



Form 33

Rule 16.32

DEFENCE

No VID 1153 of 2018

Federal Court of Australia

District Registry: Victoria

Division: General

AUSTRALIAN SECURITIES AND INVESTMENTS COMMISSION

Plaintiff

AUSTRALIA AND NEW ZEALAND BANKING GROUP LIMITED (ACN 005 357 522)

Defendant

Unless otherwise stated, this Defence adopts the defined terms used in the Further Amended Statement of Claim dated 4 June 2019 (**FASOC**) (without admission as to any allegation contained in, or implied by, any defined terms used in the FASOC and adopted in this Defence).

In answer to the allegations in the FASOC, the Defendant (**ANZ**) states as follows.

Parties

- 1 It admits the allegations in paragraph 1.
- 2 It admits the allegations in paragraph 2.
- 3 It admits the allegations in paragraph 3.
- 4 As to paragraph 4, it:
 - (a) admits that the Underwriting Agreement contained provisions generally to the effect alleged;
 - (b) says that at trial it will refer to the Underwriting Agreement for its full terms and effect.

The Placement

- 5 It admits the allegations in paragraph 5.

- 6 It admits the allegations in paragraph 6.
- 7 It admits the allegations in paragraph 7.
- 8 It admits the allegations in paragraph 8 and says that at trial it will refer to the Placement Announcement for its full terms and effect.
- 9 It admits the allegations in paragraph 9.
- 9A In relation to the Placement:
- (a) applications at the price of \$30.95 per share were received from institutional investors, being eligible investors under cl 1(e) of the Underwriting Agreement, for more than the full amount of the Placement Shares;
 - (b) ANZ was informed by the Underwriters of the matters set out in sub-paragraph (a) above;

Particulars

As to sub-paragraphs (a) and (b):

- (i) at 12:03pm on 6 August 2015, Anthony Hanna of Citi sent an email to Rick Moscati and John Needham of ANZ, which was copied to representatives of JPM and DB, which attached a document entitled "ANZ Placement" which recorded that at a price of \$30.95 per share the Underwriters had "demand" from institutional investors (that is applications) for 37,387,266 shares, such that the book was 46% covered;
- (ii) at 2:34pm on 6 August 2015, Anthony Hanna of Citi sent an email to Rick Moscati and John Needham of ANZ, which was copied to representatives of JPM and DB, which attached an updated version of the document entitled "ANZ Placement" which recorded that at a price of \$30.95 per share the Underwriters had "demand" from institutional investors (that is applications) for 65,751,915 shares, such that the book was 81% covered;
- (iii) at 8:35pm on 6 August 2015, Kristopher Salinger of Citi sent an email to Rick Moscati and John Needham of ANZ, which was copied to representatives of JPM and DB, which attached an updated version of the document entitled "ANZ Placement" which recorded that at a price of \$30.95 per share the Underwriters had "demand" from institutional investors (that is applications) for 83,291,006 shares, such that the book was 103% covered;
- (iv) at 2:26am on 7 August 2015, Kristopher Salinger of Citi sent an email to Rick Moscati and John Needham of ANZ, which was copied to

representatives of JPM and DB, which attached an updated version of the document entitled "ANZ Book Allocations VF" which recorded that at a price of \$30.95 per share the Underwriters had "demand" from institutional investors (that is applications) for 83,291,006 shares, such that the book was 103% covered.

- (c) the Underwriters recommended to ANZ that notwithstanding that applications were received from institutional investors for more than the full amount of the Placement Shares, having regard to the composition of the applications, the Underwriters should take up a portion of the Placement Shares by scaling-back the allocations to certain eligible investors below their applications;

Particulars

At 8:35pm on 6 August 2015, Kristopher Salinger of Citi sent an email to Rick Moscati and John Needham of ANZ, which was copied to representatives of JPM and DB, which email attached what Mr Salinger referred to as a "draft allocation list". The draft allocation list recorded that:

- (i) the book was 103% covered, as to which ANZ refers to and repeats paragraph (iii) of the particulars to sub-paragraphs 9A(a) and (b) above;
- (ii) while the majority of eligible investors would be allocated the full amount of their applications, the shares to be allocated to a number of eligible investors would be less than the amount of their applications, such that there would be an amount of \$754,969,181 "left to allocate".

Shortly after, or around, the time that the draft allocation list was sent, ANZ (Rick Moscati and John Needham) had a call or calls with representatives of the Underwriters (at least Michael Richardson (DB) Richard Galvin (JPM) and John McLean (Citi)) in which the Underwriters made a recommendation to the effect alleged.

