

Concise Statement in Response

No. NSD1305 of 2017

Federal Court of Australia

District Registry: New South Wales

Division: General

CHIEF EXECUTIVE OFFICER OF THE AUSTRALIAN TRANSACTION REPORTS AND ANALYSIS CENTRE

Applicant

COMMONWEALTH BANK OF AUSTRALIA ACN 123 123 124

Respondent

A. IMPORTANT FACTS GIVING RISE TO THE CLAIM

Commonwealth Bank of Australia

1. It is not in dispute that the Commonwealth Bank of Australia (**CBA**) has at all relevant times:
 - a. been enrolled as a reporting entity under the *Anti-Money Laundering and Counter-Terrorism Financing Act 2006* (Cth) (the **Act**); and
 - b. adopted and maintained a joint AML/CTF Program (the **Joint Program**) as required by s 81 of the Act.
2. Part A of the Joint Program has at all relevant times required CBA to:

Filed on behalf of the Respondent

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- a. undertake risk assessments of the inherent risk that new products and services (including new channels and technologies for delivering those products and services) might involve or facilitate money laundering (**ML**) or terrorism financing (**TF**) (together, **ML/TF risk**) and keep those risk assessments up to date; and
 - b. subject identified areas of ML/TF risk to appropriate systems and controls with a view to mitigating and managing that risk.
3. At all relevant times and in accordance with the Joint Program, CBA has implemented an ongoing customer due diligence program (**OCDD Program**), which includes risk-based systems and controls to monitor the provision by CBA of designated services (within the meaning of the Act) to its customers for the purpose of identifying, mitigating and managing the ML/TF risk associated with those services.
4. The OCDD Program includes a transaction monitoring program directed to the purpose of identifying, having regard to ML/TF risk, transactions that appear to be suspicious within the terms of section 41 of the Act, and transactions that are complex, unusually large, have an unusual pattern, or which have no apparent economic or visible lawful purpose. Some products and services, such as transaction and deposit accounts, have been assessed as carrying a high inherent ML/TF risk and are subjected to systems and controls including automated transaction monitoring that is intended to detect atypical transactional activity. CBA has had, at all relevant times, a financial crime platform for undertaking automated transaction monitoring and a system for manual alerts to be raised and transmitted to CBA's Pegasus Financial Crimes Case Management System (**Pegasus**).
5. The OCDD Program also includes an enhanced customer due diligence program (**ECDD Program**), with risk-based systems and controls directed to undertaking measures appropriate to the circumstances in cases where required by the *Anti-Money Laundering and Counter-Terrorism Financing Rules Instrument 2007 (Cth)* (the **Rules**).
6. At all relevant times and in accordance with the OCDD Program, CBA has had a dedicated team of personnel (referred to as the **AML Operations team**) with responsibility for:
 - a. undertaking ongoing customer due diligence (**OCDD**) including through the review of alerts generated by the automated transaction monitoring system, as well as alerts manually created by branch or other CBA staff;
 - b. determining whether activity identified in alerts gives rise to a suspicious matter reporting obligation under s 41 of the Act and, if so, submitting a suspicious matter report (**SMR**) to AUSTRAC – responsibility for these matters rests solely

with senior analysts, team leaders and managers within the AML Operations team; and

- c. undertaking enhanced customer due diligence (**ECDD**), including recommending closure of customer accounts where it forms the view that closure is appropriate in light of the ML/TF risk posed by those customers.
7. Between 1 January 2012 and 31 July 2017:
 - a. approximately 160,000 automated transaction monitoring alerts were generated by the financial crime platform; and
 - b. CBA submitted over 36,000 SMRs to AUSTRAC.
 8. Between 1 July 2012 to 31 July 2017, CBA closed over 4,000 accounts as a result of the application of its OCDD Program.

