

## NOTICE OF FILING

### Details of Filing

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File Title:	KATHLEEN O'DONNELL v COMMONWEALTH OF AUSTRALIA & ORS
Registry:	VICTORIA REGISTRY - FEDERAL COURT OF AUSTRALIA



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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Form 33  
Rule 16.32

### **AMENDED DEFENCE**

*Amended on 3 March 2023 pursuant to order 4(c) of the orders of Murphy J dated 25 October 2022*

**FEDERAL COURT OF AUSTRALIA**  
**DISTRICT REGISTRY: VICTORIA**  
**DIVISION: GENERAL**

**No. VID482 of 2020**

**KATHLEEN O'DONNELL**  
Applicant

**THE COMMONWEALTH OF AUSTRALIA**  
Respondent

To the applicant's ~~Third~~ Fourth Further Amended Statement of Claim filed on 21 December 2022 ~~dated 28 October 2021~~, the respondent says by way of defence:

#### **A PARTIES**

##### **A.1 Applicant**

1. The respondent admits paragraph 1.

~~The respondent does not know and therefore cannot admit the allegations in paragraph 4.~~

1A. The respondent admits paragraph 1A.

1B. The respondent admits paragraph 1B.

1C. The respondent admits paragraph 1C.

1D. As to paragraph 1D, the respondent:

1D.1 denies paragraphs 1D.1 to 1D.5;

1D.2 admits paragraph 1D.6; and

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Filed on behalf of the Respondent  
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1903

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1D.3 says that on 6 February 2023 the respondent requested particulars of this paragraph and those particulars have not yet been supplied.

~~The respondent denies paragraph 1D.~~

## **A.2 Representative Proceeding**

2. The respondent admits paragraph 2.

3. The respondent admits paragraph 3.

4. The respondent admits paragraph 4. ~~As to paragraph 4, the respondent:~~

4.1. ~~refers to and repeats paragraph 1D above; and~~

4.2. ~~admits that, to the extent the applicant has an interest in the proceeding, it is the same as the interest of the Represented Persons.~~

## **A.3 Respondent**

5. The respondent admits paragraph 5.

6. [deleted in 3FASOC]

7. [deleted in 3FASOC]

8. [deleted in 3FASOC]

9. [deleted in 3FASOC]

10. [deleted in 3FASOC]

11. [deleted in 3FASOC]

12. The respondent admits paragraph 12.

13. The respondent admits paragraph 13.

14. The respondent admits paragraph 14.

15. The respondent admits paragraph 15.

16. [deleted in 3FASOC]

17. The respondent admits paragraph 17 save that the date of the Commonwealth Inscribed Stock Act 1911 (Cth) is “1911” and not “2011” as alleged.

## **B JURISDICTION**

18. The respondent admits that the Court has jurisdiction in this matter.

## **C AUSTRALIAN GOVERNMENT BONDS**

### **C.1 Issue of stock under Inscribed Stock Act**

19. The respondent admits paragraph 19, save that it says that:
- 19.1. the definition of “stock” in s 3 of the *Commonwealth Inscribed Stock Act 1911* (Cth) (**Inscribed Stock Act**) does not include depository interests;
- 19.2. a “depository interest” is defined in s 3 of the Inscribed Stock Act as a beneficial interest in stock issued by a depository nominee (as a depository nominee); and
- 19.3. “Treasury Bonds” as defined in s 3 of the Inscribed Stock Act do not include depository interests.
20. The respondent admits paragraph 20, save that it says that the power in s 4(1)(a) of the Inscribed Stock Act is not a power to issue depository interests.
21. The respondent admits paragraph 21, save that it says the power in s 3A(1) of the Inscribed Stock Act is not a power to issue depository interests to borrow money.
22. As to paragraph 22 the respondent:
- 22.1. admits paragraph 22; and
- 22.2. says that because the definition of “stock” does not include depository interests, the authority to borrow in s 3A does not extend to the borrowing of money by issuing depository interests.

### **C.2 Depository interests under the Inscribed Stock Act**

23. The respondent admits paragraph 23.
24. The respondent admits paragraph 24.
25. The respondent admits paragraph 25.
26. The respondent admits paragraph 26.
27. The respondent admits paragraph 27.
28. The respondent admits paragraph 28.

