

NOTICE OF FILING

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Details of Filing

Document Lodged: Concise Statement
File Number: VID482/2020
File Title: KATHLEEN O'DONNELL v COMMONWEALTH OF AUSTRALIA &
ORS
Registry: VICTORIA REGISTRY - FEDERAL COURT OF AUSTRALIA



Dated: 22/07/2020 4:46:15 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.

Concise Statement

No. of 2020

Federal Court of Australia
 District Registry: Victoria
 Division: General

Kathleen O'Donnell

Applicant

The Commonwealth of Australia

First Respondent

Secretary to the Department of Treasury

Second Respondent

Chief Executive Officer of the Australian Office of Financial Management

Third Respondent

A PARTIES

- 1 The applicant is the holder of and an investor in eAGBs and brings this proceeding on her own behalf and as representing other holders of and investors in eAGBs who have the same interest in the proceeding.
- 2 The first respondent is the Commonwealth of Australia (**Commonwealth**). The second respondent is the Secretary to the Department of the Treasury (**Treasury**) and is the “accountable authority” of the Treasury for the purpose of the *Public Governance, Performance and Accountability Act 2013* (Cth) (**PGPA Act**) (s 12). The third respondent is the Chief Executive Officer (**CEO**) of the Australian Office of Financial Management (**AOFM**), who is appointed by the Treasury Secretary and is the accountable authority of the AOFM for the purposes of the PGPA Act (*Public Governance, Performance and Accountability Rule 2014* (Cth), Sch 1, Item 2).

B AUSTRALIAN GOVERNMENT BONDS

- 3 Through the AOFM, the Commonwealth issues “Commonwealth Government Securities” (**CGS**) to investors operating in a wholesale market for CGS.

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- 4 Through the AOFM or otherwise, the Commonwealth has entered into contracts, agreements or arrangements¹ with the Australian Securities Exchange (**ASX**) and third parties to enable and facilitate trading by investors in “Exchange-traded Australian Government Bonds” (**eAGBs**) on the ASX.
- 5 The direct participants in that retail market are the investors that hold the legal interest in CGSs and the purchasers of eAGBs. A purchaser of an eAGB obtains a beneficial interest in a CGS in the form of a “CHESS Depository Interest” (**CDI**). The value of a CDI is linked to the value of the underlying CGS. The Respondents are obliged to make interest (coupon) and principal payments on an eAGB pursuant to its terms.
- 6 Under the *Corporations Act 2001* (Cth) (**CA**), an eAGB is a “CGS depository interest” (s 761A). Division 5C of Part 7.9 is headed “Information about CGS depository interests”. In general terms, under Div 5C, a “regulated person” is required to provide an “information statement” to investors in relation to CGS depository interests (CA s 1020AI).
- 7 There are two classes of eAGBs: Exchange-traded Treasury Bonds (**eTBs**) and Exchange-traded Treasury Indexed Bonds (**eTIBs**). The Commonwealth prepares and publishes an “information statement” for both eTBs and eTIBs (**Information Statements**) (CA s 1020AH). Both Information Statements are published on the “CGS depository interest information website”.² More specifically they are located on a webpage headed “Investor Information Statements”. Both Information Statements are dated 10 February 2015. The function of Information Statements is to provide information to potential investors about “financial products”.³
- 8 For each class of eAGB, the same webpage also directs investors to:
- 8.1 **Term Sheets**, which detail the key commercial terms of the relevant underlying AGB, and which are to be read together with the relevant Information Statement; and
- 8.2 **Information Memoranda**, which contain the full terms and conditions of the underlying AGB.

C CLIMATE CHANGE

- 9 At all material times there has existed a significant likelihood that the climate is changing, and will continue to change, as the result of anthropogenic influences (**Climate Change**).
- 10 Climate Change is likely to include, or result in, acute and chronic changes including: higher mean and maximum temperatures; higher minimum temperatures; decreases in precipitation; increases in the severity of droughts and the frequency of bushfire weather; decreases in relative humidity;

¹ See *Commonwealth Inscribed Stock Act 1911* (Cth), s 13C.

² That website is www.australiangovernmentbonds.gov.au: *Corporations Regulations 2001* (Cth), reg 7.9.61E

³ A “CGS depository interest” is a “security” (para (g) in definition of “security” in CA, s 761A), which is a “financial product”: see CA, s 764A(1)(a).

increases in the intensity of rainfall; increases in the intensity of bushfires, cyclones and storms; and increases in the mean sea level (the **Physical Impacts**).

- 11 Australia and other nation states (**Sovereigns**) aim to prevent dangerous Climate Change and to hold the increase in global average temperature to 1.5 degrees Celsius above pre-industrial levels. Those aims have caused, and will increasingly continue to cause exposure to stranded assets and legal actions, and changes to Australian and international economies, policies, laws, markets, technology, and customer and community perceptions towards companies and investors (the **Transition Impacts**).
- 12 Sovereigns have been, are, and will be impacted differently by Physical Impacts and Transition Impacts. Sovereigns exhibit differing abilities to absorb or withstand those impacts, including their ability to raise debt (**Resilience**).

