

NOTICE OF FILING

This document was lodged electronically in the FEDERAL COURT OF AUSTRALIA (FCA) on 14/09/2018 11:59:22 AM AEST and has been accepted for filing under the Court's Rules. Details of filing follow and important additional information about these are set out below.

Details of Filing

Document Lodged: Concise Statement
File Number: VID1153/2018
File Title: AUSTRALIAN SECURITIES AND INVESTMENTS COMMISSION v
AUSTRALIA AND NEW ZEALAND BANKING GROUP LIMITED
Registry: VICTORIA REGISTRY - FEDERAL COURT OF AUSTRALIA



Dated: 14/09/2018 12:16:16 PM AEST

Registrar

A handwritten signature in blue ink, appearing to read 'Warwick Soden'.

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.

The date and time of lodgment also shown above are the date and time that the document was received by the Court. Under the Court's Rules the date of filing of the document is the day it was lodged (if that is a business day for the Registry which accepts it and the document was received by 4.30 pm local time at that Registry) or otherwise the next working day for that Registry.



Form NCF1

CONCISE STATEMENT

FEDERAL COURT OF AUSTRALIA
REGISTRY: VICTORIA
DIVISION: GENERAL

NO. OF 2018

AUSTRALIAN SECURITIES AND INVESTMENTS COMMISSION

Plaintiff

AUSTRALIA AND NEW ZEALAND BANKING GROUP LIMITED

ACN: 005 357 522

Defendant

Claim

1. The Plaintiff (**ASIC**) claims that the Defendant (**ANZ**) failed to comply with its continuous disclosure obligations under s.674(2) of the *Corporations Act 2001 (Cth)* (**Act**) in relation to a \$2.5 billion institutional share placement undertaken by ANZ on 6 August 2015 (**Placement**). ASIC seeks a declaration of contravention under s.1317E of the Act and a pecuniary penalty order under s.1317G(1A) of the Act.
2. ASIC alleges that ANZ contravened s.674(2) by failing to notify the Australian Securities Exchange (the **ASX**) that approximately \$791 million of the \$2.5 billion of ANZ shares offered in the Placement were to be acquired by its underwriters rather than placed with investors (alternatively, by failing to notify the ASX that a significant proportion of the shares the subject of the Placement were to be acquired by the underwriters).

(a) Important facts giving rise to the Claim

3. ANZ is one of the 'big four' banks operating in the Australian banking system. It is a listed disclosing entity to which s.674(2) of the Act applies.
4. On the morning of 6 August 2015, ANZ entered into an underwriting agreement with JP Morgan Australia Ltd (**JPM**), Citigroup Global Markets Australia Pty Ltd (**Citi**) and Deutsche Bank AG (**DB**) (together – **Underwriters**) in respect of the Placement (**Underwriting Agreement**).
5. The Underwriting Agreement provided for the Underwriters to use their best endeavours to place new fully paid ordinary shares in the capital of ANZ to the value of \$2.5 billion (**Placement Shares**) at a price no lower than \$30.95 per share with investors between

Filed on behalf of (name & role of party)	Australian Securities and Investments Commission, the plaintiff
Prepared by (name of person/lawyer)	Savas Miriklis
Law firm (if applicable)	
Tel 03 9280 3200	Fax 03 9280 3402
Email Savas.miriklis@asic.gov.au	
Address for service (include state and postcode)	Level 7, 120 Collins Street, Melbourne, VIC 3000

8:30am and 6:00pm on 6 August 2015 (**Placement Date**) and to underwrite the issue of the Placement Shares. In the event that the number of shares successfully placed by the Underwriters with investors was less than the totality of the Placement Shares, the Underwriting Agreement obliged the Underwriters to acquire the “Shortfall Securities” in specified proportions – 40% by Citi and 30% by each of JPM and DB.

