

## NOTICE OF FILING

### Details of Filing

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

Registrar

### Important Information

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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## Concise Statement

No. of 2024

Federal Court of Australia

District Registry: Victoria

Division: General

### AUSTRALIAN SECURITIES AND INVESTMENTS COMMISSION

Plaintiff

**HSBC BANK AUSTRALIA LIMITED (ACN 006 434 162)**

Defendant

#### A. IMPORTANT FACTS GIVING RISE TO THE CLAIM

##### Introduction

1. This proceeding concerns failures by the Defendant (**HSBC Australia**), a member of one of the largest banking and financial institutions in the world, to have:
  - (a) adequate controls for the prevention and detection of unauthorised payments to unintended parties made by third parties from accounts held by **Customers** with its Wealth and Personal Banking business;
  - (b) adequate systems and processes to prevent widespread non-compliance with its obligations under the 2016 and 2022 **ePayments Code** (which were part of its contractual terms with its Customers), under which it was required to investigate reports of unauthorised transactions and respond to Customers within prescribed timeframes and by providing prescribed information; and
  - (c) adequate systems and processes to ensure that Customers who had their access to banking services restricted or blocked following making a report of a suspected unauthorised transaction were allowed to get 'back to banking' promptly or in a reasonable timeframe, or were notified in a timely way how to do so.
2. By its conduct, in respect of each of those matters, HSBC Australia failed to do all things necessary to ensure that:
  - (a) the financial services covered by its Australian financial services licence (**AFSL**) were provided efficiently, honestly and fairly, in contravention of its obligations under s 912A(1)(a) of the *Corporations Act 2001* (Cth) (**Corporations Act**); and

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- (b) the credit activities authorised by its credit licence (**ACL**) were engaged in efficiently, honestly and fairly, in contravention of its obligations under s 47(1)(a) of the *National Consumer Credit Protection Act 2009* (Cth) (**Credit Act**).

### HSBC Australia's obligations

3. HSBC Australia is an authorised deposit taking institution for the purposes of the *Banking Act 1959* (Cth). It is a wholly owned subsidiary of HSBC Holdings plc, and a member of the HSBC group of companies, comprising HSBC Holdings plc and its subsidiaries.
4. HSBC Australia is subject to certain obligations as a subscriber to the ePayments Code and a signatory to the **Banking Code** of Practice. HSBC Australia issued the HSBC Personal Banking **Booklet**, which formed part of its agreement with Customers. In the Booklet, HSBC Australia warranted that it would comply with the ePayments Code and that, if the Banking Code applies to a customer, the relevant provisions of that Code apply when the Customer uses one of HSBC Australia's products or services.

### HSBC Australia's banking facilities and the risk of Unauthorised Payments

5. HSBC Australia offered its Customers financial products, including transaction, offset, savings and term deposit accounts (**Deposit Accounts**); and credit contracts, including home loans, personal loans and credit card accounts (**Loan Accounts**).
6. HSBC Australia provided its Customers with the functionality to make payments from and receive payments into Deposit Accounts and Loan Accounts, using online banking through an internet browser (**Online Banking**) and mobile banking through an HSBC-branded mobile banking application on a mobile device (**Mobile Banking**).
7. By virtue of the digital functionality provided by HSBC Australia, Customers were exposed to the risk of third-parties, through forgery or account compromise, obtaining access to their Online Banking or Mobile Banking (or both) and making payments from the Customer's Deposit Accounts or Loan Accounts (or both) to unintended parties, without the customer's authority (**Unauthorised Payments**). The risk of Unauthorised Payments occurring was evident from external fraud activity that posed a risk to Customers which was reported internally. This activity included fraudsters using HSBC Australia accounts as 'money mule' accounts for the purpose of fraudulently channelling funds to other financial institutions; and Customers being subject to **Smishing** (where a fraudster socially engineers a Customer (for example, by impersonating HSBC Australia staff) into revealing sensitive information such as Online Banking or Mobile Banking login credentials via a text message, with the purpose of making unauthorised fraudulent payments from the Customer's accounts).
8. Materially before January 2023, HSBC Australia was aware of the risk of Unauthorised Payments. The functionality to make real-time or near-real-time (within seconds) payments to third parties, including from May 2023 using the New Payments Platform (also known as Fast Payments), increased the risk.

### Failure to have adequate controls for the detection and prevention of unauthorised payments

9. By reason of the matters referred to in paragraph 7, alternatively paragraphs 7 to 8, and its obligations as the holder of its AFSL and ACL, HSBC Australia should have had in place adequate controls for the prevention and detection of Unauthorised Payments on Customers' accounts.