A.1 Sovereign responses to Climate Change

- 13 Sovereigns (including Australia) exhibit a range of responses with respect to Climate Change, including: (a) emissions reduction, including under the Paris Agreement; (b) domestic and exported emissions per capita and total emissions; (c) greenhouse gas content of the domestic energy mix; (d) energy intensity of the domestic economy; (e) domestic energy policy; (f) existence of a domestic price on carbon and the adequacy of that price; (g) policy with respect to restricting the development of coal, gas and oil industries; (h) cooperation with other Sovereigns, with respect to international climate negotiations; (the matters individually and collectively in any combination, without limiting those matters, comprise the **Sovereign Climate Change Response**).
- 14 Sovereign Climate Change Response and Resilience will impact how a Sovereign is viewed by central banks, pension funds, investors, credit ratings agencies and others (**Reputational Risk**).

A.2 Sovereign Climate Change Risk and Financial Risk

- 15 Physical Impacts, Transition Impacts, Resilience, Reputational Risk, Sovereign Climate Change Response, and related Environmental, Social and Governance (**ESG**) factors (collectively **Climate Change Risk**) can have a material impact on a decision by an investor to invest in Sovereign bonds and on the value of Sovereign bonds.
- 16 Climate Change Risk can have a material impact on the fiscal position of the Sovereign and the investment performance of Sovereign bonds by, amongst other things, the impact on a Sovereign's (a) gross domestic product; (b) fiscal policy; (c) foreign exchange rates; (d) inflation; (e) taxation revenue; (f) terms of trade; (g) international relations; (h) bond yield (**Climate Change Financial Risk**).
- 17 Climate Change Risk and Climate Change Financial Risk are material factors for global credit rating agency assessment of Sovereign credit risk (**Climate Change Ratings Risk**).

A.3 Material risks for investors

18 Australia is materially exposed and susceptible to the risks in [15] to [17] above (**Australia's Climate Change Risks**). Accordingly, (a) those risks are material to an investor's decision to trade in eAGBs; and (b) an investor is entitled to be informed of those risks.

A.4 Duty of disclosure

19 The Commonwealth acts as a promoter of each class of eAGBs by, inter alia, engaging in the activities set out in [3] to [5] and [7] to [8] above, including by publishing the Information Statements (see at [7] above); and the Information Memoranda (see at [8.2] above) for the underlying AGBs (together, the **Information Documents**).

20 As a promoter, the Commonwealth owes a duty of utmost candour and honesty to investors who acquire or intend to acquire eAGBs. That duty requires the Commonwealth to disclose information about Australia's Climate Change Risks that can influence the investor's decision to acquire eAGBs.

21 The Commonwealth breached its duty as a promoter by disclosing in the Information Documents some material risks but failing to disclose any information about Australia's Climate Change Risks.

D ASIC ACT

22 An eAGB is a "financial product" for the purposes of Div 2 of Pt 2 of the *Australian Investments and Securities Commission Act 2001* (Cth) (**ASIC Act**) (ss 12BAA(1) and (7)(i)). In promoting and arranging for the trading of eAGBs on the ASX, the Commonwealth:

22.1 carries on a business;

22.2 arranges for a person to engage in issuing a financial product (see ASIC Act, s 12BAB(1)(b), (7)(b), (8)), including by making contracts, agreements or arrangements to enable and facilitate trading on the ASX (see *Inscribed Stock Act 1911* (Cth), s 13C);

22.3 in trade or commerce engages in conduct that is "misleading or deceptive or likely to mislead or deceive" by, in the Information Documents, disclosing some risks but failing to disclose any information about Australia's Climate Change Risks; and

22.4 thereby breached the prohibition in s 12DA(1) of the ASIC Act.

E PGPA ACT

23 The AOFM has responsibility for the management and administration of Australian Government debt, including the issuing of AGBs. The AOFM is within the Treasury portfolio. It is accountable to the Treasury Secretary and, ultimately, the Treasurer. The AOFM operates the CGS depository interest information website on behalf of the Commonwealth.

- 24 The AOFM CEO and the Treasury Secretary are each “officials of a Commonwealth entity” (PGPA Act s 13) and subject to the duty under s 25(1) of the PGPA Act to exercise his or her powers, and to perform his or her functions, and to discharge his or her duties, with reasonable care and diligence.
- 25 By reason of the matters set out at [19] to [22] above and, in particular, the breach of the duty of disclosure and the contravention of s 12AD(1) of the ASIC Act, both the AOFM CEO and Treasury Secretary breached their duty under s 25(1) of the PGPA Act.

F RELIEF

- 26 The applicant on her own behalf and as representing other holders of eAGBs who have the same interest in the proceeding seeks:
- 26.1 declarations that the Commonwealth breached its duty of disclosure and s 12DA(1) of the ASIC Act by failing to disclose in the Information Documents any information about Australia’s Climate Change Risks;
- 26.2 declarations that the Treasury Secretary and the AOFM CEO breached their duty under s 25(1) of the PGPA Act by failing to disclose in the Information Documents any information about Australia’s Climate Change Risks;
- 26.3 an injunction restraining the Commonwealth from further promoting eAGBs until it complies with its duty of disclosure as set out in the declarations sought in [26.1] and [26.2] above;
- 26.4 such further or other orders, including orders as to costs, as the Court deems fit.

This Concise Statement was settled by Ron Merkel QC and Thomas Wood of Counsel.

Certificate of lawyer

I David Barnden certify to the Court that, in relation to the Concise Statement 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: 22 July 2020



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Signed by David Barnden
Lawyer for the Applicant