

NOTICE OF FILING

This document was lodged electronically in the FEDERAL COURT OF AUSTRALIA (FCA) on 3/09/2019 4:34:16 PM AEST 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: Concise Statement
File Number: NSD1420/2019
File Title: AUSTRALIAN SECURITIES & INVESTMENTS COMMISSION v BANK OF QUEENSLAND LIMITED ABN 32 009 656 740
Registry: NEW SOUTH WALES REGISTRY - FEDERAL COURT OF AUSTRALIA



A handwritten signature in blue ink that reads 'Warwick Soden'.

Dated: 3/09/2019 5:08:37 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

No. of 2019

Federal Court of Australia
 District Registry: New South Wales
 Division: General

AUSTRALIAN SECURITIES AND INVESTMENTS COMMISSION

Plaintiff

BANK OF QUEENSLAND LIMITED (ABN 32 009 656 740)

Defendant

A. The important facts giving rise to the claim

1. These proceedings concern standard form, small business contracts that are financial products or contracts for the supply of financial services used by the defendant (**Bank of Queensland**). The plaintiff (**ASIC**) contends that certain terms in these contracts are unfair within the meaning of s 12BF of the *Australian Securities and Investments Commission Act 2001 (Cth)* (**ASIC Act**).

Bank of Queensland

2. Bank of Queensland is a leading regional bank with branches in every state and territory of Australia. In the financial year ended 30 June 2018 it had statutory net profit after tax of \$336 million, gross loans and advances of \$45,279 million and a market capitalisation of \$4,565 million. It is a top 100 listed company on the Australian Securities Exchange.

Unfair Terms

3. Since November 2016 (**Relevant Period**), the Bank of Queensland used the following general conditions:
 - a. Guarantee Facility General Conditions dated September 2016 (**Guarantee**); Business Term Loan General Conditions dated September 2016 (**Term Loan**);
 - b. Commercial Rate Loan Facility General Conditions dated September 2016 (**Commercial Rate Loan**);

Filed on behalf of (name & role of party)	Australian Securities and Investments Commission, Plaintiff
Prepared by (name of person/lawyer)	Conrad Gray, Litigation Counsel
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- c. Business Overdraft and Business Line of Credit General Conditions dated September 2016 (**Overdraft**); and
- d. Facility General Conditions dated November 2016 (**General Conditions**).

(together, **Standard Form Terms**).

4. The Standard Form Terms include:

- a. indemnification clauses that:
 - i. apply to losses not caused by a customer's default; and
 - ii. have the effect of limiting the Bank of Queensland's vicarious liability for its agents

(Guarantee clause 5; Commercial Rate Loan clauses 17(c), 17(d), 17(e) and 17(g); General Conditions clauses 10.1(c), 10.1(d), 10.1(e), 10.1(f) and 10.1(h));
- b. event of default clauses that allow the Bank of Queensland to unilaterally determine whether a default has occurred (Guarantee clause 11(a) (bullet 17); Term Loan clause 13(a) (bullet 15); Commercial Rate Loan clause 22(l); Overdraft clause 12(a) (bullet 15); General Conditions clause 13(l));
- c. event of default clauses that do not permit the customer to remedy a default capable of remedy and which create defaults based on events which may or may not involve any credit risk: (Guarantee clause 11(a) (bullets 6, 7, 17); Term Loan clause 13(a) (bullets 5, 6, 15); Commercial Rate Loan clauses 22(e), 22(l), 22(t); Overdraft clause 12(a) (bullets 5, 6, 15) General Conditions clauses 13(e), 13(l), 13(t));
- d. event of default clauses that create defaults based on events that may or may not involve any credit risk (Guarantee clause 11(a) (bullets 6, 7 and 17); Term Loan clause 13(a) (bullets 5, 6, 15); Commercial Rate Loan clauses 22(e), 22(l), 22(t); Overdraft clause 12(a) (bullets 5, 6, 15); General conditions clauses 13(e), 13(l), 13(t));
- e. unilateral variation or termination clauses which permit the Bank of Queensland to vary the upfront price of the contract, the financial services to be supplied under the contract and other terms of the contract: (Guarantee clauses 12; Term Loan clauses 10(c), 14; Commercial Rate Loan clauses 25.2, 39, Overdraft clauses 8(c), 9(c), 13; General Conditions clauses 16.2, 32); and
- f. conclusive evidence clauses that have the effect of imposing an evidential burden on the customer in proceedings relating to the contract (Commercial Rate Loan clause 35 General clause 28). These clauses also have the effect of allowing the Bank of Queensland but not the customer to terminate the contract if the customer does not pay an amount stated in a certificate by a stated date.