- (d) ANZ accepted the recommendation referred to in sub-paragraph (c) above;

Particulars

During a conference call which took place shortly after 8:30pm on 6 August 2015 with at least Mr Richard Galvin and Mr Harry Florin of JPM and Mr Michael Richardson of DB, Rick Moscati confirmed that he accepted the draft allocation list provided by the Underwriters, and ANZ refers to

paragraph 12 of the FASOC and its admission (set out below) of the allegations in that paragraph.

- (e) a substantial reason for the Underwriters recommending scaling-back the applications of certain investors was that investors such as hedge funds, if not scaled-back, might deal with their shares in such a way as to create a disorderly, or volatile, after-market for ANZ shares;

Particulars

The Underwriters' decision to recommend scaling-back applications was made by at least John McLean, Itay Tuchman and/or Robert Jahrling (Citi), Michael Ormaechea and/or Michael Richardson (DB), and Richard Newton and/or Richard Galvin (JPM) for the reason, or reasons including, that set out in sub-paragraph (e).

- (f) ANZ was informed by the Underwriters of the matters set out in sub-paragraph (e) above;

Particulars

As to sub-paragraph (f), Rick Moscati and John Needham of ANZ were informed of these matters in, at least, the call with the Underwriters on 6 August 2015 referred to in the particulars under sub-paragraph (d) above.

- (g) prior to the commencement of trading in ANZ shares on 7 August 2015, the Underwriters had each indicated to ANZ their intention to promote an orderly after-market in ANZ shares and not to promptly dispose of any allocation of Placement Shares to them.

Particulars

In various conversations on 6 August 2015, representatives of the Underwriters told Rick Moscati and/or John Needham that they were not in any hurry to dispose of any ANZ shares allocated to them in the Placement, had no concerns about that allocation, and/or would manage appropriately any allocation to them.

Further, ANZ representatives, Rick Moscati and John Needham, had separate calls with each of the Underwriters on 7 August 2015 at around 9am (Geoff Tarrant and Michael Ormaechea, DB), 9:10am (Robert Priestley, JPM), and 9:15am (Steven Roberts, Citi). During those calls representatives of the Underwriters said words to the effect that they were in no rush to

sell, would coordinate in order to manage the aftermarket and/or that they were happy to hold the Placement Shares allocated to them.

- (h) each of the Underwriters was obliged by section 798H of the *Corporations Act* to comply with the *ASIC Market Integrity Rules (ASX Market) 2010 (Rules)*;

Particulars

- (i) Rule 5.9.1 of the Rules required each of the Underwriters not to do anything which results in the market for ANZ shares not being both fair and orderly, or fail to do anything where that failure has that effect.
 - (ii) The expression “orderly” in that context encompasses reliable market operations displaying price continuity and depth and in which unreasonable price variations between sales are avoided.
- (i) the total shares ultimately allocated to the Underwriters represented:
 - (i) only approximately 3.4 days trading in ANZ shares based on the average daily trading volume of shares traded in the previous three months;
 - (ii) only approximately 0.9% of the issued share capital in ANZ, and around 0.27% of the issued share capital for JPM and DB and around 0.37% for Citi;
 - (iii) for each Underwriter only about one day of trading volume.

10 As to paragraph 10:

- (a) it says that the allegation is vague and embarrassing as it does not identify the level of interest that was anticipated by ANZ and/or the Underwriters;
- (b) under cover of the objection in sub-paragraph (a) above, it:
 - (i) does not know, and therefore does not admit, the allegation insofar as it concerns the Underwriters;
 - (ii) refers to and repeats paragraph 9A above and, subject to sub-paragraph (b)(i) above, otherwise denies the allegations in paragraph 10.

- 11 As to paragraph 11, it refers to and repeats paragraphs 9A and 10(b) above and otherwise denies the allegations in that paragraph.
- 12 It admits the allegations in paragraph 12 and says further that it refers to and repeats paragraph 9A above.
- 12A It admits the allegations in paragraph 12A and says further that it refers to and repeats paragraph 9A above.
- 12B It admits the allegations in paragraph 12B and says further that it refers to and repeats paragraph 9A above.
- 13 [Not used]
- 14 As to paragraph 14, it does not know, and therefore does not admit, the allegation and says further that it refers to and repeats paragraph 9A above.
- 15 [Not used]
- 16 It admits the allegations in paragraph 16 and says further that it refers to and repeats paragraph 9A above.
- 17 It admits the allegations in paragraph 17 and says further that it refers to and repeats paragraph 9A above.

