

## NOTICE OF FILING

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### Details of Filing

Document Lodged: Statement of Claim - Form 17 - Rule 8.06(1)(a)  
File Number: VID1085/2017  
File Title: ZONIA HOLDINGS PTY LTD v COMMONWEALTH BANK OF AUSTRALIA LIMITED  
Registry: VICTORIA REGISTRY - FEDERAL COURT OF AUSTRALIA



A handwritten signature in blue ink that reads 'Warwick Soden'.

Dated: 10/10/2017 11:02:21 AM AEDT

Registrar

### Important Information

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

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Form 17  
Rule 8.05(1)(a)

## STATEMENT OF CLAIM

No. VID of 2017

Federal Court of Australia  
District Registry: Victoria  
Division: General

### ZONIA HOLDINGS PTY LTD (ACN 008 565 286)

Applicant

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

Respondent

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Filed on behalf of:

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## A. INTRODUCTION

### A.1 The Applicant and the Group Members

1. This proceeding is commenced as a representative proceeding pursuant to Part IVA of the *Federal Court of Australia Act 1976* (Cth) by the Applicant on his own behalf and on behalf of all persons who or which:
  - (a) acquired an interest in fully paid ordinary shares in Commonwealth Bank of Australia Limited (**CBA Shares**) during the period between 1 July 2015 and 1.00PM on 3 August 2017 (**Relevant Period**);
  - (b) suffered loss or damage by reason of the conduct of the Respondent (**CBA**) pleaded in this Statement of Claim;
  - (c) were not during any part of the Relevant Period, and are not as at the date of this Statement of Claim, any of the following:
    - (i) a related party (as defined by s 228 of the *Corporations Act 2001* (Cth)) of CBA;

- (ii) a related body corporate (as defined by s 50 of the Corporations Act) of CBA;
- (iii) an associated entity (as defined by s 50AAA of the Corporations Act) of CBA;
- (iv) an officer or a close associate (as defined by s 9 of the Corporations Act) of CBA;
- (v) a judge or the Chief Justice of the Federal Court of Australia or a Justice or the Chief Justice of the High Court of Australia; or
- (vi) an officer or employee of, or other legal practitioner engaged by, Maurice Blackburn Pty Ltd in relation to this proceeding,

**(Group Members).**

2. The Applicant:

- (a) is incorporated pursuant to the *Corporations Act 2001* (Cth) (**Corporations Act**) and capable of suing in its corporate name and style;
- (b) acquired interests in CBA Shares during the Relevant Period.

**Particulars**

*Details of the particular acquisitions of CBA Shares by the Applicant are set out below.*

<b>Date</b>	<b>Transaction type</b>	<b>Number of shares</b>	<b>Price</b>
18/09/2015	Acceptance of entitlements	718	\$71.50

3. Immediately prior to the commencement of this proceeding, the group, on whose behalf this proceeding is brought, comprised more than seven persons.

**A.2 The Respondent**

**A.2.1 Introduction**

4. CBA is and at all material times was:

- (a) incorporated pursuant to the Corporations Act and capable of being sued;

- (b) a person within the meaning of s 1041H of the Corporations Act;
- (c) a person within the meaning of s 12DA of the *Australian Securities and Investments Commission Act 2001* (Cth) (**ASIC Act**);
- (d) a person within the meaning of s 18 of the Australian Consumer Law set out in Schedule 2 of the *Competition and Consumer Act 2010* (Cth), as applicable pursuant to:
  - (i) s 7 of the *Fair Trading (Australian Consumer Law) Act 1992* (ACT);
  - (ii) s 28 of the *Fair Trading Act 1987* (NSW);
  - (iii) s 12 of the *Australian Consumer Law and Fair Trading Act 2012* (Vic);
  - (iv) s 16 of the *Fair Trading Act 1989* (Qld);
  - (v) s 6 of the *Australian Consumer Law (Tasmania) Act 2010* (Tas);
  - (vi) s 19 of the *Fair Trading Act 2010* (WA);
  - (vii) s 14 of the *Fair Trading Act 1987* (SA); and/or
  - (viii) s 27 of the *Consumer Affairs and Fair Trading Act* (NT),as in force after 1 January 2011 (individually, or together, the **ACL**).

#### **A.2.2 CBA's business and brand**

5. At all material times, CBA carried on business as a provider of integrated financial services, including retail, business and institutional banking, funds management, superannuation, life insurance general insurance, broking services and finance company activities, primarily in Australia, New Zealand and the Asia Pacific Region.
6. CBA is and at all material times was the consolidated reporting entity for CBA and its subsidiaries, within the meaning of Australian Accounting Standard AASB127 (Consolidated and Separate Financial Statements) (**CBA Group**).

### **A.2.3 The market disclosure regime governing CBA**

7. CBA is and at all material times was included in the official list of the financial market operated by the Australian Securities Exchange (**ASX**), and by reason thereof:
- (a) CBA Shares are:
    - (i) ED securities for the purposes of s 111AE of the Corporations Act; and
    - (ii) able to be acquired and disposed of by investors and potential investors in CBA Shares (**Affected Market**) on the financial market operated by ASX;
  - (b) CBA is and at all material times was:
    - (i) a listed disclosing entity within the meaning of s 111AL(1) of the Corporations Act;
    - (ii) subject to and bound by the Listing Rules of the ASX (**ASX Listing Rules**); and
    - (iii) obliged by ss 111AP(1) and/or 674(1) of the Corporations Act and/or ASX Listing Rule 3.1 to, once it is, or becomes aware of, any information concerning CBA that a reasonable person would expect to have a material effect on the price or value of CBA Shares, tell the ASX that information immediately (unless the exceptions in ASX Listing Rule 3.1A apply) (**Continuous Disclosure Obligations**).

### **A.2.4 The Anti-Money Laundering and Counter-Terrorism Financing regime governing CBA**

8. At all material times, CBA was:
- (a) licensed to carry on banking business in Australia, and authorized to take deposits from customers, as an Authorised Deposit-Taking Institution (**ADI**) under the *Banking Act 1959* (Cth);
  - (b) subject to the *Anti-Money Laundering and Counter-Terrorism Financing Act 2006* (Cth) (the **AML/CTF Act**) and the *Anti-Money Laundering and Counter-Terrorism Financing Rules Instrument 2007* (Cth) (**AML/CTF Rules**), and:

- (i) a “person” and “reporting entity” within the meaning of s 5 of the AML/CTF Act; and
- (ii) a provider of designated services to customers within the meaning of s 6 of the AML/CTF Act.

### **Particulars**

*CBA provides, among others, the following designated services:*

- i) Item 1, Table 1 – in the capacity of account provider, opening an account, where the account provider is an ADI.*
- ii) Item 2, Table 1 – in the capacity of account provider for a new or existing account, allowing a person to become a signatory to the account, where the account provider is an ADI.*
- iii) Item 3, Table 1 – in the capacity of account provider for an account, allowing a transaction to be conducted in relation to the account, where the account provider is an ADI.*
- iv) Item 29, Table 1 – in the capacity of an ordering institution, accepting an electronic funds transfer instruction from the payer.*

9. At all material times, the object of the AML/CTF Act included to address matters of international concern, including the need to combat money laundering and financing of terrorism.

### **Particulars**

*AML/CTF Act, s 3(1)*

10. At all material times:
- (a) CBA was obliged by ss 81, 82 and 83 of the AML/CTF Act and rule 1.2.1 of the AML/CTF Rules to adopt and maintain an anti-money laundering and counter terrorism financing program that applies to CBA, and comply with Part A of that program (this being a civil penalty provision);
  - (b) CBA was obliged by rule 9.1.5 of the AML/CTF Rules to design Part A of its program to enable CBA to identify significant changes in the risk that a reporting entity may reasonably face that the provision by the reporting entity of designated services might (whether inadvertently or otherwise) involve or facilitate money laundering or the financing of terrorism (**ML/TF Risk**) for the purposes of CBA's Part A and Part B programs.



- (c) CBA had a Joint Anti-Money Laundering and Counter-Terrorism Financing Program (**CBA's AML/CTF Program**), Part A of which contained procedures for managing ML/TF Risk.
11. At all material times, CBA was obliged by s 43(2) of the AML/CTF Act to report to the Australian Transaction Reports and Analysis Centre (**AUSTRAC**) "threshold transactions" (being transactions involving the transfer of physical currency in the amount of \$10,000 or more) within 10 business days after the transaction occurred (this being a civil penalty provision).
12. At all material times in the Relevant Period, CBA was subject to:
- (a) reputational risk arising from negative perception on the part of customers, counterparties, shareholders, investors, debt holders, market analysts and regulators, with adverse reputational risk outcomes flowing from the failure to manage other types of risk (including compliance risk); and
  - (b) the risk of loss of reputation if it failed to comply with its obligations under the AML/CTF Act.

#### **Particulars**

- i) CBA's Annual Report for the financial year ended 30 June 2015 (**2015 Annual Report**), pp.136-137.*
  - ii) CBA's US Disclosure Document for the Full Year ended 30 June 2015 (**2015 US Disclosure**), pp. 17, 21*
  - iii) CBA's Annual Report for the financial year ended 30 June 2016 (**2016 Annual Report**), pp.139-140.*
  - iv) CBA's US Disclosure Document for the Full Year ended 30 June 2016 (**2016 US Disclosure**), pp. 17, 21*
13. Further, at all material times in the Relevant Period:
- (a) CBA would be potentially liable to civil penalties if:
    - (i) it did not comply with Part A of CBA's AML/CTF Program in contravention of s 82 of the AML/CTF Act; and/or
    - (ii) it did not comply with s 43(2) of the AML/CTF Act,
- in the amount of up to 100,000 penalty units (being \$18,000,000) per contravention; and

- (b) Anti-money laundering and counter-terrorism financing compliance had been the subject of increasing regulatory change and enforcement, and if CBA failed to comply with the requirements of such regulations, it may become subject to significant regulatory fines, regulatory sanctions and suffer material financial loss or loss of reputation. Further, the increasing volume, complexity and global reach of such regulatory requirements, and the increased propensity for sanctions and the level of financial penalties for breaches of requirements could exacerbate the severity of this risk.

### **Particulars**

- i) *As to subparagraph (a), AML/CTF Act, s 175(4); Crimes Act 1914 (Cth), s 4AA.*
- ii) *As to sub-paragraph (b), the Applicant refers to:*
- A) the 2015 US Disclosure, p.17;*
- B) the 2016 US Disclosure, p.17.*

## **A.3 Directors and officers of CBA**

### **A.3.1 The Chief Executive Officer**

14. Mr Ian Narev (**Narev**) was:
- (a) from 1 December 2011, Managing Director and Chief Executive Officer of CBA; and
- (b) at all material times in the Relevant Period, an officer of CBA within the meaning of s 9 of the Corporations Act and ASX Listing Rule 19.12.