Compliance with the Joint Program

9. As noted above, the Joint Program has at all relevant times required an assessment of the inherent ML/TF risk of a new channel or technology and appropriate measures to manage and mitigate that risk. Where the risk is high, some automated transaction monitoring will generally be appropriate.
10. Intelligent Deposit Machines (**IDMs**) were rolled out by CBA commencing in May 2012 as part of a broader project to refresh CBA's Automatic Teller Machine (**ATM**) network. IDMs have the same functionality as ATMs but also have the ability to automatically count cash deposited, enabling the cash to be immediately credited to the customer's account (in the same way that cash deposited in branch is immediately credited to the customer's account).
11. CBA had assessed the inherent ML/TF risk of its ATMs prior to the launch of IDMs in May 2012. CBA did not prior to May 2012 undertake a separate assessment of the inherent ML/TF risk of IDMs. However, as with ATMs, transactions through IDMs were subjected to automated transaction monitoring.
12. CBA conducted assessments of the inherent ML/TF risk of IDMs in July 2015, July 2016 and October 2017, each of which assessed the inherent ML/TF risk of IDMs as 'high'.
13. By no later than January 2016, in light of information available to CBA about money laundering activity through IDMs, including information provided by AUSTRAC, CBA accepts that, in addition to subjecting transactions through IDMs to its automated transaction monitoring program, it should have introduced daily limits on cash deposits

through IDMs to CBA branded cards connected with a personal account as an additional measure to manage and mitigate ML/TF risk. Those daily limits were introduced in November 2017.

14. CBA admits that it failed to comply with its Joint Program and contravened s 82(1) of the Act in two respects. First, by failing to conduct an assessment of the inherent ML/TF risk in respect of IDMs prior to July 2015, and secondly by failing to introduce daily limits on cash deposits through IDMs to CBA branded cards connected with a personal account by January 2016.
15. CBA also admits that at various times between about 20 October 2012 and 12 October 2015, due to an error in the process of merging data from two systems, its account level automated transaction monitoring did not operate as intended in respect of 778,370 accounts. CBA admits that this deficiency in its automated transaction monitoring over that period constituted a contravention of s 82(1) of the Act.

Late TTRs

16. When CBA introduced IDMs, CBA established an automated process to identify cash deposits into IDMs that constituted “threshold transactions” for the purpose of submitting TTRs to AUSTRAC.
17. CBA’s automated process identified cash deposits by searching for certain transaction codes and then reported cash transactions of \$10,000 or more. In November 2012, in order to correct an error message that was appearing on customer statements, a new transaction code was applied in respect of some cash deposits through IDMs. However, the automated TTR reporting process was not updated to search for that new transaction code. In September 2015, CBA’s automated process was corrected so that TTRs were generated for transactions identified by the relevant transaction code. However, between November 2012 and September 2015, the automated process did not generate TTRs for 53,506 deposits of \$10,000 or more through IDMs.
18. CBA admits that the failures to lodge these TTRs in the time required by the Act constituted contraventions of s 43(2) of the Act.

Approach to filing SMRs

19. AUSTRAC alleges 174 failures relating to SMRs. CBA denies 83 of these allegations in full and admits 91 in whole or in part (although CBA says that 29 of those failures constitute 2, rather than 29, contraventions).

Incomplete SMRs

20. A significant number of AUSTRAC's allegations are to the effect that SMRs were incomplete, either because they were missing one or more transactions (or specific transaction details), or because they contained incorrect information.
21. In 63 instances, CBA accepts that the pleaded SMRs did not contain full transactional or other details. However, in each case an SMR was filed, which contained precise details of a number of transactions and referred in more general terms to further relevant transactions or signalled a broader pattern of relevant activity. CBA says that those SMRs satisfied the requirements of s 41(2) of the Act, and that no civil penalty is payable in respect of a failure to provide the additional details.
22. In 11 further instances, CBA accepts that the SMR contained incorrect information, such as an inaccurate record of the recipient of a money transfer. While CBA admits the facts alleged by AUSTRAC, it again says that they do not result in a contravention of s 41(2) of the Act and that no civil penalty is payable in respect of those contraventions. CBA also says that even if this were otherwise a civil penalty contravention, a statutory defence for taking reasonable precautions and exercising due diligence is available to it in these circumstances under ss 232 and 236 of the Act.

Late or Missing SMRs

23. AUSTRAC alleges that in the remaining cases CBA either failed to submit SMRs, or failed to do so in the time required by the Act.
24. In 6 cases, CBA does not accept that its authorised personnel formed a suspicion in respect of the matters that AUSTRAC has pleaded. In 3 further cases, CBA does not accept that it contravened the requirements of s 41(2) for other reasons.
25. However, CBA accepts that in 46 cases it filed SMRs later than required by the Act, and in 45 cases it did not file an SMR at all, for at least an element of the deficiency that AUSTRAC has pleaded, in circumstances where it should have done so. In relation to these admissions, CBA says that:
 - a. In 33 cases, it had filed an SMR in relation to the relevant customer within the previous three months and did not submit a further SMR at the time in relation to additional transactions exhibiting a similar pattern of conduct on the same account. In 11 of these cases, the transactions were incorporated into later SMRs but in the remaining cases they were not. CBA at the time did not appreciate, but now admits, that the approach of not submitting an SMR in those circumstances failed to satisfy the requirements of the Act.

