

**Royal Commission into Misconduct in the Banking, Superannuation and  
Financial Services Industry**

**REASONS FOR RULING**

**Ruling No:** 01/2018

**Application No:** APD-001

**Applicant:** Commonwealth Bank of Australia

**Application for:** Non-publication directions

**Direction No:** DIR-001

**Date of reasons:** 2 March 2018

## Introduction

1           Section 6D of the *Royal Commissions Act* 1902 (Cth) (**the Act**) deals with the rights of witnesses. Subsection (1) of s 6D provides that nothing in the Act shall make it compulsory for any witness before a Royal Commission to disclose to the Commission any secret process of manufacture. Subsection (2) entitles a person to ask a Commission to take a witness's evidence in private "on the ground that the evidence relates to the profits or financial position of any person, and that the taking of the evidence in public would be unfairly prejudicial to the interests of that person". Subsection (3) gives a Commission power to direct that, among other things, any evidence given before it or the contents of any document produced before, or delivered to, the Commission or produced under a notice to produce given under s 2(3A) of the Act, shall not be published, or shall not be published except in such manner, and to such persons, as the Commission specifies.

2           The Commonwealth Bank of Australia (**CBA**) has made an application for a direction to be made under s 6D(3) of the Act with respect to parts of a draft statement dated 25 February 2018 of evidence to be given by an employee of CBA about the CCP Product, and with respect to the contents of certain documents that CBA proposes to exhibit to the final statement.

3           I encourage the approach adopted by CBA of making an application for a direction pursuant to s 6D(3) of the Act whilst the relevant statement is still in draft. This assists with the efficient operation of the Commission and conduct of its hearings as I can decide whether I will make any direction with respect to the documents proposed to be exhibited to the final statement and indicate how I would propose to deal with paragraphs of the statement, in respect of which a direction is sought, if they remain in substantially the same form in the final statement. It also permits preparation of a redacted version of the final statement and accompanying documents reflecting the directions I have made or propose to make pursuant to s 6D(3) of the Act.

4 Ordinarily speaking, it would be neither necessary nor appropriate to give elaborate reasons for decision when deciding whether to make or refuse to make a direction under s 6D(3). The application made by CBA in respect of this witness statement does warrant a more elaborate statement of reasons and warrant publication of those reasons for the guidance of others who may seek a direction under s 6D(3).

5 CBA's application sets out four paragraphs of generally expressed grounds and alleges that the documents and the identified parts of the draft statement fall within "one or more" of those grounds. No more particular connection is made between the grounds and the documents or identified information. No attempt is made to demonstrate how or why the publication of a specific document or the publication of identified information referred to in a document would have any of the several different effects alleged in the application. General assertions are made that certain kinds of communication, such as, for example, communications between CBA and regulators, are confidential. Why the particular communications should be treated in this way is not explained.

6 Arguments framed in this fashion are unhelpful and unpersuasive. Where an applicant asserts that information is confidential to the applicant and seeks a non-publication direction on that basis, it is for the applicant to articulate with precision the ground or grounds on which each direction for non-publication is claimed. Saying that "one or more" of several grounds is engaged does not do that.

7 It is not possible to describe exhaustively the circumstances that might warrant making a direction under s 6D(3). In considering the exercise of the power it will always be necessary to bear at the forefront of consideration that the Commission is a public inquiry into whether any conduct by financial services entities might have amounted to misconduct or is conduct that falls below community standards and expectations. Exceptional circumstances must be demonstrated for the Commission, charged with those tasks, to direct that information revealing conduct of a kind that the Commission must investigate and report about not be publicly available.

8           And, in dealing with this particular application it is also necessary to bear well in mind that the conduct that is the subject of the draft statement, and to which the documents that it is proposed should be exhibits to the statement relate, is conduct which, in its first submission to the Commission, CBA acknowledged fell short of community standards and expectations and is conduct the consequences of which CBA has sought to remedy by making payments totalling several million dollars. (Whether, or to what extent, the conduct was misconduct may remain an open issue even though it is to be noted that CBA has made a notification to the Australian Securities and Investments Commission (ASIC) under s 912D of the *Corporations Act* 2001 (Cth) in respect of at least some of the conduct.)