### **A.3.2 The Chief Risk Officer**

15. Mr Alden Toevs (**Toevs**) was:
- (a) from 2008 to 30 June 2016, Group Chief Risk Officer of CBA;
- (b) from 1 July 2016 to the end of the Relevant Period, Chief Risk Officer Emeritus and Board Risk Adviser of CBA; and
- (c) at all material times in the Relevant Period, an officer of CBA within the meaning of s 9 of the Corporations Act and ASX Listing Rule 19.12.
16. Mr David Cohen (**Cohen**) was:

- (a) from 2008 to 30 June 2016, Group General Counsel and Group Executive (Group Corporate Affairs); and
- (b) from 1 July 2016 to the end of the Relevant Period, Group Chief Risk Officer of CBA; and
- (c) at all material times in the Relevant Period, an officer of CBA within the meaning of s 9 of the Corporations Act and ASX Listing Rule 19.12.

### **A.3.3 The Chairman**

17. Mr David Turner (**Turner**) was:

- (a) from August 2006 to 31 December 2016, a director of CBA;
- (b) from February 2010 to 31 December 2016, Chairman of CBA;
- (c) from the beginning of the Relevant Period to 31 December 2016, a member of the Risk Committee of CBA; and
- (d) at all material times in the Relevant Period prior to 31 December 2016, an officer of CBA within the meaning of s 9 of the Corporations Act and ASX Listing Rule 19.12.

18. Ms Catherine Livingstone AO (**Livingstone**) was:

- (a) from 1 March 2016, a director of CBA;
- (b) from 1 January 2017, Chairman of CBA;
- (c) from 1 January 2017, a member of the Risk Committee of CBA; and
- (d) at all material times in the Relevant Period since 1 March 2016, an officer of CBA within the meaning of s 9 of the Corporations Act and ASX Listing Rule 19.12.

### **A.3.4 The Non-Executive Directors**

19. Ms Jane Hemstrich (**Hemstrich**) was:

- (a) from October 2006 to 31 March 2016, a non-executive director of CBA;

- (b) from the beginning of the Relevant Period to 31 March 2016, a member of the Risk Committee of CBA; and
  - (c) at all material times in the Relevant Period prior to 31 March 2016, an officer of CBA, within the meaning of s 9 of the Corporations Act and ASX Listing Rule 19.12.
20. Mr Harrison Young (**Young**) was:
- (a) from February 2007, a non-executive director of CBA;
  - (b) throughout the Relevant Period, a member of the Risk Committee of CBA; and
  - (c) at all material times in the Relevant Period, an officer of CBA, within the meaning of s 9 of the Corporations Act and ASX Listing Rule 19.12.
21. Sir John Anderson (**Anderson**) was:
- (a) from March 2007 to 9 November 2016, a non-executive director of CBA;
  - (b) from the beginning of the Relevant Period to 9 November 2016 a member of the Risk Committee of CBA; and
  - (c) at all material times in the Relevant Period prior to 9 November 2016, an officer of CBA, within the meaning of s 9 of the Corporations Act and ASX Listing Rule 19.12.
22. Mr Andrew Mohl (**Mohl**) was:
- (a) from July 2008, a non-executive director of CBA;
  - (b) throughout the Relevant Period, a member of the Risk Committee of CBA; and
  - (c) at all material times in the Relevant Period, an officer of CBA, within the meaning of s 9 of the Corporations Act and ASX Listing Rule 19.12.
23. Mr Brian Long (**Long**) was:
- (a) from September 2010, a non-executive director of CBA;
  - (b) throughout the Relevant Period, a member of the Risk Committee of CBA; and

- (c) at all material times in the Relevant Period, an officer of CBA, within the meaning of s 9 of the Corporations Act and ASX Listing Rule 19.12.
24. Ms Launa Inman (**Inman**) was:
- (a) from March 2011, a non-executive director of CBA;
  - (b) at all material times in the Relevant Period, an officer of CBA, within the meaning of s 9 of the Corporations Act and ASX Listing Rule 19.12.
25. Mr Shirish Apte (**Apte**) was:
- (a) from June 2014, a non-executive director of CBA; and
  - (b) throughout the Relevant Period, a member of the Risk Committee of CBA; and
  - (c) at all material times in the Relevant Period, an officer of CBA, within the meaning of s 9 of the Corporations Act and ASX Listing Rule 19.12.
26. Sir David Higgins (**Higgins**) was:
- (a) from 1 September 2014, a non-executive director of CBA;
  - (b) from 1 April 2016, a member of the Risk Committee of CBA; and
  - (c) at all material times in the Relevant Period, an officer of CBA, within the meaning of s 9 of the Corporations Act and ASX Listing Rule 19.12.
27. Ms Wendy Stops (**Stops**) was:
- (a) from 9 March 2015, a non-executive director of CBA; and
  - (b) at all material times in the Relevant Period, an officer of CBA, within the meaning of s 9 of the Corporations Act and ASX Listing Rule 19.12.
28. Ms Mary Padbury (**Padbury**) was:
- (a) from 14 June 2016, a non-executive director of CBA; and
  - (b) at all material times in the Relevant Period from 14 June 2016, an officer of CBA, within the meaning of s 9 of the Corporations Act and ASX Listing Rule 19.12.

### **A.3.5 The knowledge of the officers of CBA is the knowledge of CBA**

29. By reason of the matters pleaded in paragraphs 14 to 28, any information of which each of:

- (a) Narev;
- (b) Toevs and Cohen;
- (c) Turner, Hemstritch, Young, Anderson, Mohl, Long, Inman, Apte, Higgins and Stops (together, **2015 NEDs**); and
- (d) Livingstone and Padbury (together **2016 NEDs**),

became aware, or which ought reasonably to have come into his or her possession in the course of the performance of his or her respective duties as an officer of CBA, was information of which CBA was aware (as awareness is defined in ASX Listing Rule 19.12).

## **B. THE 3 AUGUST DISCLOSURES AND THEIR IMPACT**

### **B.1 The 3 August announcements**

30. On 3 August 2017 at approximately 12.26PM, AUSTRAC published:

- (a) a tweet that stated that “@AUSTRAC today initiated civil penalty proceedings against CBA for serious non-compliance with AML/CTF Act”;
- (b) a media release entitled “AUSTRAC seeks civil penalty orders against CBA” (which was linked through to from the tweet),

**(3 August AUSTRAC Statement).**

#### **Particulars**

- i) the tweet is to be found at <https://twitter.com/austrac?lang=en>, in the Twitter feed of “@AUSTRAC”;*
- ii) the media release is to be found at <http://www.austrac.gov.au/media/media-releases/austrac-seeks-civil-penalty-orders-against-cba>*

31. The 3 August AUSTRAC Statement, inter alia, stated that:
- (a) AUSTRAC had that day initiated civil penalty proceedings in the Federal Court against CBA for serious and systemic non-compliance with the AML/CTF Act (**AUSTRAC Proceeding**);
  - (b) the action followed an investigation by AUSTRAC into CBA's compliance, particularly regarding its use of intelligent deposit machines (**IDMs**);
  - (c) the AUSTRAC Proceeding alleged 53,700 contraventions of the AML/CTF Act; and
  - (d) In summary, the AUSTRAC Proceeding alleged:
    - (i) CBA did not comply with its own AML/CTF program, because it did not carry out any assessment of the money laundering and terrorism financing (ML/TF) risk of IDMs before their rollout in 2012, and took no steps to assess the ML/TF risk until mid-2015 - three years after they were introduced.
    - (ii) For a period of three years, CBA did not comply with the requirements of its AML/CTF program relating to monitoring transactions on 778,370 accounts.
    - (iii) CBA failed to give 53,506 threshold transaction reports (**TTRs**) to AUSTRAC on time for cash transactions of \$10,000 or more through IDMs from November 2012 to September 2015.
    - (iv) These late TTRs represent approximately 95 per cent of the threshold transactions that occurred through the bank's IDMs from November 2012 to September 2015 and had a total value of around \$624.7 million.
    - (v) The bank failed to report suspicious matters either on time or at all involving transactions totalling over \$77 million;
    - (vi) Even after CBA became aware of suspected money laundering or structuring on CBA accounts, it did not monitor its customers to mitigate and manage ML/TF risk, including the ongoing ML/TF risks of doing business with those customers.

32. The 3 August AUSTRAC Statement contained a link to a Concise Statement filed in the Federal Court in the AUSTRAC Proceeding, which inter alia stated:

- (a) In May 2012, CBA had rolled out IDMs, a type of ATM that accepts deposits by both cash and cheque, which are automatically counted and credited instantly to the nominated recipient account, the funds then being available for immediate transfer to other accounts both domestically and internationally: [1];
- (b) CBA's IDMS could accept up to 200 notes per deposit (that is, up to \$20,000 per cash transaction), and CBA did not limit the number of IDM transactions a customer can make a day: [2];
- (c) IDMs facilitate anonymous cash deposits. Although a card must be entered to activate and make a deposit through an IDM, the card could be from any financial institution and if it was not a CBA card, the cardholder details were not known to CBA: [3];
- (d) There was significant growth in CBA IDM use since their roll-out; in the six months from January to June 2016, cash deposits through IDMs grew to about \$5.81 billion, and in May and June 2016 over \$1 billion in cash was deposited each month through CBA IDMs: [4];
- (e) CBA had not complied with a number of the procedures in CBA's AML/CTF Program on and from May 2012: [5];
- (f) CBA did not carry out a ML/TF Risk assessment:
  - (i) prior to rolling out IDMs;
  - (ii) in response to the exponential rise in cash deposits through IDMs;
  - (iii) in response to alerts raised by internal transaction monitoring systems;
  - (iv) in response to identification by law enforcement of significant instances of money laundering through IDMs;
  - (v) until mid-2015, three years after IDMs were introduced (and after about \$8.91 billion in cash had been deposited through CBA IDMs),

[6];