### **C.3 AGB and eAGB**

29. The respondent admits paragraph 29.
30. As to paragraph 30, the respondent: ~~The respondent denies paragraph 30 and says:~~

30.1. admits that the respondent applied for participant status in the Austraclear System by application of 24 November 2008 sent to the ASX and otherwise denies paragraph 30.1;

~~the AOFM maintains a Registered Bidders List which as at 3 May 2021 identified 28 registered bidders; and~~

30.2. admits paragraph 30.2.

~~by application of 24 November 2008 sent to the ASX, the respondent applied for participant status in the Austraclear System.~~

### **Particulars**

~~A copy of the 3 May 2021 Registered Bidders List and a copy of the 24 November 2008 application are in the possession of the respondent's solicitors and are available for inspection upon request.~~

30A. The respondent admits paragraph 30A.

31. The respondent admits paragraph 31 but says that the registered bidders are referred to in paragraph 30A of the 4FASOC rather than paragraph 30 as alleged. ~~but says further the wholesale market for AGBs consists of:~~

31.1. ~~a primary wholesale market in which registered bidders participate; and~~

31.2. ~~a secondary wholesale market in which institutions described as "market makers" trade directly between themselves and with investors who can participate in the secondary wholesale market for AGBs.~~

32. As to paragraph 32 the respondent:

32.1. refers to and repeats paragraph 31 of the 4FASOC and paragraph 31 above; and

32.2. subject to paragraph 31, admits paragraph 32.

33. The respondent admits paragraph 33.

~~The respondent denies paragraph 33 and says that the market in which retail investors operate is different from the wholesale market.~~

34. The respondent admits paragraph 34.

### **C.4 The ASX Services Agreement**

35. The respondent admits paragraph 35.

~~As to paragraph 35 the respondent admits that:~~

35.1. ~~by cl 8.2(e) of the Services Agreement in relation to Trading of Government Bond Depository Interests (the **ASX Services Agreement**) the Depository Nominee agreed that the AOFM is engaged to make payments and will make payments to Holders of Government Bond Depository Interests on account of their interest in Government Bond Depository Interests on behalf of the Depository Nominee; and~~

35.2. ~~otherwise denies paragraph 35.~~

### **Particulars**

~~A copy of the ASX Services Agreement dated 21 March 2013 is in the possession of the respondent's solicitors and is available for inspection upon request.~~

36. The respondent admits paragraph 36.

~~As to paragraph 36 the respondent:~~

36.1. ~~admits that CHESS Depository Nominees Pty Ltd (**CHESS DN**) is the Depository Nominee appointed under s 13.2.2 of the ASX Settlement Operating Rules and under cl 8.1 of the ASX Services Agreement;~~

36.2. ~~says that CHESS DN holds the legal title to a principal financial product in respect of which the relevant CHESS depository interests are units of beneficial interest in that principal financial product recorded in CHESS; and~~

36.3. ~~otherwise denies paragraph 36.~~

36A. The respondent admits paragraph 36A.

36B. As to paragraph 36B, the respondent:

36B.1 admits paragraph 36B.1;

36B.2 denies paragraph 36B.2 to 36B.4;

36B.3 says that:

36B.3.1 Pursuant to regulation 8.1.1 of the Austraclear Regulations, Austraclear holds legal title to AGBs deposited in the Austraclear System by a Participant and Participants in the Austraclear System retain beneficial title to those AGBs until it is withdrawn by the Participant or transferred to another Participant;

36B.3.2 CHESS DN holds equitable or beneficial title to certain AGBs that are to be held in the form of CHESS Depository Interests (**CDIs**) subject to the rights of Holders of CDIs to receive all direct economic benefits and other entitlements in relation to those AGBs;

### **Particulars**

Austraclear Regulations, regulation 8.1.1.

ASX Settlement Operating Rules, sections 2.13.1 (definition of "Title"), 13.2.3(a) and 13.4.1.