10. In the period from 1 January 2023 to 1 June 2024, HSBC Australia did not have adequate controls in place for the prevention and detection of Unauthorised Payments. Specifically, it did not have:
- (a) adequate customer authentication and access controls, including:
    - (i) digital fraud behavioural biometrics (to analyse biometric behaviours of transaction processes to distinguish between normal, criminal, and non-human use), which were not implemented by HSBC Australia across both Mobile Banking and Online Banking until June 2024; and
    - (ii) digital fraud device identification capabilities for transactions (to assess device data, and digital identity from browser activity and digital footprint and true location through an IP address to define patterns of trusted user behaviour), which were not implemented by HSBC Australia across both Mobile Banking and Online Banking until June 2024;
  - (b) adequate real time fraud payment monitoring including transaction interception capabilities to identify and block suspicious activity, which was not implemented by HSBC Australia across both Mobile Banking and Online Banking until about May 2024; and
  - (c) adequate or sufficient rules to detect potentially fraudulent activity, including critical rules within its enterprise fraud management transaction monitoring software system, which were not introduced until between 5 June 2023 and 18 June 2024,

**(Missing Controls).**

11. Materially prior to 1 January 2023, alternatively materially prior to 1 June 2024, HSBC Australia management had identified that one or more of the Missing Controls were: available controls that could be implemented by HSBC Australia; controls that would substantially protect against the risks of Unauthorised Payments; and/or gaps in HSBC Australia's controls to detect and prevent Unauthorised Payments.
12. From about mid 2023, there was a significantly increased volume of Unauthorised Payment activity, continuing until about June 2024. As a result, in this period, Customers, who experienced Unauthorised Payments, lost significant sums of money, primarily after fraudsters had obtained access to their accounts after impersonating HSBC Australia staff, and through Smishing.

**Investigating and responding to unauthorised transaction reports**

13. As a subscriber to the ePayments Code, HSBC Australia was required:
- (a) within 21 days of receiving a report of an unauthorised transaction, to (a) complete the investigation and advise the user, in writing, of the outcome, or (b) advise the user in writing of the need for more time to complete its investigation;
  - (b) consider and apply the **Liability Rules** in Chapter C of the ePayments Code in conducting its investigation;
  - (c) unless there were exceptional circumstances, to complete its investigation within 45 days of receiving the report of an unauthorised transaction;
  - (d) tell the customer in writing (a) the outcome of the report, and (b) the reasons for the outcome, including references to the relevant clauses of the ePayments Code (including the Liability Rules); and

- (e) unless there were exceptional circumstances, tell the Customer the matters in (d) within 45 days of receiving the report of an unauthorised transaction.
14. From January 2020 until about October 2023, HSBC Australia's systems and processes for investigating unauthorised transactions (and reporting the outcomes of those investigations to Customers) failed to adequately reflect its obligations under the ePayments Code. Further, until about November 2024, or alternatively November 2023, HSBC Australia had inadequate systems or processes to track and report on its compliance with those obligations.
  15. From 1 January 2020 until August 2024, there was widespread and systemic non-compliance with the ePayments Code timeframes and processes. For example, between January 2020 and 31 August 2024, HSBC Australia received 950 reports of unauthorised transactions, and in relation to these:
    - (a) failed to comply with the prescribed timeframes in cl 38.4 and 38.5 of the 2016 ePayments Code and cl 18.1 and 18.2 of the 2022 ePayments Code for 78% (743 reports);
    - (b) on a yearly basis, only achieved compliance with the required investigation timeframes for 0% of reports in 2020, 4% of reports in 2021, 15% of reports in 2022, 2% of reports in 2023, and 14% of reports in 2024 (up to 15 August 2024);
    - (c) the mean average number of days taken to complete its investigation into a report was 145 days, and in 66% of cases the investigation took more than 100 days (against the required timeframe of no more than 45 days as no exceptional circumstances applied).

Further detail is set out in Schedules F and G of the accompanying Statement of Claim.

#### **Delay in reinstating blocked customer's bank accounts**

16. Under the Banking Code, HSBC Australia was, among other things, obliged to deliver high customer service and standards, ensure banking services are accessible, engage with Customers in a fair, reasonable and ethical manner, communicate with Customers in a timely manner and give Customers information that is useful and clear.
17. Until at least April 2024, HSBC Australia's typical process following a report of an unauthorised transaction was to apply restrictions to the **Blocked Customer's** account (**Account Restrictions**) or block the Customer's access to Online Banking and Mobile Banking (**Digital Blocks**) (or both) until the investigation had been closed. This occurred in circumstances where HSBC Australia's investigations were subject to the extensive delays referred to above.
18. Until about April 2024, HSBC Australia did not have in place any, or any adequate, systems or processes to ensure that Blocked Customers were informed of the process to reinstate full use and access of their accounts promptly or within a reasonable period of time after a Customer had notified it of an unauthorised transaction.
19. Until August 2024, there were widespread, systemic and significant failures by HSBC Australia to reinstate full access and use of Blocked Customer's accounts and to notify Customers of the process to reinstate full use and access promptly or within a reasonable time frame following the report of an unauthorised transaction. For example, in the period 1 January 2020 to 31 August 2024:
  - (a) there were 872 Blocked Customers;

