

## NOTICE OF FILING

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### Details of Filing

Document Lodged: Concise Statement  
File Number: NSD1275/2020  
File Title: AUSTRALIAN SECURITIES & INVESTMENTS COMMISSION v  
COMMONWEALTH BANK OF AUSTRALIA ACN 123 123 124  
Registry: NEW SOUTH WALES REGISTRY - FEDERAL COURT OF  
AUSTRALIA



*Sia Lagos*

Dated: 1/12/2020 9:45:53 AM 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.

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.



# Concise Statement

No. [REDACTED] of 2020

Federal Court of Australia  
District Registry: New South Wales  
Division: General

## AUSTRALIAN SECURITIES AND INVESTMENTS COMMISSION

Plaintiff

## COMMONWEALTH BANK OF AUSTRALIA (ACN 123 123 124)

Defendant

### A. NATURE OF PROCEEDING

1. This proceeding concerns conduct whereby the defendant, Commonwealth Bank of Australia (**CBA**), charged certain credit facility customers interest at a rate significantly greater than that provided for by the relevant terms and conditions, and provided periodic account statements including the notations referred to in paragraphs 8 and 9 which constituted representations understating the rate of interest at which interest had been and/or would be charged.
2. ASIC contends that when providing affected customers with statements featuring such errors, CBA contravened ss 12DB(1)(g) and/or 12DA(1) of the *Australian Securities and Investments Commission Act 2001* (Cth) (**ASIC Act**), and s 912A(1)(c) of the *Corporations Act 2001* (Cth) (**Corporations Act**).

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

#### B1 CBA's overcharging conduct

3. CBA is a major Australian bank and the holder of an Australian Financial Services Licence (**AFSL**) No 234945. As at 19 November 2020, CBA was the second largest listed company in Australia by market capitalisation, which was approximately \$139.92 billion as at close of market 19 November 2020. On 12 August 2020, CBA reported a statutory net profit of \$9.634 billion (after tax) for the financial year ending 30 June 2020.
4. During the period 29 December 2011 to 31 March 2018 (**Relevant Period**) CBA offered business customers credit facilities known as:
  - (a) the Simple Business Overdraft (**SBO**), which was offered from March 2013; and

Filed on behalf of (name & role of party)	Australian Securities and Investments Commission, the plaintiff		
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(include state and postcode)			

- (b) the Business Overdraft (**BOD**), which was offered for the entire Relevant Period, (collectively **Overdraft Facilities**).
- 5. During the Relevant Period, CBA:
  - (a) charged certain Overdraft Facility customers interest at a rate that was significantly more than (often more than double) the rate provided for by the relevant terms and conditions (**Overcharging Errors**); and
  - (b) sent those customers periodic account statements (**Statements**) which included the notations referred to in paragraphs 8 and 9 below (**Interest Summary Errors**).
- 6. During the Relevant Period, this conduct affected more than 2,200 customers and resulted in overcharged interest totalling more than \$2.9 million.

## **B2. CBA's conduct during the Penalty Period**

- 7. Between 1 December 2014 and 31 March 2018 (**Penalty Period**) CBA made Overcharging Errors and Interest Summary Errors affecting 1,510 Overdraft Facility customers (**Affected Customers**).
- 8. Of the Affected Customers, 1,397 had SBOs as to which:
  - (a) the terms and conditions of the Overdraft Facility provided that interest would be charged at 16% pa (for SBOs entered into prior to 29 May 2017) and 14.55% pa (for SBOs entered into from 29 May 2017);
  - (b) for various periods CBA, in fact, charged interest at the rate of approximately 34% pa;
  - (c) CBA sent those customers Statements covering those periods which included a notation stating that the interest rate shown on the Statement (**the Statement Rate**), was effective as at the last day of the period covered by the Statement; and
  - (d) the Statement Rate was:
    - (i) the same interest rate as was shown on the previous Statement or, in the case of the first Statement issued after the Overdraft Facility was entered into, the same interest rate as was shown in the terms and conditions of the Overdraft Facility; and
    - (ii) lower than the interest rate that was, in fact, charged referred to in paragraph (b) above.
- 9. Of the Affected Customers, 113 had BODs as to which:
  - (a) the terms and conditions of the Overdraft Facility provided that interest would be charged at a rate between 5.34 to 14.18% pa (varying by customer);
  - (b) for various periods CBA, in fact, charged interest at the rate of between 12.38 and approximately 34% pa; and
  - (c) CBA sent those customers Statements covering those periods which included a notation stating that the Statement Rate was effective as at the last day of the period covered by the Statement; and
  - (d) the Statement Rate was:
    - (i) generally the same interest rate as was shown on the previous Statement or, in the case of the first Statement issued after the Overdraft Facility was

entered into, the same interest rate as was shown in the terms and conditions of the Overdraft Facility; and

- (ii) lower than the interest rate that was, in fact, charged referred to in paragraph (b) above.