36B.4 says further that CHESS DN is a "depository nominee" as defined in s 3 of the Inscribed Stock Act because, with the agreement of the Commonwealth, it issues eAGBs to which it holds the equitable or beneficial title.

36C. The respondent admits paragraph 36C.

36D. The respondent admits paragraph 36D.

### **C.5 Computershare Contract**

37. The respondent ~~admits~~ ~~denies~~ paragraph 37 and says that the Computershare Contract was novated to Computershare Investor Services Pty Limited (ACN 48 078 279 277) (CIS) so that CIS assumed the rights and obligations of Computershare under the Computershare Contract.:

37.1. ~~the respondent, not Computershare, is the depository interest register operator within the meaning of the Inscribed Stock Act; and~~

37.2. ~~Computershare provides services to the respondent pursuant to the Domestic Registry Services Contract executed by the respondent and Computershare on or about 13 November 2012.~~

### **Particulars**

~~A copy of the Domestic Registry Services Contract is in the possession of the respondent's solicitors and is available for inspection upon request.~~

The novation of the Computershare Contract was by an agreement in writing dated 19 August 2013. A copy is in the possession of the respondent's solicitors and is available for inspection upon request.

38. ~~[deleted in 4FASOC] The respondent admits paragraph 38.~~

39. ~~[deleted in 4FASOC] As to paragraph 39 the respondent:~~

39.1. ~~says the words "access the liquidity in" are ambiguous and likely to cause prejudice, embarrassment or delay and accordingly are objectionable under r 16.02(2)(c) or (d) of the Federal Court Rules 2011; and~~

39.2. ~~otherwise admits the allegations in paragraph 39.~~

40. ~~[deleted in 4FASOC] The respondent denies paragraph 40 and says that:~~

40.1. ~~it does not determine the price for eAGBs;~~

~~40.2. the price of eAGBs is determined by the market;~~

~~40.3. the price at which informed participants in the market are willing to buy or sell eAGBs is likely to be influenced by their assessment of changes in the price of AGBs in the wholesale market.~~

41. ~~[deleted in 4FASOC] The respondent denies paragraph 41 and says that:~~

~~41.1. by s 13AA(c) of the Inscribed Stock Act the Consolidated Revenue Fund is appropriated to the extent necessary for the payment of amounts to be paid by the respondent to CHESS for payment to holders of depository interests on account of principal and interest;~~

~~41.2. pursuant to rr 13.6A.1-13.6A.4 of the ASX Operating Rules, the respondent's obligation to pay CHESS as the Depository Nominee is discharged and the respondent is to pay entitlements to holders of Government Bond CDIs instead of to CHESS; and~~

~~41.3. pursuant to the Domestic Registry Services Contract, Computershare (not the respondent) is the Registrar and Calculation Agent, and Paying Agent, in respect of the CHESS (dematerialised) register, with the effect that the respondent makes payments to holders of depository interests through Computershare.~~

#### **Particulars**

~~The respondent refers to Sch 2A(2) of the Domestic Registry Services Contract.~~

42. The respondent admits paragraph 42. As to paragraph 42, the respondent:

~~42.1. refers to and repeats paragraph 41 above; and~~

~~42.2. otherwise denies the allegations therein.~~

#### **C.64 The Corporations Act**

43. The respondent admits that an AGB is a “financial product” for the purposes of Ch 7 of the Corporations Act 2001 (Cth) (**Corporations Act**) (as defined in s 764A(1)(a)).

44. The respondent admits paragraph 44.

45. The respondent admits paragraph 45.

46. The respondent admits paragraph 46, save that in the particulars to that paragraph the reference to regulation 7.0.61E should be regulation 7.9.61E of the Corporations Regulations 2001 (Cth).

#### **C.75 Publication of information by the Respondent**

47. The respondent admits paragraph 47.



- 48. The respondent admits paragraph 48.
- 49. The respondent admits paragraph 49.
- 50. The respondent admits paragraph 50.
- 51. The respondent admits paragraph 51.
- 52. The respondent admits paragraph 52 but says that the correct heading is “Exchange-traded Treasury Indexed Bonds”.
- 53. As to paragraph 53 the respondent:
  - 53.1. admits the paragraph;
  - 53.2. says that by s 5A(4) it is not subject to the disclosure obligations in Ch 7 of the Corporations Act and therefore the documents identified in paragraph 53 are not accurately described as “Disclosure Documents”; and
  - 53.3. says the documents identified in paragraph 53 are the responsibility of the respondent acting through the AOFM.

