

NOTICE OF FILING

This document was lodged electronically in the FEDERAL COURT OF AUSTRALIA (FCA) on 1/03/2021 3:28:26 PM AEDT 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: NSD150/2021
File Title: AUSTRALIAN SECURITIES & INVESTMENTS COMMISSION v
COMMONWEALTH SECURITIES LIMITED (ACN 067 254 399) &
ANOR
Registry: NEW SOUTH WALES REGISTRY - FEDERAL COURT OF
AUSTRALIA



Sia Lagos

Dated: 1/03/2021 3:32:40 PM AEDT

Registrar

Important Information

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

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. _____ of _____

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

Australian Securities and Investments Commission
Plaintiff

Commonwealth Securities Limited ACN 067 254 399 and another
Defendants

A. INTRODUCTION

1. These proceedings concern allegations by the plaintiff, the Australian Securities and Investments Commission (**ASIC**) of systemic compliance failures by the defendants, Commonwealth Securities Limited ACN 067 254 399 (**CommSec**) and Australian Investment Exchange Limited ACN 076 515 930 (**AUSIEX**) in the delivery of financial services, resulting in contraventions of ss 912A(1)(a) and 798H of the *Corporations Act 2001 (Cth)* (**Corporations Act**), and s 12DB of the *Australian Securities and Investments Commission Act 2001 (Cth)* (**ASIC Act**) (by CommSec only). CommSec and AUSIEX were at all relevant times subsidiaries of the Commonwealth Bank of Australia Limited.
2. Each of CommSec and AUSIEX provide financial services to clients, including services that allowed clients to trade securities and maintain a trading account online. Most trades were in equities, but there were also trades in exchange traded options and other financial products.
3. CommSec is the holder of Australian Financial Services Licence (**AFSL**) no 238814, and is a market participant of the ASX Limited (**ASX**) and Chi-X Limited (**Chi-X**) financial markets. AUSIEX is the holder of AFSL no 241400, and also a market participant of the ASX and Chi-X markets. As participants of the ASX and Chi-X, CommSec and AUSIEX were subject to (as applicable, the **Market Integrity Rules**):
 - a. the ASIC Market Integrity Rules (ASX Market) 2010 (**ASX Rules**), in force between 1 August 2010 and 6 May 2018;
 - b. the ASIC Market Integrity (Competition in Exchange Markets) Rules 2011 (**Exchange Markets Rules**), in force between 5 May 2011 and 6 May 2018; and
 - c. the ASIC Market Integrity Rules (Securities Markets) 2017 (**Securities Markets Rules**), in force between 7 May 2018 to the present.
4. Between 1 January 2017 and 14 August 2020, CommSec and AUSIEX provided 63 notifications to ASIC in relation to: incorrect brokerage fees charged by CommSec (**Brokerage Issues**); breaches of client money requirements and trust account reconciliation rules by CommSec and AUSIEX (**Client Money Issues**); failure to send trade confirmations as required and failure to send accurate trade confirmations by each of CommSec and AUSIEX (**Trade Confirmations Issues**); inadequate automated order processing (**AOP**) filters by CommSec to determine no change in beneficial ownership (**AOP issue**); failure to comply with best execution obligations by CommSec and AUSIEX (**Best Execution Issue**); trading of warrants on CommSec accounts without a valid Warrant Agreement Form (**WAF**) on record (**Warrant Agreement Issue**); and failure to adhere to regulatory data requirements by CommSec and AUSIEX (**Regulatory Data issue**). The parties have agreed a Statement of Agreed Facts and Contraventions (**SOAFAC**)

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pursuant to s 191 of the *Evidence Act 1995 (Cth)*, setting out the conduct in issue in greater detail (the **Reported Conduct**).

5. The Reported Conduct spanned the period from 1 August 2010 to 18 June 2020 for CommSec and from 6 May 2010 to 27 November 2019 for AUSIEX, and related to failures across multiple systems, processes and business areas. The number, breadth and duration of the Reported Conduct when viewed in totality is significant and indicates the entities did not have adequate systems and processes in place to ensure compliance with their relevant obligations under their AFSL and pursuant to the Market Integrity Rules.
6. CommSec has been before the Markets Disciplinary Panel for contraventions of the Market Integrity Rules on seven previous occasions since 2012, receiving fines totalling \$1,055,000. It has also been subject to a Court Enforceable Undertaking in 2013 for client money and trust account failings.
7. Due to limitation periods, declarations and penalties are sought in relation to conduct occurring on or after 1 March 2015, although conduct occurring prior to that date is referenced to contextualise later conduct or establish a continuing course of conduct.

