

## NOTICE OF FILING

This document was lodged electronically in the FEDERAL COURT OF AUSTRALIA (FCA) on 28/10/2021 4:10:54 PM AEDT 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:	Statement of Claim - Form 17 - Rule 8.06(1)(a)
File Number:	VID482/2020
File Title:	KATHLEEN O'DONNELL v COMMONWEALTH OF AUSTRALIA & ORS
Registry:	VICTORIA REGISTRY - FEDERAL COURT OF AUSTRALIA



Dated: 28/10/2021 4:17:19 PM AEDT

A handwritten signature in blue ink, reading "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.



Form 17  
Rule 8.05(1)(a)

**[Proposed] Second Third Further Amended Statement of claim**

Amended on 28 October 2021 pursuant to the order of Justice Murphy dated 28 October 2021

No. VID482 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**

**A.1 Applicant**

1 On and since 7 July 2020, the applicant:

1.1 has owned five “Exchange-traded Australian Government Bond” units in the form of an exchange-traded Treasury Index Bond (**eTIB**), each unit:

1.1.1 with maturity date 21 February 2050;

Filed on behalf of	Kathleen O'Donnell		
Prepared by	David Barnden		
Law firm	Equity Generation Lawyers		
Tel	03 9607 8300	Fax	03 9088 9445
Email	<a href="mailto:david@equitygenerationlawyers.com">david@equitygenerationlawyers.com</a>		
Address for service	L40 140 William Street, Melbourne VIC 3000		

- 1.1.2 with ASX code GSIC50;
- 1.1.3 a face value of \$100.00.
- 1.1.4 with a coupon interest rate of 1.00% per annum;
- 1.1.5 with coupon payment dates of 21 February, 21 May, 21 August and 21 November.

**Particulars**

The applicant purchased five eTIB units with code GSIC50 on 3 July 2020 at an average price of \$125.72 per unit, for total consideration of \$628.60. The settlement date was 7 July 2020.

- 1.2 has owned four “Exchange-traded Australian Government Bond” units in the form of an exchange-traded Treasury Bond (**eTB**):

- 1.2.1 with maturity date 21 March 2047
- 1.2.2 with ASX code GSBE47;
- 1.2.3 a face value of \$100.00.
- 1.2.4 with a coupon interest rate of 3.00% per annum;
- 1.2.5 with coupon payment dates of 21 March and 21 September.

**Particulars**

The applicant purchased four eTB units with code GSBE47 on 3 July 2020 at an average price of \$127.78 per unit, for total consideration of \$521.15. The settlement date was 7 July 2020.

- 1A On the maturity date:

- 1A.1 for an eTIB, the nominal value of the unit will be paid to the holder (being the face value adjusted for inflation by reference to the Consumer Price Index (**CPI**)), unless that nominal value is less than the face value; and
- 1A.2 for an eTB, the face value of the unit will be paid to the holder.

- 1B On each coupon payment date:

- 1B.1 for an eTIB, an interest payment will be made at the coupon interest rate, calculated by reference to the nominal value of the unit (being the face value

adjusted for inflation by reference to the CPI as at the coupon payment date), unless that nominal value is less than the face value.

- 1B.2 for an eTB, an interest payment will be made at the coupon interest rate, calculated by reference to the face value of the unit.
- 1C eTIBs and eTBs are traded daily on the ASX at their current market prices determined by the prices offered by purchases and accepted by vendors (**the value of eAGBs**).
- 1D By reason of the matters in paragraphs 1 to 1C above, and the matters in paragraphs 76 to 77B below:
- 1D.1 the applicant has a special interest, being a financial and economic interest in the subject matter of the proceeding; and
- 1D.2 that interest is greater than that of other members of the public who do not hold eAGBs and thereby do not have a financial or economic interest in the subject matter of the proceeding.

## **A.2 Representative Proceeding**

- 2 The applicant brings this proceeding on her own behalf and on behalf of represented persons (**Represented Persons**) pursuant to rule 9.21 of the *Federal Court Rules 2011* (Cth).
- 3 The Represented Persons are all persons who, at any time on or since 7 July 2020 have acquired:
- 3.1 one or more eAGB units in the form of an eTIB with code GSIC50; and/or
- 3.2 one or more eAGB units in the form of an eTB with code GSBE47;
- and continue to hold one or more of those units as at the date of this pleading.
- 4 The applicant and the Represented Persons have the same interest in the proceeding insofar as it relates to the relief sought at paragraph 107 below.

## **A.3 Respondents**

- 5 The ~~first~~ respondent is the Commonwealth of Australia (**Commonwealth**) and is a body politic capable of being sued in its name.

### **Particulars**

Constitution, s 75(iii).

6 [Deleted in 3FASOC]. ~~The second respondent is the Secretary to the Department of the Treasury (Treasury).~~

7 [Deleted in 3FASOC].

~~The Treasury is a “Department of State” and thereby a “Commonwealth entity” within the meaning of the *Public Governance, Performance and Accountability Act 2013* (Cth) (PGPA Act).~~

~~Particulars~~

~~PGPA Act, s 10(1)(a).~~

8 [Deleted in 3FASOC].

~~The Treasury Secretary is the accountable authority of the Department of Treasury for the purpose of the PGPA Act.~~

~~Particulars~~

~~PGPA Act, s 12(2), Item 1 of the Table.~~

9 [Deleted in 3FASOC]. ~~The third respondent is the Chief Executive Officer (CEO) of the Australian Office of Financial Management (AOFM).~~

10 [Deleted in 3FASOC].

~~The AOFM is a “listed entity” and thereby a “Commonwealth entity” within the meaning of the PGPA Act.~~

~~Particulars~~

~~PGPA Act, s 10(1)(e).~~

~~Public Governance, Performance and Accountability Rule 2014 (Cth), Sch 1, Item 2.~~

11 [Deleted in 3FASOC].

