

NOTICE OF FILING

This document was lodged electronically in the FEDERAL COURT OF AUSTRALIA (FCA) on 3/09/2019 4:47:56 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: NSD1421/2019
File Title: AUSTRALIAN SECURITIES & INVESTMENTS COMMISSION v
BENDIGO AND ADELAIDE BANK LIMITED ABN 11 068 049 178
Registry: NEW SOUTH WALES REGISTRY - FEDERAL COURT OF
AUSTRALIA



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

Dated: 3/09/2019 5:12:30 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

BENDIGO AND ADELAIDE BANK LIMITED (ABN 11 068 049 178)

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 (**Bendigo and Adelaide Bank**). 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**).

Bendigo and Adelaide Bank, Delphi Bank and Rural Bank

- 2. Bendigo and Adelaide Bank is Australia’s fifth largest retail bank with around 1.6 million customers, more than \$65.7 billion assets under management and a market capitalisation of around \$4.6 billion. It is a top 60 listed company on the Australian Securities Exchange.
- 3. Delphi Bank and Rural Bank are divisions of Bendigo and Adelaide Bank.

Unfair Terms

- 4. Bendigo and Adelaide Bank have used:
 - a. the Delphi Bank General Conditions dated July 2015 (**Delphi Conditions**) since at least November 2016; and
 - b. the Rural Bank Facility Terms dated November 2016 (**Rural Conditions**) since at least April 2017.

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

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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5. 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's vicarious liability for its agents
(Delphi Conditions clause 14; Rural Conditions clause 12.1);
 - b. event of default clauses that allow the bank to unilaterally determine whether a default has occurred (Delphi Conditions clause 10.1(j); Rural Conditions clause 8.1(q));
 - c. event of default clauses that do not permit the customer to remedy a default capable of remedy: (Delphi Conditions clauses 10.1(c), 10.1(j), 10.1(k), 10.1(n); Rural Conditions clause 8.1(c), 8.1(p), 8.1(q), 8.1(v));
 - d. event of default clauses that create defaults based on events that may or may not involve any credit risk (Delphi Conditions clause 10.1(c), 10.1(j); 10.1(k); 10.1(n), Rural Conditions clause 8.1(c), 8.1(p), 8.1(q), 8.1(v));
 - e. event of default clauses that create defaults based on events that are within the control of the bank, not the customer (Delphi Conditions clause 10.1(n); Rural Conditions clause 8.1(p));
 - f. unilateral variation or termination clauses which permit the defendant s to vary the upfront price of the contract, the financial services to be supplied under the contract and other terms of the contract: (Delphi Conditions clauses 22.1, 11.1; Rural Conditions clauses 2.3, 2.4, 4.2, 4.4; and
 - g. conclusive evidence clauses that have the effect of imposing the evidential burden on the customer in proceedings relating to the contract (Delphi Conditions clause 17.6, Rural Conditions clause 13.1). These clauses also have the effect of allowing the bank but not the customer to terminate the contract if the customer does not pay an amount stated in a certificate by a stated date.
6. Between 16 November 2016 and 30 June 2019, Bendigo and Adelaide Bank entered into 3,490 standard form contracts with businesses for under \$1 million which incorporated the Delphi Conditions. As at 30 June 2019, Bendigo and Adelaide Bank had 15,529 current standard form contracts on foot with businesses for under \$1 million which incorporated the Rural Conditions.
7. The standard form contracts entered into by the Bendigo and Adelaide Bank incorporating the Standard Form Terms include the contracts described in the Originating Process as the First to Second Delphi Bank Contracts, and the First to Fourth Rural Bank Contracts (**Small Business Contracts**).
8. 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 Delphi Bank Contract is a business loan that incorporates the terms of the Delphi Conditions for \$150,000 with a term of 10 years. At the time of entry into the contract, the other party to the contract, (**First Delphi Bank Party**) conducted a business that had between six and eight employees.
 - b. The Second Delphi Bank Contract is a business loan that incorporates the terms of the Delphi Conditions for \$252,000 with a term of 25 years. At the time of entry into the contract, the other party to the contract (**Second Delphi Bank Party**) conducted a business that had no employees.
 - c. The First Rural Bank Contract is a facility that incorporates the terms of the Rural Conditions for up to \$425,000 for 60 months. At the time of entry into the contract, the other party to the contract (**First Rural Bank Party**) conducted a business that had no permanent employees.
 - d. The Second Rural Bank Contract is a facility that incorporates the terms of the Rural Conditions for up to \$385,000 for 60 months. At the time of entry into the contract, the other party to the contract (**Second Rural Bank Party**) conducted a business that had no permanent employees.
 - e. The Third Rural Bank Contract is a facility that incorporates the terms of the Rural Conditions for up to \$200,000, repayable on demand. At the time of entry into the contract, the other party to the contract (**Third Rural Bank Party**) conducted a business that had no permanent employees.
 - f. The Fourth Rural Bank Contract is a facility that incorporates the terms of the Rural Conditions for up to \$150,000, repayable on demand. At the time of entry into the contract, the other party to the contract, (**Fourth Rural Bank Party**) conducted a business that had no permanent employees.
9. ASIC has provided Bendigo and Adelaide Bank with a schedule which sets out the identities of the parties to each of the Small Business Contracts.

B. Relief sought from the Court

10. 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 s 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

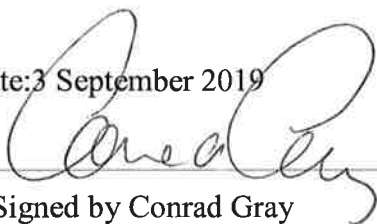
11. Each of the Small Business Contracts:
- a. is a small business contract within the meaning of s 12BF(4) of the ASIC Act;

- 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.
12. Each of the terms identified in paragraph 5 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 Bendigo and Adelaide Bank's legitimate interests (ASIC relies on the presumption in s 12BG(4)); and
 - c. each would cause detriment to the customer if the Bendigo and Adelaide Bank relied on it.
13. Further, where any of the Standard Form Terms is included in any small business contract entered into by the Bendigo and Adelaide Bank 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 5 above are void pursuant to s 12BF(1) of the ASIC Act and that declaratory relief under ss 12GND and s 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