10. As a result, the Affected Customers were:
  - (a) overcharged interest totalling \$2,238,554.94; and
  - (b) sent Statements containing an Interest Summary Error on 12,119 occasions.
11. An example of the form of notation used in Statements is set out in **Schedule A**.
12. A summary of the Overcharging Errors and Interest Summary Errors during the Penalty Period, is at **Schedule B**.
13. By providing Affected Customers with Statements featuring Interest Summary Errors, and in all the circumstances, CBA represented to the relevant Affected Customer that the interest rate that had been applied upon Overdraft Facility borrowings over the date range referred to in the Statement was the Statement Rate (**Representations**).

### **B3. History of the Overcharging Errors and Interest Summary Errors**

14. Overcharging Errors and Interest Summary Errors first occurred in or around late 2011. A coding error meant that the interest and fees for certain SBO and BOD facilities were sourced from two software systems, referred to as SAP (being 'internal' pricing) and SPARR (being 'external' pricing).
15. As a result of the coding error, Affected Customers were charged both the SAP sourced rate and the SPARR sourced rate. This resulted in the Affected Customer being charged interest at a rate significantly higher than the interest rate provided for by the relevant terms and conditions.
16. In August 2013, CBA received its first inquiry regarding an Overcharging Error and Interest Summary Error relating to an SBO. An incident was raised in CBA's Risk Insite system regarding overcharging of interest on some SBOs.
17. By October 2013, CBA introduced a manual process with a view to identifying and removing the incorrect pricing. While this manual control was in place, CBA undertook work to develop a system-based solution.
18. However, in the period between October 2013 and May 2015, the manual process implemented to address the issue was not set up effectively to identify the Affected Customers.
19. By November 2013, CBA had identified that, in addition to SBO facilities, BOD facilities were also impacted by the coding defect and that the issue had been occurring since late 2011 in relation to certain BOD facilities.
20. In or around May 2015, CBA implemented a coding change in the system to address the root cause for the Overcharging Errors in respect of both SBOs and BODs.
21. In March 2016, a migration was effected so that the pricing for all BODs was sourced from the SPARR system.
22. Following a customer complaint to the Financial Ombudsman Service, which was escalated within CBA in July 2016, in September 2016, CBA:
  - (a) discovered that the manual process implemented from October 2013 to May 2015

had failed to identify the majority of the customers impacted by the Overcharging Error; and

- (b) identified a gap in its implementation of the May 2015 system fix.
23. In March 2017, CBA implemented a system-based solution which largely resolved the coding error, with the exception that incorrect pricing still arose if the customer used a digital channel to accept terms and conditions in certain circumstances. As a result of this anomaly, CBA continued to undertake manual reviews of SBOs and BDOs from time to time.
  24. In May 2017, CBA identified another system anomaly, which resulted in one customer's SBO being overcharged.
  25. CBA remediated customers in two tranches between November 2016 and July 2017 and between November 2018 and March 2019. It continued to undertake manual reviews.
  26. A manual review completed in April 2018 identified that two accounts had been overcharged interest in March 2018.
  27. The above failures to detect and resolve the Overcharging Errors and the Interest Summary Errors arose out of CBA's failure during the Relevant Period to:
    - (a) establish and maintain effective systems and processes to ensure and monitor its performance of the applicable terms and conditions for the Overdraft Facilities in respect of the interest charged and to ensure that Statements included accurate summaries of the interest rates applied;
    - (b) establish sufficient controls to ensure the effectiveness of the manual process in the period from October 2013 to May 2015; and
    - (c) identify the need to test for, and test for, the gap that affected its implementation of the May 2015 system fix.

### **C. RELIEF SOUGHT FROM THE COURT**

28. ASIC seeks declarations, pecuniary penalties, publication orders and ancillary orders as set out in the Originating Application.

