

ORIGINATING PROCESS

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

NO QUD OF 2019

IN THE MATTER OF AUSTRALIA AND NEW ZEALAND BANKING GROUP LIMITED

ACN: 005 357 522

**AUSTRALIAN SECURITIES AND INVESTMENTS
COMMISSION**

Plaintiff

**AUSTRALIA AND NEW ZEALAND BANKING GROUP
LIMITED ACN 005 357 522**

Defendant

A. DETAILS OF APPLICATION

This application is made under sections 19 and 21 of the *Federal Court of Australia Act 1976* (Cth) (**FCA Act**), sections 12GBA(1), 12GJ(1) and 12GLB(1)(a) of the *Australian Securities and Investments Commission Act 2001* (Cth) (**ASIC Act**), and section 1101B of the *Corporations Act 2001* (Cth) (**Corporations Act**).

The Plaintiff seeks declarations of contraventions of the ASIC Act and the Corporations Act, pecuniary penalty orders, adverse publicity orders and ancillary orders, including costs.

In this originating process, terms which are defined in the Concise Statement dated 25 July 2019 have the same meaning as they do in that document.

On the facts stated in the accompanying Concise Statement, the Plaintiff seeks:

Declarations

1. A declaration under s 21 of the FCA Act, and s 1101B of the Corporations Act that, between 26 July 2013 and 23 February 2016, on each of the at least 1,340,087 occasions, by charging a Same Name PP Fees, or notifying the charging of a Same Name PPNP Fee or Same Name PP Transaction Fee, and in doing so expressly or impliedly representing in trade or commerce and in connection with the supply or

Filed on behalf of the Plaintiff, ASIC

File ref: 18010111

Prepared by: Jody Marshall

AGS lawyer within the meaning of s 55I of the *Judiciary Act*
1903

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possible supply of financial services that it had a contractual entitlement to do so when ANZ did not have such a contractual entitlement (the **ANZ Representation**), ANZ:

- 1.1. made false and/or misleading representations in connection with the supply of financial services concerning the existence or effect of a condition, right or remedy in contravention of s 12DB(1)(i) of the ASIC Act, on each occasion that ANZ made the ANZ Representation;
 - 1.2. engaged in conduct in relation to financial services that was misleading or deceptive or likely to mislead or deceive in contravention of s 12DA(1) of the ASIC Act on each occasion that ANZ made the ANZ Representation; and
 - 1.3. breached its general obligation to comply with financial services laws in contravention of s 912A(1)(c) of the Corporations Act, on each occasion that ANZ made the ANZ Representation.
2. A declaration under s 21 of the FCA Act and s 1101B of the Corporations Act that:
- 2.1. by charging the Same Name PP Fees on each occasion from 26 July 2013, when ANZ knew that the charging of those fees was unlawful or knew that the charging of those fees was at risk of being unlawful, and knew or had reason to believe that it was highly unlikely that ANZ would be able to remediate all affected customers; and
 - 2.2. additionally or alternatively, by failing to inform customers who may have been affected of the fact of its unlawful charging on each day between 26 July 2013 and 23 September 2015, when ANZ knew or had reason to believe that:
 - 2.2.1. there was a strong prospect that a very substantial proportion of its customers who had been unlawfully charged since August 2003 were unlikely to be aware of that fact;
 - 2.2.2. the rights of its customers to sue ANZ for unlawfully charging them might be expiring due to limitation periods, or at least ANZ would argue that the rights had expired;
 - 2.2.3. it had not proposed and was not intending to reimburse customers whose rights under limitation statutes ANZ contended had expired;
 - 2.2.4. by reason of the inadequacy of its record keeping, ANZ was highly unlikely to be able to identify all customers affected by its conduct either quickly or at all, with the consequence that if it did not take steps to immediately alert all customers going back to August 2003 that their funds might have been unlawfully taken, affected customers might have no ability to identify the conduct, make a claim or act to preserve their rights to do so; and/or
 - 2.3. additionally or alternatively, by deliberately not making remediation payments after 11 December 2013 to customers who had been charged Same Name PP Fees in the period between August 2003 and 31 December 2007,

