed to be communicated: see J [46]. It is with regard to that audience that the Court is to determine the extent to which the adverse publicity order serves the statutory purpose and, therefore, the efficacy of the adverse publicity order.

17 Specifically, I made reference in the principal judgment to the need to reflect upon what is the appropriate mode to apprise the general public of complicated information. It is a fairy tale to think that in 2021 dense legalistic public advertisements, published in the notices section of daily newspapers, often cheek by jowl with the results of things such as flower shows and greyhound races, amounts to an effective way of communicating information to a broad audience of consumers. The decline in literacy rates in Western societies, and the likelihood that the intended audience is made up of persons at every point of the continuum of sophistication in financial and legal matters, presents real challenges that cannot be simply ignored: J [49]–[51]; see also *Lenthall v Westpac Banking Corporation (No 2)* [2020] FCA 423; (2020) 144 ACSR 573 (at 587–8 [45]–[50]).

C THE EXPERT EVIDENCE

18 Before addressing the efficacy of publishing the Misconduct Notices on the CommBank App, an issue arises as to the weight to be given to the evidence filed by the CBA regarding the intended audience of the Misconduct Notices.

19 Following the case management hearing on 28 April 2021, the Court made orders which allowed the CBA to file evidence on the following matters (outlined in [17] of the affidavit of Ross David McInnes sworn 27 April 2021):

> (a) there is a risk that many customers would consider the notification to be a hoax or scam because it would provide a link to a website containing a publication which is not CBA branded, and whose content is not (for almost all recipients) relevant to their everyday banking or interaction with CBA;
>
> (b) there is significant risk that many customers would be confused about whether the notification applied to them or their accounts (in circumstances where, for almost every customer who receives the notification, the fact is that they will not have been affected by the conduct the subject of the alert and affected customers have already been remediated). Notifications to customers through the CommBank App are usually personalised or otherwise applicable to the customers receiving them;
>
> (c) there is a risk that many customers will be deterred from completing their banking transactions either through confusion or because of a concern that the notification is a hoax or a scam.

20 In accordance with those orders, the CBA filed the following evidence:

(1) an affidavit of Fredrik Vilhelm Lindstrom, affirmed 19 May 2021 (**Lindstrom Affidavit**);

(2) expert reports of:

  (a) Professor Benjamin R Newell, filed 19 May 2021 (**Newell Report**);

  (b) Professor Michael J Hiscox, filed 27 May 2021 (**Hiscox Report**); and

  (c) Fiona Guthrie AM, filed 27 May 2021 (**Guthrie Report**).

21 Mr Lindstrom is the Executive General Manager of Digital, Operations and Technology of the CBA. In his affidavit, Mr Lindstrom outlines the purpose and approach to the design of the CommBank App, including information on its users and the means of communicating information to those users. It is upon this information that the three expert relied for their understanding of the nature of the CommBank App and its features.

22 The Newell Report, the Hiscox Report, and the Guthrie Report (together, the **Expert Reports**) each addresses the author's opinion on the following topics:

(1) the proposal to publish the Misconduct Notice in the Notification section of the CommBank App;

(2) whether there is any risk that if the Misconduct Notice is published in the Notification section of the CommBank App, customers may suffer any harm, detriment, or disadvantage, and the nature, likelihood and consequences of any other risks identified by Professor Newell; and

(3) whether it is possible to amend the mode, content, and/or location of publication of the Misconduct Notice so as to reduce, or eliminate any risks identified.

