FEDERAL COURT OF AUSTRALIA

Australian Securities and Investments Commission v Commonwealth Bank of Australia [2021] FCA 423

File number:	NSD 1275 of 2020
Judgment of:	**LEE J**
Date of judgment:	6 March 2021
Catchwords:	**BANKING AND FINANCIAL INSTITUTIONS** – assessment of pecuniary penalty – declarations of contraventions – overcharging errors on overdraft accounts due to coding error – delay in notifying and remediating customers – public interest in predictability of outcomes in civil penalty proceedings – consideration of the parity principle – process one of instinctive synthesis – degree of artificiality in imposing a penalty equivalent to profit earned in a little over six hours of bank's operations – form of corrective notice – need to rethink form in which information is communicated to public
Legislation:	*Australian Securities and Investments Commission Act 2001* (Cth) ss 12DA, 12DB, 12GBA, 12GLB *Corporations Act 2001* (Cth) ss 912A, 912D *Evidence Act 1995* (Cth) ss 144, 191 *Federal Court of Australia Act 1976* (Cth) ss 33J, 33X
Cases cited:	*Australian Competition and Consumer Commission v Coles Supermarkets Australia Pty Ltd* [2015] FCA 330; (2015) 327 ALR 540 *Australian Building and Construction Commissioner v Construction, Forestry, Mining and Energy Union* [2018] HCA 3; (2018) 262 CLR 157 *Australian Competition and Consumer Commission v Apple Pty Ltd (No 4)* [2018] FCA 953 *Commonwealth of Australia v Director, Fair Work Building Industry Inspectorate* [2015] HCA 16; (2015) 258 CLR 482 *Australian Securities and Investments Commission v MLC Nominees Pty Ltd* [2020] FCA 1306; (2020) 147 ACSR 266 *Australian Securities and Investments Commission v Commonwealth Bank of Australia* [2020] FCA 790 *Australian Securities and Investments Commission v Australia and New Zealand Banking Group Limited (No 3)*

[2020] FCA 1421

Trade Practices Commission v CSR Limited (1991) 13 ATPR 41–076

NW Frozen Foods Pty Ltd v Australian Competition and Consumer Commission (1996) 71 FCR 285

Australian Securities and Investments Commission v AMP Financial Planning Pty Ltd (No 2) [2020] FCA 69; (2020) 377 ALR 55

Lenthall v Westpac Banking Corporation (No 2) [2020] FCA 423; (2020) 144 ACSR 573

Division:	General Division
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Number of paragraphs:	54
Date of hearing:	6 March 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:	**6 MARCH 2021**

THE COURT ORDERS THAT:

1. Pursuant to s 12GBA(1) of the *Australian Securities and Investments Commission Act 2001* (Cth), within 30 days, CBA is to pay to the Commonwealth of Australia a pecuniary penalty of $7 million.
2. The proceeding be listed for a further case management hearing at 9.30am on 28 April 2021.

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

REASONS FOR JUDGMENT

(Revised from the Transcript)

LEE J:

A INTRODUCTION

1 This is a proceeding brought for the imposition of a pecuniary penalty by the Australian Securities and Investments Commission (**ASIC**). More particularly, ASIC seeks declarations of contraventions of the *Australian Securities and Investments Commission Act 2001* (Cth) and the *Corporations Act 2001* (Cth), pecuniary penalty orders and ancillary orders, including costs.

2 In a manner which has characterised its constructive and helpful approach to the conduct of this litigation, at the first case management hearing, the respondent (**CBA**) informed the Court that it admitted the facts and allegations contained in ASIC's concise statement (subject to an irrelevancy that need not detain us) and did not oppose the making of declarations on 12 February 2021 to the following effect:

> **THE COURT DECLARES THAT:**
>
> 1. By provision of a periodic account statement with an Interest Summary Error, and in all the circumstances, on 12,119 occasions during the period 1 December 2014 to 31 March 2018 inclusive, CBA represented to a customer in trade or commerce that the interest rate that had been applied upon overdraft facility borrowings over the date range referred to in the statement was the interest rate shown in a notation to the statement (**Representations**), which representations were each:
>
>   a. a false or misleading representation with respect to the price of services, in contravention of s 12DB(1)(g) of the *Australian Securities and Investments Commission Act 2001* (Cth) (**ASIC Act**); and
>
>   b. misleading or deceptive conduct, or conduct that was likely to mislead or deceive, in relation to financial services, in contravention of s 12DA(1) of the ASIC Act,
>
>   in that the interest rate actually charged was greater than that referred to in the applicable Representation.
>
> 2. On each occasion that CBA contravened ss 12DA(1) and 12DB(1)(g) as referred to above, CBA breached its general obligation as a financial service licensee to comply with financial services laws in contravention of s 912A(1)(c) of the *Corporations Act 2001* (Cth).

3 I was prepared to make those declarations, and it was a licit exercise of Chapter III judicial power to do so, because I was satisfied on the basis of the matters specified in the concise

statement and facts agreed that there was a proper factual and legal basis for the granting of that remedy. Accordingly, these reasons deal with the balance of the relief sought by ASIC concerning the applicable penalty and related orders.

4 The principal object of a pecuniary penalty is to attempt to put a price on a contravention that is sufficiently high enough to deter repetition by the malefactor and by others who might be tempted to contravene. Given this, it might be thought in a case such as the present, that there is a degree of tension between two well-established principles.

5 The *first* of these principles is that the size of a corporation alone does not justify a higher penalty than might otherwise be imposed: see *Australian Competition and Consumer Commission v Coles Supermarkets Australia Pty Ltd* [2015] FCA 330; (2015) 327 ALR 540 (at 559–60 [89]–[92] per Allsop CJ).

6 The *second* of these principles is that where the penalty does not impose a sting or burden on the contravener, it is less likely to achieve the deterrent effect that is the *raison d'être* of its imposition: see *Australian Building and Construction Commissioner v Construction, Forestry, Mining and Energy Union* [2018] HCA 3; (2018) 262 CLR 157 (at 195–6 [116] per Keane, Nettle and Gordon JJ).

7 Although not part of this tension, there is a further important principle that arises squarely in the circumstances of this case. That is, there is an important public policy involved in promoting the predictability of outcomes in civil penalty proceedings, which encourages corporations to acknowledge contraventions: see *Australian Competition and Consumer Commission v Apple Pty Ltd (No 4)* [2018] FCA 953 (at [6] per Lee J). Such acknowledgements assist in avoiding lengthy and complex litigation and hence diminish demand on the public resources constituted by both the Court and the regulator. Although in the circumstances of this case we are not dealing with an agreed penalty, it is this underlying principle which was the foundation of the High Court's comments in *Commonwealth of Australia v Director, Fair Work Building Industry Inspectorate* [2015] HCA 16; (2015) 258 CLR 482 (at 507 [57] per French CJ, Kiefel, Bell, Nettle and Gordon JJ) that in civil proceedings there is generally very considerable scope for the parties to agree on the facts and upon the consequences, and there is also very considerable scope for them to agree upon the appropriate remedy and for the Court to be persuaded of the appropriate remedy.

8 Prior to the hearing, I was assisted by comprehensive and thoughtful submissions filed on behalf of both ASIC and the CBA. The thoroughness of those submissions, the exchange today at the oral hearing, and the high degree of cooperation in agreeing upon relevant facts, has allowed me to proceed immediately to the delivery of judgment.