## **C.86 Contents of information published by the Respondent**

### **C.86.1 Information Statements**

- 54. As to paragraph 54 the respondent:
  - 54.1. admits sub-paragraphs 54.1 and 54.2;
  - 54.2. ~~denies~~ admits sub-paragraph 54.3 and says the Information Statements expressly contain a summary of "some risks that prospective investors should consider ... It is not an exhaustive list";
  - 54.3. as to sub-paragraph 54.4:
    - 54.3.1. admits that the two risks expressly identified are in relation to “changes in market price” and “conversions by the Australian Government”;
    - 54.3.2. otherwise denies the allegation and repeats and relies on sub-paragraph 54.2 above;
  - 54.4. admits sub-paragraph 54.5 but says that:
    - 54.4.1. the risk of “changes in market price” identified in the Information Statement encompasses risks that would or might affect the market price;
    - 54.4.2. the allegation is embarrassing because it does not identify other risks that could have been disclosed but were not disclosed; and

54.5. says that the Corporations Act does not oblige the respondent to publish Information Statements and does not require the disclosure of risks in Information Statements.

55. As to paragraph 55 the respondent:

55.1. admits sub-paragraphs 55.1 to 55.2;

55.2. ~~denies~~ admits sub-paragraph 55.3 and says the Information Statements expressly contain a summary of "some risks that prospective investors should consider ... It is not an exhaustive list";

55.3. as to sub-paragraph 54.4:

55.3.1. admits that the three risks expressly identified are in relation to "changes in market price", "deflation" and "conversions by the Australian Government";

55.3.2. otherwise denies the allegation and repeats and relies on sub-paragraph 55.2 above;

55.4. admits sub-paragraph 55.5 but says that:

55.4.1. the risk of "changes in market price" identified in the Information Statement encompasses risks that would or might affect the market price;

55.4.2. the allegation is embarrassing because it does not identify other risks that could have been disclosed but were not disclosed; and

55.5. says that the Corporations Act does not oblige the respondent to publish Information Statements and does not require the disclosure of risks in Information Statements.

### **C.86.2 AGB Website**

56. The respondent admits paragraph 56.

57. The respondent admits paragraph 57.

### **C.86.3 Term Sheets**

58. The respondent admits paragraph 58 and says there is no obligation to disclose any risks in the Term Sheets.

### **C.86.4 Information Memoranda**

59. The respondent admits paragraph 59 and says there is no obligation to disclose any risks in the Information Memoranda, which are contractual in nature.

## **D CLIMATE CHANGE RISKS**

60. The respondent admits paragraph 60.

60A. The respondent admits paragraph 60A ~~and says further the Paris Agreement was adopted on 12 December 2015, ratified by Australia on 10 November 2016 and entered into force in Australia on 9 December 2016.~~

### **D.1 Physical Risk**

61. The respondent admits paragraph 61.

62. As to paragraph 62, the respondent:

62.1. admits that it receives tax revenue from companies in the industries identified in sub-paragraphs 62.1, 62.2, 62.3, 62.4, 62.5, 62.6, 62.7, and 62.8, 62.9, 62.10, 62.11 as well as from individuals employed in those industries;

62.2. admits that it receives tax revenue from communities identified in sub-paragraphs 62.3, 62.4, 62.5, 62.6 and 62.7;

62.3. says that on 6 February 2023 the respondent requested particulars of this paragraph and those particulars have not yet been supplied; and says that the words “bushfire-prone”, “bushfire smoke-prone”, “drought-prone” and “heatwave-prone” are ambiguous and likely to cause prejudice, embarrassment or delay and are therefore objectionable under r 16.02(2)(c) or (d) of the Federal Court Rules 2011 (Cth);

62.4. says that the words “relies” and “significant” are ambiguous and likely to cause prejudice, embarrassment or delay and are therefore objectionable under r 16.02(2)(c) or (d) of the Federal Court Rules 2011 (Cth); and

62.5. otherwise denies the allegations in paragraph 62.

