

NOTICE OF FILING

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Details of Filing

Document Lodged:	Concise Statement
File Number:	NSD1355/2019
File Title:	AUSTRALIAN SECURITIES & INVESTMENTS COMMISSION v NATIONAL AUSTRALIA BANK LIMITED ACN 004 044 937
Registry:	NEW SOUTH WALES REGISTRY - FEDERAL COURT OF AUSTRALIA



A handwritten signature in blue ink, reading "Warwick Soden".

Dated: 23/08/2019 12:13:26 PM AEST

Registrar

Important Information

As required by the Court's Rules, this Notice has been inserted as the first page of the document which has been accepted for electronic filing. It is now taken to be part of that document for the purposes of the proceeding in the Court and contains important information for all parties to that proceeding. It must be included in the document served on each of those parties.

The date and time of lodgment also shown above are the date and time that the document was received by the Court. Under the Court's Rules the date of filing of the document is the day it was lodged (if that is a business day for the Registry which accepts it and the document was received by 4.30 pm local time at that Registry) or otherwise the next working day for that Registry.



CONCISE STATEMENT

Federal Court Of Australia

District Registry: New South Wales

Division: General

No. of 2019

AUSTRALIAN SECURITIES AND INVESTMENTS COMMISSION

Applicant

NATIONAL AUSTRALIA BANK LTD (ACN 004 044 937)

Respondent

A. IMPORTANT FACTS GIVING RISE TO THE CLAIM

1. The Respondent (**NAB**) is one of Australia's major banks and one of Australia's largest publicly listed companies. NAB provides a range of banking services and products to consumers, including home loans and personal loans.
2. NAB holds an Australian credit licence (**ACL**) granted under s38 of the *National Consumer Credit Protection Act 2009* (Cth) (**National Credit Act**). As the holder of an ACL, it must comply with the obligations imposed on licensees by the National Credit Act. Some of the key aims of the National Credit Act are regulating credit industry participants, including by way of the licensing regime, and enhancing consumer protection. The introduction of the licensing regime sought to address, inter alia, concerns that brokers may misrepresent consumers' financial details so that loans were approved, and commissions paid to brokers, when the consumer's true financial position meant that the loan should not have been made.
3. From 2013 to December 2016 (the **Relevant Period**) NAB had in place a program by which third parties (**Introducers**) could introduce potential customers to the bank, under what was known as a "spot and refer" model. An "Introducer" was a person or company whose main business was not in finance or lending, but in some other industry such as accounting or real estate. In the course of that business they 'spotted' customers that they could then 'refer' to NAB. If NAB advanced a loan to introduced customers, including home loans, the Introducer was paid a commission. Introducers were not required by NAB to hold an ACL. The program was known as the "Introducer Program".
4. The Introducer Program was profitable for NAB. During the Relevant Period, almost 46,000 loans, involving lending totalling more than \$24 billion, were brought in through this program.
5. Some Introducers had direct written agreements with NAB governing the terms of their referral relationship (**Introducer Agreements**). Other Introducers did not have direct agreements with the bank, but rather were "affiliates" of NAB's "national referral partners" (**NRPs**).

6. The terms of the Introducer Agreements were generally in a standard form. It was a term of the Introducer Agreements that Introducers who did not hold an ACL were not to provide NAB with information other than a potential customer's name and contact details.
7. In addition, NAB had in place policies and procedures governing the operation of the Introducer Program (**Introducer Program Policies**). The Introducer Program Policies also specified that Introducers who did not hold an ACL were to provide NAB with a potential customer's name and contact details only.
8. However, in relation to the 297 loans identified in Confidential Annexure A referred to in the Originating Application (**Confidential Annexure A**), Introducers who did not hold an ACL provided NAB's employees with information and documents beyond the consumer's name and contact details including, for example, completed home loan applications, tax returns, payslips, letters of employment and other material. In some cases, information or documents provided by Introducers to bank officers was false. The NAB advanced loans to these customers and commission was paid to the relevant Introducers.
9. This conduct exposed the customers and NAB to the risk of wrongful conduct by the Introducer, including possible fraud. It also exposed customers to a risk that loans would be advanced to them that were unsuitable.
10. By interacting with customers and passing on information to bank officers in this manner, the Introducers in each identified case assisted borrowers to apply for a particular loan with NAB. The Introducers were also acting as an intermediary between the bank and the borrower. This conduct constitutes "credit activity" for the purposes of the National Credit Act. Undertaking these activities without an ACL meant that the Introducers were in breach of s.29 of the National Credit Act, which prohibits engaging in a "credit activity" without such a license.
11. By conducting business with Introducers who did not hold an ACL in the circumstances described above, NAB contravened s.31 of the National Credit Act.
12. NAB is obliged under the National Credit Act to do all things to ensure that the activities authorised by its ACL are engaged in efficiently, honestly and fairly. That standard requires competence in complying with statutory obligations. It also requires NAB to exercise sound judgment in relation to customer affairs, and imports a requirement of a reasonable standard of performance. In accepting documents and information from Introducers, NAB employees contravened NAB policy and contravened the terms of the Introducer Agreements. NAB did not act reasonably in accepting that information from Introducers, rather than from customers.