B THE RELEVANT FACTS

9 Admitted pursuant to s 191 of the *Evidence Act 1995* (Cth) was a statement of agreed facts and admissions. This document was marked Exhibit A in the proceeding and is reproduced at **Annexure A** to these reasons. I find for the purposes of this proceeding the facts identified at [5]–[59] of Exhibit A.

10 Without any criticism, one aspect of what has occurred that seems to me to be of great significance, being the chronology of events, does not emerge with great clarity from Exhibit A. It is worth focusing on an aspect of that chronology.

Month	Description
December 2011	Due to a coding defect, the CBA started charging certain overdraft facilities 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 sent those customers statements which did not reflect the correct position concerning interest. The overdraft facilities to which Exhibit A makes reference were managed by different business units within the CBA and involved two products, namely: (a) the Simple Business Overdraft (**SBO**); and (b) the Business Overdraft (**BOD**).
August 2013	The Overcharging Errors in relation to the SBOs were first identified by the CBA at this time after the CBA had received an enquiry from an SBO customer regarding the amount of monthly debit interest that had been charged on the customer's account the previous month. During this month, the CBA conducted investigations which indicated that two separate interest rates had been applied to the SBO account. Further, manual checking of randomly selected accounts identified that the same issue had occurred in relation to one other account. At this stage, there was evidence that there was a problem.
October 2013	At this time, the CBA implemented a monthly manual process aimed at identifying and removing incorrect pricing before it affected any SBO or BOD account, and it was assumed by the CBA that this process was sufficient.
November	What was described as a CBA "internal incident management team" identified that

2013	not only SBOs but also BODs were impacted by the coding defect and that this had been occurring since late 2011 in relation to certain BODs. Hence, by November 2013 it appears that the broad scope of the difficulty had been identified.
May 2015	By this time a coding change to the system had been implemented which was directed at ensuring that the correct interest would be charged, and there was certain testing undertaken.
January 2016	It became apparent through the receipt of customer complaints that the Overcharging Errors were apparently still occurring, and a couple of months later further changes were made. Subjectively, the CBA considered that the changes made by this time had resolved the issues causing the Overcharging Errors.
June – July 2016	A complaint was made by a customer to the Financial Ombudsman Service (**FOS**) that interest had been overcharged on her SBO account, and the following month the issue was "escalated" to Mr Clive Van Horen, Executive General Manager Retail Products in the Retail Banking Services business unit of the CBA. This, it appears, was the first time that the Overcharging Errors and the bank's receipt of amounts representing interest to which it was not entitled had been made apparent to an officer within the CBA of some seniority.
September 2016	For reasons that are not apparent on the evidence, it was not until September 2016 that the investigation was managed as "a high priority" with regular reviews being held, and the CBA became aware that there were ongoing difficulties, with a consequence that the matter was escalated to the CBA's Executive Committee.
November 2016	During a long period of further investigation, as set out in Exhibit A (at [49]), the CBA belatedly commenced a customer remediation programme which, at the request of the FOS, was the subject of regular reporting, and which ultimately involved the payment of $3.74 million (including interest on the overcharged amount) being paid to the customers that had been overcharged until it was completed in March 2019.
March – May 2018	It was only in March 2018 that a revised table identifying matters of misconduct was provided to the Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry. Following this, in May 2018, the CBA submitted a breach report to ASIC in relation to the Overcharging Errors. The CBA had not taken this step prior to this time as it had considered that it was not in breach of s 912D of the Corporations Act, because, *inter alia*, the BODs and SBOs were apparently considered not to be "financial products", the Overcharging Errors did not amount to any breach of the financial services laws, and the CBA personnel who had reviewed the decision five years previously had formed the view that it was "not sufficiently significant to warrant reporting".

11 In my view, a few conclusions should be drawn from this chronology.

12 *First*, the overcharging originally occurred not as a result of any sort of deliberate decision to procure the payment of moneys to which the CBA was not entitled, but, rather, due to an unfortunate systems error.

13 *Secondly*, when the problems first became apparent, and for a very considerable period thereafter, persons within the CBA were content to not take steps to notify customers that had been affected and, notwithstanding that they were aware the CBA was holding onto money to which it was not entitled, were content to let the matter rest. The matter was not further addressed until a customer had actually taken the step of making a complaint.

14 *Thirdly*, even when the complaint was raised, the reaction of the CBA remained tardy and wholly inappropriate, until the matter had been escalated by a further complaint to the FOS, at which time finally someone with a degree of seniority became involved.

15 *Fourthly*, after a further period of time elapsed, a remediation programme was finally put in place.

16 Given the way that I have drawn these threads out of the chronology, no doubt, it would already be evident that I regard this conduct, which I will describe as the **CBA delay**, as both serious and reflecting poorly upon those that were aware the bank was holding onto money to which it was not entitled. Indeed, this was not a case of any complexity – even the most junior member of the bank apprised of all the relevant details would be aware of the fundamental relationship between a bank and its customer and the premise that a customer is likely to take a statement given to them by the bank at face value. Further, the customer is likely to be influenced by matters such as the Banking Code of Practice, which is supposed to provide for protections (or at least assurances) addressing the imbalances between a bank and customer.

C THE AMBIT OF THE DISPUTE

17 As it turned out, through the exchange of submissions, the residuum of the dispute between ASIC and the CBA related to the quantum of the penalty. ASIC submits that it is appropriate to impose a penalty of $7 million. The CBA submits that the penalty should be somewhere within the range of $4 million to $5 million and, as it was put in oral submissions today, the imposition of a penalty of $7 million would represent this case being an "outlier": T22.43–4.

18 The point of departure between the parties seemed to revolve around two propositions:

(1) *first*, it is not appropriate to describe (or at least is potentially inaccurate to describe) the contraventions as "numerous" or "extensive"; and

(2) *secondly*, the penalty sought by ASIC is "materially inconsistent" with the application of the parity principle and principles of general deterrence.

19 Needless to say, in the course of fixing a penalty, I engage with both of these propositions or areas of disagreement.

D THE RELEVANT PRINCIPLES

20 The world does not need yet a further penalty judgment which canvasses at great length the principles that are well-known and not in dispute. I have identified above the principles that have real resonance or importance in resolving the nature of the dispute between the parties. Needless to say, faithful to the statutory mandate in s 12GBA(2) of the ASIC Act (as relevantly in force until 12 March 2019), I have had regard to *all* relevant matters, including: (a) the nature and extent of the act or omission and of any loss or damage suffered as a result of the act or omission; (b) the circumstances in which the act or omission took place; and (c) whether the person has previously been found by the Court in proceedings to have engaged in similar conduct. I have also had regard to the general principles usefully summarised, if I may respectfully say so, by Yates J in *Australian Securities and Investments Commission v MLC Nominees Pty Ltd* [2020] FCA 1306; (2020) 147 ACSR 266 (at 285–9 [115]–[132]).

21 In addition to the principles I have explained above, the only additional point I would make is to reinforce what Beach J explained in a recent proceeding between the same litigants (see *Australian Securities and Investments Commission v Commonwealth Bank of Australia* [2020] FCA 790), when his Honour considered the approach to what is sometimes described as the so-called "parity principle". As his Honour noted (at [77]):

> … in all but the co-offender scenario or analogues thereof it is conceptually problematic to look at penalties in other cases to calibrate a figure in the present case when all that one has from the other cases are single point determinations produced by opaque intuitive synthesis. Deconvolution analysis of the single point determinations in order to work out the causative contribution of any particular factor is unrealistic. No juridical style Fourier transformation is possible. But unless that can be done, comparisons outside the co-offender or like scenario have little value. Moreover, the comparative value of other single point determinations is even further reduced in cases where they have been substantially influenced by the parties' identification of and then consensus to the relevant figure or range.