ANZ:

- 2.4. engaged in conduct in trade or commerce and in connection with the supply or possible supply of financial services that was, in all the circumstances, unconscionable in contravention of s 12CB(1) of the ASIC Act; and
 - 2.5. breached its general obligation to comply with the financial services laws in contravention of s 912A(1)(c) of the Corporations Act.
3. A declaration under s 1101B of the Corporations Act and s 21 of the FCA Act that by ANZ's conduct in:
- 3.1. imposing the Same Name PP Fees for 12 years when it had no contractual right to do so;
 - 3.2. additionally or alternatively, failing to remediate customers for Same Name PP Fees or to disclose the existence of a possible issue in relation to the imposition of that fee in a reasonable time after receiving the 2011 Information;
 - 3.3. additionally or alternatively, continuing to impose the Same Name PP Fees after it had been put on notice or should have known that the imposition of those fees was unlawful;
 - 3.4. additionally or alternatively, failing, in a timely way after receiving the 2011 Information, to investigate whether it was entitled to impose the Same Name PP Fees; and
 - 3.5. additionally or alternatively, providing incomplete or misleading information to ASIC when it reported the issue in February 2014,

ANZ breached its obligation to do all things necessary to ensure that the financial services covered by its financial services licence were provided efficiently, honestly and fairly, and thereby contravened s 912A(1)(a) of the Corporations Act.

Penalties

4. An order pursuant to s 12GBA(1) of the ASIC Act that, within 30 days of the order, ANZ pay to the Commonwealth of Australia such pecuniary penalties as the Court determines to be appropriate in respect of ANZ's conduct declared to be contraventions of s 12DB(1)(i) of the ASIC Act.
5. An order pursuant to s 12GBA(1) of the ASIC Act that, within 30 days of the order, ANZ pay to the Commonwealth of Australia such pecuniary penalties as the Court determines to be appropriate in respect of ANZ's conduct declared to be in contravention of s 12CB(1) of the ASIC Act.

Other orders

6. An order pursuant to s 12GLB(1)(a) of the ASIC Act that, within 30 days of the order, ANZ take all reasonable steps to cause to be published, at its own expense, a notice

stating that it has been ordered to pay a pecuniary penalty because it has made false or misleading representations, and/or engaged in unconscionable conduct in a manner and form approved by the Court.

7. An order that the Defendant pay the Plaintiff's costs of and incidental to the proceeding.
8. Such further or other orders as the Court considers appropriate.

Date: 25 July 2019


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Jody Marshall
AGS lawyer
for and on behalf of the Australian Government Solicitor
Lawyer for the Plaintiff

This application will be heard byat the Harry Gibbs Commonwealth Law Courts Building, 119 North Quay Brisbane QLD 4000 at
*am/*pm on

B. NOTICE TO THE DEFENDANT

TO: Australia and New Zealand Banking Group Limited
c/o Ashurst Australia
Level 26, 181 William Street, Melbourne VIC 3000

If you or your legal practitioner do not appear before the Court at the time shown above, the application may be dealt with, and an order made, in your absence. As soon after that time as the business of the Court will allow, any of the following may happen:

- (a) the application may be heard and final relief given;
- (b) directions may be given for the future conduct of the proceeding;
- (c) any interlocutory application may be heard.

Before appearing before the Court, you must file a notice of appearance, in the prescribed form, in the Registry and serve a copy of it on the plaintiff.

Note Unless the Court otherwise orders, a defendant that is a corporation must be represented at a hearing by a legal practitioner. It may be represented at a hearing by a director of the corporation only if the Court grants leave.

D. FILING

Date of filing: 25 July 2019

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Registrar

E. SERVICE

The Plaintiff's address for service is:

Australian Government Solicitor,
Level 11, 145 Ann St, Brisbane, QLD 4000

Email: Jody.Marshall@ags.gov.au

The Australian Government Solicitor's telephone, facsimile, and document exchange numbers are:

Tel: 07 3360 5751

Fax: 07 3360 5795

DX 119 Brisbane

It is intended to serve a copy of this originating process on the Defendant.