

FEDERAL COURT OF AUSTRALIA

Australian Securities and Investments Commission v Bank of Queensland Limited [2021] FCA 957

File number: NSD 1420 of 2019

Judgment of: **BANKS-SMITH J**

Date of judgment: 12 August 2021

Catchwords: **CONSUMER LAW** - small business lending contracts - unfair contract terms within the meaning of s 12BG(1) of the *Australian Securities and Investments Commission Act 2001* (Cth) - agreed facts - where bank concedes impugned terms unfair - where impugned terms include terms relating to indemnities, events of default, unilateral variations and conclusive evidence - where parties seek declarations under s 12BF, s 12BG and s 12GND that terms unfair and void - declarations made - orders made varying contract terms under s 12GNB - undertaking proffered

Legislation: *Australian Securities and Investments Commission Act 2001* (Cth) ss 12BAA, 12BF, 12BG, 12BH, 12BK, 12GB, 12GNB, 12GNC, 12GND, Division 2, Part 2
Competition and Consumer Act 2010 (Cth) Schedule 2 (*Australian Consumer Law*) s 24
Evidence Act 1995 (Cth) s 191
Federal Court of Australia Act 1976 (Cth) s 21
Australian Securities and Investments Commission Regulations 2001 (Cth) reg 2B

Cases cited: *Australian Competition and Consumer Commission v Ashley & Martin Pty Ltd* [2019] FCA 1436
Australian Competition and Consumer Commission v Chrisco Hampers Australia Limited [2015] FCA 1204; (2015) 239 FCR 33
Australian Competition and Consumer Commission v CLA Trading Pty Ltd [2016] FCA 377
Australian Competition and Consumer Commission v Coles Supermarkets Australia Pty Ltd [2014] FCA 1405
Australian Competition and Consumer Commission v JJ Richards & Sons Pty Ltd [2017] FCA 1224
Australian Competition and Consumer Commission v Smart Corporation Pty Ltd (No 3) [2021] FCA 347

Australian Securities and Investments Commission v Bendigo and Adelaide Bank Limited [2020] FCA 716
Clarence City Council v Commonwealth of Australia [2020] FCAFC 134
International Litigation Partners Pte Ltd v Chameleon Mining NL (Receivers and Managers Appointed) [2012] HCA 45; (2012) 246 CLR 455

Division:	General Division
Registry:	New South Wales
National Practice Area:	Commercial and Corporations
Sub-area:	Regulator and Consumer Protection
Number of paragraphs:	108
Date of hearing:	24 November 2020
Counsel for the Plaintiff:	Mr R Scruby SC with Ms T Jonker
Solicitor for the Plaintiff:	Australian Securities and Investments Commission
Counsel for the Defendant:	Mr D Sulan
Solicitor for the Defendant:	Jones Day

ORDERS

NSD 1420 of 2019

BETWEEN: **AUSTRALIAN SECURITIES AND INVESTMENTS
COMMISSION**
Plaintiff

AND: **BANK OF QUEENSLAND LIMITED (ABN 32 009 656 740)**
Defendant

ORDER MADE BY: **BANKS-SMITH J**

DATE OF ORDER: **12 AUGUST 2021**

THE COURT MAKES THE FOLLOWING DECLARATIONS AND ORDERS:

First BOQ Contract

Declarations

1. Pursuant to s 12GND of the *Australian and Securities Investments Commission Act 2001* (Cth) (**Act**), each of clauses 5, 8(b) and 11(a) (bullets 6, 7 and 17) of the Guarantee Facility General Conditions dated September 2016 (**Guarantee**) that comprises part of the small business contract between the defendant and the First BOQ Party (as identified in a confidential schedule provided to the defendant) dated 16 August 2017 (**First BOQ Contract**) is an unfair term within the meaning of s 12BG of the Act.
2. Pursuant to s 12GNB of the Act or alternatively s 21 of the FCA, each of clauses 5, 8(b) and 11(a) (bullets 6, 7 and 17) of the Guarantee that comprises part of the First BOQ Contract is void *ab initio*.

Order

3. Pursuant to s 12GNB of the Act, the First BOQ Contract be varied, with effect from the date of the contract, by replacing clauses 5, 8, 11(a) and 20(a) of the Guarantee that comprises part of the First BOQ Contract with the clauses specified in the schedule to these orders.