- (g) CBA had not, at any stage and even after mid-2015, introduced appropriate risk-based systems and controls to mitigate and manage the higher ML/TF Risks it reasonable faced by providing designated services through IDMS: [7];
- (h) CBA did not comply with the requirements of its transaction monitoring program (part of CBA's AML/CTF Program) at various times between about 20 October 2012 to 27 September 2016 with respect to 778,370 accounts, none of which were subject to transaction monitoring at the "account level" at various times, and some were not subject to "customer level" transaction monitoring: [8];
- (i) CBA was required to report to AUSTRAC "threshold transactions" (being transactions involving the transfer of physical currency in the amount of \$10,000 or more) within 10 business days after the transaction occurred: [9];
- (j) CBA failed to give TTRs on time for 53,506 cash transactions of \$10,000 or more processed through IDMs from 5 November 2012 to 1 September 2015 (**Late TTRs**): [10]
- (k) In respect of the Late TTRs:
  - (i) the Late TTRs represented 95% of threshold transactions that occurred through IDMs; and
  - (ii) the Late TTRs had a total value of \$624.7 million;
  - (iii) 1,640 of the Late TTRs (totalling about \$17.3 million) related to transactions with money laundering syndicates being investigated by the Australian Federal Police or accounts connected with those investigations;
  - (iv) 6 of the Late TTRs related to 5 customers who CBA had assessed as posing a potential risk of terrorism or terrorism financing,[10];
- (l) CBA lodged 2 of the Late TTRs with AUSTRAC on 24 August 2015, and the remaining 53,504 late TTRs on 24 September 2015: [10];
- (m) CBA repeatedly failed to give suspicious matter reports (**SMRs**) to AUSTRAC either at all, or within the time required by s 41 of the AML/CTF Act, in some cases because it had adopted a policy of not submitting SMRs if the same type of suspicious behaviour had been reported any time within the 3 months prior

and in some cases because no transaction monitoring alert had been raised, alerts had not been reviewed, CBA only partially notified its suspicious, or notifications by law enforcement of unlawful activity were ignored: [12]

- (n) CBA failed to monitor its customers with a view to identifying, mitigating and managing ML/TF Risk, including:
  - (i) because in some instances no transaction monitoring alerts were raised for suspicious activity, and when alerts were raised they were not reviewed in a timely manner having regard to ML/TF risk (in many instances, not being reviewed for months after they were raised): [13];
  - (ii) because even after suspected money laundering or structuring on CBA accounts had been brought to CBA's attention (by law enforcement or through internal analysis), CBA often looked no further than whether or not to submit an SMR, and did not carry out mandatory enhanced due diligence as required (including terminating accounts), and when accounts were terminated customers were given 30 days' notice and permitted to transact on the accounts in the meantime: [14];
- (o) CBA's failure to file TTRs and SMRs on time, or at all, had deprived AUSTRAC and other law enforcement and designated agencies of information, which delays and hinders law enforcement efforts, resulting in lost intelligence and evidence, further money laundering and lost proceeds of crime: [43];
- (p) It was essential to the integrity of the Australian financial system that a major bank such as CBA had compliant and appropriate risk-based systems and controls in place to deter money laundering and terrorism financing, and the effect of CBA's conduct had exposed the Australian community to serious and ongoing financial crime: [44]

#### Particulars

i) <http://www.austrac.gov.au/sites/default/files/20170803-concise-statement-cba-s.pdf>

33. On 3 August 2017 at about 1.00PM, CBA published a media release on its website entitled "*Commonwealth Bank Response to AUSTRAC Civil Proceedings*" (**3 August CBA Statement**).

### Particulars

- i) *The 3 August CBA Statement contains source coding on the webpage indicating that the page was published at 1.00PM, and later modified at 1.28PM*

34. The 3 August CBA Statement inter alia stated that:
- (a) CBA acknowledged that civil proceedings had been brought by AUSTRAC, which related to deposits made through CBA's IDMs from 2012;
  - (b) CBA had been in discussions with AUSTRAC for an extended period and had cooperated fully with AUSTRAC's requests, and over the same period CBA had worked to continuously improve CBA's compliance and had kept AUSTRAC abreast of those efforts; and
  - (c) CBA was reviewing the nature of the AUSTRAC Proceeding and would have more to say on the specific claims in due course.
35. On 3 August 2017 between 1.47PM and 2.02PM, Reuters released 4 alerts in relation to the AUSTRAC Proceeding "*Commonwealth Bank Response to AUSTRAC Civil Proceedings*".

### Particulars

- i) *03-Aug-2017 01:47:41 PM - AUSTRAC SAYS LAUNCHES CIVIL PROCEEDINGS AGAINST COMMONWEALTH BANK CBA.AX FOR BREACHES OF ANTI-MONEY LAUNDERING RULES;*
- ii) *03-Aug-2017 01:49:37 PM - AUSTRAC SAYS ACTION FOLLOWS INVESTIGATION INTO CBA'S COMPLIANCE;*
- iii) *03-Aug-2017 01:50:51 PM - AUSTRAC SAYS ALLEGES OVER 53,700 CONTRAVENTIONS OF ANTI-MONEY LAUNDERING RULES;*
- iv) *03-Aug-2017 02:02:43 PM – AUSTRALIA'S MONEY-LAUNDERING WATCHDOG LAUNCHES CIVIL LAWSUIT AGAINST CBA.*

36. On 4 August 2017 at 12:09PM, CBA published to the ASX an announcement entitled "Commonwealth Bank response to media reports regarding AUSTRAC civil proceedings", in which CBA stated that it noted the media coverage of the AUSTRAC Proceeding, and that it was currently reviewing the claim and would file a defence.

## B.2 The price impact of the 3 August announcements

37. After about 1.00PM on 3 August 2017, following the publication of the 3 August AUSTRAC Statement and the 3 August CBA Statement (together **3 August Corrective Disclosure**), CBA's share price declined substantially.

### Particulars

- i) *On 3 August 2017, the opening price of CBA Shares was \$84.09, and increased to an intraday high was \$84.69 (reached at 12.44PM). The price of CBA Shares at 1.00PM was \$84.58, and the price thereafter declined to a closing price of \$83.97. The total traded volume was 2,372,029 shares.*
- ii) *On 4 August 2017, CBA Shares opened at \$82.51 and closed at \$80.72, on a traded volume of 9,239,819 shares.*
- iii) *The decline in the price of CBA Shares between 1.00PM on 3 August and the close of market on 4 August was \$3.86 (being 4.56% as against the price as at 1.00PM on 3 August 2017).*
- iv) *On 7 August 2017, the price of CBA Shares opened at \$80.11, being a further decline against the closing price on 4 August 2017.*
- v) *Between 7 August 2017 and 7 September 2017, the price of CBA Shares further declined to a closing price on 7 September 2017 of \$73.98*

## C. CBA'S KNOWLEDGE PRIOR TO 3 AUGUST 2017

### C.1 CBA's IDMs

38. Prior to the Relevant Period, in May 2012 CBA had rolled out IDMs which had the following features (**IDM Features**):
- (a) CBA's IDMs were a type of ATM that accepts deposits by both cash and cheque, which are automatically counted and credited instantly to the nominated recipient account, the funds then being available for immediate transfer to other accounts both domestically and internationally;
  - (b) CBA's IDMS could accept up to 200 notes per deposit (that is, up to \$20,000 per cash transaction);
  - (c) CBA did not limit the number of IDM transactions a customer could make per day; and
  - (d) CBA's IDMs facilitated anonymous cash deposits, in that although a card must be entered to activate and make a deposit through an IDM, the card could be

from any financial institution and if it was not a CBA card, the cardholder details were not known to CBA.

39. Prior to the Relevant Period, the number of cash deposits received through CBA's IDMs grew substantially. (**IDM Channel Growth**)

#### **Particulars**

- i) Between June 2012 and November 2012, a total of approximately \$89.1 million in cash was deposited through CBA's IDMs*
- ii) Between January 2015 and June 2015, a total of approximately \$3.35 billion in cash was deposited through CBA's IDMs.*
- iii) By June 2015, a total of approximately \$8.91 billion in cash had been deposited through CBA's IDMs.*

#### **C.2 The Late TTR Information**

40. Prior to the Relevant Period:

- (a) CBA had failed to give TTRs on time for tens of thousands of cash transactions of \$10,000 or more processed through IDMs following the introduction of IDMs;
- (b) the Late TTRs represented the vast majority of threshold transactions that occurred through CBA's IDMs;
- (c) the Late TTRs had a total value in excess of \$500 million;
- (d) the Late TTRs were lodged significantly late; and
- (e) there was a material risk or likelihood that some of the transactions the subject of the Late TTRs related to money laundering or terrorism financing,

**(Late TTR Information).**

#### **Particulars**

*The Applicant refers to and relies upon CBA's publication to the ASX on 9 August 2017 entitled "Statement from the Commonwealth Bank of Australia Chairman of the Board (**9 August Announcement**)", which stated, inter alia that "the alleged issues relating to Threshold Transaction Reporting (TTRs) in the Intelligent Deposit Machines (IDMs) were brought to Board's attention" in "the second half of 2015".*

41. At all material times in the Relevant Period, CBA was aware (within the meaning of ASX Listing Rule 19.12) of the Late TTR Information.

## Particulars

- i) *As to the Late TTR Information referred to in sub-paragraph 40(a):*
- (A) *At all material times on and from no later than 1 July 2015, this was information of which Toevs ought reasonably to have become aware in the course of carrying out his duties as Group Chief Risk Officer of CBA.*
  - (B) *On and from a date unknown to the Applicant with its present state of knowledge, but prior to 24 September 2015 (the **Board Knowledge Date**), each of Narev and the 2015 NEDs in office as at that time had actual knowledge of this information, and the Applicant repeats the particulars to paragraph 40;*
  - (C) *this was information of which Cohen ought reasonably to have become aware on and from 1 July 2016, in the course of taking over the duties of Chief Risk Officer from Toevs and in the course of carrying out the duties of Chief Risk Officer;*
  - (D) *this was information of which each of the 2016 NEDs ought reasonably to have become aware of on and from a date shortly after the dates of their respective appointments, by familiarising themselves with the previous records of the board of CBA.*
- ii) *As to the Late TTR Information referred to in sub-paragraphs 40(b) and (c):*
- (A) *these were matters of which Toevs and the 2015 NEDs ought reasonably to have become aware in the light of the knowledge they ought reasonably to have had, or had, as referred to in sub-paragraph (i) above; and*
  - (B) *Further, these matters which were known to Narev and the 2015 NEDs in office as at that time on and from the Board Knowledge Date, and the Applicant repeats the particulars to paragraph 40.*
  - (C) *this was information of which Cohen ought reasonably to have become aware on and from 1 July 2016, in the course of taking over the duties of Chief Risk Officer from Toevs and in the course of carrying out the duties of Chief Risk Officer;*
  - (D) *this was information of which each of the 2016 NEDs ought reasonably to have become aware of on and from a date shortly after the dates of their respective appointments, by familiarising themselves with the previous records of the board of CBA.*
- iii) *As to the Late TTR Information referred to in sub-paragraph 40(d):*
- (A) *At all material times on and from no later than 1 July 2015 (and in the Relevant Period) this was information of which Toevs ought reasonably to have become aware in the course of carrying out his duties as Group Chief Risk Officer of CBA; and*
  - (B) *these were matters which were known by Narev and the 2015 NEDs in office as at that time on and from the Board Knowledge Date, and the Applicant repeats the particulars to paragraph 40;*
  - (C) *this was information of which Cohen ought reasonably to have become aware on and from 1 July 2016, in the course of taking over the duties of Chief Risk Officer from Toevs and in the course of carrying out the duties of Chief Risk Officer;*