Completion Announcement

- 18 It admits the allegations in paragraph 18 and says that it will refer to the Completion Announcement at trial for its full terms and effect.
- 19 It admits the allegations in paragraph 19 and says that it will refer to the Completion Announcement at trial for its full terms and effect.
- 20 It admits the allegations in paragraph 20.
- 21 As to paragraph 21, it:
- (a) admits that no disclosure was made in the terms alleged or of the specific information alleged;
 - (b) says that a disclosure of the information alleged without some or all of the context of the matters set out in paragraph 9A above would have made any disclosure misleading or incomplete;

- (c) otherwise denies the allegations in paragraph 21.

22 As to paragraph 22, it:

- (a) admits that no disclosure was made at any material time in the terms alleged or of the specific information alleged;
- (b) says that a disclosure of the information alleged without some or all of the context of the matters set out in paragraph 9A above would have made any disclosure misleading or incomplete;
- (c) otherwise denies the allegations in paragraph 22.

23 As to paragraph 23, it:

- (a) admits the allegation in sub-paragraph (a) that the information described in paragraph 21(a) of the FASOC was not generally available;
- (b) otherwise denies the allegations in sub-paragraph (a) and says further that the information described in paragraph 21(b) of the FASOC was generally available because it consists of deductions, conclusions or inferences made or drawn from:
 - (i) readily observable matter; and/or
 - (ii) information made known in a manner that would, or would be likely to, bring it to the attention of persons who commonly invest in securities of a kind whose price or value might be affected by the information, and where since that information was made known a reasonable period for it to be disseminated had elapsed;

Particulars

The matters or information referred to in sub-paragraph (i) and/or (ii), from which relevant deductions, conclusions or inferences were made or drawn, include:

- (i) the fact that the bookbuild did not clear at greater than the underwritten floor price, which was stated in the Completion Announcement;
- (ii) the absence of bids by many of ANZ's largest shareholders, which information was known to those shareholders, and is likely to have been known by other industry participants who were in contact with those persons;

- (iii) how the bids (applications) were treated during the subscription process, including in particular that many bidders (including those who were not existing ANZ shareholders) received their entire allocation, which information was known to those persons who placed bids during the Placement, and is likely to have been known by other industry participants who were in contact with those persons;
 - (iv) the fact that deductions were drawn in fact, and published (including in an article dated 12 August 2015 from Clime Asset Management which stated: “*The investment banks clearly didn’t get the full raising away and they have been left holding the can*” (**Clime Article**)) – without any material share price reaction – from which it can be inferred that the information was generally available for one of the reasons in sub-paragraphs (i) or (ii) above.
- (c) denies the allegations in sub-paragraphs (b) and (c), and says further or alternatively that any assessment of whether the information in paragraph 21 of the FASOC:
 - (i) was information that a reasonable person would expect to have a material effect on the price of ANZ shares; or
 - (ii) was likely to influence investors in deciding whether to acquire and in deciding whether to dispose of ANZ shares,

would need to have regard to the totality of relevant information or context, which includes some or all of the matters alleged in paragraph 9A above;

Particulars

The information in paragraph 21 of the FASOC was not information that a reasonable person would expect to have a material effect upon the price of ANZ shares, and was not information that was likely to influence investors in deciding whether to acquire and in deciding whether to dispose of ANZ shares, for reasons including:

- (i) the information was not information about the fundamentals of ANZ’s business, or that was relevant to ANZ’s future cash flows or their risks, and was merely information about the identity of ANZ shareholders in respect of less than 1% of its shares;
- (ii) investors would not expect that the Underwriters would promptly dispose of the acquired Placement Shares;

- (iii) the information would have to be assessed having regard to the totality of relevant information or context.
- (d) denies that the “information” in paragraphs 16 and 21 of the FASOC was “information concerning it” within the meaning of ASX Listing Rule 3.1;
- (e) otherwise denies the allegations in paragraph 23.

Resumption of Trading

- 24 It admits the allegations in paragraph 24.
- 25 It admits the allegations in paragraph 25.
- 26 It admits the allegations in paragraph 26.