~~The CEO of the AOFM is the accountable authority of the AOFM for the purposes of the PGPA Act.~~

~~Particulars~~

~~Public Governance, Performance and Accountability Rule 2014 (Cth), Sch 1, Item 2.~~

- 12 The Australian Office of Financial Management (AOFM) is part of the Department of the Treasury (Treasury) portfolio.
- 13 The Chief Executive Officer of the AOFM is accountable to the Secretary to the Treasury (Treasury Secretary).
- 14 Both the Treasury Secretary and the CEO of the AOFM are accountable to the Treasurer of Australia (the **Treasurer**).
- 15 The Treasurer is a Minister of State and is responsible for the administration of the ~~Department of~~ Treasury.

**Particulars**

Constitution, s 64

- 16 [Deleted in 3FASOC]. ~~The Treasurer is the responsible Minister for the AOFM within the meaning of the PGPA Act.~~
- 17 The Treasurer administers the *Commonwealth Inscribed Stock Act 2011* (Cth) (**Inscribed Stock Act**).

**Particulars**

Administrative Arrangements Order, signed 5 December 2019.

**B JURISDICTION**

- 18 The Court has jurisdiction in this matter:
  - 18.1 pursuant to ss 12GD, 12GJ and 12HD of the *Australian Securities and Investments Commission 2001* (Cth) (**ASIC Act**) by reason of the matters set out in Part G below;
  - 18.2 [Deleted in 3FASOC] ~~pursuant to s 39B(1) of the *Judiciary Act 1903* (Cth) (**Judiciary Act**) because the matter is in one which injunctions are sought against officers of the Commonwealth, namely the relief set out in paragraph 108.3 and 108.4 below;~~
  - 18.3 pursuant to s 39B(1A)(c) of the Judiciary Act because the matter arises under a law made by the Parliament, namely the Inscribed Stock Act by reason of the matters set out in paragraphs 19 to 42 below;

- 18.4 alternatively to paragraphs 18.2 and 18.3 above, pursuant to s 1337B(1) of the *Corporations Act 2001* (Cth) (**Corporations Act**) because it is a civil matter arising under the Corporations legislation (as defined in s 9 of the Corporations Act), namely:
- 18.5 under or by reason of the Corporations Act because of the matters in paragraphs 43 to 59 below.
- 18.6 under or by reason of the ASIC Act because of the matters set out in Part G below.

## **C AUSTRALIAN GOVERNMENT BONDS**

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

- 19 Section 3 of the Inscribed Stock Act relevantly defines:
- 19.1 “stock” to include “Treasury Bonds”; and
- 19.2 “Treasury Bond” to include a “Treasury Fixed Coupon Bond” and a “Treasury Indexed Bond”.
- 20 Section 4(1)(a) of the Inscribed Stock Act provides that the Governor-General may create stock from time to time for raising money by way of loan.
- 21 Under s 3A(1) of the Inscribed Stock Act, the Treasurer has power to borrow money on behalf of the Commonwealth by issuing stock denominated in Australian currency.
- 22 The power in s 3A(1) of the Inscribed Stock Act has been delegated to officers of AOFM pursuant to s 51JA of the Inscribed Stock Act.

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

- 23 Section 3 of the Inscribed Stock Act defines a “depository nominee” as a person who, with the agreement of the Commonwealth, issues to someone else one or more beneficial interests in stock the person:
- 23.1 owns legally; or
- 23.2 would own beneficially, apart from the issue of those interests; or
- 23.3 has a beneficial interest in.

- 24 Section 3 of the Inscribed Stock Act defines “depository interest” as a beneficial interest in stock issued by a depository nominee (as a depository nominee).
- 25 Section 3 of the Inscribed Stock Act defines “depository interest registry operator” to mean a person who has been engaged by a depository nominee to make payments:
- 25.1 on behalf of the depository nominee; and
  - 25.2 to holders of depository interests issued by the depository nominee; and
  - 25.3 on account of those interests.
- 26 Pursuant to s 13AA of the Inscribed Stock Act, the Consolidated Revenue Fund is appropriated to the extent necessary for the payment of:
- 26.1 principal secured by stock; and
  - 26.2 interest on that principal; and
  - 26.3 amounts that are to be paid by the Commonwealth to depository nominees or depository interest registry operators for payment by or on behalf of the depository nominees to holders of depository interests, on account of either or both of:
    - 26.3.1 principal secured by stock in which the depository interest are beneficial interests; and
    - 26.3.2 interest on that principal.
- 27 Further, pursuant to s 13A of the Inscribed Stock Act, the Consolidated Revenue Fund is appropriated to the extent necessary for the payment of, among other things:
- 27.1 the costs and expenses incurred by the Commonwealth that relate directly or indirectly to the issue, management or transfer of depository interests, including but not limited to:
    - 27.1.1 fees charged by depository nominees or depository interest register operators; and
    - 27.1.2 clearing and settlement facility fees; and
  - 27.2 the costs and expenses incurred by the Commonwealth in relation to the making of payments by the Commonwealth referred to in paragraph 26.3 above.



- 28 Pursuant to s 13C of the Inscribed Stock Act, on behalf of the Commonwealth, the Treasurer may enter into, vary, administer or otherwise give effect to a contract, agreement or arrangement relating, directly or indirectly, to one or more of the following:
- 28.1 the issue, management or transfer of stock or depository interests;
  - 28.2 the trading of stock or depository interests on a financial market;
  - 28.3 services relating to one or more of the following:
    - 28.3.1 a registry that relates to stock or depository interests;
    - 28.3.2 a clearing and settlement facility;
    - 28.3.3 depository nominees.