- (D) *this was information of which each of the 2016 NEDs ought reasonably to have become aware of on and from a date shortly after the dates of their respective appointments, by familiarising themselves with the previous records of the board of CBA.*
- iv) *As to the Late TTR Information referred to in sub-paragraph 40(e), given the purpose of s 43(2) of the AML/CTF Act was to ensure that cash transactions which might facilitate money laundering or terrorism financing were reported to AUSTRAC so that they could detect money laundering and terrorism financing, it was statistically probable that some number of the 53,306 Late TTRs related to that subject matter, and:*
- (A) *this was information of which a reasonable person in the position of Toevs, Narev, and the 2015 NEDs who had, or ought reasonably to have had the information in paragraphs 38 and 40(a) to (d) thereby ought reasonably to have known from the time they had, or ought reasonably to have had that information; and*
- (B) *this was information of which Cohen ought reasonably to have become aware on and from 1 July 2016, in the course of taking over the duties of Chief Risk Officer from Toevs and in the course of carrying out the duties of Chief Risk Officer;*
- (C) *this was information of which each of the 2016 NEDs ought reasonably to have become aware of on and from a date shortly after the dates of their respective appointments, by familiarising themselves with the previous records of the board of CBA.*

### **C.3 The IDM ML/TF Risk Assessment Non-Compliance Information**

42. CBA failed, in the period between the roll-out of CBA's IDMs in May 2012 and July 2015, to carry out an assessment of ML/TF Risk in relation to the provision of designated services through CBA's IDMs, notwithstanding the IDM Features and the IDM Channel Growth, and thereby failed to comply with its own AML/CTF program (**IDM ML/TF Risk Assessment Non-Compliance Information**).

#### **Particulars**

- i) *CBA did not conduct an assessment of ML/TF Risk before rolling out CBA's IDMs, notwithstanding the IDM Features*
- ii) *CBA did not update its assessment of ML/TF Risk notwithstanding the IDM Channel Growth*

43. At all material times in the Relevant Period, CBA was aware (within the meaning of ASX Listing Rule 19.12) of the IDM ML/TF Risk Assessment Non-Compliance Information.

#### **Particulars**

- i) *The IDM ML/TF Risk Assessment Non-Compliance Information was information of which Toevs ought reasonably to have become aware*

*in the course of carrying out his duties as Group Chief Risk Officer of CBA (in the course of which he ought also reasonably to have been aware of the IDM Features and the IDM Channel Growth) by no later than the time when the ML/TF Risk Assessment of IDMs occurred for the first time in mid-2015 (being no later than 1 July 2015).*

- (ii) The IDM ML/TF Risk Assessment Non-Compliance Information was information of which Cohen ought reasonably to have become aware on and from 1 July 2016, in the course of taking over the duties of Chief Risk Officer from Toevs and in the course of carrying out the duties of Chief Risk Officer;*
- ii) The IDM ML/TF Risk Assessment Non-Compliance Information was information of which Narev, and the 2015 NEDs ought reasonably to have become aware in the course of their duties as directors to whom Toevs reported, and of which they became actually aware at a time in the Relevant Period which is unknown to the Applicants with their present state of knowledge.*

#### **C.4 The Account Monitoring Failure Information**

44. By June 2014, CBA had failed to conduct account level monitoring with respect to hundreds of thousands of accounts for a significant period of time (**Account Monitoring Failure Information**).

##### **Particulars**

- i) CBA had identified a 'systems error' on 16 June 2014 in relation to transaction monitoring on up to 778,370 accounts, which had subsisted for a period of at least 1 year and 8 months (from 20 October 2012).*
45. At all material times in the Relevant Period, CBA was aware (within the meaning of ASX Listing Rule 19.12) of the Account Monitoring Failure Information.

##### **Particulars**

- i) The Account Monitoring Failure Information was information of which Toevs ought reasonably to have become aware in the course of carrying out his duties as Group Chief Risk Officer of CBA by no later than 16 June 2014, or alternatively the time when CBA took steps to update its Financial Crimes Platform in response to identification of the systems error, or alternatively from mid-2015 when CBA undertook a program of action to upgrade the financial crime technology used to monitor accounts and transactions for suspicious activity: 9 August Announcement.*
- ii) The Account Monitoring Failure Information was information of which Cohen ought reasonably to have become aware on and from 1 July 2016, in the course of taking over the duties of Chief Risk Officer from Toevs and in the course of carrying out the duties of Chief Risk Officer in continuing to oversee the implementation of the program of action referred to in (i) above.*



- iii) *The Account Monitoring Failure Information was information of which Narev, and the 2015 NEDs ought reasonably to have become aware in the course of their duties as directors to whom Toevs reported, and of which they became actually aware at a time in the Relevant Period which is unknown to the Applicants with their present state of knowledge.*

## **C.5 The ML/TF Risks Systems Deficiency Information**

46. At all material times in the Relevant Period, CBA's systems for assessing, monitoring and managing ML/TF Risk and reporting transactions which may be affected by ML/TF Risk in relation to IDMs, and generally, were deficient (**ML/TF Risk Systems Deficiency Information**).

### **Particulars**

- i) *The system for assessing, monitoring and managing ML/TF Risk was deficient by reason of the matters the subject of each and any combination of the Late TTR Information, the IDM ML/TF Risk Assessment Non-Compliance Information and the Account Monitoring Failure Information.*
- ii) *The system for reporting suspected money laundering and terrorism financing to authorities was also deficient in that:*
- A) *CBA adopted a policy of not giving suspicious matter reports to AUSTRAC pursuant to s 41 of the AML/CTF Act if a report had been given for the customer in question within the previous three months;*
- B) *CBA's system for reviewing transaction monitoring alerts and reviewing concerns raised by CBA employees about suspicious transactions was insufficient to give timely suspicious matter reports to AUSTRAC pursuant to s 41 of the AML/CTF Act;*
- C) *Where CBA decided to terminate a customer's account for suspected money laundering or terrorism financing, CBA gave the customer 30 days' notice and permitted ongoing transactions, including cash deposits and international transfers, on the account in the meantime;*
- D) *CBA's system for mitigating and managing the risk that its services (including IDMs) might involve or facilitate money laundering or financing or terrorism pursuant to s 36 of the AML/CTF Act was inadequate, in that in circumstances where CBA had identified a risk that a particular account was being used for money laundering or terrorism financing, CBA's system did not ensure that CBA took timely steps to verify the identity of the customer, verify whether the customer had a legitimate reason for depositing cash amounts or transferring such deposits out of the CBA, restrict transactions on the account or terminate the account.*
- ii) *The deficiencies had not completely been redressed: 9 August Announcement.*

47. At all material times in the Relevant Period CBA was aware (within the meaning of ASX Listing Rule 19.12) of the ML/TF Risk Systems Deficiency Information.

#### **Particulars**

- i) *At all times in the Relevant Period, the ML/TF Risk Systems Deficiency Information was information of which Toevs ought reasonably to have become aware in the course of carrying out his duties as Group Chief Risk Officer of CBA by no later than the time when he ought reasonably to have known of the Late TTR Information, the IDM ML/TF Risk Assessment Non-Compliance Information and/or the Account Monitoring Failure Information (as pleaded in paragraphs 41, 43 and 45.*
- ii) *On and from the Board Knowledge Date, each of Narev and the NEDs had actual knowledge of this information, or alternatively ought reasonably to have had knowledge of by reason of their position as directors of CBA, in that:*
- (A) *after the Board Knowledge Date, the board was aware that its systems had failed to lodge 53,306 TTRs on time (and failed to detect the late lodgement of the Late TTRs for a considerable period);*
- (B) *after the Board Knowledge Date, the board progressed a program of action for:*
- (I) *promptly fixing the coding error relating to the IDM TTRs;*
- (II) *changing senior leadership in the key roles overseeing financial crimes compliance, compliance more broadly and operational risk;*
- (III) *recruiting more than 15 financial crime compliance professionals;*
- (IV) *upgrading financial crime technology used to monitor accounts and transactions for suspicious activity (which upgrade was still incomplete as at 9 August 2017, and was expected “to be fully delivered over the next twelve months”);*
- (V) *commencing the upgrade of additional fraud monitoring technology,*
- (see 9 August Announcement);*
- (C) *the scale of the remedial program of action indicated the seriousness of the deficiencies in CBA’s systems for assessing and monitoring ML/TF Risk in relation to IDMs, and generally, and the potential that those deficiencies affected the assessment and monitoring of a very large number of customer transactions (and thereby customer accounts)*

#### **C.6 The Potential Penalty Information**

48. At all material times in the Relevant Period CBA was potentially exposed to enforcement action by AUSTRAC in respect of allegations of serious and systemic

non-compliance with the AML/CTF Act, which might result in CBA being ordered to pay a substantial civil penalty (**Potential Penalty Information**)

#### **Particulars**

- i) The Late TTR Information could be characterised as an allegation of serious and systemic non-compliance with the AML/CTF Act.*
- ii) The IDM ML/TF Risk Assessment Non-Compliance Information could be characterised as an allegation of serious non-compliance with the AML/CTF Act.*
- iii) The Account Monitoring Failure Information could be characterised as an allegation of serious and systemic non-compliance with the AML/CTF Act.*
- iv) The ML/TF Risk Systems Deficiency Information could be characterised as an allegation of serious and systemic non-compliance with the AML/CTF Act.*
- v) The precise quantum of the potential civil penalty would be assessed on a basis which took into account the number of contraventions of the AML/CTF Act (which was numbered in the tens of thousands, having regard to the Late TTR Information).*

49. At all material times in the Relevant Period, CBA was aware (within the meaning of ASX Listing Rule 19.12) of the Potential Penalty Information.