22 It is trite to remark that no two cases are alike. It necessarily follows that no bespoke operation of the principles (which leads to an instinctive synthesis) operates in the same way. Further,

judgments, particularly agreed judgments on penalty, do not necessarily reflect all of the evidence before the judge called upon to undertake such a process. Although in this area of the law generalisations are seldom helpful or even appropriate, one thing can be said for cases such as the present. That is, the apparent difficulty of reconciling, as I indicated in the introduction, the notion that the size of a corporation does not justify a higher penalty, with the need for the penalty to impose a sufficient sting or burden (such that the penalty should not be regarded by either the contravener or those sought to be deterred as a cost of doing business).

E CONSIDERATION

23 During the course of his helpful oral submissions, Mr Kulevski gave particular emphasis to the issue of parity and stressed the important public policy involved in promoting predictability of outcomes. These submissions were said to have a particular resonance when they were illustrated by reference to two cases: (1) the decision of Allsop CJ in *Australian Securities and Investments Commission v Australia and New Zealand Banking Group Limited (No 3)* [2020] FCA 1421; and (2) the decision of Beach J in *ASIC v CBA*. I will consider each of these decisions in turn.

24 *First*, in relation to *ASIC v ANZ*, counsel for the CBA stressed that I should obtain some assistance from the way in which the Chief Justice approached what was described in that case as the “two remediation contraventions”. I will resist the temptation of detailing at any length the facts giving rise to that case. It suffices to note that the Chief Justice found that since July 2011, ANZ knew that there was a risk that it was not entitled to charge what were described as the “same-name fees” to the affected customers: see [51]. It also knew or ought to have known that during the period between February 2014 and September 2015, there was a risk that not all affected customers would repaid all the fees that it was continuing to charge and, at all times during the period between 2014 and 2015, knew or ought to have known that in relation to a portion of the same-name fees that it was continuing to charge, the affected customers would not be repaid because it had a practice of not remediating customers who no longer had an ANZ account and who only had a low amount of remediation payable: see [56]. Further, ANZ admitted that it had engaged in two contraventions by not making remediation payments to certain customers, being affected customers who had been charged the relevant fees during the period between 2005 and 2007: see [10]. The decision made by ANZ, apparently, was that the start of the remediation programme would be at the beginning of 2008. As his Honour noted,

this meant that there were a number of customers entitled to remediation who did not receive a payment: see [66].

25 The parties to that case agreed that, in respect of these two remediation contraventions, a total penalty of $2 million was appropriate. The Chief Justice noted that if he had been required to come to a figure it was likely he would have considered the appropriate figure to be slightly lower than $2 million. However, in respect of the contraventions related to charging the fees, an agreed penalty of $8 million was imposed, notwithstanding that the Chief Justice stated he would likely have imposed a penalty somewhat more than $8 million if he was approaching it in circumstances where there had not been a joint position presented by the parties: see [75].

26 The point made on behalf of the CBA was that given $2 million was charged for the remediation contraventions in that case, how could it possibly be consistent for a penalty in the region sought by ASIC to be imposed (or some higher figure) when, albeit belatedly, and unlike the position in *ASIC v ANZ*, full remediation was eventually given. Further, it was said that although *ASIC v ANZ* involved contraventions of different provisions of the ASIC Act, this only serves to emphasise the lack of parity between an $8 million penalty imposed in that case for the charging conduct and the penalty sought by ASIC in this case. It was said that the impugned conducted considered in *ASIC v ANZ* was simply a different species of conduct (in the sense of being more egregious) to the conduct in this case.

27 *Secondly*, the CBA drew attention to Beach J's judgment in *ASIC v CBA*, in which his Honour imposed a pecuniary penalty of $5 million on the CBA for conduct in relation to the AgriAdvantage Packages offered by the CBA between May 2005 and November 2015. In that case, it was found that in a penalty period spanning from March 2014 to December 2015, the CBA made false and misleading representations to customers that it had adequate systems and processes to be able to provide customers with the benefits offered by the packages and would apply those benefits in accordance with its terms and conditions: see [3] and [26]–[27]. Further, during the broader period from 2005 to 2015, the CBA accepted payments in exchange for the CBA applying the benefits when there were reasonable grounds for believing the CBA would not be able to provide the benefits: see [4]. As a consequence of this conduct, a large number (8,659) of customers were harmed on a multitude (131,542) of occasions: see [84]. The CBA remediated the full amount of over $8 million, including interest. Again, commendably in the circumstances of that case, the CBA cooperated with ASIC during its investigations.

28 At the outset of his Honour's judgment, Beach J observed (at [11]) that "a penalty of $5 million may be seen to be on the light side". His Honour stressed that it must be appreciated that the CBA took early self-generated steps to remedy the deficiencies and remediate its customers and also "reported the deficiencies to ASIC at an early stage". It was for these two reasons that his Honour considered there was little need for a substantial penalty to serve the objective of specific deterrence. His Honour also found that general deterrence would, in the circumstances of that case, be sufficiently served by a $5 million penalty.

29 These cases need to be approached through the correct lens (which I have already identified). There is a real, significant and important public interest in predictability of outcomes in civil penalty proceedings. It is only if parties are assured that there will not be idiosyncratic and capricious results that matters will be litigated in a way that reduces the demand on public resources. But that does not mean that one must lose sight of the inherent difficulties that accompany some supposed ideal of comparability. This is why Beach J's comments extracted above (at [21]) have such resonance.

30 As I indicated during the course of oral argument, the imposition of a penalty does not just serve the notion of deterrence but also represents a condign curial response to what has occurred. As in the case with criminal sentencing, what may have been an appropriate sentence at one time for a particular offence may, through developments unrelated to the particular case at hand (but reflecting broader societal developments), be considered inadequate or manifestly excessive at another time. Similarly, in the context of pecuniary penalties for wrongful corporate conduct, what may have been regarded as an appropriate penalty at one time, may not reflect an appropriate penalty at another time (so as to give effect to the notion of deterrence both specific and general).

31 Although both cases which were suggested to be of particular importance do provide some assistance, that assistance cannot result in me looking at the facts of those cases and then adding and subtracting the differences and then determining an appropriate figure. That is not the way an instinctive synthesis works.

32 Without losing sight of the factors identified by French J in *Trade Practices Commission v CSR Limited* (1991) 13 ATPR 41–076 (at 52,152–3) and Burchett and Kiefel JJ in *NW Frozen Foods Pty Ltd v Australian Competition and Consumer Commission* (1996) 71 FCR 285 (at 292–4), one of the factors which is relevant in this case is the important role of an organisation such as

the CBA in Australian society. The Chief Justice touched upon this consideration in *ASIC v ANZ* when his Honour noted the following (at [13]–[14]):

> The importance of the banking system in Australian social and commercial life need only be stated. Reliance by customers on the integrity and good faith of their bank is at the heart of social and commercial life in this country. It is highlighted in general life from advertising by banks and by community expectations. Despite all other features, the banker and customer relationship is at the heart of the economic system. It is a relationship based on contract, but, as the Code of Banking Practice reveals, it is founded on trust and good faith in a commercial sense.
>
> It would shock any customer to know that his or her bank took and was continuing to take his or her money in fees when it knew that there was a risk that it had no authority to do so, and without thereafter coming to a view that it did have that authority. This would be especially the case if the customer knew that, upon a view that the terms would be changed in the ordinary course of business, no decision would be made to stop taking the fees because that was difficult and would lead to other fees about which there was no risk not being charged. The customer might well consider that he or she had not been treated fairly and in good faith in those circumstances. But, of course, in their position the customers were not privy to that knowledge, especially in relation to terms and conditions that reflect contracts of adhesion (or standard form contracts) in the ordinary course of business.