C.1 The Newell Report

23 Professor Newell is a Professor of Cognitive Psychology in the School of Psychology at the University of New South Wales. The opinions expressed in the Newell Report were summarised as follows (at [11]):

> It is my opinion that i) publishing the Misconduct Notice via the Notification section of the CommBank App is likely to attract customer attention and that the message will be viewed by a large proportion of users; ii) it is likely that some customers may become anxious, distressed, or annoyed by the thought that the misconduct is personally relevant, or an attempt at scamming and that this may affect future engagement with the app and the bank; and iii) the wording of the notification on the app landing page could be amended to reduce the likelihood of misinterpretation, as could the language used in the notification itself …

C.2 The Hiscox Report

24 Professor Hiscox is the Clarence Dillon Professor of International Affairs at Harvard University; the Director of the Sustainability, Transparency, Accountability Research (STAR) Lab at Harvard; and a faculty member of Harvard's Behavioral Insights Group at the Center for Public Leadership, the Institute for Quantitative Social Science, the Weatherhead Center for International Affairs, and the Harvard University Center for the Environment.

25 The opinions expressed in the Hiscox Report can be broadly summarised as follows:

(1) Publication of the Misconduct Notices in the Notification section of the landing page of the CommBank App poses a significant risk of potential adverse consequences for many customers (at [2.1]). This opinion is based on Professor Hiscox's insights into "human limitations in cognitive resources or capacity, cognitive biases and the use of simple heuristics, and the importance of the choice context in which information is presented" (at [2.1(e)]).

(2) There is a significant risk that, if the Misconduct Notice is published in the Notification section in the landing page of the CommBank App, many customers may be confused or alarmed and suffer financial harm as a result of the unintended effects of the intervention on their behaviour (at [2.2]). The potential for these consequences is amplified by the highly personalised nature of the CommBank App to the users needs (at [2.2(g)]–[2.2(h)]).

(3) It may be possible to reduce risks of harm by amending the mode and/or location of publication of the Misconduct Notice (at [2.2(g)]–[2.2(h)]) on the Commbank App. Specifically, Professor Hiscox recommends clarifying the wording of the adverse publication notice and placing it in another section of the app that provides links to general information about the bank (at [2.3]).

C.3 The Guthrie Report

26 Ms Guthrie is the CEO of Financial Counselling Australia – a body that assists people experiencing financial difficulty.

27 Ms Guthrie summarised her views on the three topics as follows (at [39]):

> My view is that publication of the notice will confuse a portion of the customers of the Commonwealth Bank. In my view, it would not be the most effective way to "provide members of the public with information the Court considers to be significant".
>
> …
>
> The impact of publication will vary depending on the personal circumstances of the CommBank customer, such as their literacy and numeracy and previous interactions with institutions.
>
> My view is that there will be some people who will experience a level of harm, detriment or disadvantage.
>
> It is not possible to be precise about the size of this group, but it would not be insignificant.
>
> …
>
> No. The Notice could not be amended sufficiently in a way that would overcome issues with it being included in the CommBank app.

C.4 Weighing of Evidence

28 ASIC did not adduce any expert evidence in support of its position, although aspects of the expert material adduced by the CBA were challenged by way of cross examination.

29 The primary issue that falls for the Court to decide is the weight to be given to the evidence. ASIC submits that the conclusions to be drawn from the Expert Reports ought to be given little, if any, weight for the following two reasons.

30 *First*, ASIC submits that the assumptions upon which the expert evidence is based are pitched at a level of generality that provides little insight to the current matter. At the hearing, speaking broadly, the cross-examination was directed to the information provided to the experts and the assumptions that made up the foundations of the Expert Reports. The unanimous answer provided by all three witnesses was that their opinions were founded on the assumption that the users of the CommBank App would be representative of the general population: see T16.30–38, T21.16–25, T28.5–20. Consequently, data specific to the users of the CommBank App was not used to inform the Expert Reports.

31 ASIC submits that the Expert Reports provide no insight into how the users of the CommBank App itself might react, but rather, how the general public might react to receiving a notification containing the Misconduct Notices. However, although one might have thought that more specific material would have been given to the experts as to the cohort of the population that uses the CommBank App, on the evidence as it stands, I am not convinced it matters a great deal. Given that there are 6.3 million users of the CommBank App, in the absence of any other evidence, it is reasonable to proceed on the basis that this is a sufficiently large and generic cohort to justify the assumption that it is broadly reflective of the general public.