B. IMPORTANT FACTS GIVING RISE TO THE CLAIM

Failures in systems, processes and people

8. Failures by CommSec and AUSIEX in systems, processes and people in the delivery of financial services underly the Reported Conduct and the contraventions referred to in the SOAFAC. In or around 2019 and 2020, CommSec and AUSIEX each undertook an assessment of the causes of the Reported Conduct and categorised the types of causes identified as relating to one or more of the following, at a high level: systems, processes and people (**Root Cause Analysis**). Specifically, the Root Cause Analysis identified failures relating, but not limited to: (i) business requirements incorrectly coded or inadequately incorporated in system specifications; (ii) inadequate or ineffective testing of specified system requirements; (iii) outdated and/or incompatible system/software versions; (iv) current standards, policies and/or procedures not adequately designed to address or clearly describe risks and/or related controls; and (v) inadequate design and development of change (scoping, approval and assessment).

Brokerage Issues

9. ASIC received four breach notifications from CommSec relating to incorrect brokerage fees:
 - a. Between 1 August 2010 and 31 August 2017, CommSec overcharged clients on 42,332 occasions, amounting to aggregate overcharging of \$1,790,204.29 to customers in excess of what customers should have been charged. Overcharging arose from the incorrect application of the 'N-override code', automatically applied when it should not have been.
 - b. Between 1 August 2010 and 19 October 2018, CommSec overcharged approximately 9,918 customer accounts brokerage rates above the advertised pricing. Some customers were charged the standard internet rate of \$29.95 rather than the internet preferred rate of \$19.95, despite qualifying for the preferred rate, and some were charged a greater amount despite qualifying for the internet standard rate or internet preferred rate. Clients were charged above the advertised brokerage rate on 74,872 occasions, amounting to aggregate overcharging of \$2,433,429.72.
 - c. Between 1 August 2010 and 12 March 2019, CommSec overcharged 2,170 customer accounts an aggregate of \$51,585.45 on 3,434 occasions by charging brokerage for phone transactions at a higher rate than stated in the Financial Services Guide (**FSG**) and on the CommSec website.
 - d. Between 18 February 2017 and 27 February 2020, CommSec charged brokerage fees in excess of the rates advertised in the FSG to 295 customer accounts which held equity accounts through ESUPERFUND. The total amount of overcharge was \$76,974.80.
10. In the period between 1 March 2015 and 27 February 2020, clients were overcharged on 39,484 occasions. All overcharges have been remediated (including with interest).

Client Money Issues

11. During the period 2017-2019, CommSec and AUSIEX submitted a series of breach reports to ASIC regarding failures in client money related matters. CommSec and AUSIEX were required by the Market Integrity Rules to undertake daily and weekly trust account reconciliations of their trust accounts, which were required to be accurate in all respects. While the required reconciliations were undertaken, there were undetected instances of amounts which should have been classified as client money not being included in the trust accounts, and instances of money which was not or had ceased to be client money being included in the trust accounts, affecting the accuracy of reconciliations. There were also occasions where CommSec and AUSIEX failed to notify ASIC of the inaccuracy within the required timeframe.
12. For CommSec, a total of 1,237 reconciliations were affected during the period 1 March 2015 to 23 March 2020, which related to 13 courses of conduct. For AUSIEX, a total of 1,175 reconciliations were affected during the period 1 March 2015 to 18 September 2019, which related to 4 courses of conduct. In respect of some reconciliations, there was more than one inaccuracy as more than one issue affected it.