33 Indeed, large organisations who adopt a public position of adhering to norms such as is reflected in the Banking Code of Practice and which hold themselves out as having persons whose titles include terms such as "governance" and "compliance" must do more than simply declaim platitudes. What matters is the corporate will to do the right thing. As I noted in *Australian Securities and Investments Commission v AMP Financial Planning Pty Ltd (No 2)* [2020] FCA 69; (2020) 377 ALR 55 (at 59 [2]):

> For generations, many successful financial institutions did not need "value statements" setting out bromides; nor was it thought necessary to have an array of compliance executives with highfalutin titles; those responsible simply ensured that their employees or representatives dealt with customers in a manner reflecting an instinctive institutional commitment to playing with a straight bat.

34 Although the conduct in this case does not reflect the seriously wrongful conduct of the representatives in *ASIC v AMP*, the CBA delay is particularly troubling given the nature of the commercial relationship between the bank and its customers. One would expect an organisation such as the CBA to do the right thing without having to be activated by customer complaints.

35 ASIC pointed to the fact that in *ASIC v CBA*, in contradistinction to the current case, the steps taken by the CBA once it had identified the problem were timely and thorough, including in relation to remediation, and it had brought ASIC "into the loop" at the earliest opportunity: see [100] and [119]. This has a significance in distinguishing between these two cases, but also

points to the real problem in the present case – the failure of the CBA to act without prompting, deal with ASIC straightaway, or put in place a remediation programme with celerity.

36 Like in *ACCC v Apple (No 4)* (at [56]–[60]), there does seem to me to be a high degree of artificiality in reconciling the notion that a penalty of $7 million (which represents profit earned in a little over six hours of the bank's operations during the course of the year when the remediation programme was finally completed) would operate in a way to deter repetition of this conduct by an organisation as large as the CBA and by others who might be tempted to contravene.

37 Uninstructed by the parity principle (such as it is) and the views of the regulator, I would have thought an appropriate sum to give effect to deterrence and to impose a sting or burden on an organisation such as the CBA (and having full account of the other considerations to which I must have regard by reference to the statute and the authorities), would be higher than that proposed by ASIC. Indeed, during the course of oral submissions, counsel for the CBA did accept that the contravening conduct could be described appropriately as "serious": T14.16–7.

38 It follows I do not consider the penalty sought by ASIC to be materially inconsistent with the application of the parity principle and principles of general deterrence. In fact, I think any lower figure would insufficiently have regard to the principles of deterrence, both specific and general. In this regard, it is important to recall that specific deterrence is not simply served by reason of the fact that the systemic breach has been rectified, but rather makes plain that conduct of this type or nature must be prevented and the business be conducted in a way which is consistent with statutory norms.

39 The contravening conduct is serious without being egregious. It is possible to imagine far worse cases. However, I specifically reject the submission made by the CBA that it acted expeditiously in relation to the rectification of the problem once it was identified. As I have said, the delay reflects very poorly on the CBA. At the end of the day, one must remember that a large number of customers were misled as to the interest charged on their accounts on 12,119 occasions, and the false and misleading representations were significant with the result that customers were overcharged interest totalling $2,238,554.94. This does call for a response that goes well beyond a sum which could be conceptualised as a mere cost of doing business.

40 Lastly, I should note that although it is rightly accepted that the contraventions were serious, terms such as "numerous" and "extensive" need to be approached with some degree of care. In

a financial institution the scale of the CBA, many financial services are delivered on a continual basis. It must be recognised, as the CBA correctly submits, that even within the cohort of the CBA customers that transacted on the overdraft facilities affected by the contravening conduct, 0.31 per cent of customers with BODs were affected and 7.3 per cent of those with SBOs were affected, and that a significant number of contraventions resulting from the coding error caused repetition of the conduct in respect of those customers. Again, when it comes to the notion of "extensive", there is merit in the CBA's submission that while it must ensure that it establishes and maintains appropriate systems and processes to deliver the financial services it delivers, it cannot really be said that the conduct here was extensive, given the extent of the transactions it has with its customers.

41 Accordingly, I intend to impose a pecuniary penalty of $7 million. In reaching this view, I have also had regard to the cooperative way in which the CBA has conducted itself since ASIC became aware of the contraventions and, in particular, the way in which the CBA has approached the litigation consistently with the overarching purpose.

F OTHER RELIEF

42 Part of the relief sought by ASIC was for a corrective notice, which is reproduced at **Annexure B** to these reasons. As I indicated to the parties, I do not think that I should make such an order.

43 When I asked Mr Luxton, counsel for ASIC, as to the purpose of such an order, he noted, unsurprisingly, "the point is to draw it to the attention of the public": T3.10. If this is the purpose, then I think a notice in the terms of Annexure B is unlikely to assist in achieving this purpose.

44 While I express no criticism of either party for agreeing the terms of such a notice, which is in a form similar to those that have been ordered in a number of cases in the past, in my view, the time has come to rethink the form in which this information is communicated to the public.

45 Section 12GLB of the ASIC Act is 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.

46 As the heading makes clear, it is a punitive order which seeks to publicise relevant information. In relation to a notice issued pursuant to this section, like those issued in other areas of the law, regard must be had to the audience to which that information is proposed to be communicated.

47 I dealt with a similar issue in *Lenthall v Westpac Banking Corporation (No 2)* [2020] FCA 423; (2020) 144 ACSR 573, where I considered the content of opt-out notices issued pursuant to s 33X of the *Federal Court of Australia Act 1976* (Cth) (**FCA Act**). In a regime where no consent is required for people to become group members in a class action, Pt IVA of the FCA Act provides a mechanism by which the Court is required to set a date for opt-out and approve a notice to be communicated to members of the public: ss 33J(1) and 33X(1)(a). That notice is to apprise the public of information upon which the group member relies to make a decision as to his or her rights.

48 Although the issue of effective communication by the Court to group members in a class action may be somewhat different than the present context, the underlying purpose of the communication is the same: it is to provide members of the public with information the Court considers to be significant.

49 In *Lenthall v Westpac*, I noted (at [45]) that, like here, the audience is likely to include highly sophisticated persons and persons who are unsophisticated in financial and legal matters, including those who may have either literacy problems or at the least some difficulty in taking in complex information in written form. In that case, I noted that I did not consider it was unduly stretching the bounds of s 144(1) of the Evidence Act to remark that:

> … it is not reasonably open to question that advanced Western societies have reached a stage where significant parts of the community, and, in particular, younger members of the community, more readily digest information conveyed to them in audio-visual rather than written form.

50 I then went onto say (at [46]–[50]) that:

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).

It seems to me quite obvious that in large scale consumer class actions, the Court is communicating to a number of people who are within cohorts who have attained only basic levels of literacy.

