

## NOTICE OF FILING

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### Details of Filing

Document Lodged:	Statement of Claim - Form 17 - Rule 8.06(1)(a)
File Number:	VID1153/2018
File Title:	AUSTRALIAN SECURITIES AND INVESTMENTS COMMISSION v AUSTRALIA AND NEW ZEALAND BANKING GROUP LIMITED
Registry:	VICTORIA REGISTRY - FEDERAL COURT OF AUSTRALIA



Dated: 4/06/2019 12:08:14 PM AEST

A handwritten signature in blue ink, which appears to read "Warwick Soden".

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.



Form 17  
Rule 8.05(1)(a)

**FURTHER AMENDED STATEMENT OF CLAIM**

Amended on 4 June 2019 with the consent of the defendant pursuant to r 16.51(3) of the Federal Court Rules 2011 (Cth). The amendments of 4 June 2019 are indicated by yellow highlighting.

FEDERAL COURT OF AUSTRALIA  
REGISTRY: VICTORIA  
DIVISION: GENERAL

NO. VID 1153/2018

**AUSTRALIAN SECURITIES AND INVESTMENTS COMMISSION**

Plaintiff

**AUSTRALIA AND NEW ZEALAND BANKING GROUP LIMITED**

**ACN: 005 357 522**

Defendant

**Parties**

**1. The Plaintiff (ASIC):**

- a. was established by s 7 of the *Australian Securities and Investments Commission Act 1989 (Cth)* and continued in existence by s 261 of the *Australian Securities and Investments Commission Act 2001 (Cth)* (the **ASIC Act**);
- b. by s 8(1) of the ASIC Act, is a body corporate and may sue in its corporate name; and
- c. has statutory functions and powers conferred on it by the ASIC Act and by other statutes identified in s 12A of the ASIC Act.

**2. The Defendant (ANZ):**

- a. is a publicly listed company;
- b. provides banking and financial products and services to various categories of clients;
- c. is one of the four major banks operating in the Australian banking system; and

Filed on behalf of (name & role of party)	Australian Securities and Investments Commission, the Plaintiff		
Prepared by (name of person/lawyer)	Savas Miriklis		
Law firm (if applicable)			
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- d. is a listed disclosing entity to which s 674(2) of the *Corporations Act 2001* (Cth) (the **Act**) applies.

### **Underwriting Agreement**

- 3. On the morning of 6 August 2015, ANZ entered into an underwriting agreement with JP Morgan Australia Limited (**JPM**), Citigroup Global Markets Australia Pty Ltd (**Citi**) and Deutsche Bank AG, Sydney Branch (**DB**) (together – **Underwriters**) in respect of an institutional share placement to be undertaken by the ANZ (**Underwriting Agreement**).

### **Particulars**

The Underwriting Agreement is in writing and is dated 6 August 2015. A copy is in the possession of ASIC's solicitors and is available for inspection upon request.

- 4. The Underwriting Agreement provided, inter alia:
  - a. for the Underwriters to use their best endeavours to place new fully paid ordinary shares in the capital of ANZ (**Placement Shares**) with investors between 8:30am and 6:00pm on 6 August 2015 (**Placement Date**) (clause 1(a));
  - b. the issue price of the Placement Shares was to be no lower than \$30.95 per share (clause 1(b));
  - c. the Placement was intended to raise about \$2.5 billion (preamble);
  - d. the class of investors from whom the Underwriters would seek applications to place the Placement Shares was restricted to certain institutional investors (preamble; clause 1(e));
  - e. in the event that the number of shares successfully placed by the Underwriters with investors was less than the totality of the Placement Shares, the Underwriters must acquire the "Shortfall Securities" in specified proportions – 40% by Citi and 30% by each of JPM and DB (clause 3(e)).

### **The Placement**

- 5. At about 8:38am on the Placement Date, the securities of ANZ were placed in a trading halt.
- 6. Immediately prior to being placed in a trading halt, securities in ANZ traded on the Australian Securities Exchange (**ASX**) at a price of \$32.58.

7. At about 8:44am on the Placement Date, ANZ issued a release to the ASX (**Placement Announcement**) entitled “ANZ announces Institutional Placement (fully underwritten) and share Purchase Plan to raise a total of \$3 billion”.

### Particulars

A copy of the Placement Announcement is in the possession of ASIC’s solicitors and is available for inspection upon request.

8. The Placement Announcement stated, inter alia, that:
- a. the Placement size was “fixed at \$2.5 billion and will not be increased” (p 1);
  - b. the Placement would be conducted by means of an “accelerated book-build” process with an “underwritten floor price” of \$30.95 (p 1); and
  - c. the Placement was fully underwritten by Citi, DB and JPM (p 1).
9. At or about the time of the Placement Announcement, the Underwriters commenced the process of seeking and accepting applications in the bookbuild.
10. The Placement did not attract the level of interest from institutional investors that was anticipated by ANZ and/or the Underwriters.