Alleged Breaches of the Corporations Act

- 27 It denies the allegations in paragraph 27.
- 28 It denies the allegations in paragraph 28.
- 29 As to paragraph 29:
 - (a) it denies the allegations in sub-paragraph (a) and:
 - (i) refers to and repeats paragraph 9A above;
 - (ii) says that:
 - (A) information that the Placement had not gone well was generally or widely available to, or understood by, participants in the market, and so was incorporated in ANZ’s share price, prior to the market opening on 7 August 2015;
 - (B) the information alleged in paragraph 21 of the FASOC was either immaterial or its substance was generally or widely available to, or understood by, participants in the market (and so incorporated in ANZ’s share price) from the opening of the market on 7 August 2015.

Particulars

The matters in sub-paragraph (A) are evident from matters including:

- (i) negative commentary during the trading halt on 6 August 2015, including:
 - (A) a report published by CLSA on 6 August 2015 titled "*The beginning of the end*", which stated that there could be a significant overhang from the Placement;
 - (B) a report published by Macquarie Research on 6 August 2015 titled "*ANZ Bank: A Change of Heart*", which stated that at a 5% discount Macquarie did not consider the capital raising to be a particularly compelling proposition;
- (ii) the fact that the bookbuild did not clear at greater than the underwritten floor price;
- (iii) negative commentary on 7 August 2015 prior to the market opening, including an article in The Australian Financial Review on 7 August 2015 at 12:15am titled "*ANZ Banking Group and the \$3b checkmate*" which stated, *inter alia*, that the Placement had not had the result that ANZ had hoped for, local fund managers had not participated to the extent expected, and the Underwriters had to turn to offshore investors who may not be long-term holders of ANZ shares;
- (iv) the two day share price reaction by peer banks;
- (v) the failure of the market price for ANZ shares to react to the Clime Article.

The matters in sub-paragraph (B) are evident from matters including:

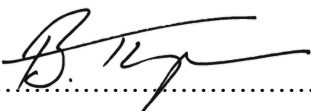
- (i) the particulars provided in respect of sub-paragraph (A);
- (ii) the fact that the information described in paragraph 21 of the FASOC was not information about the fundamentals of ANZ's business, or that was relevant to ANZ's future cash flows or their risks, and was merely information

about the identity of ANZ shareholders in respect of less than 1% of its shares.

Further particulars may be provided after the provision of expert evidence.

- (b) in relation to sub-paragraph (i) under sub-paragraph (b), it admits that at around 10:00am on 7 August 2015, Mr Moscati and Mr Needham took part in a conference call with representatives of the Underwriters;
- (c) in relation to sub-paragraph (ii) under sub-paragraph (b), it admits that:
 - (i) on 8 August 2015 at about 11am, Mr Moscati and Mr Needham took part in a further conference call with representatives of each of the Underwriters;
 - (ii) during this call the Underwriters informed Mr Moscati and Mr Needham of their intentions as set out in sub-paragraphs (ii)(A) and (B);
- (d) it otherwise denies the allegations in paragraph 29.

Date: 27 June 2022


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Signed by Belinda Thompson
Lawyer for the Defendant

This pleading was prepared by John Sheahan QC and Paul Liondas, counsel for the Defendant.

Certificate of lawyer

I, Belinda Thompson, certify to the Court that, in relation to the defence filed on behalf of the Defendant, the factual and legal material available to me at present provides a proper basis for:

- (a) each allegation in the pleading; and
- (b) each denial in the pleading; and
- (c) each non admission in the pleading.

Date: 27 June 2022

A handwritten signature in black ink, appearing to read 'B. Thompson', written over a horizontal dotted line.

Signed by Belinda Thompson
Lawyer for the Defendant

NOTICE OF FILING

This document was lodged electronically in the FEDERAL COURT OF AUSTRALIA (FCA) on 27/06/2022 2:15:35 PM AEST and has been accepted for filing under the Court's Rules. Details of filing follow and important additional information about these are set out below.

Details of Filing

Document Lodged:	Defence - Form 33 - Rule 16.32
File Number:	VID1153/2018
File Title:	AUSTRALIAN SECURITIES AND INVESTMENTS COMMISSION v AUSTRALIA AND NEW ZEALAND BANKING GROUP LIMITED
Registry:	VICTORIA REGISTRY - FEDERAL COURT OF AUSTRALIA



Dated: 27/06/2022 2:25:09 PM AEST

A handwritten signature in blue ink that reads "Sia Lagos".

Registrar

Important Information

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

The date and time of lodgment also shown above are the date and time that the document was received by the Court. Under the Court's Rules the date of filing of the document is the day it was lodged (if that is a business day for the Registry which accepts it and the document was received by 4.30 pm local time at that Registry) or otherwise the next working day for that Registry.