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

- 29 Pursuant to s 3A(1) of the Inscribed Stock Act, officers of the AOFM, on behalf of the Commonwealth, issue the following stock from time to time:
- 29.1 Treasury Bonds (**TB**); and
  - 29.2 Treasury Indexed Bonds (**TIB**).
- (together, Australian Government Bonds or AGB)
- 30 Through the Treasurer, the AOFM or otherwise, the Commonwealth has entered into contracts, agreements or understandings with:
- 30.1 financial institutions, pursuant to which it issues AGBs to those financial institutions in accordance with the AOFM Tender System Conditions of Operation; and
  - 30.2 Austraclear Ltd to enable and facilitate the issue and trading of AGBs on a wholesale market.

#### **Particulars**

The financial institutions include Australia and New Zealand Banking Group Limited, BofA Securities, BNP Paribas, Citi, Commonwealth Bank of Australia, Daiwa Capital Markets Europe Limited, Deutsche Bank AG, Goldman Sachs, HSBC, JP Morgan, Macquarie Bank Limited, Mizuho Securities Asia Limited, Morgan Stanley, National Australia Bank Limited, Nomura, RBC Capital Markets, TD Securities, UBS AG and Westpac Banking Corporation.

The applicant will seek a copy of the AOFM Tender System Conditions of Operation and relevant contracts, arrangements or understandings on discovery. The contract, agreement or understanding with Austraclear Ltd commenced on or about 17 April 2009.

- 31 There exists a wholesale market for AGBs, in which the financial institutions referred to in paragraph 30.1 above participate.
- 32 Retail investors, such as the applicant, are not able to participate in the wholesale market for AGBs.
- 33 Retail investors, such as the applicant, are able to participate indirectly in the wholesale market for AGBs by obtaining “depository interests”, as defined in the Inscribed Stock Act, in AGBs.
- 34 There are two classes of depository interests available to retail investors:
- 34.1 an eTB, which is a beneficial interest in a TB;
- 34.2 an eTIB, which is a beneficial interest in a TIB.
- (together **eAGB**).
- 35 Through the Treasurer, the AOFM or otherwise, the Commonwealth is obliged to make interest (coupon) and principal payments on eAGBs in accordance with their terms.
- 36 With the agreement of the Commonwealth, CHESS Depository Nominees Pty Ltd (ABN 75 071 346 506) (**CHESS DN**):
- 36.1 is a “depository nominee” within the meaning of the Inscribed Stock Act; and
- 36.2 issues eAGBs.

#### **Particulars**

The applicant will seek copies of the relevant agreement on discovery, and is unable to provide further particulars until after that time.

- 37 Through the Treasurer, the AOFM or otherwise, the Commonwealth has entered into a contract, agreement or understanding with Computershare Investor Services Pty Ltd (**Computershare**), pursuant to which Computershare is a depository interest register operator within the meaning of the Inscribed Stock Act.

#### **Particulars**

The contract, agreement or understanding commenced on or about 12 November 2012. The applicant will seek copies of the contracts, agreements or arrangements on discovery, and is unable to provide further particulars until after that time.

- 38 Through the Treasurer, the AOFM or otherwise, the Commonwealth has entered into a contract, agreement or understanding with ASX Operations Pty Ltd, pursuant to which eAGBs may be traded on the ASX (ASX).

**Particulars**

The contract, arrangement or understanding commenced on or about 11 April 2013. The applicant will seek copies of the contracts, agreements or arrangements on discovery, and is unable to provide further particulars until after that time.

- 39 Market makers, who are financial institutions that operate in the wholesale market for AGBs, have been appointed to access the liquidity in the wholesale market and provide continuous bid and offer prices for all eAGBs.

**Particulars**

The current market makers are the Commonwealth Bank of Australia and JP Morgan.

- 40 The value of eAGBs traded on the ASX is linked to changes in the value of the underlying AGBs on the wholesale market.

- 41 Through the Treasurer, the AOFM or otherwise, the Commonwealth has entered into a contract, agreement or understanding (or several) to enable and facilitate the payment of:

- 41.1 amounts that are to be paid by the Commonwealth to CHESS DN or Computershare for payment by or on behalf of the CHESS DN to holders of eAGBs, on account of either or both of:

41.1.1 principal secured by AGBs in which the eAGBs are beneficial interests; and

41.1.2 interest on that principal;

- 41.2 the costs and expenses incurred by the Commonwealth that relate directly or indirectly to the issue, management or transfer of eAGBs, including but not limited to:

41.2.1 fees charged by CHESS DN or Computershare; and

41.2.2 clearing and settlement facility fees; and

- 41.3 the costs and expenses incurred by the Commonwealth in relation to the making of payments by the Commonwealth referred to in paragraph 41.2 above.

**Particulars**

The applicant will seek copies of the contracts, agreements or arrangements on discovery, and is unable to provide further particulars until after that time.

- 42 Pursuant to the contract, arrangement or understanding (or several) referred to in paragraph 41 above, the Commonwealth makes the payments referred to in that paragraph.

**Particulars**

The applicant is unable to provide particulars until after discovery.

**C.4 The Corporations Act**

- 43 For the purposes of Ch 7 of the Corporations Act, an AGB is a “financial product” (as defined in s 764A(1)(a)(j)).
- 44 For the purposes of Ch 7 of the Corporations Act, an eAGB is:
- 44.1 a “CGS depository interest” (as defined in s 761A);
  - 44.2 a “security” (as defined in para (f) in definition of “security” in s 761A); and
  - 44.3 a “financial product” (as defined in s 764A(1)(a)).
- 45 As defined in s 1020AH of the Corporations Act, an “information statement” for a class of CGS depository interests is a document that:
- 45.1 contains a statement that the document is an information statement for that class for the purposes of Div 5C of Pt 7.9 of the Corporations Act;
  - 45.2 contains information about all CGS depository interests of that class (whether or not it also contains information about CGS depository interests of another class);
  - 45.3 is prepared by the Commonwealth; and
  - 45.4 is published on the “CGS depository interest information website”.
- 46 The “CGS depository interest information website” as defined in s 1020AH of the Corporations Act is the website at [www.australiangovernmentbonds.gov.au](http://www.australiangovernmentbonds.gov.au) (the **AGB Website**).