### Particulars

ASIC relies on the following communications:

(i) a telephone call between Mr Rick Moscati (Group Treasurer, ANZ) and Mr John Needham (Head of Capital and Structured Funding, ANZ) and at least Mr Richard Galvin and Mr Harry Florin of JPM and Mr Michael Richardson of DB at about 2.30pm on the Placement Date. ASIC says that during that telephone call the ANZ participants were told “the long only funds were not there” (or words to that effect);

(ii) a telephone call between Mr Rick Moscati and Mr John Needham of ANZ, and Mr Geoffrey Tarrant of DB at about 3.00pm on the Placement Date. ASIC says that during that telephone call the ANZ participants were told that the “long funds” that were expected to come into the book were “clearly not going to do so” (or words to that effect);

(iii) shortly after the above call between Mr Rick Moscati and Mr John Needham of ANZ and Mr Geoffrey Tarrant of DB, a meeting between Mr Rick Moscati, Mr John Needham and Mr Shayne Elliott (all of ANZ) on the Placement Date, during which meeting Mr Geoffrey Tarrant of DB called in. ASIC says that during that meeting, Mr Rick Moscati and Mr John Needham provided Mr Shayne Elliott with an update and told him, in the course of the update, that “long money funds weren’t participating” (or words to that effect);

(iv) a meeting between Mr Rick Moscati and Mr Mike Smith (Chief Executive Officer, ANZ) at about 5.30pm - 6.30pm on the Placement Date; and

(v) a telephone call between Mr Rick Moscati and Mr John Needham of ANZ and at least Mr Richard Galvin and Mr Harry Florin of JPM and Mr Michael Richardson of DB ~~at about~~ shortly after 8.30pm on the Placement Date. ASIC says that during that telephone call the participants discussed, inter alia, the reasons why the book had not gone as well as expected, discussed how to “manage” the situation, and discussed the “complete absence” of long only funds (or words to that effect).

Further particulars may be provided prior to trial.

11. During the course of the Placement Date, there were communications between senior officers and employees of ANZ and representatives of the Underwriters to the effect that, because the level of demand from institutional investors was less than had been expected, there was a prospect of the Underwriters acquiring a significant portion of the Placement Shares.

### Particulars

~~The ASIC relies on the~~ communications ~~include the calls and meetings~~ referred to in ~~subparagraphs~~ subparagraphs (ii) to (v) of the particulars sub-joined to paragraph 10 and says further:-

(i) as to particular (ii) to paragraph 10, ASIC further states that during that telephone call the participants discussed two alternatives to the long money funds. On the first alternative discussed, the transaction would continue with the underwriters taking up an amount of the placement. On the second alternative discussed, the deal would be relaunched and repriced.

(ii) as to particular (iii) to paragraph 10, ASIC further states that during that meeting Mr Rick Moscati and Mr John Needham discussed the two alternatives (as described in sub-paragraph (i) above) with Mr Shayne Elliott, and Mr Geoffrey Tarrant (who called in) advised the ANZ representatives to “progress with the transaction” (or words to that effect). Mr Shayne Elliott was told it was expected the Underwriters would take up approximately \$500m worth of Placement Shares at this stage.

(iii) as to particular (iv) to paragraph 10, ASIC further states that during that meeting Mr Rick Moscati informed Mr Mike Smith that a \$700 million shortfall would be taken up by the Underwriters (or words to that effect), and Mr Smith responded by stating “this is what underwriters are there for” (or words to that effect).

(iv) as to particular (v) to paragraph 10, ASIC further states that during that telephone call, and based on the document emailed to ANZ at 8:35pm (and identified in the particulars subjoined to paragraph 12 below), ANZ was informed that the Underwriters would be taking up a position of around \$750m.

Further particulars may be provided prior to trial.

12. ~~Shortly after At about~~ 8:30pm on the Placement Date, ANZ accepted the Underwriters' ~~final~~ proposed allocations of Placement Shares in the course of a teleconference.

#### **Particulars**

The participants in the teleconference included at least Mr Rick Moscati and Mr John Needham of ANZ, Mr Richard Galvin and Mr Harry Florin of JPM and Mr Michael Richardson of DB. During that teleconference ANZ (by Mr Rick Moscati) approved the proposed allocations.

The proposed allocations were identified in a document titled "ANZ Book Allocations v6.xlsx" and circulated as an attachment to an email sent at 8:35pm on 6 August 2015 from Mr Kristopher Salinger of Citi to Mr Rick Moscati and Mr John Needham of ANZ, that document recorded that shares worth \$754,969,181 were not allocated.