9           It is necessary to recognise that a non-publication direction should be made only for cause shown. The circumstances that have just been mentioned emphasise the need to look carefully at whether, in a particular case, proper cause has been demonstrated to prevent publication of evidence that is given to the Commission about what is acknowledged to have been conduct falling short of community standards and expectations and which may, on examination, be found to amount to misconduct. This may involve a weighing of the public interest in the open and transparent operation of a public inquiry into a matter of public interest against the public interest in protecting the privacy of an individual or the public interest in protecting private commercial interests so as, for example, to avoid a risk to the efficient operation of a market.

10          But, there are circumstances in which a non-publication direction will often be made. Informants and whistleblowers are obvious cases where care must be taken to ensure that people of those kinds are not deterred from giving information to the Commission. And, in aid of that, it may very well be necessary to give non-publication directions. Other cases may include where a person, other than the financial services entity whose conduct is being examined, would suffer damage by reason of publication of certain information, or where personal information of a third party having only an incidental connection to the conduct in issue would be revealed. But, as already indicated, these can be, and are, no more than examples of relevant circumstances. They are not, and are not to be read as, some exhaustive statement of the boundaries of the power.

11 The particular claims that are made with respect to the draft statement and  
proposed Exhibits may be dealt with as follows.

### Communications between CBA and ASIC

12 The application alleges that communications between CBA and regulatory  
authorities (in this case ASIC) should be treated as confidential, but does not seek to  
explain why that should be so when, as here, the communications relate to conduct  
that CBA considered appropriate to draw to the attention of ASIC and, in respect of  
which, CBA engaged in detailed dealings with ASIC about whether and how the  
conduct was to be remedied. Absent ASIC joining in an application for  
a non-publication direction, I do not accept that a non-publication direction should be  
made in respect of any of those parts of the draft statement, or (subject to one limited  
qualification) the proposed Exhibits (being Exhibits 9 to 12, 25 to 29 and 31 to 33),  
which reveal those communications. The qualification concerns Exhibit 25. That  
Exhibit names a particular customer of CBA who had made a complaint and it  
identifies, by number, the insurance policy that had been issued to her. So much of  
the document as identifies that customer or the number of the insurance policy should  
not be published except to the Commission, its staff and counsel and solicitors assisting  
the Commission, and to CBA and its counsel and solicitors.

13 Pursuant to section 6D(3) of the Act, I direct that so much of the contents of the  
document, that is proposed Exhibit 25, as discloses the name of the customer and the  
number of the insurance policy not be published except to the Commission, its staff  
and counsel and solicitors assisting the Commission, and to CBA and its counsel and  
solicitors.

14 If any other document that is proposed to be exhibited to the statement, apart  
from that information in Exhibit 25 that I have already identified, contains personal  
information of a customer, such as the customer's name or account numbers, then that  
information should be specifically identified by CBA so that a direction pursuant to  
s 6D(3) of the Act can be given, if appropriate.

### Internal documents of CBA or related entities about the conduct in issue

15 The proposed Exhibits include (as Exhibits 7, 8 and 30) those parts of internal audit documents and board papers that relate to the conduct in issue. Each of those Exhibits has been redacted to provide only so much of the document as relates to the conduct in issue. There is no sufficient reason given to preclude publication of those redacted documents. Their publication is important to a proper understanding of the sequence of events surrounding identification of the relevant conduct and steps taken thereafter.

### The remediation scheme

16 CBA alleges that so much of the statement as describes the design, cost and implementation of its remediation program should not be published. No sufficient reason is given to warrant making such a direction. What CBA did in response to the conduct is an important part of the Commission's inquiry.

### Number and value of certain kinds of dealings

17 The statement provides numbers for, and values of, certain kinds of dealing, such as home loans and credit card accounts, at various dates. Again, no sufficient reason is offered for directing that this information should not be published. More particularly, it is not demonstrated that revealing the information would have identifiable and identified adverse consequences for CBA or its business.

### Conclusion

18 Apart from the one case where a particular customer's name and policy number would otherwise have been revealed, none of the particular information in respect of which CBA sought directions was shown to be of a kind that should not be published. CBA identified no damage to itself or any other person that would follow from publication of the material. Subject to the direction described above, the application is otherwise refused.

**K M HAYNE**