The concept of "readability" has spawned various tests which have been used to measure the readability of certain texts, providing quantitative estimates of the style difficulty of different writing examples. "Readability" has been variously defined, but in essence consists of three aspects: "comprehension, fluency (reading speed), and interest": see Grant Richardson and David Smith, "The Readability of Australia's Goods and Services Tax Legislation: An Empirical Investigation", (2002) 30(3) *Federal Law Review* 475 at 478. If information must be conveyed in writing, there is a need to adopt a form of language, structure and design, which maximises the chance of all the intended audience readily understanding the information sought to be communicated.

Leaving aside the adoption of plain language, I consider the time has come for those proposing notices to consider new modes of communicating complex information. This need will only become more acute as we progress (if that is the right word) further into the age of social media.

Put more directly, it is simply complacent to continue to make the assumption that sending complex information in written form is the best way of communicating information to group members in some types of class actions, and consideration should be given as to whether supplementary or substitute modes of conveying information should be adopted.

51 Likewise, in the present context, it might be thought less than satisfactory to continue to just assume that notices of the type set out in Annexure B are an appropriate means to communicate punitive orders requiring adverse publicity – just because this is the way it has always been done.

52 Both parties, commendably, have indicated that they have no difficulties with the information being prepared and being communicated in a different form. Given the high degree of cooperation that has been reflected in the conduct of this litigation to date, I propose to stand the matter over to a convenient date in order for the parties to confer as to an appropriate form of the punitive order requiring adverse publicity.

53 Such an adjournment would also allow the parties to confer in relation to the issue of costs. It is proposed that I make an order that the CBA pay ASIC's costs of and incidental to the proceeding. My preference would be to make an order in a lump sum, if that can be agreed, and failing any agreement, for me then to make directions as to the quantification of the lump sum costs amount.

G CONCLUSION AND ORDERS

54 For the above reasons, at present, I will make the following orders:

(1) Pursuant to s 12GBA(1) of the *Australian Securities and Investments Commission Act 2001* (Cth), within 30 days, CBA is to pay to the Commonwealth of Australia a pecuniary penalty of $7 million.

(2) The proceeding be listed for a further case management hearing at 9.30am on 28 April 2021.

I certify that the preceding fifty-four (54) numbered paragraphs are a true copy of the Reasons for Judgment of the Honourable Justice Lee.

Associate:

Dated: 26 April 2021

Annexure A

Form 1
Rule 2.13(2)

Statement of Agreed Facts and Admissions

No. NSD 1275 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 Introduction

1 This Statement of Agreed Facts and Admissions (**SAFA**) is made for the purposes of s 191 of the *Evidence Act 1995* (Cth) (**Evidence Act**) jointly by the plaintiff (**ASIC**) and the defendant (**CBA**).

2 The SAFA relates to Proceedings No NSD1275 of 2020 commenced by ASIC against CBA on 30 November 2020 (**Proceedings**). By the Proceedings, ASIC has sought and obtained declarations that CBA contravened particular provisions of the *Australian Securities and Investments Commission Act 2001* (Cth) (**ASIC Act**) and the *Corporations Act 2001* (Cth) (**Corporations Act**). ASIC also seeks orders that CBA pay pecuniary penalties to the Commonwealth, as well as publication orders and ancillary orders.

3 This document identifies the facts relevant to each of the contraventions alleged by ASIC and admitted by CBA for the purpose of the Proceedings. The facts agreed to, and the admissions made, are agreed to and made solely for the purpose of the Proceedings and do not constitute any admission outside of the Proceedings.

4 For the purposes of the Proceedings only, CBA admits that it contravened:

(a) ss 12DB(1)(g) and/or 12DA(1) of the ASIC Act; and

(b) s 912A(1)(c) of the Corporations Act 2001,

on the number of occasions and as set out in Sections C and D of this SAFA.

B The parties

5 ASIC is a body corporate which was established by s 7 of the *Australian Securities and Investments Commission Act 1989* (Cth) and continues by operation of s 261 of the ASIC Act. It is entitled to sue by reason of s 8(1)(d) of the ASIC Act.

6 CBA is a body corporate incorporated according to law and able to be sued in

its own name. CBA at all material times held an Australian Financial Services Licence (**AFSL**) No 234945.

7 CBA:

(a) is a major Australian bank;

(b) on 12 August 2020 reported a net profit of $9.634 billion (after tax) for the financial year ending 30 June 2020;

(c) on 10 February 2021 reported a net profit of $4.877 billion (after tax) for the half year ending 31 December 2020; and

(d) as at 12 February 2021 had a market capitalisation of approximately $154.116 billion, the largest of any listed company in Australia.

C Facts

8 Facts set out below are identified with reference to the following periods:

(a) 29 December 2011 to 31 March 2018 inclusive (**Relevant Period**); or

(b) 1 December 2014 to 31 March 2018 inclusive (**Penalty Period**).

SBO and BOD

9 During the Relevant Period, CBA offered business customers credit facilities known as:

(a) the Simple Business Overdraft (**SBO**), which was offered from December 2012; and

(b) the Business Overdraft (**BOD**), which was offered for the entire Relevant Period,

(collectively **Overdraft Facilities**).

10 The Overdraft Facilities provided business customers of the CBA with a revolving line of credit which allowed them to make withdrawals up to an agreed limit utilising a linked transaction account. The Overdraft Facilities were required to be linked to a business purpose transaction account (**BPTA**) held with CBA. Whilst a BOD could be linked to any one of multiple types of BPTAs, an SBO could only be linked to a Business Transaction Account (**BTA**).

11 The BOD has been available for many years. It is intended for customers looking for larger facility limits and uses a similar application and establishment process to other, more complex commercial lending products. For example, facility limits for BODs held by institutional customers can be upwards of $20 million.

12 The SBO, which was introduced following a pilot program in December 2012, is intended for smaller businesses with simpler financing needs and has a streamlined application process. Except in limited circumstances, the facility limit for SBOs did not exceed $50,000.

13 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 17 and 18 below (**Interest Summary Errors**).

14 As at 1 December 2014, there were 20,480 facilities for SBOs with a further 7,708 facilities opened by 31 March 2018. Of these, 2,058 (or 7.3%) facilities were impacted by Overcharging Errors. As at 1 December 2014, there were 62,598 facilities for BODs with a further 4,903 facilities opened by 31 March 2018. Of these, 211 (or 0.31%) facilities were impacted by Overcharging Errors.

15 During the Relevant Period, this conduct affected more than 2,200 customers and resulted in overcharged interest totalling more than $2.9 million.

16 During the Penalty Period CBA made Overcharging Errors and Interest Summary Errors affecting 1,510 Overdraft Facility customers (**Affected Customers**).

17 Of the Affected Customers, 1,397 had SBOs. As to those SBOs:

(a) the terms and conditions of the Overdraft Facility provided that interest would be charged at:

i. 16% pa for SBOs entered into prior to 29 May 2017; and

ii. 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.

18 Of the Affected Customers, 113 had BODs. As to those BODs:

(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;

(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.

19 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.

20 An example of the form of notation used in Statements and examples of Statements of an SBO account and a BOD account respectively are set out in **Schedule A** to this SAFA.

21 A summary of the Overcharging Errors and Interest Summary Errors during the Penalty Period is at **Schedule B** to this SAFA.

22 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**).

D Admissions

23 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).

24 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.

25 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.

26 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.