**Particulars**

Regulation 7.0.61E of the *Corporations Regulations 2001* (Cth) specifies that the CGS depository interest information website is the website at [www.australiangovernmentbonds.gov.au](http://www.australiangovernmentbonds.gov.au)

## C.5 Publication of information by the Respondents

- 47 The Commonwealth has prepared an “information statement” (**Information Statement**) within the meaning of s 1020AH of the Corporations Act for each class of eAGBs.

### Particulars

The Information Statements for eTBs and eTIBs are both dated 10 February 2015.

- 48 The Information Statement for each class of eAGB is published on the AGB Website (page headed “Investor Information Statements”).

### Particulars

<https://www.australiangovernmentbonds.gov.au/how-invest/investor-information-statements>

- 49 The AGB Website (page headed “How to invest”) directs potential investors to read:

49.1 the relevant **Term Sheet** for the specific series of the underlying AGB; and

49.2 the relevant **Information Memorandum** for each class of underlying AGB.

### Particulars

<https://www.australiangovernmentbonds.gov.au/how-invest/>

- 50 The Term Sheet and Information Memorandum for each class of eAGB are published on the AGB Website, and direct links to those documents are provided on page headed “Investor Information Statements”.

### Particulars

<https://www.australiangovernmentbonds.gov.au/how-invest/investor-information-statements>

- 51 The AGB Website (page headed “Exchange-traded Treasury Bonds”) provides certain information about eTBs.

### Particulars

<https://www.australiangovernmentbonds.gov.au/bond-types/exchange-traded-treasury-bonds>

- 52 The AGB Website (page headed “Exchange-traded Indexed Treasury Bonds”) provides certain information about eTIBs.

### Particulars

<https://www.australiangovernmentbonds.gov.au/bond-types/exchange-traded-treasury-indexed-bonds>

53 The respondents ~~are~~<sup>is</sup> responsible for the publication, maintenance and updating of:

53.1 the Information Statements;

53.2 the Term Sheets;

53.3 the Information Memoranda; and

53.4 the AGB Website.

(the **Disclosure Documents**).

## **C.6 Contents of information published by the Respondents**

### ***C.6.1 Information Statements***

54 The Information Statement for eTBs:

54.1 directs the reader to the relevant Term Sheet for the specific series of the underlying TB;

54.2 directs the reader to the relevant Information Memorandum for each class of underlying TB;

54.3 includes a summary of risks which prospective investors should consider when deciding whether to invest in eTBs;

54.4 identifies those risks as:

54.4.1 changes in market price; and

54.4.2 conversion by the Australian Government;

54.5 does not identify any other risks associated with investing in eTBs.

55 The Information Statement for eTIBs:

55.1 directs the reader to the relevant Term Sheet for the specific series of the underlying TIB;

55.2 directs the reader to the relevant Information Memorandum for each class of underlying TIB;

- 55.3 includes a summary of risks which prospective investors should consider when deciding whether to invest in eTIBs;
- 55.4 identifies those risks as:
  - 55.4.1 changes in market price;
  - 55.4.2 deflation; and
  - 55.4.3 conversion by the Australian Government;
- 55.5 does not identify any other risks associated with investing in eTIBs.

### ***C.6.2 AGB Website***

- 56 The webpage referred to in paragraph 51 above:
  - 56.1 includes a sub-heading “Risks of eTBs”;
  - 56.2 states below that sub-heading risks associated with investing in eTBs, which it states should be considered when deciding to invest in eTBs;
  - 56.3 identifies the following risks:
    - 56.3.1 “Changes in market price”;
    - 56.3.2 “Conversion by Australian Government”;
  - 56.4 does not identify any other risks.
- 57 The webpage referred to in paragraph 52 above:
  - 57.1 includes a sub-heading “Risks of eTIBs”;
  - 57.2 states below that sub-heading risks associated with investing in eTIBs, which it states should be considered when deciding to invest in eTIBs
  - 57.3 identifies the following risks:
    - 57.3.1 “Changes in market price”;
    - 57.3.2 “Deflation”;
    - 57.3.3 “Conversion by Australian Government”;

57.4 does not identify any other risks.

### **C.6.3 Term Sheets**

58 The Term Sheet for each series of AGB does not disclose any risks associated with investing in AGBs.

### **C.6.4 Information Memoranda**

59 The Information Memorandum for each class of AGB does not disclose any risks associated with investing in AGBs.

## **D CLIMATE CHANGE RISKS**

60 On and since 7 July 2020, and at the date of delivery of this pleading (the **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**).

60A It is an objective of the Paris Agreement, made on 10 November 2016 and ratified by the Commonwealth, to strengthen the global response to the threat of Climate Change, including by holding the increase in the global average temperature to well below 2°C above pre-industrial levels and pursuing efforts to limit the temperature increase to 1.5°C above pre-industrial levels (**Paris Objective**), recognizing that this would significantly reduce the risks and impacts of Climate Change.

### **Particulars**

Paris Agreement, Article 1(a).

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

61 At the material times, it has been projected that Australia will experience the following **Physical Impacts** as a result of Climate Change over the coming decades, including before the maturity dates of the eAGBs held by the applicant:

61.1 continued warming, with more extremely hot days and fewer extremely cool days;

61.2 a decrease in cool season rainfall across many regions of the south and east, likely leading to more time spent in drought;

61.3 a longer fire season for the south and east and an increase in the number of dangerous fire weather days;



- 61.4 more intense short-duration heavy rainfall events, and serious flooding events, throughout the country;
- 61.5 fewer tropical cyclones, but a greater proportion projected to be of high intensity, with ongoing large variations from year to year;
- 61.6 fewer east coast lows particularly during the cooler months of the year, and for events that do occur, sea level rise will increase the severity of some coastal impacts;
- 61.7 more frequent, extensive, intense and longer-lasting marine heatwaves leading to increased risk of more frequent and severe bleaching events for coral reefs, including the Great Barrier and Ningaloo reefs;
- 61.8 continued warming and acidification of its surrounding oceans;
- 61.9 ongoing sea level rise;
- 61.10 more frequent extreme sea level events, which were once per hundred year events becoming, over time, annual events.