Trade Confirmations Issues

13. CommSec and AUSIEX were obliged by the Market Integrity Rules to give a confirmation to a client in respect of each market transaction entered into on the client's instructions. Each confirmation had to contain certain content set out in the Market Integrity Rules.
14. On 21 September 2018, CommSec and AUSIEX notified ASIC of a number of issues relating to inaccuracies in exchange traded options (**ETO**) confirmations provided to customers, some of which amounted to contraventions of the Market Integrity Rules. Subsequent to that, additional notifications to ASIC were made by each of CommSec and AUSIEX relating to additional inaccuracies affecting ETO or equities confirmations and failures to send ETO or equities confirmations. The issues spanned a range of inaccuracies, and affected confirmations dating back to April 2012 for CommSec and to May 2012 for AUSIEX.
15. By way of example, there were issues (among others) with trade confirmations issued by either CommSec and/or AUSIEX where: the strike price was shown as "0" instead of the actual strike price, the confirmations described the contract size as "10 Shares per lot", where it should have been described as "\$10 per point"; confirmations for rebooked trades contained an incorrect total value amount on the confirmation; confirmations did not contain a crossing disclosure where AUSIEX had acted on behalf of both the buying and selling clients to that transaction.
16. Cumulatively, during the period from 1 March 2015 to 6 November 2019, the number of CommSec confirmations affected was 206,404, and during the period 1 March 2015 to 27 November 2019, the number of AUSIEX confirmations affected was 22,088.

AOP Issue

17. CommSec was obliged under the Market Integrity Rules to have in place appropriate automated filters in relation to its AOP systems, which included a particular IRESS order system (**IOS**) where orders originated from ASB Securities Limited (**ASB**). One of the filters to detect transactions which would result in no change of beneficial ownership (**NCBO**) was not appropriate, leading to orders which originated from ASB entering the market without being vetted to determine NCBO (referred to as the **AOP Issue**). In the period between 1 August 2010 and 1 November 2018, this resulted in 49 NCBO transactions being executed on market, with 23 of those occurring on or after 1 March 2015.

Best Execution Issue

18. Contrary to its Best Execution Policy Disclosure published on its website, CommSec failed to consider ASX CentrePoint as an execution venue for orders from ASB Clients from 24 October 2013 to 26 March 2018.
19. Each of CommSec and AUSIEX also had Best Execution Policies & Procedures (**BEPP**) in place which provided between that for every month certain monitoring processes would be undertaken to check best execution performance, by testing results obtained. Between June 2016 and February 2019, CommSec failed to monitor best execution quality performance for each month in the month immediately following or shortly thereafter, contrary to its BEPP. Similarly, between

June 2016 and February 2019, AUSIEX did not monitor best execution quality performance for each month in the month immediately following or shortly thereafter as required under its BEPP.

Warrant Agreement Issue

20. Contrary to the requirements under the Market Integrity Rules, between 22 April 2004 and 18 June 2020, CommSec allowed 46 accounts associated with 70 retail clients to purchase warrants in circumstances where CommSec cannot establish that it provided a copy of the explanatory booklet in respect of warrants published by the operator of the relevant market, and is unable to locate on record valid client agreements, known as a warrant agreement form. This impacted approximately 472 buy transactions, with 408 of those transactions occurring on or after 1 March 2015 (the **Warrant Agreement Issue**).

Regulatory Data Issue

21. CommSec and AUSIEX were obliged by the Market Integrity Rules to provide certain information about trades (**Regulatory Data**) to a market operator in orders transmitted to the order book of that market operator, including the Intermediary ID (being the relevant AFSL of an AFSL holder) in circumstances where CommSec or AUSIEX acted as agent for an AOP Client that was an AFSL holder, and where they had an arrangement with the AFSL holder under which the AFSL holder submitted trading messages into CommSec's or AUSIEX's systems as intermediary for its own clients.
22. From 1 March 2015 to 5 February 2019, CommSec failed to include the AFSL for Commonwealth Private Limited (**CPL**) in the intermediary ID field for orders placed by CPL advisers via the CommSec Customer Service Console (**CSC**) and IRESS. This affected the data submitted by CommSec for 83,877 orders.
23. From 18 March 2019 to 18 July 2019, CommSec also failed to include in submitted data to ASX and Chi-X the CPL AFSL as an intermediary ID for orders placed by CPL advisers via the CSC and IRESS for 319 orders (of which 2 were not executed).
24. From 27 October 2016 to 8 February 2019, AUSIEX provided an erroneous number in the intermediary ID field for 29 orders placed by one of AUSIEX's AFSL clients, via the CSC. The field should have been populated with the correct AFSL number for the relevant client.
25. From 2 February 2018 to 12 August 2019, AUSIEX also failed to provide an AFSL number in the intermediary ID field in regulatory data submitted in respect of one of its AFSL clients in relation to 84 orders.