62A. As to paragraph 62A the respondent:

62A.1 does not know and therefore cannot admit the allegations; and

62A.2 says that on 6 February 2023 the respondent requested particulars of this paragraph and those particulars have not yet been supplied.

62B. As to paragraph 62B the respondent:

62B.1 does not know and therefore cannot admit the allegations; and

62B.2 says that on 6 February 2023 the respondent requested particulars of this paragraph and those particulars have not yet been supplied.

63. As to paragraph 63 the respondent:

63.1. denies the paragraph to the extent it alleges ~~significant~~ additional expenditure by the respondent in respect of matters falling within the responsibility of the States;

63.2. does not know and cannot admit the paragraph to the extent it requires the respondent to make admissions founded upon predictions of policies of future governments;

63.3. subject to paragraphs 63.1 and 63.2 above, admits that additional expenditure will or will likely be required in respect of the matters in sub-paragraphs 63.1 and 63.2 of the 4FASOC; ~~3FASOC~~; but

63.4. otherwise does not know and therefore does not admit the allegations in the paragraph; and

63.5. says that on 6 February 2023 the respondent requested particulars of this paragraph and those particulars have not yet been supplied. does not admit the allegation of “significant” additional expenditure on the basis the word “significant” is ambiguous and likely to cause prejudice, embarrassment or delay and are therefore objectionable under r 16.02(2)(c) or (d) of the Federal Court Rules 2011 (Cth).

64. ~~[deleted in 4FASOC] The respondent admits paragraph 64.~~

64B. ~~[deleted in 4FASOC] The respondent does not know and cannot admit the allegations in paragraph 64B.~~

64C. The respondent does not plead to paragraph 64C on the basis it is a definitional paragraph and contains no allegations of fact.

## **D.2 Transition Risk**

### ***D.2.1 Australia’s Commitments***

65. The respondent admits paragraph 65.

66. The respondent admits paragraph 66.

67. [Removed in 4FASOC]

68. The respondent admits paragraph 68.

69. As to paragraph 69 the respondent:

69.1. admits the allegations therein; and

69.2. says that on ~~31 December 2020~~ 22 June 2022 the respondent communicated an updated Paris Agreement nationally determined contribution to the United Nations Framework Convention on Climate Change which:

- 69.2.1. committed to a strengthened 2030 target to reduce emissions to 43 per cent below 2005 levels and reaffirmed Australia's target to achieve net zero emissions by 2050 (**Australia's Paris Commitments**); which affirmed its 2030 target; and
- 69.2.2. is the current nationally determined contribution for Australia under the Paris Agreement; and
- 69.2.3. superseded all nationally determined contributions previously communicated by Australia referred to in paragraph 69.3 below;
- 69.3. says further that between August 2015 and 22 June 2022, the respondent communicated (now superseded) nationally determined contributions:
  - 69.3.1. in August 2015, the respondent submitted an intended nationally determined contribution which communicated its 2030 target to reduce emissions to 26-28% below 2005 levels and which became Australia's first nationally determined contribution upon ratification of the Paris Agreement;
  - 69.3.2. on 31 December 2020, the respondent communicated an updated nationally determined contribution which affirmed its 2030 target to reduce emissions to 26-28% below 2005 levels; and
  - 69.3.3. on 28 October 2021 the respondent communicated an updated and enhanced nationally determined contribution which affirmed its 2030 target to reduce emissions to 26-28% below 2005 levels and which confirmed its adoption of a target of net zero emissions by 2050.