#### **Particulars**

The *State of the Climate 2020* Report is published by the Commonwealth (the CSIRO and the Bureau of Meteorology) and identifies the matters above: see summary at page 3.

The *Intergenerational Report 2021* is published by the Commonwealth, and was circulated by the Treasurer, the Minister responsible for the Department of Treasury.

The *Intergenerational Report 2021* recognises that climate change presents a significant challenge to the natural environment: see at 57-58.

The applicant will provide further particulars if requested by the Respondents, including after discovery.

- 62 At the material times, the Commonwealth relies upon receiving, directly and indirectly, significant revenue (including taxes) from:
  - 62.1 the agricultural industry;
  - 62.2 the tourism industry;
  - 62.3 industries and communities located on Australia's coastlines;
  - 62.4 industries and communities located in bushfire-prone areas or bushfire smoke-prone areas;

- 62.5 industries and communities located in drought-prone areas or heatwave-prone areas;
  - 62.6 the resources industry (including the fossil fuel industry);
  - 62.7 the financial industry;
  - 62.8 the export industries;
- and from individuals employed by, or associated with, those industries and communities.
- 63 Before the maturity dates of the eAGBs held by the applicant, significant additional expenditure by Commonwealth will, or will likely, be required:
- 63.1 to maintain the ongoing financial viability of the industries and communities referred to in paragraph 62 above;
  - 63.2 to respond to emergency weather events of the kind referred to in paragraph 61 above (that is, extreme temperature days; drought events; fire events; rainfall events; cyclone events; bleaching events; extreme sea level events), including to:
    - 63.2.1 assist industries and individuals adversely affected by those events;
    - 63.2.2 fund recovery and reconstruction operations; and
    - 63.2.3 fund additional emergency services.
- 64 The financial viability of the industries and communities identified in paragraph 62 above are particularly vulnerable to being, and will be, or will likely be, negatively affected by the Physical Impacts identified in paragraph 61 above before the maturity dates of the eAGBs held by the applicant.

#### **Particulars**

The *Intergenerational Report 2021* recognises that impacts of climate change are already being felt by the agricultural sector: at 60.

The applicant will provide further particulars if requested by the Respondents, including after discovery.

- 64B The negative effects referred to in paragraph 64 above will lead, or will be likely lead, to a substantial reduction in revenue received by the Commonwealth from those industries before the maturity dates of the eAGBs held by the applicant.

### Particulars

The *Intergenerational Report 2021* recognises that climate change is expected to have physical effects on Australia's economy, including by reducing taxation revenue: at page 59. It recognises that the agricultural sector and the financial industry is particularly vulnerable to physical effects: at pages 59-60.

The applicant will provide further particulars if requested by the Respondents, including after discovery.

64C The:

64C.1 increase, or likely increase, in expenditure by the Commonwealth referred to in paragraphs 63; and

64C.2 decrease, or likely decrease, in revenue received by the Commonwealth referred to in paragraph 64 above;

is a **Physical Risk**.

## D.2 Transition Risk

### D.2.1 Australia's Commitments

65 The Commonwealth ratified the United Nations Framework Convention on Climate Change (UNFCCC) on 30 December 1992.

66 The Commonwealth ratified the Paris Agreement on 10 November 2016.

67 [Removed in FASOC]

68 Under Article 4(2) of the Paris Agreement, the Commonwealth is obliged to prepare, communicate and maintain successive nationally determined contributions that it intends to achieve, and pursue domestic mitigation measures with the aim of achieving the objectives of such contributions.

69 Pursuant to Article 4(2), the Commonwealth's nationally determined contribution is to reduce greenhouse gas (GHG) emissions by 26 to 28 per cent below 2005 levels by 2030 (**Australia's Paris Commitment**).

### Particulars

Australia's Nationally Determined Contribution, 2015.

70 Pursuant to Article 4(2), the Commonwealth is obliged to pursue domestic mitigation measures with the aim of achieving Australia's Paris Commitment (**Australia's Paris Measures**).

- 71 To achieve the Paris Objective, it will be necessary for global GHG emissions to be net zero by 2050 (**Net Zero Target**).

**Particulars**

IPCC Special Report: Global Warming of 1.5 °C.

- 72 The Commonwealth has accepted that it must achieve net zero GHG emissions in relation to its role concerning the Net Zero Target.
- 73 The Commonwealth has indicated that it would be preferable to achieve net zero GHG emissions in relation to its role concerning the Net Zero Target by 2050, but has refused to commit to doing so by that time.

**Particulars**

The *Intergenerational Report 2021* states that the Government has committed to reaching net zero as soon as possible, preferably by 2050: at 61.

- 74 To reach the Net Zero Target by 2050, the Commonwealth would be required to pursue domestic mitigation measures in addition to Australia's Paris Measures (**Net Zero Measures**), the implementation of which will, or will likely, require significant additional expenditure by Commonwealth before the maturity dates of the eAGBs held by the applicant.

**Particulars**

The *Intergenerational Report 2021* recognises that transition effects relate to the impacts of global and domestic efforts to reduce greenhouse gas emissions, which includes the costs of Australia's mitigation efforts: at 59.

The applicant will provide further particulars if requested by the Respondents, including after discovery.

- 75 The less time in which the Commonwealth has to meet the Net Zero Target from the time it begins to implement the Net Zero Measures, the progressively greater the amount that the Commonwealth will be, or will likely be, required to expend to:

75.1 implement Net Zero Measures;

75.2 counter any adverse impact to the Australian economy as a result of delayed implementation of the Net Zero Measures.