#### **Particulars**

- i) The Potential Penalty Information was information which ought reasonably to have been known by any reasonable person who knew or ought reasonably to have been aware of the Late TTR Information and/or the IDM ML/TF Risk Assessment Non-Compliance Information and/or the Account Monitoring Failure Information and/or the ML/TF Risks Systems Deficiency Information, having regard particularly to the number and value of transactions the subject of the Late TTRs and the issues with the IDMs the subject of the Late TTRs.*
- ii) Further, any reasonable person who knew or ought reasonably to have been aware of the Late TTR Information ought reasonably to have been aware that the lodgement in bulk of tens of thousands of Late TTRs would result in AUSTRAC further investigating CBA.*
- iii) The Applicant also refers to the fact that as at August 2017, CBA had been in discussions with AUSTRAC for “an extended period” (and refers to the 3 August CBA Statement).*

### **C.7 Continuing Omission to disclose information**

50. CBA did not, at any time prior to 3 August 2017 make any statement which disclosed to the Affected Market:

- (a) the Late TTR Information;

- (b) the IDM ML/TF Risk Assessment Non-Compliance Information;
- (c) the Account Monitoring Failure Information;
- (d) the ML/TF Risk Systems Deficiency Information; and/or
- (e) the Potential Penalty Information.

#### **D. CBA'S STATEMENTS PRIOR TO 3 AUGUST 2017**

##### **D.1 CBA's statements about AML/CTF Act compliance**

51. At all material times in the Relevant Period, CBA published on its website an "Anti-Money Laundering and Counter-Terrorism Financing Disclosure Statement" (CBA's **AML/CTF Disclosure Statement**).
52. In the AML/CTF Disclosure Statement, CBA made the following statements (**AML/CTF Compliance Statements**):
- (a) CBA was subject to, and complies with Australian law, including the AML/CTF Act;
  - (b) CBA had implemented the requirements of the AML/CTF Act within the specified timeframes;
  - (c) CBA had adopted internal policies, procedures and controls to ensure that it complied with existing legislation, and had adopted an AML/CTF Program that reasonably identified, mitigated and managed the risk of Money Laundering or Terrorism Financing (that is ML/TF Risk) in the provision of services designated by legislation;
  - (d) CBA's AML/CTF Program involved inter alia:
    - (i) Customer due diligence / Know Your Customer;
    - (ii) Monitoring of suspicious activities or transactions through a risk-based approach;
    - (iii) Reports of suspicious transactions, in that CBA was required to report suspicious customer activities or transactions to AUSTRAC and had

internal policies and procedures in place to ensure compliance with the applicable legislation and regulatory requirements;

- (iv) Reports of significant account and non-account based cash transactions and all IMTs, in that CBA was required to report cash transactions of \$10,000 or more to AUSTRAC, and had internal policies and procedures in place to ensure compliance with the applicable legislation and regulatory requirements;
  - (e) CBA's auditors and internal compliance departments conducted programs of audits and compliance testing of all CBA's operational policies and procedures including those applicable to AML, the frequency and scope of which were determined through a risk-based approach where higher risks were audited and tested more frequently;
  - (f) CBA had not been the subject of any anti-money laundering or terrorist financing-related proceedings, investigations, sanctions or punitive actions.
53. CBA did not, at any time prior to 3 August 2017 make any statement which corrected, qualified or contradicted the AML/CTF Compliance Statements.

## **D.2 CBA's 2015 statements**

54. On 12 August 2015 prior to the opening of trading on the ASX, CBA published and lodged with the ASX a number of announcements (together, **12 August 2015 Announcements**), including:
- (a) an announcement entitled "Trading Halt", which stated that CBA Shares would be placed in trading halt pending the release of an announcement by CBA, and would remain in trading halt until the commencement of normal trading on 17 August 2015;
  - (b) an announcement entitled "2015 Annual Results Profit Announcement" (**2015 Appendix 4E**);
  - (c) an announcement entitled "2015 Annual Results and Capital Update Media Release" (**2015 Media Release**);
  - (d) an announcement entitled "2015 Full Year and Capital Update Analyst Slides" (**2015 Investor Presentation**);

- (e) an announcement entitled “2015 Annual Results Media Presentation Slides”;
- (f) an announcement entitled “Cleansing Notice” (**2015 Cleansing Notice**).

55. In the 12 August 2015 Announcements, CBA was undertaking a capital raising through an pro rata renounceable entitlement offer, pursuant to which CBA would offer entitlements to CBA ordinary shares pro rata to all eligible shareholders which could be exercised to buy 1 new share for every 23 shares held on the record date for the offer at an offer price of \$71.50 per new share, which represented a 10.5% discount to the dividend adjusted closing price on the ASX on 11 August 2015 (**Entitlement Offer**), comprising:

- (a) An accelerated institutional offer to be completed by 14 August 2015; and
- (b) A retail offer to be conducted in the period from 24 August 2015 to 8 September 2015.

#### **Particulars**

- i) 2015 Investor Presentation, p.69, 71*
- ii) 2015 Retail Entitlement Offer Booklet, p.22*

56. In the 12 August 2015 Announcements, CBA also made the following statements:

- (a) Its 2015 Annual Results Profit Announcement should be read in conjunction with the 30 June 2015 Annual Financial Report of CBA (that is, the 2015 Annual Report) and any public announcements made in the period by CBA Group in accordance with the continuous disclosure requirements of the Corporations Act and ASX Listing Rules (2015 Appendix 4E, p.2); and
- (b) As at 12 August 2015:
  - (i) CBA had complied with s 674 of the Corporations Act; and
  - (ii) there was no excluded information of the type referred to in s 708AA(8) and 708AA(9) of the Corporations Act that was required to be set out in the Cleansing Notice under s 708AA(7) of the Corporations Act,

**(2015 Cleansing Notice Compliance Statement)** (2015 Cleansing Notice, p.1); and

- (c) CBA had an integrated risk management approach, whereby it actively managed major categories of risk, and its approach to risk management including governance, management, material business risks, and policies and procedures were described in the Notes to the Financial Statements in the 30 June 2015 Annual Report of CBA Group (that is, the 2015 Annual Report) (2015 Appendix 4E, p.80).

#### **Particulars**

*i) 2015 Appendix 4E, p.2, 80*

*ii) 2015 Cleansing Notice, p.1*

57. On 17 August 2015, CBA published and lodged with the ASX:
- (a) its Annual Report for the financial year ended 30 June 2015 (that is, the 2015 Annual Report); and
  - (b) an ASX Announcement entitled “Commonwealth Bank of Australia Retail Entitlement Offer Booklet”, which attached a document entitled “Retail Entitlement Offer Booklet” dated 17 August 2015 (**2015 Entitlement Offer Booklet**).
58. In the 2015 Annual Report, CBA made the following statements (**2015 Compliance Statements**):
- (a) CBA Group had undertaken an extensive review of its culture over the last 12 months. Integrity, transparency and trust were clear ingredients of “ethics”, and the task of ensuring that behaviour mirrors excellence in all of these characteristics was an ongoing task with management’s full attention, which was central to the conduct of CBA Group’s business (p.2);
  - (b) CBA was committed to ensuring that its policies and practices reflect a high standard of corporate governance, and the CBA board had adopted a comprehensive framework of Corporate Governance Guidelines (p.43);
  - (c) Throughout the 2015 financial year, CBA’s governance arrangements were consistent with the Corporate Governance Principles and Recommendations (3<sup>rd</sup> edition) published by the ASX Corporate Governance Council (p.43), with a link to the CBA Group’s Corporate Governance Statement which stated inter alia:

- (i) CBA Group's Guidelines for Communication between Bank and Shareholders set out processes to ensure that shareholders and the market are provided with full and timely information about the Group's activities in compliance with continuous disclosure requirements;
  - (ii) Continuous disclosure policy and processes are in place throughout the Group to ensure that all material matters which may potentially require disclosure are promptly reported to the CEO via established reporting lines or as part of the deliberations of the Group's Executive Committee;
- (d) CBA's Risk Committee oversees the CBA Group's Risk Management Framework, reviews regular reports from management on the measurement of risk and the adequacy of the CBA Group's risk management and internal controls systems, monitors the health of the CBA Group's risk culture, and reports any significant issues to the Board (p.134);
- (e) A material risk for CBA was "compliance risk", being the risk of legal or regulatory sanctions, material financial loss or loss of reputation that the group may suffer as a result of its failure to comply with requirements of relevant laws, regulatory bodies, industry standards and codes, which risk CBA managed with its "Compliance Risk Management Framework", with the key management forum being the Executive Committee (p.136);
- (f) CBA's "key" approaches to compliance risk included:
- (i) a structured hierarchy of committees and forums across the group, each with specified accountabilities, primarily undertaken at the business unit level;
  - (ii) maintaining pro-active relationships with CBA's regulators at all times;
  - (iii) establishing appropriate policies, processes and procedures;
  - (iv) employing appropriate management, monitoring and reporting of compliance activities,
- (p.136).

### **Particulars**

*2015 Annual Report, pp. 43, 134, 136*



59. In each of the 12 August 2015 Announcements and the 2015 Entitlement Offer Booklet, CBA made the following statements (also **2015 Compliance Statements**):

- (a) CBA managed risks relating to legal and regulatory requirements, sales, trading and advisory practices, potential conflicts of interest, money laundering laws, foreign exchange controls, trade sanctions laws, privacy laws, ethical issues and conduct by companies in which CBA holds strategic investments, which may cause harm to its reputation amongst customers and investors (pp.138, 22);
- (b) Failure to appropriately manage some of these risks could subject CBA to litigation, legal and regulatory enforcement actions, fines and penalties (pp.128, .22).