5. Between 16 November 2016 and 30 June 2019, Bank of Queensland entered into 3,754 standard form contracts with businesses for under \$1 million which incorporated one or more of the Standard Form Terms. As at 30 June 2019, Bank of Queensland had 3,018 current standard form contracts on foot with businesses for under \$1 million, which incorporated one or more of the Standard Form Terms.
6. The standard form contracts entered into by the Bank of Queensland incorporating the Standard Form Terms include the contracts described in the Originating Process as the First to Eleventh BOQ Contracts (**Small Business Contracts**).
7. Each of the Small Business Contracts is a small business contract within the meaning of s 12BF(4) of the ASIC Act, for the following reasons:
 - a. The First BOQ Contract is a guarantee facility that incorporates the terms of the Guarantee with a limit of \$20,000 for 5 years. At the time of entry into the contract, the other party to the contract (**First BOQ Party**) conducted a business that had 17 employees.
 - b. The Second BOQ Contract is a guarantee facility that incorporates the terms of the Guarantee with a limit of \$13,441 for 5 years. At the time of entry into the contract, the other party to the contract (**Second BOQ Party**) conducted a business that had 5 employees.
 - c. The Third BOQ Contract is a business term loan that incorporates the terms of the Term Loan for \$800,000 with a term of 15 years. At the time of entry into the contract, the other party to the contract (**Third BOQ Party**) conducted a business that had no employees.
 - d. The Fourth BOQ Contract is a business term loan that incorporates the terms of the Term Loan for \$464,000 with a term of 25 years. At the time of entry into the contract, the other parties to the contract (**Fourth BOQ Party**) conducted a business that had no employees.
 - e. The Fifth BOQ Contract is a commercial rate loan that incorporates the terms of the Commercial Rate Loan for \$800,000 with a term of 3 years. At the time of entry into the contract, the other party to the contract (**Fifth BOQ Party**) conducted a business that had 1 employee.
 - f. The Sixth BOQ Contract is a commercial rate loan that incorporates the terms of the Commercial Rate Loan for \$650,000 with a term of 5 years. At the time of entry into the contract, the other party to the contract (**Sixth BOQ Party**) conducted a business that had 2 employees.
 - g. The Seventh BOQ Contract is an overdraft facility that incorporates the terms of the Overdraft for \$50,000. At the time of entry into the contract, the other party to the contract (**Seventh BOQ Party**) conducted a business that had 3 employees.

- h. The Eighth BOQ Contract is an overdraft facility that incorporates the terms of the Overdraft for \$600,000. At the time of entry into the contract, the other parties to the contract (**Eighth BOQ Party**) conducted a business that had 3 employees.
 - i. The Ninth BOQ Contract is a bank guarantee that incorporates the terms of the General Conditions for \$7,218.75 for 60 months. At the time of entry into the contract, the other party to the contract (**Ninth BOQ Party**) conducted a business that had 3 employees.
 - j. The Tenth BOQ Contract is a bank guarantee that incorporates the terms of the General Conditions for \$4,166.67 for 60 months. At the time of entry into the contract, the other party to the contract (**Tenth BOQ Party**) conducted a business that had 2 employees.
 - k. The Eleventh BOQ Contract is an overdraft facility that incorporates the terms of the General Conditions for \$25,000 repayable on demand. At the time of entry into the contract, the other parties to the contract (**Eleventh BOQ Party**) conducted a business that had 4 employees.
8. ASIC has provided the Bank of Queensland with a schedule that sets out the identities of the parties to each of the Small Business Contracts.

B. Relief sought from the Court

9. ASIC seeks the relief set out in the accompanying originating process comprising declarations pursuant to ss 12GND and 12GNB of the ASIC Act, and/or section 21 of the *Federal Court of Australia Act 1976* (Cth) (FCA), and injunctions pursuant to s 12GD of the ASIC Act.

C. Primary legal grounds for the relief sought

10. Each of the Small Business Contracts:
- a. is a small business contract within the meaning of s 12BF(4) of the ASIC Act;
 - b. is a standard form contract within the meaning of ss 12BF(1)(b) and 12BK of the ASIC Act, and ASIC relies on the presumption in s 12BK(1) of the ASIC Act in that regard; and
 - c. is a financial product or a contract for the supply of financial services within the meaning of s 12BF(1)(c) of the ASIC Act.
11. Each of the terms identified in paragraph 4 above of the Small Business Contracts is unfair within the meaning of s 12BG of the ASIC Act (and therefore void as a result of s 12BF(1)) in that:
- a. each would cause a significant imbalance in the parties' rights and obligations; and
 - b. each is not reasonably necessary to protect the Bank of Queensland's legitimate interests (ASIC relies on the presumption in s 12BG(4)); and

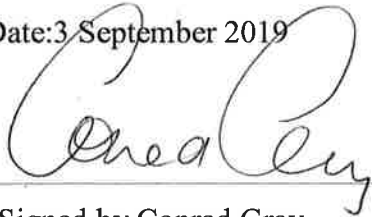
c. each would cause detriment to the customer if the Bank of Queensland relied on it.

12. Further, where any of the Standard Form Terms is included in any small business contract entered into by the Bank of Queensland during the Relevant Period (and that contract is a standard form contract for the supply of financial services) ASIC contends that each of the terms identified at paragraph 4 above are void pursuant to s 12BF(1) of the ASIC Act and that declaratory relief under ss 12GND and 12GNB of the ASIC Act, or s 21 of the FCA, and injunctive relief under s 12GD of the ASIC Act is appropriate.

Certificate of lawyer

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

Date: 3 September 2019



Signed by Conrad Gray

Lawyer for the Plaintiff