Placement

6. At about 8:38am on the Placement Date, the securities of ANZ were placed in a trading halt. Immediately prior to being placed in a trading halt, securities in ANZ traded on the ASX at a price at \$32.58.
7. At about 8:44am on the Placement Date, ANZ issued a release to the ASX (**Placement Announcement**) entitled “ANZ announces Institutional Placement (fully underwritten) and share Purchase Plan to raise a total of \$3 billion”. The Placement Announcement relevantly stated that the Placement size was “fixed at \$2.5 billion and will not be increased”, that the Placement would be conducted by means of an “accelerated book-build” process with an “underwritten floor price” of \$30.95, and that the Placement was fully underwritten by Citi, DB and JPM. The Underwriters commenced the process of seeking and accepting applications in the bookbuild at about this time.
8. The Placement did not attract the level of interest from institutional investors that was anticipated. That lack of interest gave rise to a sequence of communications over the course of the Placement Date between senior officers and employees of ANZ and representatives of the Underwriters addressing the inadequate level of demand from those investors and, ultimately, the prospect of the Underwriters acquiring a significant portion of the Placement Shares.
9. At about 8:30pm on the Placement Date, ANZ accepted the Underwriters’ final proposed allocations of Placement Shares in the course of a teleconference participated in (for ANZ) by at least Mr Rick Moscati (ANZ’s then treasurer) and Mr John Needham (then ANZ’s head of Capital and Structured Funding).
10. In the result, the share price was set at the minimum price of \$30.95 and, owing to the inadequate level of demand from institutional investors, the Underwriters (with ANZ’s knowledge and approval) allocated to themselves approximately \$791 million of the Placement Shares (**Underwriter Acquisition**). In percentage terms, the Underwriters allocated to themselves and subsequently acquired approximately 31% of the Placement Shares. In numerical terms, the Underwriters allocated to themselves and subsequently acquired a total of 24,653,708 ANZ shares in the following proportions:
 - (a) Citi - 9,861,480 shares (40%);
 - (b) JPM - 7,396,115 shares (30%); and
 - (c) DB - 7,396,113 shares (30%).
11. The outcome of the Placement was known to ANZ by about 8:30pm on the Placement Date. The facts of, and the effect of, the outcome of the Placement known to ANZ by that time included:

- (a) the fact of the Underwriter Acquisition; and
- (b) the fact that the shares comprising the Underwriter Acquisition (**Underwriter Shares**) had been allocated to the Underwriters:
 - (i) in consequence of inadequate demand from institutional investors in respect of the Placement; and
 - (ii) as short-term holders of the shares.

12. The Underwriter Shares:

- (a) amounted in number to about the equivalent volume of 3 days trading in ANZ shares on the ASX; and
- (b) amounted in value to about 0.9% of the issued share capital of ANZ.

Completion Announcement

13. At about 7:30am on 7 August 2015, ANZ issued a release to the ASX in respect of the Placement (**Completion Announcement**). It stated, *inter alia*, “ANZ today announced that it had raised \$2.5 billion in new equity capital through the placement of approximately 80.8 million ANZ ordinary shares at the price of \$30.95 per share”. The terms of the Completion Announcement were approved by two ANZ disclosure officers.

14. The Completion Announcement did not disclose the Underwriter Acquisition or (more generally) that the Underwriters had acquired a substantial proportion of the Placement Shares. ANZ did not disclose the fact of the Underwriter Acquisition (or that the Underwriters had acquired a significant proportion of the Placement Shares) to the ASX by other means at any stage. That information was not generally available to the market at the time.

Resumption of Trading

15. The halt upon trading in ANZ shares was lifted prior to the commencement of trading on 7 August 2015. ANZ shares opened at \$29.99 before hitting an intraday low of \$29.80 and closing at \$30.14. More than \$1.1 billion of ANZ shares were traded on 7 August 2015.

(b) Relief Sought

16. ASIC seeks the following relief:

- (a) pursuant to s.1317E of the Act, a declaration that ANZ contravened s.674(2) of the Act by failing to notify the ASX of the Underwriter Acquisition and/or that the Underwriters had been allocated and were to acquire a significant proportion of the Placement Shares, on:
 - (i) 6 August 2015; or, alternatively
 - (ii) prior to the recommencement of trading in ANZ shares on 7 August 2015; and

- (b) an order pursuant to s.1317G(1A) of the Act, that ANZ pay to the Commonwealth a pecuniary penalty in such amount as the Court considers appropriate.