- 12A. The document "ANZ Book Allocations v6.xlsx" (to which reference is made in the particulars to paragraph 12 above):

- a. recorded the value of allocated shares to be \$1,745,030,819; and
- b. recorded that shares worth \$754,969,181 were not allocated.

- 12B. By email sent at 2:26am on 7 August 2015, Mr Rick Moscati and Mr John Needham of ANZ were provided with a copy of a revised allocations list of Placement Shares, which list showed that the value of the unallocated shares had increased to \$790,871,681.

#### **Particulars**

The email was sent by Mr Kristopher Salinger of Citi to Mr Rick Moscati and Mr John Needham, copying various representatives of the Underwriters. The email attached a document titled "ANZ Book Allocations vF .xlsx", that document recorded that shares worth \$790,871,681 were not allocated. A copy of the email and the attachment are in the possession of the plaintiff's solicitors and are available for inspection.

13. ~~[not used] In the result:~~

- a. ~~the share price was set at the minimum price of \$30.95; and~~
- b. ~~owing to the inadequate level of demand from institutional investors, the Underwriters (with ANZ's knowledge and approval) allocated to themselves approximately \$791 million of the Placement Shares (Underwriter Acquisition).~~

#### **Particulars**

~~As to ANZ's knowledge and approval, ASIC refers to an email sent at 8:35pm on 6 August 2015 from Kristopher Salinger of Citi to Messrs Moscati and Needham, which email attached a document titled "ANZ Book Allocations v6.xlsx". ASIC also refers to and repeats paragraph 12 above.~~

~~A copy of the 8:35pm email is in the possession of ASIC's solicitors and available for inspection upon request.~~

14. ~~Pursuant to the Underwriter Acquisition,~~ The Underwriters allocated to themselves and subsequently on or about 13 August 2015 acquired approximately 31% of the Placement Shares, or a total of 24,653,710~~08~~ ANZ shares with a value of \$763,032,324.50, in the following proportions: (i) Citi - 9,861,483~~0~~ shares (40%); (ii) JPM - 7,396,113~~35~~ shares (30%); and (iii) DB - 7,396,113 shares (30%).

15. ~~[Not used] The outcome of the Placement was known to ANZ by about 8:30pm on the Placement Date.~~

16. Prior to ANZ issuing to the ASX the release alleged in paragraph 18 below, ANZ held information:

- a. that shares with a value between approximately \$754 million and \$790 million were to be acquired by the Underwriters (the **Underwriter Acquisition**); and/or
- b. that a significant proportion of the shares the subject of the Placement were to be acquired by the Underwriters.

#### Particulars

ASIC refers to and repeats:

(i) particulars (iv) and (v) to paragraph 10, as supplemented by the particulars to paragraph 11;

(ii) the particulars to paragraph 12;

(iv) the particulars to paragraph 12B.

Further particulars may be provided prior to trial.

16. ~~The facts of, and the effect of, the outcome of the Placement known to ANZ by that time included:~~

~~(a) the fact of the Underwriter Acquisition; and~~

~~(b) the fact that the shares comprising the Underwriter Acquisition (**Underwriter Shares**) had been allocated to the Underwriters:~~

~~(i) in consequence of inadequate demand from institutional investors in respect of the Placement; and~~

~~(ii) as short term holders of the shares.~~

17. The Underwriter ~~Acquisition Shares~~ shares:

- (a) amounted in number to about the equivalent volume of 3.77 to 3.95 days trading in ANZ shares on the ASX when compared with the Average Daily Trading Volume of ANZ over the preceding month; and
- (b) amounted in value to about ~~0.90.85%~~ to 0.89% of the issued share capital of ANZ.

### Completion Announcement

18. At about 7:30am on 7 August 2015, ANZ issued a release to the ASX in respect of the Placement (**Completion Announcement**).

#### Particulars

A copy of the Completion Announcement is in the possession of ASIC's solicitors and is available for inspection upon request.

19. The Completion Announcement stated, *inter alia*, "ANZ today announced that it had raised \$2.5 billion in new equity capital through the placement of approximately 80.8 million ANZ ordinary shares at the price of \$30.95 per share".
20. The terms of the Completion Announcement were approved by two ANZ disclosure officers, Ms Jill Craig (now, Jill Campbell) and Mr Paul Edwards.
21. The Completion Announcement did not disclose:
- a. the Underwriter Acquisition; or
  - b. that the Underwriters ~~had been allocated and~~ were to acquire a significant proportion of the Placement Shares.
22. ANZ did not disclose the fact of the Underwriter Acquisition, or that the Underwriters ~~had been allocated and~~ were to acquire a significant proportion of the Placement Shares, to the ASX by other means at any stage.
23. The information described in paragraph 21 above:
- a. was not generally available to the market at the time (including to participants in the market for ANZ shares);