- (b) for 90% of Blocked Customers, it took HSBC Australia more than 21 days to either advise them of the process to reinstate full use and access of their accounts (for those who were advised at all) or to reinstate full use and access of Blocked Customers' accounts;
- (c) the mean number of days taken by HSBC Australia to advise Blocked Customers of the process to reinstate full use and access of their accounts (for those who were advised at all) was 85 days;
- (d) the mean number of days taken for HSBC Australia to reinstate full use and access of Blocked Customers' accounts was 95 days; and
- (e) the longest time it took for HSBC Australia to reinstate full use and access of a Blocked Customer's account was 542 days.

Further detail is set out in Schedules H and I of the accompanying Statement of Claim.

## **B. RELIEF SOUGHT FROM THE COURT**

- 20. ASIC seeks the declaratory, pecuniary penalty and other relief set out in the accompanying originating process.

## **C. PRIMARY LEGAL GROUNDS FOR THE RELIEF SOUGHT**

- 21. By reason of the matters alleged in paragraphs 6 to 10 above, HSBC Australia contravened s 912A(1)(a) and (5A) of the Corporations Act and s 47(1)(a) and (4) of the Credit Act by failing to have adequate controls for the prevention and detection of Unauthorised Payments between 1 January 2023 and 1 June 2024, including further or alternatively in the circumstances referred to in paragraphs 11 and 12 above.
- 22. By reason of the matters alleged in paragraphs 4 and 13 to 15 above, HSBC Australia contravened s 912A(1)(a) and (5A) of the Corporations Act and s 47(1)(a) and (4) of the Credit Act by (either individually or in combination):
  - (a) between January 2020 and August 2023, failing to have adequate systems and processes to ensure that significant, widespread or systemic non-compliance with the prescribed timeframes in the ePayments Code set out in paragraphs 13(a), 13(c) and 13(e) above did not occur, or otherwise prevent such non-compliance occurring;
  - (b) between January 2020 and October 2023, failing to have adequate systems and processes to ensure that there was not a significant, widespread or systemic failure to consider and/or apply the Liability Rules in conducting its investigation into unauthorised transactions (within the meaning of the ePayments Code) or to refer to the relevant clauses of the ePayments Code when reporting the outcome of investigations to Customers, or otherwise prevent such failures occurring;
  - (c) between January 2020 and November 2024 (or alternatively November 2023), failing to have adequate systems and processes to identify, track and report the extent to which HSBC Australia was complying with the requirements in the ePayments Code set out in paragraphs 13(a), 13(c) and 13(e) above.
- 23. By reason of the matters alleged in paragraphs 4 and 16 to 19 above, HSBC Australia contravened s 912A(1)(a) and (5A) of the Corporations Act and s 47(1)(a) and (4) of the Credit Act from

1 January 2020 until April 2024, by failing to have adequate systems and processes to ensure that there were not significant, widespread or systemic failures to reinstate full access or use of the Blocked Customers' accounts, or to advise the Blocked Customers of the process to reinstate full access or use of their accounts, promptly or within a reasonable period of time (or at all), following the report of an unauthorised transaction, or otherwise to prevent such failures occurring.

**D. HARM SUFFERED**

24. As a result of HSBC Australia's failures, its Customers have suffered financial harm, incurring losses as a result of falling victim to Unauthorised Payments, and being unable to make payments as a result of having Account Restrictions or Digital Access Blocks placed on their accounts for inordinate periods after reporting unauthorised transactions to HSBC Australia. Customers also suffered non-financial harm, including emotional distress and inconvenience, as a result of being a victim of Unauthorised Payments, significant delays in receiving HSBC Australia's report into the outcome of its investigation into the unauthorised transactions and the lengthy restrictions or blocks placed on their account. The Customers who reported unauthorised transactions in the period January 2020 to August 2024 are referred to in Schedule F to the Statement of Claim, and the Customers who suffered delays after having their accounts blocked or restricted are referred to in Schedule H to the Statement of Claim. Between January 2020 and August 2024, the Customers who reported unauthorised transactions suffered total losses of about \$23 million from transactions through Online Banking and Mobile Banking (after any recoveries).

This Concise Statement was prepared by JK Muckersie, solicitor, P G Liondas KC and F L Shand of Counsel.

**Certificate of lawyer**

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

Date: 13 December 2024



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Signed by Fred Prickett

Lawyer for the plaintiff