(c) Primary Legal Grounds

17. ASIC's claim is founded upon s.674(2) of the Act. Section 674(2) of the Act, in combination with ASX Listing Rule 3.1, requires relevant listed disclosing entities to notify the ASX immediately of any information which is not generally available of which it becomes aware (within the meaning of ASX Listing Rule 19.12) that a reasonable person would expect, if it were generally available, to have a material effect on the price or value of the relevant entity's securities. ANZ is a listed disclosing entity to which s.674(2) applies.

18. ASIC contends that the fact of the Underwriter Acquisition and/or the fact that the Underwriters had been allocated and were to acquire a significant proportion of the Placement Shares was information that:

- (a) was not generally available to participants in the market for ANZ shares; and
- (b) if disclosed, was information that a reasonable person would expect to have a material effect upon the price of ANZ shares.

19. Pursuant to s.677 of the Act, the information that a reasonable person would expect to have a relevant material effect includes information about the relevant entity's securities which would, or would be likely to, influence persons who commonly invest in securities in deciding whether to acquire or dispose of those securities. In that regard, ASIC contends the information described in paragraph 18 above was likely to influence investors in deciding whether to acquire and in deciding whether to dispose of ANZ shares for reasons including:

- (i) the size of the Underwriter Acquisition (whether it was described in quantum, percentage terms or generally as "significant"); and
- (ii) the expectation of both sophisticated and unsophisticated investors that the Underwriters would promptly dispose of the acquired Placement Shares and place downward pressure upon the ANZ share price;

with the result *inter alia* that:

- (iii) potential purchasers of ANZ shares would likely refrain from purchasing shares in anticipation that the disposal of the Underwriter Shares would present an opportunity to purchase at a lower price; and/or
- (iv) sophisticated traders of ANZ shares would likely engage in trading activities such as shorting the shares in anticipation of being able to purchase them at a lower price.

20. It is contended that, in the identified facts and circumstances, ANZ was required (but failed) to notify the ASX of the Underwriter Acquisition and/or that the Underwriters had been allocated and were to acquire a significant proportion of the Placement Shares on the night

of 6 August 2015 or, alternatively, prior to the recommencement of trading in ANZ shares on 7 August 2015.

21. As to the availability of a pecuniary penalty order under s 1317G(1A) of the Act, it is further contended that the contravention arising from ANZ's failure to notify the ASX of the Underwriter Acquisition and/or that the Underwriters had been allocated and were to acquire a significant proportion of the Placement Shares (as specified in the preceding paragraph):

(a) materially prejudiced the interests of purchasers or disposers of ANZ Shares, including those persons who participated in the retail shareholder share purchase plan announced by ANZ on 6 August 2015;

(b) was serious and attended by the following aggravating circumstances:

(i) from around 10:00am on 7 August 2015, Mr Moscati and Mr Needham took part in a conference call with representatives of the Underwriters during which each of the Underwriters undertook not to sell their Underwriter Shares on that day and Mr Moscati requested that the Underwriters confer about how to manage the Underwriters' disposal of the Underwriter Shares; and

(ii) on 8 August 2015, Mr Moscati and Mr Needham took part in a further conference call with representatives of each of the Underwriters during which the Underwriters agreed with each other and with ANZ:

(A) not to sell down their respective portions of the Underwriter Shares in volumes greater than 5% of the daily volume of ANZ shares; and

(B) that if any of the Underwriters formed a view that they had an obligation to disclose the existence of the Underwriter Acquisition, they would consult before doing so.

(d) Harm Alleged

22. The harm alleged is ANZ's contravention of s.674(2), by which the market was deprived of information which the Act intended should have been available to it. The purpose of imposing the obligation of disclosure in s.674(2) of the Act is to facilitate the fair, effective and efficient operation of Australian markets for securities and to preserve and foster the reputation of Australian listing markets as fair, orderly and transparent securities markets. That purpose was frustrated by the non-disclosure.

DATE: 14 September 2018



Signed by Savas Miriklis
Lawyer for the plaintiff

CERTIFICATE OF LAWYER

I Savas Miriklis certify to the Court that, in relation to the concise statement filed on behalf of the Plaintiff, the factual and legal material available to me at present provides a proper basis for each allegation in the pleading.

Date: 14 September 2018



Signed by Savas Miriklis

Lawyer for the Plaintiff