#### **Particulars**

*i) 2015 Investor Presentation, p.138.*

*ii) 2015 Retail Entitlement Offer Booklet, p.22.*

60. On 28 August 2015, CBA published the 2015 US Disclosure Document, in which CBA made the following statements (also **2015 Compliance Statements**):

- (a) One of the principal risk factors that could materially affect CBA's business was that CBA Group was subject to extensive regulation which could impact its results, including in that:
  - (i) anti-money laundering and counter-terrorism financing had been the subject of increasing regulatory change and enforcement in recent years;
  - (ii) if CBA Group failed to comply with the requirements of such regulations, it may become subject to significant regulatory fines, regulatory sanctions and suffer material financial loss or loss of reputation, and the increasing volume, complexity and global reach of such regulatory requirements, and the increase propensity for sanctions and the level of financial penalties for breaches of requirements, could exacerbate the severity of this risk,(p.17);
- (b) reputational damage could harm CBA Group's business and prospects, which could include breaching legal and regulatory requirements (such as money laundering laws), and non-compliance with internal policies and procedures,

and failure to address these issues appropriately could also give rise to additional legal risk, subjecting the CBA Group to regulatory enforcement actions, fines and penalties, or harm the CBA Group's reputation and integrity among the Group's customers, investors and other stakeholders (p.21)

- (c) CBA's Risk Committee oversees the CBA Group's Risk Management Framework, reviews regular reports from management on the measurement of risk and the adequacy of the CBA Group's risk management and internal controls systems and monitors the health of the CBA Group's risk culture, and reports any significant issues to the Board (p.87);
- (d) A principal risk for CBA was Compliance Risk being the risk of legal or regulatory sanctions, material financial loss or loss of reputation that the group may suffer as a result of its failure to comply with requirements of relevant laws, regulatory bodies, industry standards and codes, which risk CBA managed with its "Compliance Risk Management Framework", with the key management forum being the Executive Committee (p.89); and
- (e) CBA's "key" approaches to compliance risk included:
  - (i) a structured hierarchy of committees and forums across the group, each with specified accountabilities, primarily undertaken at the business unit level;
  - (ii) maintaining pro-active relationships with CBA's regulators at all times;
  - (iii) establishing appropriate policies, processes and procedures;
  - (iv) employing appropriate management, monitoring and reporting of compliance activities,(p.89).

61. CBA did not, at any time prior to 3 August 2017 make any statement which corrected, qualified or contradicted the 2015 Cleansing Notice Compliance Statement, and the 2015 Compliance Statements.

### **D.3 CBA's 2016 statements about regulatory compliance**

62. On 15 August 2016, CBA published and lodged with the ASX its Annual Report for the financial year ended 30 June 2016 (that is, the 2016 Annual Report).

63. In the 2016 Annual Report, CBA made the following statements (**2016 Compliance Statements**):

- (a) CBA was committed to ensuring that its policies and practices reflect a high standard of corporate governance, and the CBA board had adopted a comprehensive framework of Corporate Governance Guidelines (p.46), with a link to the Corporate Governance Statement which stated, inter alia:
  - (i) CBA Group's Guidelines for Communication between Bank and Shareholders set out processes to ensure that shareholders and the market are provided with full and timely information about the Group's activities in compliance with continuous disclosure requirements;
  - (ii) Continuous disclosure policy and processes are in place throughout the Group to ensure that all material matters which may potentially require disclosure are promptly reported to the CEO via established reporting lines or as part of the deliberations of the Group's Executive Committee;
- (b) Throughout the 2016 financial year, CBA's governance arrangements were consistent with the Corporate Governance Principles and Recommendations (3<sup>rd</sup> edition) published by the ASX Corporate Governance Council (p.46);
- (c) CBA's Risk Committee oversees the CBA Group's Risk Management Framework, reviews regular reports from management on the measurement of risk and the adequacy of the CBA Group's risk management and internal controls systems and monitors the health of the CBA Group's risk culture (via both formal reports and through its dialogues with the risk leadership team and executive management), and reports any significant issues to the Board (p.137);
- (d) CBA regarded risk culture (being the collection of values, ideas, skills and habits that equip group employees and directors to see and talk about risks, and make sound judgments in the absence of definitive rules, regulations or market signals) as an aspect of overall culture, and the CBA Group's risk culture flourished within an organisational context that emphasised and rewarded integrity, accountability, collaboration, service and excellence (p.137);
- (e) CBA had Risk Policies & Procedures which provided guidance to the business on the management of each material risk, and supported CBA Group's Risk

Management Framework by, inter alia, outlining a process for monitoring, communicating and reporting risk issues, including escalation procedures for the reporting of material risks (p.137).

- (f) A material risk for CBA was “compliance risk”, being the risk of legal or regulatory sanctions, material financial loss or loss of reputation that the group may suffer as a result of its failure to comply with “Compliance Obligations”, being formal requirements that may arise from various sources including but not limited to laws, regulations, legislation, industry standards, rules, codes or guidelines which risk CBA managed with its Group Operational Risk Management Framework, the “Compliance Risk Management Framework”, and the Compliance Incident Management Group Policy with the key management forum being the Executive Committee and the Data Governance Committee (p.139).

### **Particulars**

*2016 Annual Report, pp.46, 137, 139*

- 64. On 26 August 2016, CBA published the 2016 US Disclosure Document, in which CBA made the following statements (also 2016 Compliance Statements):
  - (a) One of the principal risk factors that could materially affect CBA’s business was that CBA Group was subject to extensive regulation which could impact its results, including in that:
    - (i) anti-money laundering and counter-terrorism financing had been the subject of increasing regulatory change and enforcement in recent years;
    - (ii) if CBA Group failed to comply with the requirements of such regulations, it may become subject to significant regulatory fines, regulatory sanctions and suffer material financial loss or loss of reputation, and the increasing volume, complexity and global reach of such regulatory requirements, and the increase propensity for sanctions and the level of financial penalties for breaches of requirements could exacerbate the severity of this risk,(p.17);
  - (b) reputational damage could harm CBA Group’s business and prospects, which could include breaching legal and regulatory requirements (such as money laundering laws), and non-compliance with internal policies and procedures,

and failure to address these issues appropriately could also give rise to additional legal risk, subjecting the CBA Group to regulatory enforcement actions, fines and penalties, or harm the CBA Group's reputation and integrity among the Group's customers, investors and other stakeholders (p.21);

- (c) CBA had engaged in significant spend on risk and compliance projects implementing systems to assist in satisfying new regulatory obligations, including Anti-Money Laundering (p.34);
- (d) CBA's Risk Committee oversees the CBA Group's Risk Management Framework, reviews regular reports from management on the measurement of risk and the adequacy of the CBA Group's risk management and internal controls systems and monitors the health of the CBA Group's risk culture (via both formal reports and through its dialogues with the risk leadership team and executive management), and reports any significant issues to the Board (p.86);
- (e) CBA regarded risk culture (being the collection of values, ideas, skills and habits that equip group employees and directors to see and talk about risks, and make sound judgments in the absence of definitive rules, regulations or market signals) as an aspect of overall culture, and the CBA Group's risk culture flourished within an organisational context that emphasised and rewarded integrity, accountability, collaboration, service and excellence (p.86);
- (f) CBA had Risk Policies & Procedures which provided guidance to the business on the management of each material risk, and supported CBA Group's Risk Management Framework by, inter alia, outlining a process for monitoring, communicating and reporting risk issues, including escalation procedures for the reporting of material risks (p.88).
- (g) A major risk class for CBA was "compliance risk", being the risk of legal or regulatory sanctions, material financial loss or loss of reputation that the group may suffer as a result of its failure to comply with "Compliance Obligations", being formal requirements that may arise from various sources including but not limited to laws, regulations, legislation, industry standards, rules, codes or guidelines which risk CBA managed with its Group Operational Risk Management Framework, the "Compliance Risk Management Framework", and the Compliance Incident Management Group Policy with the key management

forum being the Executive Committee and the Data Governance Committee (p.88).

65. CBA did not, at any time prior to 3 August 2017 make any statement which corrected, qualified or contradicted the 2016 Compliance Statements.

#### **D.4 CBA's Compliance Representations**

66. By the matters pleaded in paragraphs 51 to 65, CBA represented to the Affected Market throughout the Relevant Period that:

- (a) CBA had in place effective systems for ensuring compliance by CBA with relevant regulatory requirements (including the AML/CTF Act); and/or
- (b) CBA's risk management systems had ensured appropriate monitoring and reporting of compliance activities (including compliance with the AML/CTF Act),

**(Compliance Representations).**

#### **Particulars**

- i) The Compliance Representations are to be implied from:
  - A) the AML/CTF Compliance Statements;*
  - B) the 2015 Compliance Statements, from the dates they were made; and*
  - C) the 2016 Compliance Statements, from the dates they were made; and*
  - D) the absence of any correction or qualification to the statements referred to in (A) to (C).**

#### **D.5 CBA's Continuous Disclosure Representation**

67. By the matters pleaded in paragraphs 54 to 65, CBA continuously represented to the Affected Market throughout the Relevant Period that it was in compliance with its Continuous Disclosure Obligations (**Continuous Disclosure Representation**).

#### **Particulars**

- i) The Continuous Disclosure Representation was partly express and partly implied.*
- ii) To the extent it was express, the Applicant refers to the statements in the 2015 Cleansing Notice pleaded in sub-paragraph 56(b);*

*iii) To the extent it was implied, it is to be implied from:*

*A) at all times, CBA's listing on the ASX which required adherence to ASX Listing Rule 3.1,*

*B) the statements in the 2015 Cleansing Notice pleaded in sub-paragraph 56(b), from the date they were made;*

*C) the 2015 Compliance Statements pleaded in sub-paragraphs 58(c)(i) and (ii), from the dates they were made; and*

*D) the 2016 Compliance Statements (as pleaded in sub-paragraph 63(a)(i) to (ii)), from the dates they were made; and*

*E) the absence of any correction or qualification to the statements referred to in (B) to (D) above,*

## **D.6 Continuing Representations**

68. Each of the Compliance Representations and the Continuous Disclosure Representation was a continuing representation throughout the Relevant Period.

### **Particulars**

*i) The Compliance Representations and the Continuous Disclosure Representation were of their nature likely to be continuing unless and until information was published to the Affected Market information which corrected or qualified them;*

*ii) Paragraphs 61 and 65 are repeated.*

## **E. CBA'S CONTRAVENING CONDUCT**

### **E.1 Continuous Disclosure Contraventions**

#### ***E.1.1 Late TTR Continuous Disclosure Contraventions***

69. As at, and from, 1 July 2015, the Late TTR Information was information that a reasonable person would expect to have a material effect on the price or value of CBA Shares within the meaning of ASX Listing Rule 3.1 and s 674(2)(c)(ii) of the Corporations Act.

70. By reason of CBA's Continuous Disclosure Obligations and the matters pleaded in paragraph 69 on and from 1 July 2015, CBA became obliged immediately to tell the ASX the Late TTR Information.

71. CBA did not inform the ASX of the Late TTR Information immediately on 1 July 2015, or at all in the Relevant Period, and the Affected Market did not become aware of that information until 3 August 2017, and sub-paragraph 50(a) is repeated.
72. By reason of the matters pleaded in paragraphs 41 and 69 to 71, CBA contravened ASX Listing Rule 3.1 and s 674(2) of the Corporations Act (**Late TTR Continuous Disclosure Contravention**).