**Particulars**

The *Intergenerational Report 2021* recognises that early investment in adaptation will mean Australia is better prepared and safer from current and future climate change, and will remain an attractive place to do business: at 63.

The applicant will provide further particulars if requested by the Respondents, including after discovery.

- 75A As a result of other countries seeking to achieve net zero GHG emissions in relation to their role concerning the Net Zero Target prior to 2050, global demand for exports of Australia's fossil fuel will decrease, or is likely to decrease, before 2050.

**Particulars**

The *Intergenerational Report 2021* recognises that 129 countries have committed to net-zero emissions by 2050, including key trading partners such as Japan and South Korea, while China has committed to carbon neutrality by 2060. In 2019-20, these 3 countries accounted for 87 per cent of Australia's LNG export value, 74 per cent of Australia's thermal coal export value and 55 per cent of Australia's metallurgical coal export value.

The applicant will provide further particulars if requested by the Respondents, including after discovery.

- 75B The decrease, or likely decrease, in global demand referred to in paragraph 75A above will result, or is likely to result, in a decrease in revenue received by the Commonwealth from the fossil fuel and export industries (referred to in paragraphs 62.6 and 62.8 above) before the maturity dates of the eAGBs held by the applicant.

**Particulars**

The *Intergenerational Report 2021* recognises that revenue sources such as fuel excise and mining royalties could be affected by changes in demand and consumption related to a global transition away from fossil fuel use: at 60. It also recognises that, if commitments to net zero by 2050 by other countries are fully implemented, those commitments will likely reduce demand for unabated fossil fuels over some decades: at 60.

The applicant will provide further particulars if requested by the Respondents, including after discovery.

- 75C The:

- 75C.1 increase, or likely increase, in expenditure by the Commonwealth referred to in paragraphs 74 and 75; and
- 75C.2 decrease, or likely decrease, in revenue received by the Commonwealth referred to in paragraph 75B above;

is a **Transition Risk**.

## **E EFFECT OF RISKS ON eAGBs**

76 By reason of the Physical Risk and/or the Transition Risk there will be, or is likely to be, a material adverse impact on the following matters prior to the maturity dates of the eAGBs held by the applicant:

76.1 the Commonwealth's status and reputation as a reliable and safe issuer of sovereign debt securities;

76.2 the Commonwealth's capacity to maintain its AAA status as an issuer of sovereign debt securities;

76.3 the Commonwealth's capacity to respond to economic shocks and to sustain balanced economic growth and a balanced budget; and

76.4 the Commonwealth's capacity to discharge its interest and principal obligations under the eAGBs held by the applicant and by the other persons holding eAGBs at the material times.

77 The matters in paragraphs 76.1 to 76.4 above, separately and cumulatively, are factors that are, or are likely to be, material to:

77.1 the value of AGBs on the wholesale market for AGBs, and consequentially, a material effect on the value of eAGBs on the ASX, including those held by the applicant and the Represented Persons;

77.2 alternatively, the value of eAGBs on the ASX, including those held by the Applicant and the Represented Persons.

77A By reason of the matters in paragraphs 76 and 77 above, information about:

77A.1 the existence, nature and extent of Physical Risk and Transition Risk; and/or

77A.2 the effect, or likely effect, of those risks:

77A.2.1 on the matters in paragraphs 76.1 to 76.4 above; and/or

77A.2.2 on the value of eAGBs as referred to in paragraph 77 above;

is information that:

77A.3 will inform holders of eAGBs about significant risks associated with holding the eAGBs that persons would reasonably require for the purpose of persons,

including the applicant and the Represented Persons, making a decision whether to acquire, continue to hold, or to dispose of eAGBs; and/or

77A.4 might reasonably be expected to have a material influence on:

77A.4.1 decisions by holders of eAGBs, including the applicant and the Represented Persons, as to whether to hold or dispose of their current interests in eAGBs; and

77A.4.2 decisions by potential investors of eAGBs as to whether to purchase eAGBs.

(the information referred to in paragraphs 77A.1 to 77A.2 constitutes **Material Climate Change Information**).

77B At the material times, ~~each of the Respondents~~ the respondent:

77B.1 ~~were~~ was aware of; or

77B.2 ought to have been aware of;

each of the matters that constitutes Material Climate Change Information.

#### **Particulars for paragraph 77B.1**

The applicant refers to the particulars for paragraphs 61, 64, 64B, 73, 74, 75, 75A and 75B above.

The Task Force on Climate-Related Financial Disclosures, *Recommendations of the Task Force on Climate-related Financial Disclosures* (Final Report, June 2017) is a widely available document concerning the disclosure of climate-related financial information for businesses. In the Government Response (dated March 2018) to Recommendations made by the Senate Economics reference Committee, tabled 21 April 2017 (“Carbon risk: a burning issue”), the Government noted the recommendation to implement the recommendations of the Task Force. The Government welcomed the release of the Final Report and encouraged all stakeholders to carefully consider the recommendations. The Government did not consider further law reform was required, because the disclosure requirements in the *Corporations Act 2001* (Cth) are “principles-based and do not impede the implementation of the Taskforce’s recommendations”.

On or around 9 June 2021, in response to a question concerning climate risk disclosure by sovereign bond issuers, the ~~Third Respondent~~ CEO of the AOFM said that the AOFM was getting “a range of responses particularly from the European investors that ranges from curiosity to finger waving to a bollocking”. The CEO said there that the issuer rating rather than the instrument rating in particular will be something that might take on more prominence. He also said that there would be an increased focus from fixed income investors about what governments are doing to react to the challenges ahead, and that the AOFM had discussed the efforts of S&P Global Ratings to incorporate environmental, social and governance risks into their sovereign ratings. He said that as that develops

“all countries including Australia will have to make sure that they’re aware of what the criteria are and how we are going to sit relative to other countries. Because sovereign issuer ratings through the core ratings agency process will tend to gather more attention than other measures”: see Exhibit DLB-5 to the Affidavit of David Barnden.