C. THE RELIEF SOUGHT FROM THE COURT

26. ASIC seeks the relief set out in the Originating Process, being: declaratory relief under s 1317E of the Corporations Act, s 12GBA of the ASIC Act and s 21 of the *Federal Court of Australia Act 1976 (Cth)*; pecuniary penalty orders pursuant to s 1317G of the Corporations Act and s 12GBB of the ASIC Act; compliance orders under s 1101B of the Corporations Act; and costs.

D. THE PRIMARY LEGAL GROUNDS FOR THE RELIEF SOUGHT

27. ASIC contends that, by reason of the Reported Conduct (other than the Regulatory Data Issue) and various failures in relation to systems, processes and people in the delivery of financial services identified in the CommSec Root Cause Analysis and AUSIEX Root Cause Analysis (as applicable), each of CommSec and AUSIEX failed to provide the financial services covered by their respective licences, efficiently, fairly and honestly, in contravention of s 912A(1)(a) of the Corporations Act for the period from 1 March 2015 to 18 June 2020 for CommSec and from 1 March 2015 to February 2019 for AUSIEX.
28. ASIC contends that the Reported Conduct involved contraventions of the Market Integrity Rules, and consequent contraventions of s 798H of the Corporations Act, as follows:
 - a. in relation to the Brokerage Issues, contravention by CommSec of rule 2.1.3 of the ASX Rules and the Securities Markets Rules (as applicable), by reason of it failing to have appropriate supervisory procedures to ensure that it complied with s 912A(1)(a) of the Corporations Act, until it introduced enhancements to controls in late 2018 and early 2019 to detect potential brokerage overcharges or instances where incorrect settings for a particular account may lead to overcharges;

- b. in relation to the Client Money Issues, contraventions by each of CommSec and AUSIEX of rules 3.5.9 and 3.5.10 of the ASX Rules and Securities Markets Rules (as applicable) by failing to ensure that reconciliations of trust accounts were accurate in all respects and that ASIC was notified of relevant breaches within required timeframe;
 - c. in relation to the Trade Confirmations Issues, contraventions by each of CommSec and AUSIEX of:
 - i. rule 3.4.1 of the ASX Rules and Securities Markets Rules (as applicable) by either failing to provide trade confirmations as required or providing trade confirmations with inadequate or inaccurate information;
 - ii. rule 4.2.1(1)(h) of the ASX Rules and the Securities Markets Rules (as applicable) by failing to maintain accurate records in sufficient detail;
 - iii. rule 2.1.3 of the ASX Rules and the Securities Markets Rules (as applicable) by failing to have appropriate supervisory policies and procedures to ensure compliance with rule 3.4.1 and rule 4.2.1 of the Market Integrity Rules;
 - d. in relation to the AOP Issue, contraventions by CommSec of rules 5.6.1(a) and 5.6.3(1)(a) of the ASX Rules and the Securities Markets Rules (as applicable) for failure to have in place an appropriate pre-trade filter to detect possible trades where there would be no change in beneficial ownership and for failure to have in place appropriate organisational and technical resources;
 - e. in relation to the Best Execution Issue, contraventions by each of CommSec and AUSIEX of rule 3.2.2 of the Exchange Markets Rules and 3.9.2 of the Securities Markets Rules (as applicable) for failure to comply with their best execution policies and procedures;
 - f. in relation to the Warrant Agreement Issue, contraventions by CommSec of rules 3.1.2 and 3.1.8 of the ASX Rules and the Securities Markets Rules (as applicable) for failure to provide an explanatory booklet in respect of warrants and for failure to enter into the required warrant agreement forms;
 - g. in relation to the Regulatory Data Issue, contraventions by each of CommSec and AUSIEX of rule 5A.2.1(1) of the Exchange Markets Rules and rule 7.4.2(1) of the Securities Markets Rules for failure to include the relevant Intermediary ID in regulatory data submitted.
29. ASIC further contends that, in relation to the Best Execution Issue, CommSec contravened s 12DB of the ASIC Act by reason of making false or misleading representations that services were of a particular standard or quality and/or had particular performance characteristics.

Certificate of lawyer

I Nick Kelton 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 Concise Statement.

Date: 1 March 2021



Signed by Nick Kelton
Lawyer for the Plaintiff