### ***E.1.2 IDM ML/TF Risk Assessment Non-Compliance Continuous Disclosure Contraventions***

73. As at, and from, 1 July 2015, the IDM ML/TF Risk Assessment Non-Compliance Information was information that a reasonable person would expect to have a material effect on the price or value of CBA Shares within the meaning of ASX Listing Rule 3.1 and s 674(2)(c)(ii) of the Corporations Act.
74. By reason of CBA's Continuous Disclosure Obligations and the matters pleaded in paragraph 73 on and from 1 July 2015, CBA became obliged immediately to tell the ASX the IDM ML/TF Risk Assessment Non-Compliance Information.
75. CBA did not inform the ASX of the IDM ML/TF Risk Assessment Non-Compliance Information immediately on 1 July 2015, or at all in the Relevant Period and the Affected Market did not become aware of that information until 3 August 2017, and sub-paragraph 50(b) is repeated.
76. By reason of the matters pleaded in paragraphs 43 and 73 to 75, CBA contravened ASX Listing Rule 3.1 and s 674(2) of the Corporations Act (**IDM ML/TF Risk Assessment Non-Compliance Continuous Disclosure Contravention**).

### ***E.1.3 Account Monitoring Failure Continuous Disclosure Contraventions***

77. As at, and from, 1 July 2015, the Account Monitoring Failure Information was information that a reasonable person would expect to have a material effect on the price or value of CBA Shares within the meaning of ASX Listing Rule 3.1 and s 674(2)(c)(ii) of the Corporations Act.
78. By reason of CBA's Continuous Disclosure Obligations and the matters pleaded in paragraph 77, on and from 1 July 2015 CBA became obliged immediately to tell the ASX the Account Monitoring Failure Information.



79. CBA did not inform the ASX of the Account Monitoring Failure Information immediately on 1 July 2015, or at all in the Relevant Period, and the Affected Market did not become aware of that information until 3 August 2017, and sub-paragraph 50(c) is repeated.
80. By reason of the matters pleaded in paragraphs 45 and 77 to 79, CBA contravened ASX Listing Rule 3.1 and s 674(2) of the Corporations Act (**Account Monitoring Failure Continuous Disclosure Contravention**).

#### ***E.1.4 ML/TF Risks Systems Deficiency Continuous Disclosure Contraventions***

81. As at, and from, 1 July 2015, the ML/TF Risk Systems Deficiency Information was information that a reasonable person would expect to have a material effect on the price or value of CBA Shares within the meaning of ASX Listing Rule 3.1 and s 674(2)(c)(ii) of the Corporations Act.
82. By reason of CBA's Continuous Disclosure Obligations and the matters pleaded in paragraph 81, on and from 1 July 2015 CBA became obliged immediately to tell the ASX the ML/TF Risk Systems Deficiency Information.
83. CBA did not inform the ASX of the ML/TF Risk Systems Deficiency Information immediately on 1 July 2015, or at all in the Relevant Period, and the Affected Market did not become aware of that information until 3 August 2017, and sub-paragraph 50(d) is repeated.
84. By reason of the matters pleaded in paragraphs 47 and 81 to 83, CBA contravened ASX Listing Rule 3.1 and s 674(2) of the Corporations Act (**ML/TF Risk Systems Deficiency Continuous Disclosure Contravention**).

#### ***E.1.5 Potential Penalty Continuous Disclosure Contraventions***

85. As at, and from, 1 July 2015, the Potential Penalty Information was information that a reasonable person would expect to have a material effect on the price or value of CBA Shares within the meaning of ASX Listing Rule 3.1 and s 674(2)(c)(ii) of the Corporations Act.
86. By reason of CBA's Continuous Disclosure Obligations and the matters pleaded in paragraph 85, on and from 1 July 2015 CBA became obliged immediately to tell the ASX the Potential Penalty Information.

87. CBA did not inform the ASX of the Potential Penalty Information immediately on 1 July 2015, or at all, and the Affected Market did not become aware of that information until 3 August 2017, and sub-paragraph 50(e) is repeated.
88. By reason of the matters pleaded in paragraphs 49 and 85 to 87, CBA contravened ASX Listing Rule 3.1 and s 674(2) of the Corporations Act (**Potential Penalty Continuous Disclosure Contravention**).

#### ***E.1.6 Combined Continuous Disclosure Contraventions***

89. Further or alternatively to paragraphs 69 to 72, 73 to 76, 77 to 80, 81 to 84 and 85 to 88, any combination of two or more items of the following information:
- (a) the Late TTR Information;
  - (b) the IDM ML/TF Risk Assessment Non-Compliance Information;
  - (c) the Account Monitoring Failure Information;
  - (d) the ML/TF Risk Systems Deficiency Information; and/or
  - (e) the Potential Penalty Information

was information that a reasonable person would expect to have a material effect on the price or value of CBA Shares within the meaning of ASX Listing Rule 3.1 and s 674(2)(c)(ii) of the Corporations Act.

90. By reason of CBA's Continuous Disclosure Obligations and the matters pleaded in paragraph 89, on and from 1 July 2015 CBA became obliged immediately to tell the ASX any combination of two or more items of the information referred to in paragraph 89.
91. CBA did not inform the ASX of any combination of two or more items of the information referred to in paragraph 89 immediately on 1 July 2015, or at all, and the Affected Market did not become aware of that information until 3 August 2017, and paragraph 50 is repeated.
92. By reason of the matters pleaded in paragraphs 41, 43, 45, 47 and/or 49 and 89 to 91, CBA contravened ASX Listing Rule 3.1 and s 674(2) of the Corporations Act (**Combined Continuous Disclosure Contraventions**).

## **E.2 Misleading or deceptive conduct**

### **E.2.1 Compliance Representations**

93. The conduct pleaded in paragraphs 51 to 66 (including the making of the Compliance Representations) was conduct engaged in by CBA:
- (a) in relation to financial products (being CBA Shares), within the meaning of subsections 1041H(1) and 1041H(2)(b) of the Corporations Act;
  - (b) in trade or commerce, in relation to financial services within the meaning of section 12DA(1) of the ASIC Act; and
  - (c) in trade or commerce, within the meaning of s 18 of the ACL.
94. By reason of the matters pleaded in sub-paragraphs 40, 42, 44, 46 and/or 48 on and from 1 July 2015, in making, maintaining and/or failing to correct or qualify the Compliance Representations, CBA engaged in conduct which was misleading or deceptive, or likely to mislead or deceive.
95. By reason of the matters pleaded in paragraphs 93 to 94, on and from 1 July 2015 CBA contravened s 1041H of the Corporations Act, s 12DA(1) of the ASIC Act and/or s 18 of the ACL (**Compliance Misleading Conduct Contravention**).

### **E.2.2 Continuous Disclosure Representation**

96. The conduct pleaded in paragraphs 54 to 65 and 67 (including the making of the Continuous Disclosure Representation) was conduct engaged in by CBA:
- (a) in relation to financial products (being CBA Shares), within the meaning of subsections 1041H(1) and 1041H(2)(b) of the Corporations Act;
  - (b) in trade or commerce, in relation to financial services within the meaning of section 12DA(1) of the ASIC Act; and
  - (c) in trade or commerce, within the meaning of s 18 of the ACL.
97. By reason of the matters pleaded in:
- (a) paragraphs 40 and 69 to 72
  - (b) paragraphs 42 and 73 to 76;

- (c) paragraphs 44 and 77 to 80;
- (d) paragraphs 46 and 81 to 84;
- (e) paragraphs 48 and 85 to 88; and/or
- (f) paragraphs 40, 42, 44, 46 and/or 48 and paragraphs 89 to 92,

on and from 1 July 2015, in making, maintaining and/or failing to correct or qualify the Continuous Disclosure Representation, CBA engaged in conduct which was misleading or deceptive, or likely to mislead or deceive.

98. By reason of the matters pleaded in paragraphs 96 to 97, on and from 1 July 2015 CBA contravened s 1041H of the Corporations Act, s 12DA(1) of the ASIC Act and/or s 18 of the ACL, (**Continuous Disclosure Misleading Conduct Contravention**).

### **E.3 Continuing nature of CBA's contraventions**

99. Each of:

- (a) the Late TTR Continuous Disclosure Contravention;
- (b) the IDM ML/TF Risk Assessment Non-Continuous Disclosure Contravention;
- (c) the Account Monitoring Failure Continuous Disclosure Contravention;
- (d) the ML/TF Risk Systems Deficiency Continuous Disclosure Contravention;
- (e) the Potential Penalty Continuous Disclosure Contravention; and/or
- (f) the Combined Continuous Disclosure Contraventions,

was a continuing contravention, which of its nature continued from and after 1 July 2015 during the Relevant Period until such time as the Late TTR Information, the IDM ML/TF Risk Assessment Non-Compliance Information, the Account Monitoring Failure Information, the ML/TF Risk Systems Deficiency Information and/or the Potential Penalty Information was disclosed to the Affected Market on 3 August 2017.

### **Particulars**

- i) Paragraphs 50, 71, 75, 79, 83, 87 and 91 are repeated*

100. Each of:

- (a) the Compliance Misleading Conduct Contravention; and/or
- (b) the Continuous Disclosure Misleading Conduct Contravention,

was a continuing contravention, which of its nature continued from and after 1 July 2015 during the Relevant Period until such time as the misleading nature of the representations was revealed to the Affected Market by the disclosure of the Late TTR Information the IDM ML/TF Risk Assessment Non-Compliance Information, the Account Monitoring Failure Information, the ML/TF Risk Systems Deficiency Information and/or the Potential Penalty Information on 3 August 2017.