32 So much was the evidence of the expert witnesses. For instance, the evidence of Professor Hiscox in re-examination was as follows (at T16.30–35):

> [MR KULEVSKI]: … Did you draw any conclusions from the fact that there was 6.3 [million people] using the app about their backgrounds? --- Yes. I … believe this is a fairly, you know, large and representative sample of the Australian population. … I probably should have mentioned from our previous research, we – we had surveyed some of the – of the customers who – who used the app, and we had some information from that survey sample of education levels and sociodemographic information, and it seems to be a very representative sample of the Australian population, and so we can draw some inferences there about likely average education levels, likely average financial literacy levels as well.

33 This evidence was similar to that of Professor Newell and of Ms Guthrie. Mr Newell's evidence (at T25.1–25.4) was as follows:

> [MR KULEVSKI]: Did you draw any conclusions about [the fact there were 6.3 million active users of the CommBank App]? --- That that would be a fairly broad and representative proportion of the population throughout which you might expect distributions of different characteristics, individual characteristics.

34 Ms Guthrie shared the same opinion (at T28.5–8):

> [MR KULEVSKI]: And what you've done is you've assumed that app users are essentially, users of the CommBank app are essentially representative of the general population? --- I think that's a reasonable, a very reasonable assumption to make. If there are six-point-three million users of the app, that's a very expansive – it's a very good sample size.

35 During the hearing, Ms Guthrie also said that, while it may require a degree of competency and understanding, the use of a smartphone is "an essential item to participate in society today", so much so that "the one thing that a homeless person will have is … a phone because it's the only way you can stay in contact with anyone": T29.19–23.

36 Given the evidence provided by the expert witnesses, the lack of evidence to the contrary, and the sheer size of the cohort, I am willing to find, at a level of generality, that the assumption that the 6.3 million users of the CommBank App would be broadly representative of the general population does not diminish the weight to be given to the evidence of the expert witnesses.

37 *Secondly*, ASIC submitted that the CBA's failure to adduce specific evidence as to the users of the CommBank App is consistent with the CBA having failed to discharge an evidentiary onus that there would be real difficulties in the use of the CommBank App as proposed by ASIC. Under cross-examination, Professor Hiscox gave evidence as to the level of empirical data upon which he based his opinions expressed in the Hiscox Report. For instance, Professor Hiscox gave the following evidence (at T11.11–29):

> [MR LUXTON]: Just so we can understand your insight into the app, do you … know how many notifications are published a day to the average customer that you've referred to? --- I do not. No. I do not.
>
> Do you know if CBA measures and retains that sort of information? --- I believe they would.
>
> Do you know how many items are published on the activity feed per day, again, to the average customer? --- I do not. No. No.
>
> And can I take it that you would expect that CBA would measure and retain that sort of information? --- I would expect so. Yes.
>
> Do you know how many notifications of product offers CBA issues a day, again, to the average customer? --- No, I don't know that.
>
> But, again, you would expect that they would retain – they could measure and retain that sort of information? --- I would expect so.

38 The conclusion that ASIC says the Court ought to draw from the evidence of Professor Hiscox is that the CBA has failed to adduce evidence regarding the specific users of the CommBank App – evidence that, on any rational view, would have assisted the Court.

39 Although not articulated precisely this way by ASIC, the starting point for an examination of the relevance of a failure to call material evidence is the basic principle explained in *Blatch v Archer* (1774) 1 Cowp 63, as was made clear by the High Court in *Australian Securities and Investments Commission v Hellicar* [2012] HCA 17; (2012) 247 CLR 345 (at 405–6 [145] per French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ).