- b. if disclosed, was information that a reasonable person would expect to have a material effect upon the price of ANZ shares (and, therefore, was information falling within rule 3.1 of the Market Listing Rules for the purposes of s 674(2)(b) of the Act);
- c. was likely to influence investors in deciding whether to acquire and in deciding whether to dispose of ANZ shares for reasons including:
  - (i) the size of the Underwriter Acquisition (whether it was described in quantum, percentage terms or generally as “significant”); and
  - (ii) the expectation of both sophisticated and unsophisticated investors that the Underwriters would promptly dispose of the acquired Placement Shares and place downward pressure upon the ANZ share price;with the result *inter alia* that:
  - (iii) potential purchasers of ANZ shares would likely refrain from purchasing shares in anticipation that the disposal of the Underwriter Shares would present an opportunity to purchase at a lower price; and/or
  - (iv) sophisticated traders of ANZ shares would likely engage in trading activities such as shorting the shares in anticipation of being able to purchase them at a lower price.

### **Resumption of Trading**

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

### **Breaches of the Corporations Act**

- 27. In the identified facts and circumstances, ANZ was required to notify the ASX of the Underwriter Acquisition and/or that the Underwriters ~~had been allocated and~~ were to acquire a significant proportion of the Placement Shares on the night of 6 August 2015 or, alternatively, prior to the recommencement of trading in ANZ shares on 7 August 2015.
- 28. ANZ failed to comply with its continuous disclosure obligations under s.674(2) of the Act by:
  - (a) failing to notify the ASX that, ~~approximately \$791 million~~ of the \$2.5 billion of ANZ shares offered in the Placement, shares with a value between approximately \$754

million and \$790 million were to be acquired by its underwriters rather than placed with investors;

- (b) alternatively, by failing to notify the ASX that a significant proportion of the shares the subject of the Placement were to be acquired by the Underwriters.

29. The contravention arising from ANZ's failure as alleged in paragraph 28 above:

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

**Particulars**

The "material prejudice" alleged consists of:

(i) requiring purchasers of ANZ shares to pay a higher price than would have been payable;

(ii) depriving potential purchasers of ANZ shares of the opportunity to purchase ANZ shares at an acceptable (lower) price; and

(iii) depriving potential disposers of ANZ shares of the opportunity to make decisions about whether to sell and, if so, the timing of any sale, on the basis of all relevant information,

had the Underwriter Acquisition (or the fact that a significant proportion of the shares the subject of the Placement were to be acquired by the Underwriters) been disclosed to the market.

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

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

**Particulars**

The following persons participated in the conference call:

(i) Mr Rick Moscati (ANZ);

(ii) Mr John Needham (ANZ);

(iii) Mr Michael Ormaechea (DB);

(iv) Mr Geoffrey Tarrant (DB);

(v) ~~Mr Robert Priestley~~ Mr Richard Galvin (JPM);

(vi) Mr Jeff Herbert-Smith (JPM);

~~(vi)~~(vii) Mr Steve Roberts (Citi); and

~~(vii)~~(viii) Mr John McLean (Citi).

Further particulars may be provided prior to trial.

(ii) on 8 August 2015 at about 11am, Mr Moscati and Mr Needham took part in a further conference call with representatives of each of the Underwriters during which the Underwriters agreed with each other and with ANZ:

- (A) not to sell down their respective portions of the Underwriter Shares in volumes greater than 5% of the daily traded volume of ANZ shares; and
- (B) that if any of the Underwriters formed a view that they had an obligation to disclose the existence of the Underwriter Acquisition, they would consult before doing so.

### Particulars

The following persons participated in the conference call:

(i) Mr Jeff Herbert-Smith (JPM);

(ii) Mr Richard Galvin (JPM);

(iii) Mr Robert Priestley (JPM)

(iv) Mr Michael Ormaechea (DB);

(v) Mr Michael Richardson (DB);

(vi) Mr Geoffrey Tarrant (DB);

(vii) Mr Itay Tuchman (Citi);

(viii) Mr John McLean (Citi);

(ix) Mr Rick Moscati (ANZ); and

(x) Mr John Needham (ANZ).

Further particulars may be provided prior to trial.

**Relief claimed**

ASIC claims the relief set out in the Originating Process filed on 14 September 2018.

DATED ~~30 November 2018~~ 25 March 2019

This pleading was prepared by Christopher Caleo, Kathleen Foley and Aaron Cornish of Counsel, and amended by Christopher Caleo, Kathleen Foley and Julia Watson of Counsel.

**CERTIFICATE OF LAWYER**

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

Date: ~~30 November 2018~~ 25 March 2019 ~~4 June 2019~~



Signed by Savas Miriklis

Lawyer for the Plaintiff