- b. In 29 related cases, CBA was provided with information by law enforcement that persons connected with Syndicate 1 may not have been who they claimed to be. CBA acted on that information to prevent further transactions on the affected accounts. CBA accepts that it should also have filed SMRs recording a suspicion that those persons were not who they claimed to be, and it did not do so within the time required by the Act. However, CBA says that this constituted 2, rather than 29, contraventions.
- c. In 23 further cases, CBA was provided with other information by law enforcement in relation to particular customers (a number of which were related). In 5 of these cases, the transactions were incorporated into later SMRs but in the remaining cases they were not. CBA did not sufficiently appreciate the need to give the AUSTRAC CEO an SMR solely on the basis of law enforcement communications, but now admits that this information needed to be submitted by filing SMRs consistent with the requirements of the Act.

Approach to carrying on OCDD

- 26. AUSTRAC alleges 71 failures relating to OCDD. CBA denies 19 of these allegations in full, admits 12 in full and admits some elements and denies other elements of the allegations for the remaining 40.
- 27. At all material times, CBA employed the OCDD Program (which includes the ECDD Program) to monitor customers with a view to identifying, mitigating and managing the ML/TF risk that it reasonably faced. The OCDD Program (including the ECDD Program) was applied to customers the subject of the OCDD allegations.
- 28. CBA admits that for some of the customers the subject of the OCDD allegations, it did not (or did not always):
 - a. monitor the customer sufficiently, with a view to identifying, mitigating and managing its ML/TF risk; or
 - b. undertake sufficient measures appropriate to the circumstances to mitigate or manage its ML/TF risk in respect of the customer.

Generally in those instances, CBA accepts that for a specified period insufficient transaction monitoring alerts were generated on the customer's account, transactional reviews did not occur quickly enough, or there was a delay in rendering the customer's account inactive once a decision was made to terminate the relationship resulting in further transactional activity.

29. CBA otherwise denies the OCDD allegations (either in whole or in part), and says that the steps that it took to monitor or undertake enhanced due diligence in relation to particular customers were sufficient to discharge its obligations under s 36 of the Act.
30. CBA also says that in relation to the customers that are the subject of the SMR and OCDD allegations, the application of the OCDD Program to those customers during the relevant period resulted in the following:

	Customers	Alerts (automated and manual)	SMRs filed*
Syndicate 1	30	190	71
Syndicate 2	12	53	17
Syndicate 3	1	20	4
Syndicate 4	11	35	16
Cuckoo Smurfing Syndicate	18	33	26
Remaining customers (referred to in the Statement of Claim as Persons 56 and 75)	2	8	6
TOTAL	74	339	140

* Note that some of these SMRs covered multiple customers or issues.

In addition, all relevant accounts were inactivated or, in the case of the Cuckoo Smurfing Syndicate, otherwise made the subject of continued application of the OCDD Program.

B. THE RELIEF SOUGHT FROM THE COURT

31. CBA accepts that it would be appropriate for the Court to make declarations of contravention insofar as these are admitted and to impose a pecuniary penalty in an amount determined by the Court. CBA will submit that, for the purposes of penalty, certain of the admitted contraventions, including but not limited to the 53,506 late TTRs, should be treated as single courses of conduct.

C. THE ALLEGED HARM SUFFERED

32. CBA accepts the importance of the obligations imposed on it by the Act. These obligations require it to act in the public interest to advance the effectiveness of law enforcement. Accordingly CBA accepts that the failure to issue TTRs and SMRs in accordance with the Act has deprived law enforcement of some additional intelligence. CBA will submit that the extent of that harm should be assessed in the context of the significant number of SMRs issued in respect of the customers in question above and the fact that a number of the SMR contraventions relate to information itself derived from law enforcement. CBA also accepts the need for compliant and appropriate risk-based systems and controls. It has been engaged in a program of work to enhance its existing systems and controls, including to address the matters that gave rise to the admitted contraventions.

Date: 13 December 2017



Signed by Bryony Kate Adams

Lawyer for the Respondent