40 In *Blatch v Archer* (at 65), Lord Mansfield remarked that "all evidence is to be weighed according to the proof which it was in the power of one side to have produced, and in the power of the other to have contradicted." For present purposes, there is no need to trawl through the principles that are well-known: see *Quintis Ltd (Subject to Deed of Company Arrangement) v Certain Underwriters at Lloyd's London Subscribing to Policy Number B0507N16FA15350* [2021] FCA 19; (2021) 385 ALR 639 (at 702 [252], 703 [255]–[256]). To resolve the issue in dispute between the parties, it is sufficient to say that once a fact is put in issue, it "must be decided by a court according to the evidence that the parties adduce, not according to some speculation about what other evidence might possibly have been led": *Hellicar* (at 412 [165] per French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ).

41 ASIC's submission as to the inference to be drawn from the CBA's failure to adduce evidence specific to users of the CommBank App should not be accepted. Given the novel application of s 12GLB contemplated, the assertion that the CBA had access to relevant empirical data is, on the evidence, speculative. Although one may *suspect* such material exists, there was no attempt by ASIC, by way of a notice to produce or otherwise, to establish that there was specific empirical data held by the CBA prepared for other purposes, which may have been relevant to assessing whether the cohort of users would be confused by the sort of communication contemplated. When prompted, the evidence of Professor Hiscox was (at T8.31–41):

> … I did a search myself … because I realised I didn't know whether there had been something like this tested before in the academic … literature where there's a kind of – a warning or a court decision has been reported to a set of customers about the company, and I couldn't find, you know, any published results of a test of something like this. So what the companies have and what's in the marketing literature is – is these personalised offers, or reminders, which again are sort of very different. You know, they're expected in context, you know, the customer expects offers. They expect reminders and calls to action about their particular account.

42 If there was some evidence before me that the CBA had access to a body of research that was relevant to the present issue and decided not to lead it, that failure to lead the evidence might warrant an inference of the kind identified in *Blatch v Archer*. However, in the present circumstances, no such inference should be drawn.

D CONSIDERATION

43 At the commencement of the hearing, my preliminary view was that an order that the Misconduct Notices be published on the CommBank App would be appropriate in the light of the statutory purpose of s 12GLB. As I indicated in the principal judgment, the time has come to think of a new way to approach such orders.

44 On balance, however, I have determined after hearing argument that it would not be appropriate to proceed down this novel course at this time on the present evidence and in these circumstances. In coming to this conclusion, I have considered the informative function that would be satisfied by publishing the Misconduct Notices on the CommBank App, the punitive effects such an order may have on the CBA and its customers, and the extent to which such risks could be mitigated.

D.1 Non-Punitive Purpose

45 ASIC submits that there can be no doubt that the best way to serve the provision's purpose of making the information available to the most people is to publish an adverse publicity notice on the CommBank App.

46 The Lindstrom Affidavit provides the following information on the users of the CommBank App: (a) there are over 6.3 million active CommBank App customers (at [9] and [21]); (b) the large majority of users are retail customers, as compared to business customers (at [23]); (c) the average user of the CommBank App is said to login to the CommBank App once per day (at [21]); and (d) the core users "are the general population", particularly people aged between 25 and 44 years (at [22]).

47 Given the size and engagement of the intended audience, it is clear that publication of the Misconduct Notices on the CommBank App would further s 12GLB's non-punitive purpose of informing the public.

48 However, the extent to which the non-punitive purpose is furthered must be considered in the light of the relevance of the information. Given that the relevant misconduct affected approximately 2,200 business customers, the Misconduct Notices would be specifically relevant to those 2,200 business customers, and otherwise generally relevant to business customers. In terms of numbers, this means that the Misconduct Notices would be specifically relevant to approximately 0.035% of the intended audience, and generally relevant to 7.3% of the intended audience. Therefore, the information communicated in the Misconduct Notices is

unlikely to be relevant to the majority of users of the CommBank App, who may not be aware of the context in which the conduct arose given they are not business customers.

49 Accordingly, while I accept that the publication of the Misconduct Notices would further inform the relevant audience of the CBA's misconduct, I also recognise that there is likely to be a significant "overspill" – customers using the CommBank App that the Misconduct Notices do not relate to and who are unaware of the context surrounding them.