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

29. The SBO and BOD facilities, as credit facilities, were financial products within the meaning of s 12BAA(7)(k) of the ASIC Act and r 2B of the *Australian Securities and Investments Commission Regulations 2001* (Cth).
30. By:
  - (a) providing the Statements to the Affected Customers; and/or
  - (b) providing credit pursuant to the terms of the Overdraft Facility as applicable, CBA provided a financial service, or financial services, within the meaning of s 12BAB(1)(g) of the ASIC Act.
31. The Representations were:
  - (a) made in trade or commerce;
  - (b) conduct in relation to financial services, within the meaning of s 12DA(1) of the ASIC Act; and
  - (c) made in connection with the supply or possible supply of financial services, or in connection with the promotion by any means of the supply or use of financial

services, within the meaning of s 12DB(1) of the ASIC Act.

32. The Representations were each a representation with respect to the price of services within the meaning of s 12DB(1)(g) of the ASIC Act.
33. Further to the matters referred to in Parts B1 and B2 above, the Representations were false or misleading.
34. By making each Representation, CBA:
  - (a) made a misleading representation in contravention of s 12DB(1)(g) of the ASIC Act;
  - (b) engaged in misleading or deceptive conduct, or conduct that was likely to mislead or deceive, in contravention of s 12DA(1) of the ASIC Act; and
  - (c) failed, on each occasion, to comply with its obligation to comply with financial services laws in contravention of s 912A(1)(c) of the Corporations Act.

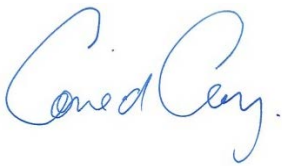
#### **E. THE ALLEGED HARM SUFFERED FROM THE CONDUCT**

35. As referred to above:
  - (a) during the Relevant Period 2,269 customers were overcharged interest totalling more than \$2.9 million; and
  - (b) during the Penalty Period the Affected Customers were:
    - (i). overcharged a total of \$2,238,554.94; and
    - (ii). sent Statements containing false and misleading representations as to the rate at which they were being charged interest on 12,119 occasions.
36. The average quantum of overcharging in respect of the Affected Customers was approximately \$1,476.90 in relation to SBOs and \$3,965.30 in relation to BODs, per Affected Customer. The highest known amount overcharged on an Affected Customers' SBO was \$17,522.34.
37. CBA has remediated approximately \$3.74 million to 2,269 unique SBOs and BODs overcharged in the Relevant Period.

**Certificate of lawyer**

I, Conrad Gray, certify to the Court that, in relation to the statement of claim 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: 30 November 2020



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Signed by Conrad Gray

Lawyer for the Plaintiff

## SCHEDULE A

### SBO and BOD Facilities

1. An example of the form of notation used in Statements issued to Affected Customers is as follows:

#### ***Your Debit Interest Rate Summary***

<b><i>Date</i></b>	<b><i>Event</i></b>	<b><i>Debit balance</i></b>	<b><i>Debit interest rate (p.a.)</i></b>
31 Oct	<i>Your overdraft limit is now \$4,000.00</i>	<i>\$0.00 - \$4,000.00</i>	<i>16.00%</i>
	<i>Excess Debit interest rate</i>	<i>\$4,000.01 and over</i>	<i>16.00%</i>

#### ***Important information***

- (1) *Any debit balances in excess of a current overdraft limit are charged interest at the current excess debit interest rate. If you have no overdraft facility the prevailing rate for debit balances applies to the full overdrawn balance.*
- (2) *Interest Rates and Overdraft Limits are effective as at the date shown but are subject to cancellation or change at the Bank's discretion. For more information about the conditions that apply to your overdraft facility please refer to your credit contract*



## SCHEDULE B

### Summary of Overcharging Errors and Interest Summary Errors during Penalty Period

BOD / SBO Facility	Number of Affected Customers	Range of interest rate provided for by credit contracts	First Date Overcharged - Last Date Overcharged	Number of Statements sent during the Penalty Period where the Statement Rate was lower than the interest rate actually charged	Range of Interest rates actually charged	Total interest overcharged (\$)
SBOs	1,397	14.55% - 16.00% Simple Business Overdraft Rate	1 December 2014 - 31 March 2018	11,146	33.94%	\$1,825,089.55
BODs	113	5.34% - 14.18% Business Overdraft Rate	1 December 2014 - 28 November 2016	973	12.38% - 33.94 %	\$413,455.39
Total	1,510			12,119		\$2,238,554.94