Having regard to the matters in paragraphs 12 to ~~15~~<sup>16</sup> above, the knowledge of officers and agents within the AOFM, obtained in the course of their duties, are attributable to the ~~Second and Third Respondents~~ Treasury Secretary and the CEO of the AOFM. The knowledge of officers and agents within the Treasury, obtained in the course of their duties, are attributable to the ~~Second Respondent~~ Treasury Secretary and the Treasurer. The knowledge of the ~~Second and Third Respondents~~ Treasury Secretary and the CEO of the AOFM, and the Treasurer, obtained in the course of their duties (including as attributed to them), are attributable to the Commonwealth.

The applicant is unable to provide further particulars until after discovery.

#### **Particulars for paragraph 77B.2**

The applicant refers to the particulars for paragraph 77B.1.

Australia has joined the Coalition for Climate Resilient Investment, working with the investment sector to better consider physical climate risks and create resilient investment solutions: *Intergenerational Report 2021* at 64.

In 2006, the Commonwealth published “Climate Change Impacts & Risk Management: A Guide for Business and Government”.

The Commonwealth’s financial regulators (including ASIC) have recognised that climate change is exposing the financial system to risks that will rise over time. To respond to these risks, regulators are working on strengthening the identification and management of climate-related risk and improving disclosure: *Intergenerational Report 2021* at 61.

The applicant is unable to provide further particulars until after discovery.

78 [Deleted in FASOC].

79 [Deleted in FASOC].

#### **F ~~DUTY OF DISCLOSURE~~ [DELETED IN 3FASOC]**

80 [Deleted in 3FASOC]. ~~At material times, the respondents have acted as a promoter of eAGBs by reason of the matters set out in paragraphs 29 to 59 above.~~

81 [Deleted in 3FASOC]. ~~As a promoter, the respondents owe a fiduciary duty of utmost candour and honesty to investors who acquire or intend to acquire eAGBs (**Disclosure Duty**).~~

82 [Deleted in 3FASOC].



The Disclosure Duty requires the respondents to disclose **Material Information**, being information they were aware of, or ought to have been aware of, that might reasonably be expected to have a material influence on:

~~82.1—decisions by current holders of eAGBs, including the applicant and the Represented Persons, as to whether to hold or dispose of their current interests in eAGBs; and~~

~~82.2—decisions by potential investors of eAGBs as to whether to purchase eAGBs;~~

~~and which includes Material Climate Change Information.~~

83 [Deleted in 3FASOC].

~~At the material times, the respondents have not published in the Disclosure Documents any Material Climate Change Information.~~

84 [Deleted in 3FASOC]. ~~By reason of the foregoing matters the respondents have breached, and continue to breach, the Disclosure Duty.~~

## **G ASIC ACT**

85 Subject to exceptions that are not presently relevant, s 12DA(1) provides that a person must not, in trade or commerce, engage in conduct in relation to financial services that is misleading or deceptive or is likely to mislead or deceive.

86 Subject to exceptions that are not presently relevant, Div 2 of Pt 2 of the ASIC Act (including s 12DA) binds the Crown in right of the Commonwealth in so far as the Crown in right of the Commonwealth carries on a business, either directly or by an authority of the Commonwealth.

### **Particulars**

ASIC Act, s 12AD(1), (5).

87 The Commonwealth, through the Treasurer, the AOFM or otherwise, carries on the business of issuing AGBs and arranging for the issue of eAGBs because it:

87.1 engages in those activities for the purpose of borrowing money;

87.2 engages in those activities on a continuous and repetitive basis;

87.3 engages in those activities in the same way as a listed corporation might issue corporate bonds which are to be traded on the ASX;

87.4 has entered into commercial arrangements with third parties to facilitate those activities, including the arrangements referred to in paragraphs 30, 35 to 38 and 41 above;

87.5 has arranged for the eAGBs to be traded on the ASX in common with other financial products.

88 For the purposes of Div 2 of Pt 2 of the ASIC Act (including s 12DA), a “financial product” is a “financial service”.

**Particulars**

ASIC Act, s 12BAB(1AA).

89 An eAGB is a “financial product” for the purposes of Div 2 of Pt 2 of the ASIC Act.

**Particulars**

ASIC Act, ss 12BAA(1) and (7)(a), (i).

90 At the material times, the Commonwealth, through the Treasurer, the AOFM or otherwise, has been providing a financial service for the purposes of Div 2 of Pt 2 of the ASIC Act because:

90.1 through the conduct referred to at paragraphs 29 to 42 above, it has arranged, and continues to arrange, for eAGBs to be issued; and

90.2 therefore, it has been dealing, and continues to deal, in a financial product.

**Particulars**

ASIC Act, ss 12BAB(1)(b), (1AA), (7)(b) and (8).

91 At the materials times, the Commonwealth, through the Treasurer, the AOFM or otherwise, has published the Disclosure Documents in relation to eAGBs.

92 The information referred to in paragraph 91 above was published for the purpose of informing retail investors about eAGBs, which investors would ordinarily have the benefit of a Product Disclosure Statement provided under Div 2 of Pt 7.9 of the Corporations Act in relation to a financial product.

93 It is a requirement of a Product Disclosure Statement that it include information about:

93.1 any significant risks associated with holding the product as a person would reasonably require for the purpose of making a decision, as a retail client, whether to acquire the financial product; and

93.2 subject to presently irrelevant exceptions, any other information that might reasonably be expected to have a material influence on the decision of a reasonable person, as a retail client, whether to acquire the product.

**Particulars**

Corporations Act, ss 1013D(1)(c), 1013E.