D.2 Punitive Purpose

50 Although ASIC acknowledges that this "overspill" from publication on the CommBank App may be a consideration, the significance of such concerns ought not to be overstated, particularly in the context of the punitive and consumer-protection functions of an adverse publicity order.

51 However, there is some tension between this submission and the evidence adduced. The Guthrie Report states (at [46(b)]):

> I am very concerned however about people with low levels of numeracy and literacy as this group is unlikely to understand the Misconduct Notice and/or will be confused by it. Taking the ABS data referenced by Lee J in [*Lenthall (No 2)*], around 13.7% of the Australian population have literacy levels at Level 1 or below. Extrapolating this to the population of users of the CommBank app suggests that around 860,000 people would be in this category.

52 In support of its conclusions, the Guthrie Report (at [30]) cites a June 2014 media release published by Financial Counselling Australia, "14% of Australians won't understand this press release, 22% will struggle with the numbers in it" (Media Release, 4 June 2014) <https://www.financialcounsellingaustralia.org.au/14-of-australians-wont-understand-this-press-release-22-will-struggle-with-the-numbers-in-it/>, which states:

> The [ABS report] has received hardly any media attention but should be a wake-up call for all of us – the community sector, industry and government – about how we communicate and respond to clients and customers.
>
> Too much of our communication assumes that our audience has the same level of numeracy and literacy. In fact, large numbers of Australians simply do not have the ability to fully understand much of the information we give them nor the forms we ask them to fill out …
>
> There are clear implications for many service providers, for example, in providing more information via short video or pictures, in simplifying language and presenting information in small chunks.

53 The Australian Bureau of Statistics (ABS) report bring referred to was based on the findings of the 2012 report of the Organisation for Economic Cooperation and Development (OECD), which I summarised in *Lenthall (No 2)* (at [47]):

> Connected to this phenomenon, a number of studies in the United States have suggested that both the quantity and quality of adult reading abilities are in decline: see, for example, Alice Horning, "Reading, Writing and Digitizing: A Meta-Analysis of Reading Research", (2010) 10(2) *Reading Matrix* 243. Further, although there is scant readily accessible recent data, according to a 2012 report of the OECD, some 12.6% of Australian adults attained only Level 1 (of 5) or below in literacy proficiency. At that level of literacy, adults can read brief texts on familiar topics and locate a single piece of specific information identical in form to information in the question or directive, but otherwise experience difficulty: Organisation for Economic Cooperation and Development, *Australia - Country Note: Survey of Adult Skills First Results* (OECD, 2012) at 3. An Australian Bureau of Statistics commentary of that OECD Survey noted that:
>
> > [a]round 3.7% (620,000) of Australians aged 15 to 74 years had literacy skills at Below Level 1, a further 10% (1.7 million) at Level 1, 30% (5.0 million) at Level 2, 38% (6.3 million) at Level 3, 14% (2.4 million) at Level 4, and 1.2% (200,000) at Level 5.
>
> Australian Bureau of Statistics, *4228.0 - Programme for the International Assessment of Adult Competencies, Australia, 2011-12* (https://www.abs.gov.au/AUSSTATS/abs@.nsf/productsbyCatalogue/A7F52A484135C822CA257BFE00257DD5?OpenDocument).

54 Further, the Guthrie Report relied on the following surveys regarding financial literacy (at [26]):

> ANZ Bank conducted surveys in 2003, 2005, 2008, 2011 and 2015 measuring the financial literacy of the Australian population. Financial literacy was defined as "the ability to make informed judgements and to take effective decisions regarding the use and management of money". The results from the first survey in 2003 were effectively replicated in future surveys, with the lowest levels of financial literacy associated with distinct cohorts of people. For example, 42% of people with Year 10 or less, and 40% of people who were unskilled, had financial literacy scores of Levels 1 - 2 (where 10 was the highest). Other groups with low financial literacy were people on lower incomes, people with lower savings levels, single people and people at the extremes of the age profile (18 – 24 years old or those aged 70 and over).
>
> (Citations omitted).