27 Further to the matters referred to in part C above, the Representations were false or misleading.

28 On each of the 12,119 occasions CBA made a 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 Harm suffered from this conduct

29 As a result of the matters referred to above, within the Penalty Period 1,510 customers were sent Statements by CBA containing misleading representations as to the rate at which they were being charged interest on 12,119 occasions, in circumstances where CBA overcharged these customers a total of $2,238,554.94. Within the Relevant Period 2,269 customers were overcharged interest totalling more than $2.9 million.

30 Affected Customers suffered financial loss (up until the date they were remediated) and inconvenience as a result of these failings. The average quantum of overcharging in respect of the customers was approximately $1,476.90 in relation to SBOs and $3,965.30 in relation to BODs, per customer. The highest known amount overcharged on a customer's SBO was $17,522.34.

F Other relevant matters

Cause of the Overcharging Errors

31 During the Relevant Period, two software systems were used in relation to the Overdraft Facilities, being:

(a) the Strategic Pricing and Risk Return System (**SPARR**) which, among other things, generated interest rates and fees applicable to various products; and.

(b) the Systems, Applications and Products System (**SAP**), which was the underlying product system for most of CBA's transaction accounts and associated overdraft products and was used to calculate and charge

interest and fees to an Overdraft Facility. The applicable interest rate or fee that was used in SAP's calculations was either sourced either internally from SAP or externally from SPARR.

32 In the period between July 2011 and May 2013 CBA undertook the following system migrations:

(a) staggered between July 2011 and July 2012, BODS and BPTAs opened prior to the migration were migrated from a legacy pricing source to SAP as the pricing source; and

(b) in May 2013, there was a system migration which was aimed at moving the sourcing of interest rates and fees applicable to those BTAs that were not linked to an SBO from SAP to SPARR. Pricing for BTAs that were linked to an SBO as at May 2013 were not migrated to SPARR, as pricing for SBOs remained on SAP - that is, interest rates applicable to SBOs continued to be sourced internally from SAP.

33 The underlying cause of the Overcharging Errors was a coding defect which resulted in SAP sourcing and charging interest rates from both SAP and SPARR in certain circumstances (**Coding Defect**). These circumstances were:

(a) where an SBO established after the system migration in May 2013 was subsequently linked to a migrated BTA; and

(b) where a customer with a BOD changed their linked BPTA from one that was created before the migration (i.e. in the period from July 2011 to July 2012) to one that was created after the migration.

In effect, the accounts of Affected Customers were charged both the SAP-sourced interest rate and the SPARR-sourced interest rate. This resulted in the Affected Customers being charged interest at a rate significantly higher than the interest rate provided for by the relevant terms and conditions.

Cause of the Interest Summary Errors

34 The underlying cause of the Interest Summary Errors was because CBA's systems produced Statements for Affected Customers which generally specified as the Statement Rate the interest rate that, pursuant to the terms and conditions of their Overdraft Facilities, ought to have been charged. Accordingly, once the Overcharging Errors were rectified, the Interest Summary Errors stopped.

CBA's investigation and attempts to rectify the Overcharging Error

35 Overcharging Errors and Interest Summary Errors first occurred in or around late 2011 in relation to BODs and from around May 2013 in relation to SBOs.

36 The Overdraft Facilities were managed by different business units within CBA. The BOD product was managed by the Institutional Banking and Markets (**IB&M**) business unit. The SBO product was managed by the Retail Banking Services (**RBS**) business unit.

37 The Overcharging Errors in relation to the SBOs were first identified by CBA in

August 2013, after CBA received an enquiry from an SBO customer regarding the amount of monthly debit interest that was charged on the customer's SBO for July 2013.

38 Between 14 August and 16 August 2013, CBA conducted investigations which indicated that two separate interest rates had both been applied to the SBO account. Manual checking of randomly selected SBO accounts identified that the same issue occurred in relation to at least one other SBO account.

39 By October 2013, CBA implemented a monthly manual process aimed at identifying and removing incorrect pricing before it affected any SBO and BOD accounts (the **Manual Process**). While the Manual Process was in place, CBA undertook work to address the Coding Defect.

40 However, (as was later discovered by CBA – see paragraph 47(c) below) in the period between October 2013 and May 2015, the Manual Process was not set up effectively to identify Affected Customers.

41 By November 2013, CBA's internal incident management team had begun a technical investigation which identified that, not only SBOs, but also BODs were impacted by the Coding Defect (and that the issue had been occurring since late 2011 in relation to certain BODs).

42 In May 2015, a coding change in the system was implemented in respect of both SBOs and BODs (**Coding Change**). The Coding Change was directed at ensuring that SAP applied the correct pricing. CBA undertook 3 sets of testing of the Coding Change:

(a) system testing where the code change was tested to ensure there was no impact on the system performance (i.e. the processing of debits and credits into the loan). A total of 55 test cases were executed;

(b) end to end testing where testing accounts were subjected to a series of life cycle events (i.e. switching from SAP to SPARR pricing). A total of 75 test cases were executed; and

(c) business verification testing post deployment into the system, to confirm that the systems code had been correctly updated. This testing was conducted on 55 accounts.

Across the BOD and SBO products the testing covered switching between the different products, ensuring that when the facility was switched from internal to external (or vice versa) the system only sourced pricing from one system.

43 Once the Coding Change was implemented, CBA's understanding at the time was that the Overcharging Error was resolved save in respect of one exception. The one exception was understood to have been rectified by the migration outlined in paragraph 45.

44 In January 2016, CBA received customer complaints which showed that the Overcharging Error was apparently still occurring.

45 In March 2016, a further systems change was made so that pricing (including the sourcing of interest rates) for all BPTAs and BODs was sourced from SPARR. CBA considered that this systems change, together with the Coding

Change, resolved the issues causing the Overcharging Errors.

46 In July 2016 a customer's complaint to the Financial Ombudsman Service (**FOS**) that interest had been overcharged on her SBO account was escalated to Clive Van Horen, Executive General Manager Retail Products in RBS. The customer had first complained to CBA in June 2015.

47 Mr Van Horen, who had been unaware of the Overcharging Errors, directed the RBS Product team responsible for SBOs to conduct an investigation (the **Investigation**). Following the commencement of the Investigation:

(a) the RBS Product team identified that the systems changes made by CBA to address the cause of the Overcharging Errors contained gaps which impacted certain SBOs and BODs;

(b) from September 2016, the Investigation was managed as a high priority with regular reviews being held (at first, twice weekly, and then, weekly and fortnightly), with oversight by Mr Van Horen and the executive responsible for IB&M;

(c) in September 2016 CBA became aware that:

i. the Manual Process had failed to identify all impacted customers; and

ii. the Coding Change effectively rectified the technical coding defect in SAP in almost all scenarios, except in less than 5% of cases where the pricing applicable to a customer's Overdraft Facility was subject to multiple switches between SAP and SPARR in one day;

(d) the matter was escalated to CBA's Executive Committee as is set out in the following sub-paragraph;

(e) on 26 September 2016, the gaps in the systems changes were reported as a new issue by RBS to the Executive Committee in a Flash Report, which indicated that:

i. 4,000 SBO accounts had been overcharged interest since 2013; and

ii. preliminary data suggested that up to 1,000 customers were still being overcharged, with the total impact estimated at approximately $1.5 million to $2 million.