B. SUMMARY OF RELIEF SOUGHT FROM THE COURT

13. The relief sought is set out in the accompanying application, summarised as follows:
 - (a) declarations;
 - (b) pecuniary penalties;
 - (c) costs; and
 - (d) such further orders as the Court considers appropriate.

C. PRIMARY LEGAL GROUNDS FOR THE RELIEF SOUGHT

14. Each of the loans referred to in Confidential Annexure A (**Loans**) was a credit contract within the meaning of s.5 of the National Credit Act.
15. NAB by:
 - (a) being the credit provider for each of the Loans; and
 - (b) carrying on a business of providing credit, being credit the provision of which the National Credit Code applies to,was engaged in a “credit activity” within the meaning of s.6 of the National Credit Act.
16. In the course of engaging in that credit activity, NAB conducted business with the Introducers shown in Confidential Annexure A. Each Introducer had an agreement with NAB either directly, or through an NRP, to refer potential customers in exchange for payment of a commission on any secured loan to that customer.
17. As identified in paragraph 8 above, the Introducers who did not hold an ACL provided NAB’s employees with information and documents beyond the customer’s name and contact details. NAB used the information and documents provided by the Introducers in assessing loan applications for these customers.
18. The Introducers were themselves engaging in a “credit activity” within the meaning of s.6 of the National Credit Act, being the provision of a “credit service” being either, or both of, providing “credit assistance” within the meaning of s.8 of the National Credit Act, or acting as an intermediary within the meaning of s.9 of the National Credit Act.
19. The Introducers were providing credit assistance as follows. By, inter alia, providing the documents and information referred to in paragraph 17 above, Introducers dealt with consumers, assisting consumers to apply for a particular credit contract (that is, the Loans) with NAB. Further, the Introducers provided this assistance by dealing with the consumers in the course of, as part of or incidentally to their core business (as identified in each case on the application form prior to joining the Introducer Program) together with their business comprised of their dealings with NAB (as governed by the terms of the Introducer Agreement for the payment of commissions). The assistance was also provided incidentally to or as part of NAB’s business.
20. The Introducers were acting as an intermediary as follows. By, inter alia, providing the documents and information referred to in paragraph 17 above, Introducers were acting as intermediaries between NAB and the consumers by providing information purportedly about the consumer wholly or partly for the purposes of securing the Loans. Further, the Introducers acted as an intermediary in the course of, as part of or incidentally to their core business (as identified in each case on the application form completed prior to joining the Introducer Program) together with their business comprised of their dealings with NAB (as governed by the terms of the Introducer Agreement for the payment of commissions). The Introducers also acted as an intermediary incidentally to or as part of NAB’s business.
21. The Introducers did not hold an ACL, nor did they engage in this credit activity on behalf of another person who was licensed to engage in the credit activity. Accordingly, by engaging in credit activity the Introducers contravened s.29 of the National Credit Act.

22. In the circumstances set out in paragraphs 15 to 21 above, NAB contravened s.31 of the National Credit Act by its dealings with the Introducers in relation to each of the Loans.
23. In dealing with the Introducers described in Confidential Annexure A for each of the Loans, in contravention of s.31, and in contravention of NAB's own policies and the terms of the Introducer Agreements, NAB failed to do all things necessary to ensure that credit activities authorised by its ACL were engaged in efficiently, honestly and fairly, in contravention of s.47(1)(a) of the National Credit Act.
24. By contravening s.31 of the National Credit Act NAB contravened s.47(1)(d).

D. HARM CAUSED BY THE RESPONDENT'S CONDUCT

25. NAB, by its contraventions of ss.31 and 47 of the National Credit Act, exposed each borrower under the Loans:
 - (a) to a risk of wrongful conduct by the Introducer, such as the provision of false or incomplete information and possible fraud;
 - (b) to the risk of entering into a credit contract that was not suitable for them, including because the customers may not have been able to repay the Loans, or may not have been able to do so without substantial hardship.

Date: 23 August 2019



Signed by Nicolette Bearup

Lawyer for the Applicant

Certificate of lawyer

I Nicolette Bearup certify to the Court that, in relation to the Concise Statement filed on behalf of the Applicant, the factual and legal material available to me at present provides a proper basis for each allegation.

Date: 23 August 2019



Signed by Nicolette Bearup

Lawyer for the Applicant