55 As for the potential consequences that publishing the Misconduct Notices may have on those customers with lower literacy rates, the Expert Reports were unanimous in their views. The evidence provided was that the content of the Misconduct Notice has the potential to distress retail customers who are not financially literate, and are unable to distinguish that the misconduct in question is not their own and does not directly affect them.

56 The Newell Report states (at [6]):

> The banner notification is very brief and does not specify the nature of the misconduct. As such it could be misinterpreted as a communication from the Federal Court of Australia about the misconduct of the individual. Such an interpretation may lead some customers to become anxious or distressed. Another potential customer reaction could be that they believe the message is a scam. Such a reaction is, in my opinion, possible given that customers would never have seen a notification from the Federal Court in their app before and might jump to the conclusion that scammers are attempting to elicit payment for a spurious 'misconduct' fine, or similar.

57 The Hiscox Report outlines (at [2.2(e)]):

> Other customers might respond to the notification by feeling confused and uncertain about how to use the additional, unusual information being presented, disengaging from the app and not taking time-sensitive actions that would improve their financial wellbeing. Again, delayed decisions and transactions could be very costly to these customers.

58 The Guthrie Report highlighted the effect that the Misconduct Notices may have for those with lower literacy comprehension, as well as vulnerable groups (at [46(c)]–[46(e)]):

> c. If taken out of context, the word "misconduct" is one that may frighten some people. This is because this is the word that they might latch on to and they may not have the literacy to read and understand the accompanying text.
>
> d. The inclusion of the Federal Court logo may have the same impact for some people. For example, there are some Aboriginal and Torres Strait Islander people who are fearful of government (because of past wrongs, such as those inflicted through the stolen generation). Similarly there are people from newly arrived communities that have fled regimes where the police and government are rightly to be feared. These groups may experience distress, fear or worry if they see a court logo in their banking app. The court logo may have the same impact on others in the community, such as people who are worried about court fines, or have had difficult experiences with government, for example through robodebt.
>
> e. People running small businesses, who are more directly the target of the Misconduct Notice, also vary in their levels of numeracy and literacy. Some of this group may also not understand the message in the notice and/or will be confused by it.

59 Although intuitively I consider these concerns are likely to be overstated, perhaps significantly, this is not a sound basis to form a judgment. Based on this evidence, I consider I am obliged to find as a fact in this case that there is a not insignificant risk that the Misconduct Notices are open to be misinterpreted by those users of the CommBank App with lower literacy rates. I also accept, again based on the evidence adduced, that this *may* cause such users to be confused, anxious, distressed, alarmed, suspicious, and/or uncertain, which may have further consequences in respect of how such users manage their finances and interact the CommBank App. Accordingly, and specifically by reference to the evidence adduced in this case, I am not

satisfied that the provision's punitive and consumer-protection functions would be advanced by making the order contemplated.

D.3 Mitigation

60 For completeness, I should deal with the balance of ASIC's submissions.

61 ASIC submits that the adverse effects caused by the "overspill" can be minimised by the drafting of the notice and the notification heading.

62 It was the opinion of both Professor Newell and Professor Hiscox that the effect of the contents or location of the Misconduct Notices on the CommBank App could be amended so as to reduce any risk of harm. The Newell Report concluded (at [10]) that "the wording of the notification on the app landing page could be amended to reduce the likelihood of misinterpretation, as could the language used in the notification itself". The Hiscox Report states (at [2.3]):

> (a) It may be possible to reduce the risk of harm but still publish the notice in the Commbank app. Rather than placing the notice in the Notifications window on the landing page, it might be placed in another section of the app that provides links to general information about the bank (informational items clearly not requiring immediate action from the customer).
>
> (b) It may also be advisable to alter the wording of the title of the notice to help reduce alarm and confusion among customers.
>
> …

63 This is supported by the evidence of Professor Newell during the hearing (at T25.10–3):

> [MR KULEVSKI]: In your opinion, is it safe to do so without that experimentation being done? --- I think it would be preferable to do the experimentation. I think … the potential change … in the wording would perhaps mitigate the possibility of risk for some individuals, but it would be hard to know.