### **Particulars**

Copies of the communications described in paragraphs 69.2 and 69.3 above are publicly available at:

<https://unfccc.int/sites/default/files/NDC/2022-06/Australias%20NDC%20June%202022%20Update%20%283%29.pdf>

<https://www4.unfccc.int/sites/submissions/INDC/Published%20Documents/Australia/1/Australias%20Intended%20Nationally%20Determined%20Contribution%20to%20a%20new%20Climate%20Change%20Agreement%20-%20August%202015.pdf>

<https://unfccc.int/sites/default/files/NDC/2022-06/Australia%20NDC%20recommunication%20FINAL.PDF>

and

<https://unfccc.int/sites/default/files/NDC/2022-06/Australia%20Nationally%20Determined%20Contribution%20Update%20October%202021%20WEB.pdf>

<https://www4.unfccc.int/sites/ndcstaging/PublishedDocuments/Australia%20First/Australia%20NDC%20recommunication%20FINAL.PDF>

and

<https://www4.unfccc.int/sites/ndcstaging/PublishedDocuments/Australia%20First/Australia%20Nationally%20Determined%20Contribution%20Update%20October%202021%20WEB.pdf>

70. The respondent admits paragraph 70.
71. [deleted in 4FASOC] The respondent denies paragraph 71 but admits that:
- 71.1. ~~in model pathways with no or limited overshoot of 1.5°C, global net anthropogenic CO<sub>2</sub> emissions reach net zero around 2050, accompanied by deep reductions in non-CO<sub>2</sub> emissions; and~~
- 71.2. ~~for limiting global warming to below 2°C, global net anthropogenic CO<sub>2</sub> emissions reach net zero around 2070, also accompanied by deep reductions in non-CO<sub>2</sub> emissions.~~

### **Particulars**

~~IPCC Special Report: Global Warming of 1.5 C (Chapter 2, Table 2.4, page 119).~~

72. ~~[deleted in 4FASOC] The respondent admits that it has committed to achieving net zero GHG emissions by 2050 and otherwise denies the allegations therein.~~
73. ~~[deleted in 4FASOC] As to paragraph 73 the respondent refers to and repeats paragraphs 71 and 72 above and 75.3 below and otherwise denies the allegations.~~
74. As to paragraph 74 the respondent:
- 74.1. does not know and therefore cannot admit the allegations; and
- 74.2. says that on 6 February 2023 the respondent requested particulars of this paragraph and those particulars have not yet been supplied.
- ~~refers to and repeats paragraphs 71 and 72 above and 75.3 below and otherwise admits paragraph 74.~~
75. [deleted in 4FASOC] As to paragraph 75 the respondent:
- 75.1. ~~refers to and repeats paragraphs 71 and 72 above;~~
- 75.2. ~~otherwise admits paragraph 75;~~
- 75.3. ~~but says that on 26 October 2021 the respondent released its Long Term Emissions Reduction Plan, which is a whole-of-economy plan to deliver net zero emissions by 2050.~~

## Particulars

The Long Term Emissions Reduction Plan is publicly available here:

<https://www.industry.gov.au/sites/default/files/October%202021/document/australias-long-term-emissions-reduction-plan.pdf>

75A. The respondent does not know and therefore cannot admits paragraph 75A.

75B. As to paragraph 75B ~~the~~ the respondent:

75B.1 does not know and therefore cannot admit paragraph 75B; and

75B.2 says that on 6 February 2023 the respondent requested particulars of this paragraph and those particulars have not yet been supplied.

75C. The respondent does not plead to paragraph 75C on the basis it is a definitional paragraph and contains no allegations of fact.

## E EFFECT OF RISKS ON EAGBs

75D. As to paragraph 75D the respondent:

75D.1 does not know and therefore cannot admit the allegations; and

75D.2 says that on 6 February 2023 the respondent requested particulars of this paragraph and those particulars have not yet been supplied.

76. As to paragraph 76 the respondent:

76.1. ~~denies paragraph 76.1;~~ does not know and therefore cannot admit the allegations; and

76.2. ~~denies paragraph 76.2;~~ says that on 6 February 2023 the respondent requested particulars of this paragraph and those particulars have not yet been supplied.

76.3. ~~as to paragraph 76.3:~~

76.3.1. ~~objects to the paragraph under r 16.02(2)(c) or (d) of the Federal Court Rules 2011 on the basis the allegations are framed too generally, are ambiguous and likely to cause prejudice, embarrassment or delay in the proceeding;~~

76.3.2. ~~under cover of that objection, denies the allegations in paragraph 76.3;~~  
~~and~~

76.3.3. ~~refers to and repeats paragraphs 60, 60A, 61 and 63.1 above;~~

76.4. ~~denies paragraph 76.4.~~

77. As to paragraph 77 the respondent:

77.1. refers to and repeats paragraph 76 above; and

77.2. denies the allegations in paragraph 77.