48 In fact, the Manual Process identified 5,635 accounts as impacted by the Overcharging Error of which 5,185 were corrected before interest was overcharged (i.e. it failed to correct 450 accounts which had been identified as being impacted). The Manual Process failed to identify 1,240 accounts impacted by the Overcharging Error during the period October 2013 to May 2015;

49 During the period October 2016 to July 2017, the team responsible for the Investigation took the following steps:

(a) identified accounts currently or historically affected by the overcharging issue;

(b) developed a monthly manual process to apply the correct pricing to an SBO or a BOD;

(c) developed, tested and implemented a system-based solution to fix the identified coding error whereby a code change in the system pricing logic ensured that accounts were charged only on a single date (**System-based Solution**)..The System-based Solution was implemented in March 2017 and largely resolved the coding error other than for the anomaly subsequently identified that is referred to in paragraph 49(e) below;

(d) developed an approach to calculate and process refunds payable to customers. This work resulted in the refunds referred to in paragraph 56(a) below; and

(e) in the period between 25 May and 22 June 2017, CBA identified another system anomaly. That anomaly was that incorrect pricing arose if a customer uses a digital channel to accept the terms and conditions for an SBO during a 30 minute window (within the hour and a half from around midnight to 1:30am) when SAP processes payments each day. This has affected two SBO accounts which were remediated within a month of occurring, with a refund value of $13.61.

50 A manual review completed in April 2018 identified that two accounts had been overcharged interest in March 2018.

51 The 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 from October 2013 to May 2015; and

(c) identify the need to test for, and actually test for, the gaps that affected the implementation of the Coding Change.

CBA's notification to ASIC

52 Prior to May 2018 CBA did not submit a breach report to ASIC pursuant to s 912D of the Corporations Act in respect of the Overcharging Errors for the following reasons:

(a) CBA personnel reviewing the issue in 2013 formed the view that it was not sufficiently significant to warrant reporting;

(b) following the FOS complaint in 2016, the IB&M and RBS teams had independently concluded that the Overcharging Error was not a breach that required notification under s 912D of the Corporations Act. This

decision was influenced by the following considerations:

i. BODs and SBOs are not "financial products" that are regulated by the Corporations Act and are not subject to the Australian Financial Services Licensing regime; and

ii. the Overcharging Error did not amount to a breach of any financial services laws.

53 CBA listed the Overcharging Errors in the revised table identifying matters of misconduct it provided to the Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry (**FSRC**) on 18 March 2018.

54 In preparing for the inquiry into the Overcharging Errors by the FSRC, CBA further reviewed the circumstances of the Overcharging Errors and identified the Interest Summary Errors and determined that it had breached s 12DA of the ASIC Act, and that breach was significant for the purposes of reporting to ASIC under s 912D of the Corporations Act. A breach report was submitted by CBA on 15 May 2018.

CBA's remediation program

55 In November 2016, CBA commenced a customer remediation program, which, at FOS' request was the subject of regular reporting by CBA to FOS.

56 CBA remediated customers in two tranches, between:

(a) November 2016 and July 2017; and

(b) November 2018 and March 2019.

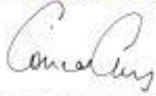
57 CBA remediated approximately $3.74 million (which includes interest on the overcharged amount) to 2,269 SBO and BOD customers overcharged in the Relevant Period.

58 The remediation program was completed in March 2019.

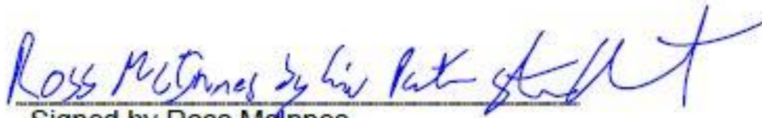
CBA cooperation

59 CBA has co-operated with ASIC in its investigation, and assisted with the efficient and less expensive resolution of the proceedings, by making complete admissions, at the first opportunity, to all the allegations contained in the Concise Statement, and by agreeing to the declaratory relief sought by ASIC.

Date: 12 March 2021



Signed by Conrad Gray
ASIC Lawyer for and on behalf of the Plaintiff



Signed by Ross McInnes
Clayton Utz
Lawyer for the Defendant

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

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

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

CommonwealthBank

Commonwealth Bank of Australia
ABN 48 123 123 124 AFSL and
Australian credit licence 234945

025

Your Statement

Statement 249	(Page 1 of 9)
Account Number	
Statement Period	1 Aug 2016 - 31 Oct 2016
Closing Balance	$412.07 CR
Enquiries	13 1998 (24 hours a day, 7 days a week)

8901.30069.1.6 ZZ258R3 0303SL.R3.S952.D365.O V06.00.17

Business Transaction Account

If this account has an attached overdraft limit or facility which is secured over your primary place of residence or over a residential investment property you should ensure that the property is insured in accordance with the terms and conditions of the mortgage. If you have any queries about your insurance cover you should contact your insurer. Information on property insurance can also be found on www.moneysmart.gov.au

Name:

Note: Please check that the entries listed on this statement are correct. For further information on your account including; details of features, fees, any errors or complaints, please contact us on the details above. Proceeds of cheques are not available until cleared.

Date	Transaction	Debit	Credit	Balance
01 Aug	2016 OPENING BALANCE			$796.02 DR
01 Aug	Debit Interest	7.20		$803.22 DR
01 Aug		76.08		$879.30 DR
01 Aug		46.63		$925.93 DR
01 Aug		31.47		$957.40 DR
01 Aug		74.45		$1,031.85 DR
01 Aug	Direct Debit FL0006870959045595	224.00		$1,255.85 DR
02 Aug	Transfer from NetBank		290.00	$965.85 DR
02 Aug	Transfer to CBA A/c NetBank ute	200.00		$1,165.85 DR
02 Aug	Transfer to NetBank Inv 1002 1001	425.00		$1,590.85 DR
02 Aug		54.99		$1,645.84 DR
03 Aug		41.08		$1,686.92 DR
03 Aug		80.00		$1,766.92 DR
04 Aug		33.44		$1,800.36 DR
04 Aug		60.00		$1,860.36 DR
04 Aug	Refund Purchase Medicare Benefit		37.05	$1,823.31 DR
04 Aug		27.95		$1,851.26 DR
04 Aug	Direct Credit		2,725.80	$874.54 CR
05 Aug		81.97		$792.57 CR
05 Aug		98.01		$694.56 CR

Statement 249 (Page 8 of 9)

Account Number [redacted]

Date	Transaction	Debit	Credit	Balance
25 Oct	[redacted]	12.80		$344.03 DR
26 Oct	[redacted]	13.20		$357.23 DR
26 Oct	[redacted]	14.90		$372.13 DR
26 Oct	[redacted]	56.99		$429.12 DR
26 Oct	[redacted] Cash Out $5.00 Purchase $15.82	20.82		$449.94 DR
26 Oct	Transfer to [redacted] NetBank inv 35 36 37 3839	759.00		$1,208.94 DR
26 Oct	Transfer to CBA A/c NetBank johnny	200.00		$1,408.94 DR
27 Oct	[redacted]	29.80		$1,438.74 DR
27 Oct	[redacted]	58.11		$1,496.85 DR
27 Oct	[redacted]	60.00		$1,556.85 DR
27 Oct	Direct Credit [redacted]		2,624.60	$1,067.75 CR
28 Oct	[redacted]	9.70		$1,058.05 CR
28 Oct	[redacted] Cash Out $10.00 Purchase $67.98	77.98		$980.07 CR
28 Oct	[redacted]	92.61		$887.46 CR
28 Oct	[redacted]	62.99		$824.47 CR
28 Oct	[redacted]	30.99		$793.48 CR
31 Oct	[redacted]	11.40		$782.08 CR
31 Oct	[redacted]	10.50		$771.58 CR
31 Oct	[redacted]	44.95		$726.63 CR
31 Oct	[redacted]	25.00		$701.63 CR
31 Oct	[redacted]	56.57		$645.06 CR
31 Oct	[redacted]	8.99		$636.07 CR
31 Oct	Direct Debit [redacted] FL0006870959045595	224.00		$412.07 CR
31 Oct	2016 CLOSING BALANCE			$412.07 CR