64 These views contrasted with the evidence of the Guthrie Report (at [39]), which opined that the Misconduct Notices could not be amended sufficiently in a way that would overcome issues with them being published on the CommBank App. This was because any proposed amendment would "not overcome the fundamental problem that some people are still very likely to be confused and not understand why they are receiving the notice": Guthrie Report (at [59]).

65 Having regard to the potential for adverse consequences, and the uncertainty among the experts as to how successfully, if at all, those consequences might be mitigated, any proposed mitigating steps do not change my view that in this case it would not be appropriate to order

an adverse notice to be published on the CommBank App in the form set out in the Misconduct Notices, or in an amended form.

66 Put simply, without further experimentation and research into the potential consequences the publication could have on a company such as the CBA and, more importantly, its customers, I am not satisfied that imposing an order with largely unknown consequences would achieve the punitive and non-punitive purposes of s 12GLB.

E A WAY FORWARD?

67 An adverse publication notice is just one of the armoury of punitive measures the Court has at its disposal. In addition to the pecuniary penalty ordered in the principal judgment, the parties have already agreed on the Misconduct Notices being published on the CBA's homepage.

68 As I have stressed on a number of occasions, there is merit in rethinking the form in which the Court is to order an adverse publication notice pursuant to s 12GLB of the ASIC Act. Although I am satisfied that the written notice and the audio-visual notice I will order to be published on specified websites will have some limited utility, I am far from convinced that the form of publication fastened upon is optimal (despite not proceeding down my originally contemplated course due to the level of uncertainty it entails in this case). Of course, this does not mean that in another case, depending upon the evidence, it would be inappropriate to make an order of the type ASIC proposed and I contemplated.

69 Empirical evidence of a type establishing a likely reaction of the recipients may be available in another case. Indeed, without expressing a definitive view, such material might be able to be provided pursuant to an order of the Court. Section 12GLA(2)(a) provides the Court with the power to make a community service order, defined in s 12GLA(4) as follows:

> **12GLA Non-punitive orders**
>
> …
>
> (4) In this section:
>
> ***community service order***, in relation to a person who has engaged in contravening conduct, means an order directing the person to perform a service that:
>
> (a) is specified in the order; and
>
> (b) relates to the conduct;
>
> for the benefit of the community or a section of the community.
>
> Example: The following are examples of community service orders:

(a) an order requiring a person who has made false representations to make available a training video which explains advertising obligations under this Act; and

(b) an order requiring a person who has engaged in misleading or deceptive conduct in relation to a financial product to carry out a community awareness program to address the needs of consumers when purchasing the financial product.

70 It is certainly arguable that the conduct of a scientifically-designed experiment by a behavioural economist (with the qualifications of someone like Professor Hiscox), being a project considering the issue of the effectiveness of communicating the terms of a notice ordered by the Court in some digital format, might be for the benefit of the community. However, for the present matter, the prospect of such an order can be put to one side as it was not suggested by ASIC and, if such an order was to be contemplated, it should have been considered when the full remedial response of the Court to proven contravening conduct was being evaluated and decided upon.

F CONCLUSION AND ORDERS

71 For the above reasons, the Court makes the orders for publication of a written adverse publicity notice and an audio-visual adverse publicity notice. I have made the order providing for publication of the audio-visual notice subject to further order, as I wish to be provided with a copy and view a version of the notice, prior to the order for publication coming into effect.

I certify that the preceding seventy-one (71) numbered paragraphs are a true copy of the Reasons for Judgment of the Honourable Justice Lee.

Associate: S.King

Dated: 16 August 2021