77A. As to paragraph 77A the respondent:

77A.1 refers to and repeats paragraphs 76 and 77 above;

77A.2 denies the allegations in paragraph 77A; and

77A.3 says that on 6 February 2023 the respondent requested particulars of this paragraph and those particulars have not yet been supplied.

77B. As to paragraph 77B the respondent:

77.3. refers to and repeats paragraphs 76, 77 and 77A above; and

77.4. denies the allegations in paragraph 77B.

78. [Deleted in 3FASOC]

79. [Deleted in 3FASOC]

[Part F deleted in 3FASOC]

80. [Deleted in 3FASOC]

81. [Deleted in 3FASOC]

82. [Deleted in 3FASOC]

83. [Deleted in 3FASOC]

84. [Deleted in 3FASOC]

## **G ASIC ACT**

85. The respondent admits paragraph 85.

86. The respondent admits paragraph 86.

87. The respondent denies paragraph 87 and says that:

87.1. the AOFM is part of the Treasury portfolio;

87.2. the AOFM's purpose is to manage the respondent's debt financing and cash needs and support the domestic lending market;



- 87.3. the AOFM arranges for the respondent to access funding markets and invest in order to meet the respondent's financing needs;
- 87.4. the respondent, and the AOFM, has no profit-making objective and does not make a "profit";
- 87.5. ~~the AOFM holds no assets;~~
- 87.6. the AOFM holds no capital buffers;
- 87.7. the AOFM does not recognise an income-generating asset for monies raised by its borrowing activities;
- 87.8. the AOFM makes no payments that are equivalent to payments of dividends to shareholders;
- 87.9. funds that are raised for the respondent are directly paid to Consolidated Revenue;
- 87.10. the respondent and the AOFM does not (and is not required to) hold an Australian Financial Services Licence;
- 87.11. in undertaking the activities in paragraph 87.1, the AOFM arranges for the respondent to borrow money and enter into commercial arrangements with third parties;
- 87.12. the purpose of eAGBs was not to make a profit but was to facilitate the development of a deep and liquid corporate bond market;
- 87.13. the respondent does not raise money from the sale of eAGBs, nor does it incur additional indebtedness from the sale of eAGBs, or additional associated principal and redemption payments at any point in time;
- 87.14. the respondent applied for eAGBs to be quoted and traded on the ASX's financial market in accordance with the ASX Settlement Operating Rules;
- 87.15. the respondent does not sell eAGBs but rather the AOFM has facilitated the establishment of infrastructure to allow the trading of these financial products on the ASX;
- 87.15A. unlike a listed corporation that issues corporate bonds, the disclosure requirements in Ch 6D and Ch 7 of the Corporations Act do not apply in relation to eAGBs;
- 87.16. in the premises, the respondent, directly or through the Treasurer or the AOFM, is not carrying on a business as alleged in paragraph 87 or otherwise, but performs an essential function of government, in the interests of the community; and

87.17. says that on 6 February 2023 the respondent requested particulars of this paragraph and those particulars have not yet been supplied.

### **Particulars**

The respondent refers to the AOFM's Annual Reports (available on the AOFM's website at [www.aofm.gov.au](http://www.aofm.gov.au)) and the website itself (including "About", "Vision and Purpose", "Governance and Structure" and Issue 5 of the AOFM's Investor Insights ("Liquidity of the Treasury Bond Market")).

In relation to paragraph 87.15A, the respondent repeats and relies on the particulars to paragraph 92. Chapter 6D of the Corporations Act does not apply in relation to eAGBs pursuant to s 700(1)(a) of the Corporations Act.