Opening balance	-	Total debits	+	Total credits	=	Closing balance
$796.02 DR		$82,380.79		$83,588.88		$412.07 CR

8901.30072.4.6 ZZ258R3 0303SL.R3.S952.D305.O V06.00.17

Your Debit Interest Rate Summary

Date	Event	Debit Balance	Debit Interest Rate (p.a.)
31 Oct	Your overdraft limit is now $4,000.00	$0.00 - $4,000.00	16.00%
	Excess debit interest rate	$4,000.01 and over	16.00%

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.

Commonwealth Bank

Commonwealth Bank of Australia
ABN 48 123 123 124 AFSL 234945

Statement	382 (Page 1 of 2)
Statement begins	1 April 2014
Statement ends	30 April 2014
Closing balance	**$15,199.09 DR**
Enquiries	**13 1998**
	(24 hours a day, 7 days a week) or your Relationship Manager

Overdraft Cheque Account

Account number

Name:

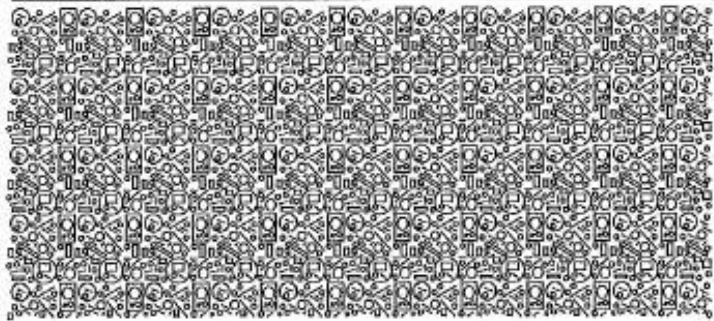
Branch:

Note: Please check that the entries listed on this statement are correct. For further information on your account including; details of features, fees, any errors or complaints, please contact us on the details above. Proceeds of cheques are not available until cleared.

Date	Transaction	Debit	Credit	Balance
01 Apr	2014 OPENING BALANCE			$14,258.19 DR
01 Apr	Debit Interest	191.80		$14,449.99 DR
01 Apr	Cash Dep		1,500.00	$12,949.99 DR
01 Apr	COMMONWEALTH BAN payment AAU1245601	1,883.77		$14,833.76 DR
01 Apr	Direct Debit Commonwealth Bank Loan Rypmt to	1,107.42		$15,941.18 DR
03 Apr	Direct Debit Commonwealth Bank Loan Rypmt to	2,514.00		$18,455.18 DR
04 Apr	Chq Dep white		26.40	$18,428.78 DR
08 Apr	Transfer to NetBank visa payment	6,904.65		$25,333.43 DR
10 Apr	Cash Dep		2,000.00	$23,333.43 DR
10 Apr	Chq Dep		2,530.00	$20,803.43 DR
11 Apr	Chq presented	190.00		$20,993.43 DR
19 Apr	Transfer to CBA A/c NetBank amanda	200.00		$21,193.43 DR
24 Apr	Cash Dep		1,500.00	$19,693.43 DR
24 Apr	Chq Dep		4,212.78	$15,480.65 DR
28 Apr	Wdl ATM CBA ATM	300.00		$15,780.65 DR
29 Apr	COMMONWEALTH BAN payment AAU1308233	190.34		$15,970.99 DR
			BALANCE CARRIED FORWARD	$15,970.99 DR

Statement 382 (Page 2 of 2)

Account number [redacted]



Date	Transaction	Debit	Credit	Balance
	BALANCE BROUGHT FORWARD			$15,970.99 DR
30 Apr	Direct Credit [redacted] MU RENT PAYMNT [redacted]		771.90	$15,199.09 DR
30 Apr	2014 CLOSING BALANCE			$15,199.09 DR

Opening balance	-	Total debits	+	Total credits	=	Closing balance
$14,258.19 DR		$13,481.98		$12,541.08		$15,199.09 DR

Your Debit Interest Rate Summary

Date	Event	Debit balance	Debit interest rate (p.a.)
30 Apr 14	Your limit is now $30,000.00	$0.00 - $30,000.00	9.98%
	Excess debit interest rate	$30,000.01 and over	9.98%

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.

FROM 1 AUGUST 2014, PIN WILL REPLACE SIGNATURES. SWITCH TO A PIN.

Remember, you can update your PIN anytime and anywhere. Here's how:

1. Log onto NetBank, click the **More** tab, **Security** and click **My card PIN**
2. Log onto the CommBank app, click on **Cards**, select your **Card and Choose card PIN.**
3. Visit us at any branch; or
4. Call us on 13 2221.

Find out more at commbank.com.au/pinwise

Our Privacy Policy is changing

Your privacy is important to us. That's why we have a strict Privacy Policy in place to keep your information safe.

The Privacy Act was recently changed — so from 12 March 2014 our Privacy Policy will be changing too.

What's changing?

We're updating our policy to include more information on:

- How we collect and handle your personal information, including collecting information from your dealings with us and from publicly available sources, so we can serve you better.
- Who we exchange your information with, such as other financial institutions and organisations that help identify illegal activities and prevent fraud.
- When we may send your information overseas, and to which countries.
- How you can access and correct your information, and how you can complain about a breach of our privacy obligations.

These changes will apply whenever we collect, use or exchange your information, so it's important for you to be aware of them.

There are also government laws which require or authorise us to collect your information, such as the Anti-Money Laundering and Counter-Terrorism Financing Act, the Taxation Administration Act and the Income Tax Assessment Act.

How can you find out more?

You can read our Privacy Policy online anytime at **commbank.com.au/privacypolicy**

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

Annexure B

CORRECTIVE NOTICE

Corrective Notice ordered by the Federal Court of Australia

CBA's conduct in making misleading representations

On [*insert date*], Lee J of the Federal Court of Australia (in proceeding NSD 1275 of 2020) ordered CBA to pay a pecuniary penalty of [*insert amount*] to the Commonwealth for its conduct in relation to Simple Business Overdraft and Business Overdraft credit facilities.

The Court ordered CBA to pay the pecuniary penalty because it was found to have, from 1 December 2014 to 31 March 2018 (**Penalty Period**), made false or misleading representations to affected customers by way of periodic account statements.

The representations were to the effect that the interest rate that had been applied to the credit facility over the period of the statement was the rate referred to in the statement.

The representations were false or misleading in that affected customers had been overcharged interest at a rate significantly greater than (often double) the rate referred to in the statement. The rate actually applied was also inconsistent with the terms and conditions of the credit facility.

The Court found that during the Penalty Period, CBA made 12,119 false or misleading representations. 1,510 customers were affected by the conduct in circumstances where CBA overcharged those customers interest totalling $2,238,554.94.

CBA co-operated with ASIC during its investigations and has remediated those customers affected by the conduct described above.

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