#### **Particulars**

- i) Paragraphs 68, 71, 75, 79, 83, 87 and 91 are repeated.*

## **F. CONTRAVENING CONDUCT CAUSED LOSS**

### **F.1 Market-based causation (On-Market Acquisitions)**

101. The Applicant and Group Members acquired an interest in CBA Shares in a market of investors or potential investors in CBA Shares:

- (a) operated by the ASX;
- (b) regulated by, inter alia, sections 674(2) of the Corporations Act and ASX Listing Rule 3.1 (and by s 708AA of the Corporations Act in respect of rights issues such as the Entitlement Offer);
- (c) where the price or value of CBA Shares would reasonably be expected to have been informed or affected by information disclosed in accordance with sections 674(2) of the Corporations Act and ASX Listing Rule 3.1;
- (d) where material information had not been disclosed, which a reasonable person would expect, had it been disclosed, would have had a material adverse effect on the price or value of CBA Shares (namely the information the subject of the contraventions of s 674(2) of the Corporations Act pleaded in this Statement of Claim (or any of them) (together, the **Contravening Omissions**);

- (e) where misleading or deceptive conduct had occurred, namely the conduct the subject of the Compliance Misleading Conduct Contraventions and the Continuous Disclosure Misleading Conduct Contraventions (together **Other Contravening Conduct**), that a reasonable person would expect to have a material effect on the price or value of CBA Shares, in that if they had not been made no investors or potential investors in CBA Shares would have been in a position to read or rely upon them; and
- (f) in which during the Relevant Period each or a combination of:
- (i) the Late TTR Continuous Disclosure Contravention;
  - (ii) the IDM ML/TF Risk Assessment Non-Continuous Disclosure Contravention;
  - (iii) the Account Monitoring Failure Continuous Disclosure Contravention;
  - (iv) the ML/TF Risk Systems Deficiency Continuous Disclosure Contravention;
  - (v) the Potential Penalty Continuous Disclosure Contravention;
  - (vi) the Combined Continuous Disclosure Contraventions;
  - (vii) the Compliance Misleading Conduct Contraventions (or any of them);  
and/or
  - (viii) the Continuous Disclosure Misleading Conduct Contraventions (or any of them),

(each being a **Market Contravention**) caused or materially contributed to the market price of CBA Shares to be substantially greater than their true value and/or the market price that would have prevailed but for the Market Contraventions, from the respective dates that those Market Contraventions commenced, as pleaded in this Statement of Claim.

### **Particulars**

*The extent to which the Market Contraventions caused the market price for CBA Shares to be substantially greater than their true value and/or the market price that would otherwise had prevailed (that is, inflated) during the Relevant Period is a matter for evidence, particulars of which will be served immediately following the Applicant filing opinion evidence in the proceeding.*

102. The decline in the price of CBA Shares pleaded in paragraph 37 above:
- (a) was caused or materially contributed to by:
    - (i) the market's reaction to the information communicated to the Affected Market in the 3 August Corrective Disclosure, in the context of what had been communicated to the Affected Market prior to those announcements; and
    - (ii) the Market Contraventions;
  - (b) would, to the extent they removed inflation from the price of CBA Shares, have occurred, or substantially occurred, earlier if:
    - (i) CBA had disclosed to the Affected Market the information that was the subject of Contravening Omissions; and/or
    - (ii) CBA had not engaged in the Other Contravening Conduct.

#### **Particulars**

*The extent to which inflation was removed from the price of CBA Shares, and would have been removed at earlier points in time during the Relevant Period is a matter for evidence, particulars of which will be served immediately following the Applicant filing expert evidence.*

#### **F.2 Market-based causation (Capital Raising Acquisitions)**

103. Between 12 August and 8 September, CBA conducted the Entitlement Offer and:
- (a) between 12 and 17 August 2015 invited eligible institutional shareholders to acquire CBA Shares, with such new CBA Shares being issued on 26 August 2015; and
  - (b) between 24 August and 8 September 2015, invited eligible retail shareholders to acquire CBA Shares, with such new CBA Shares issued on 18 September 2015.

#### **Particulars**

- i) On 12 August 2015, CBA published and lodged with the ASX the 12 August 2015 Announcements, announcing the Entitlement Offer, and paragraphs 54, 55 and 57(b) are repeated*

- ii) *Announcement entitled “Commonwealth Bank of Australia Retail Entitlement Offer – Communication to shareholders”, which attached a copy of a postcard sent that day to all CBA shareholders in Australia and New Zealand, which stated inter alia that:*
  - A) *Eligible shareholders could purchase 1 new Commbank ordinary share for every 23 ordinary shares they hold on the record date (7:00PM (Sydney time) on 17 August 2015); and*
  - B) *Eligible retail shareholders could exercise their entitlements until the offer closed on 8 September 2015;*
- iii) *On 17 August 2015, CBA published and lodged with ASX an ASX Announcement entitled “Entitlement Offer”, which stated that:*
  - A) *CBA had successfully completed the institutional component of the Entitlement Offer;*
  - B) *The institutional entitlement offer and institutional bookbuild had raised approximately \$2.1 billion, with approximately 90% of entitlements exercised by eligible institutional shareholders, and had occurred at a clearing price of \$78.00 per new share (being the offer price of \$71.50 per share plus \$6.50 per entitlement);*
  - C) *New shares to be issued as part of the institutional entitlement offer (including those subject to the institutional bookbuild) were expected to be issued on Wednesday 26 August 2015, and commence trading on ASX on the same day;*
  - D) *CBA ordinary shares would resume trading on ASX from the open of market on 17 August 2015; and*
  - E) *the retail component of the Entitlement Offer would open on Monday 24 August 2015 and close at 5:00PM (Sydney time) on Tuesday 8 September 2015.*
- iv) *On 14 September 2015, CBA published and lodged with ASX an ASX Announcement entitled “Entitlement Offer”, which stated that:*
  - A) *CBA had successfully completed the bookbuild for the retail component of the Entitlement Offer;*
  - B) *The retail entitlement offer when combined with the institutional entitlement offer had raised \$5.1 billion, and had occurred at a clearing price of \$73.50 per New Share (being the offer price of \$71.50 per share, plus \$2.00 per entitlement);*
  - C) *New shares to be issued as part of the retail entitlement offer (including those subject to the retail bookbuild) were expected to be issued on Friday 18 September 2015 and to commence trading on ASX on Monday 21 September 2015.*



104. The Entitlement Offer was undertaken:
- (a) at an offer price of \$71.50 per new CBA Share, being a price fixed by reference to the market price of CBA Shares, which traded in a market with the features pleaded in paragraph 101; and
  - (b) at a price which, by reason of the matters pleaded in sub-paragraph (a):
    - (i) would reasonably be expected to have been informed or affected by information disclosed in accordance with sections 674(2) of the Corporations Act and ASX Listing Rule 3.1;
    - (ii) was set in circumstances where material information had not been disclosed, which a reasonable person would expect, had it been disclosed, would have had a material adverse effect on the price or value of CBA Shares (namely the information the subject of the Contravening Omissions); and
    - (iii) was set in circumstances where the Other Contravening Conduct had occurred, being conduct involving making, and failing to correct or qualify representations that a reasonable person would expect to have a material effect on the price or value of CBA Shares (namely the Compliance Representations and the Continuous Disclosure Representation), in that if they had not been made no investors or potential investors in CBA Shares would have been in a position to read or rely upon them.

#### **Particulars**

*The extent to which the Market Contraventions caused the offer price for CBA Shares under the Entitlement Offer to be substantially greater than their true value and/or the price that they would have been offered had had they been set by reference to the market price that would otherwise have prevailed (that is, inflated) is a matter for evidence, particulars of which will be served immediately following the Applicant filing opinion evidence in the proceeding.*

105. Paragraph 102 is repeated.

#### **F.3 Reliance**

106. Further, or in the alternative to paragraphs 101 to 102 and/or 103 to 105, in the decision to acquire an interest in CBA Shares:

- (a) the Applicant and some Group Members would not have acquired interests in CBA Shares if they had known the information the subject of Contravening Omissions; and/or
- (b) the Applicant and some Group Members relied directly on some or all of:
  - (i) the representations the subject of the Other Contravening Conduct (namely, the Compliance Representations and the Continuous Disclosure Representation); and/or
  - (ii) the absence of any correction or qualification to the representations the subject of the Other Contravening Conduct (namely, the Compliance Representations and the Continuous Disclosure Representation).

#### **Particulars**

- i) The Applicant would not have acquired an interest in CBA Shares in the Entitlement Offer had he known the information the subject of the Contravening Omissions or had the representations the subject of the Other Contravening Conduct (namely, the Compliance Representations and the Continuous Disclosure Representation) been corrected or qualified prior to his acquisition.*
- ii) The identities of all those Group Members which or who would not have acquired an interest in CBA Shares had they known of any or all of the information that was the subject of the Contravening Omissions and/or which or who relied directly on any or all of the Other Contravening Conduct are not known with the current state of the Applicant's knowledge and cannot be ascertained unless and until those advising the Applicant take detailed instructions from all Group Members on individual issues relevant to the determination of those individual Group Member's claims; those instructions will be obtained (and particulars of the identity of those Group Members will be provided) following opt out, the determination of the Applicant's claim and identified common issues at an initial trial and if and when it is necessary for a determination to be made of the individual claims of those Group Members.*

#### **F.4 Loss or damage suffered by the Applicant and Group Members**

107. By reason of the matters pleaded in paragraphs 101 to 102 and/or 103 to 105 and/or 106, the Applicant and Group Members have suffered loss and damage by and resulting from the Market Contraventions (or any one or combination of them).

#### **Particulars**

- i) The loss suffered by the Applicant will be calculated by reference to:*

- A. *the difference between the price at which CBA Shares were acquired by the Applicant during the Relevant Period and the true value of that interest; or*
  - B. *the difference between the price at which the Applicant acquired an interest in CBA Shares and the market price that would have prevailed had the Market Contraventions not occurred; or*
  - C. *alternatively, the days during the Relevant Period where the traded price of CBA Shares fell as a result of the disclosure information which had not previously been disclosed because of the Market Contraventions, and the quantum of that fall; or*
  - D. *alternatively, the days after the Relevant Period when the traded price of CBA Shares fell as a result of the disclosure of information which had not previously been disclosed because of the Market Contraventions, and the quantum of that fall;*
  - E. *alternatively, the difference between the price at which CBA Shares were acquired by the Applicant and the price in left in hand.*
- ii) *Further particulars in relation to the Applicant's losses will be provided after the service of evidence in chief.*
  - iii) *Particulars of the losses of Group Members are not known with the current state of the Applicant's knowledge and cannot be ascertained unless and until those advising the Applicant take detailed instructions from all Group Members on individual issues relevant to the determination of those individual Group Member's claims; those instructions will be obtained (and particulars of the losses of those Group Members will be provided) following opt out, the determination of the Applicant's claim and identified common issues at an initial trial and if and when it is necessary for a determination to be made of the individual claims of those Group Members.*

Date: 9 October 2017



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Signed by Andrew Watson  
Lawyer for the Applicant

This pleading was prepared by W.A.D. Edwards of counsel, and settled by C.A. Moore of senior counsel.

### **Certificate of lawyer**

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

Date: 9 October 2017



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Signed by Andrew Watson  
Lawyer for the Applicant

## SCHEDULE A (DEFINED TERMS)

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