- 88. The respondent admits paragraph 88.
- 89. The respondent admits paragraph 89.
- 90. As to paragraph 90, the respondent denies that eAGBs are issued (saying they are created alongside existing AGBs) and otherwise admits paragraph 90.
- 91. The respondent admits paragraph 91.
- 92. As to paragraph 92 the respondent:
  - 92.1. admits that the information referred to in paragraph 91 of the 3FASOC was published for the purpose of informing retail investors about eAGBs;
  - 92.2. denies the balance of paragraph 92;
  - 92.3. says that Ch 7 of the Corporations Act does not apply to the respondent and does not otherwise impose any obligations on the respondent in relation to the disclosure of risks in Information Statements; and
  - 92.4. says that the product disclosure requirements under the Corporations Act do not, and were not intended to, apply to Information Statements issued by the AOFM in respect of eAGBs.

### **Particulars**

Div 5C of Pt 7.9 of the Corporations Act governs the information that is required to be given in relation to a CGS depository interest. Division 5C contains no obligation to provide a Product Disclosure Statement. Product Disclosure Statements are governed by Div 2 of Pt 7.9 and the obligations in Div 2 do not apply to depository interests. The Revised Explanatory Memorandum to the Commonwealth Government Securities Legislation Amendment (Retail Trading) Bill 2012 makes clear it was the intention that the Product Disclosure Statement obligations would not apply to depository interests. In this regard the respondent refers to the following paragraphs of the Explanatory Memorandum: [1.14]-[1.19]; [1.25].

93. As to paragraph 93 the respondent:
- 93.1. refers to and repeats paragraph 92.3 above; and
- 93.2. subject to 93.1, admits paragraph 93.
94. As to paragraph 94 the respondent:
- 94.1. refers to and repeats paragraph 53 above;
- 94.2. admits that the Information Statements contain information that might reasonably be expected to have a material influence on decisions by potential investors of eAGBS as to whether to purchase eAGBs, and on decisions by current holders of eAGBs as to whether to hold or dispose of their current interests in eAGBs;
- 94.3. says that the Information Statements (in section 4) state that they do not provide financial product or investment advice and do not take into account individual investor needs; and
- 94.4. otherwise denies the allegations therein.
95. The respondent admits paragraph 95.
- 95A. As to paragraph 95A the respondent:
- 95A.1 denies the allegations therein;
- 95A.2 says that the documents described by the applicant as “Disclosure Documents” are not styled as such;
- 95A.3 says that there are no obligations under the Corporations Act to disclose risks in the so-called “Disclosure Documents”;
- 95A.4 says that the Information Statements provide information but make clear (in section 4) that they do not provide financial product or investment advice and do not take into account individual investor needs; and
- 95A.5 says that the Information Statements, on their face, are not purporting to be exhaustive in relation to risk or any other material information.
96. As to paragraph 96 the respondent:
- 96.1. denies the allegations therein; and
- 96.2. refers to and repeats paragraph 95A above.
97. As to paragraph 97, the respondent refers to and repeats paragraphs 85 to 96 and otherwise denies the allegations therein.
98. The respondent denies paragraph 98.

99. The respondent denies paragraph 99.
100. Paragraph 100 contains no allegation in relation to the respondent and accordingly the respondent does not plead to it.
101. [Deleted in 3FASOC]
102. [Deleted in 3FASOC]
103. [Deleted in 3FASOC]
104. [Deleted in 3FASOC]
105. [Deleted in 3FASOC]
106. [Deleted in 3FASOC]

# **I RELIEF**

107. Paragraph 107 concerns the relief sought by the applicant and contains no allegation in relation to the respondent. Accordingly the respondent does not plead to it.
108. Paragraph 108 concerns the relief sought by the applicant and contains no allegation in relation to the respondent. Accordingly the respondent does not plead to it.

Date: ~~16 December 2021~~ 3 March 2023



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Christopher Behrens AGS lawyer  
for and on behalf of the Australian Government Solicitor  
Lawyer for the Respondent

This amended pleading was settled by Michael Hodge KQC and Kathleen Foley SC,  
Madeleine Ellicott and Sarah Spottiswood.

### CERTIFICATE OF LAWYER

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

1. each allegation in the pleading; and
2. each denial in the pleading; and
3. each non-admission in the pleading.

Date: ~~16 December 2021~~ 3 March 2023



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Signed by Christopher Behrens  
Lawyer for the Respondent