94 At the material times, through the publication of the Disclosure Documents, the Commonwealth, through the Treasurer, the AOFM or otherwise, has disclosed Material Information, being information that might reasonably be expected to have a material influence on:

94.1 decisions by current holders of eAGBs, including the applicant and the Represented Persons, as to whether to hold or dispose of their current interests in eAGBs; and

94.2 decisions by potential investors of eAGBs as to whether to purchase eAGBs.

95 At the material times, the Commonwealth, through the Treasurer, the AOFM or otherwise, has not published in the Disclosure Documents any Material Climate Change Information.

95A By reason of the matters set out in paragraphs 80 to 94 above, at the material times there was a reasonable expectation by the applicant, the Represented Persons, and potential investors in eAGBs that the Commonwealth, through the Treasurer, the AOFM or otherwise, would disclose in the Disclosure Documents the Material Climate Change Information.

96 Further or alternatively, at the material times, by reason of the Commonwealth's:

96.1 disclosure of certain Material Information in the Disclosure Documents;

96.2 in combination with the omission of providing any Material Climate Change Information in the Disclosure Documents;

the Commonwealth represented that the Material Information relating to eAGBs was only that information contained in the Disclosure Documents.

97 By reason of the matters at paragraphs 85 to 96 above, the Commonwealth, through the Treasurer, the AOFM or otherwise, has engaged, and continues to engage, in conduct that:

97.1 is misleading or deceptive; and/or

97.2 likely to mislead or deceive.

98 At the material times, the Commonwealth, through the Treasurer, the AOFM or otherwise, has engaged, and is continuing to engage, in the conduct referred to in paragraph 97 above “in trade or commerce” within the meaning of s 12DA(1) of the ASIC Act, by reason of the matters specified at paragraphs 87 and 90 to 91 above.

99 In the premises, at the material times, the Commonwealth has contravened, and is continuing to contravene, the prohibition in s 12DA(1) of the ASIC Act.

100 The applicant on her own behalf seeks the injunctive relief specified below pursuant to s 12GD(1)(a) of the ASIC Act.

#### **H ~~PGPA ACT~~ [DELETED IN 3FASOC]**

101 [Deleted in 3FASOC]. ~~The Treasury Secretary is an “official” of Treasury within the meaning of s 13 of the PGPA Act.~~

102 [Deleted in 3FASOC]. ~~The Treasury Secretary has responsibility for the management and administration of the Treasury.~~

103 [Deleted in 3FASOC]. ~~The third respondent is an “official” of the AOFM within the meaning of s 13 of the PGPA Act.~~

104 [Deleted in 3FASOC].

~~The third respondent:~~

~~has responsibility for the management and administration of the AOFM, including in relation to its conduct concerning AGBs and eAGBs; and~~

~~is accountable to the Treasury Secretary for that management and administration.~~

105 [Deleted in 3FASOC].

~~In their capacity as officials under the PGPA Act, the Treasury Secretary and the third respondent are subject to the duty in 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 the degree of care and diligence that a reasonable person would exercise if the person:~~

~~were an official of a Commonwealth entity in the Commonwealth’s entity’s circumstances; and~~

~~occupied the position held by, and had the same responsibilities within the Commonwealth entity as, the official.~~

106 [Deleted in 3FASOC].

~~By reason of the matters specified in Part E above (Effect of Risks) and:~~

~~the matters specified in Part F above (Disclosure Duty); and/or~~

~~the matters specified in Part G above (ASIC Act);~~

~~the Treasury Secretary and the third respondent have breached, and continue to breach, the duty in s 25(1) of the PGPA Act, because a reasonable person in their position would not have neglected, failed or refused to disclose the Material Climate Change Information in the Disclosure Documents.~~

## **I RELIEF**

107 The applicant on her own behalf and as representing the Represented Persons seeks:

107.1 declarations that between 7 July 2020 and the date of this pleading, the Commonwealth breached, and continued to breach, ~~the Disclosure Duty and~~ s 12DA(1) of the ASIC Act because of its failure to disclose any Material Climate Change Information in the Disclosure Documents;

107.2 [Deleted in 3FASOC] ~~declarations that, between 7 July 2020 and the date of this pleading, the Treasury Secretary and the AOFM CEO breached, and continued to breach, their duty under s 25(1) of the PGPA Act because of the failure to disclose any Material Climate Change Information in the Disclosure Documents;~~

107.4 such further or other orders, including orders as to costs, as the Court deems fit.

108 The applicant on her own behalf seeks:

108.1 declarations that, since 7 July 2020, the Commonwealth has breached, and continues to breach, ~~the Disclosure Duty and~~ s 12DA(1) of the ASIC Act because of its failure to disclose any Material Climate Change Information in the Disclosure Documents;

108.2 [Deleted in 3FASOC] ~~declarations that, since 7 July 2020, the Treasury Secretary and the AOFM CEO have breached, and continue to breach, their duty under s 25(1) of the PGPA Act because of the failure to disclose any Material Climate Change Information in the Disclosure Documents;~~

108.3 ~~[Deleted in 3FASOC]~~ an injunction restraining the Commonwealth and its officers, including the Treasury Secretary, the AOFM CEO and the Treasurer from further promoting eAGBs until they provide in the Disclosure Documents such information as the Court directs as necessary to inform in accordance with law the applicant and potential investors in eAGBs about Material Climate Change Information;

108.4 an injunction restraining the Commonwealth and its officers, including the Treasury Secretary and the AOFM CEO, from further issuing, or being involved in the issuing of, eAGBs until they provide in the Disclosure Documents such information as the Court directs as necessary to inform in accordance with law the applicant and potential investors in eAGBs about Material Climate Change Information;

108.5 such further or other orders, including orders as to costs, as the Court deems fit.

This ~~Second~~ Third Further Amended Statement of Claim 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 third further amended statement of claim 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: ~~6 August~~ 28 October 2021



.....  
Signed by David Barnden

Lawyer for the applicant