Second BOQ Contract

Declarations

4. Pursuant to s 12GND of the Act, each of clauses 5, 8(b) and 11(a) (bullets 6, 7 and 17) of the Guarantee that comprises part of the small business contract between the

defendant and the Second BOQ Party (as identified in a confidential schedule provided to the defendant) dated 20 February 2017 (**Second BOQ Contract**) is an unfair term within the meaning of s 12BG of the Act.

5. Pursuant to s 12GNB of the Act or alternatively s 21 of the FCA, each of clauses 5, 8(b) and 11(a) (bullets 6, 7 and 17) of the Guarantee that comprises part of the Second BOQ Contract is void *ab initio*.

Order

6. Pursuant to s 12GNB of the Act, the Second BOQ Contract be varied, with effect from the date of the contract, by replacing clauses 5, 8, 11(a) and 20(a) of the Guarantee that comprises part of the Second BOQ Contract with the clauses specified in the schedule to these orders.

Third BOQ Contract

Declarations

7. Pursuant to s 12GND of the Act, each of clauses 8(b), 9(c), 10(c) and 13(a) (bullets 5, 6 and 15) of the Business Term Loan General Conditions dated September 2016 (**Term Loan**) that comprises part of the small business contract between the defendant and the Third BOQ Party (as identified in a confidential schedule provided to the defendant) dated 30 June 2017 (**Third BOQ Contract**) is an unfair term within the meaning of s 12BG of the Act.
8. Pursuant to s 12GNB of the Act or alternatively s 21 of the FCA, each of clauses 8(b), 9(c), 10(c) and 13(a) (bullets 5, 6 and 15) of the Term Loan that comprises part of the Third BOQ Contract is void *ab initio*.

Order

9. Pursuant to s 12GNB of the Act, the Third BOQ Contract be varied, with effect from the date of the contract, by replacing clauses 8, 9(c), 10(c), 13(a) and 22(a) of the Term Loan that comprises part of the Third BOQ Contract with the clauses specified in the schedule to these orders.

Fourth BOQ Contract

Declarations

10. Pursuant to s 12GND of the Act, each of clauses 8(b), 9(c), 10(c) and 13(a) (bullets 5, 6 and 15) of the Term Loan that comprises part of the small business contract between the defendant and the Fourth BOQ Party (as identified in a confidential schedule

provided to the defendant) dated 27 July 2017 (**Fourth BOQ Contract**) is an unfair term within the meaning of s 12BG of the Act.

11. Pursuant to s 12GNB of the Act or alternatively s 21 of the FCA, each of clauses 8(b), 9(c), 10(c) and 13(a) (bullets 5, 6 and 15) of the Term Loan that comprises part of the Fourth BOQ Contract is void *ab initio*.

Order

12. Pursuant to s 12GNB of the Act, the Fourth BOQ Contract be varied, with effect from the date of the contract, by replacing clauses 8, 9(c), 10(c) and 13(a) and 22(a) of the Term Loan that comprises part of the Fourth BOQ Contract with the clauses specified in the schedule to these orders.

Fifth BOQ Contract

Declarations

13. Pursuant to s 12GND of the Act, each of clauses 17.1(c), 17.1(d), 17.1(e), 17.1(g), 17.2, 22(e), 22(l), 22(t), 25.2, 35.1, 39.1(a), 39.1(g), 39.1(h), 39.1(i) and 39.1(j) of the Commercial Rate Loan Facility General Conditions dated September 2016 (**Commercial Rate Loan**) that comprises part of the small business contract between the defendant and the Fifth BOQ Party (as identified in a confidential schedule provided to the defendant) dated 29 March 2019 (**Fifth BOQ Contract**) is an unfair term within the meaning of s 12BG of the Act.
14. Pursuant to s 12GNB of the Act or alternatively s 21 of the FCA, each of clauses 17.1(c), 17.1(d), 17.1(e), 17.1(g), 17.2, 22(e), 22(l), 22(t), 25.2, 35.1, 39.1(a), 39.1(g), 39.1(h), 39.1(i) and 39.1(j) of the Commercial Rate Loan that comprises part of the Fifth BOQ Contract is void *ab initio*.

Order

15. Pursuant to s 12GNB of the Act, the Fifth BOQ Contract be varied, with effect from the date of the contract, by replacing clauses 17, 22, 25.2, 35.1, 39 and 62 of the Commercial Rate Loan that comprises part of the Fifth BOQ Contract with the clauses specified in the schedule to these orders.

Sixth BOQ Contract

Declarations

16. Pursuant to s 12GND of the Act, each of clauses 17.1(c), 17.1(d), 17.1(e), 17.1(g), 17.2, 22(e), 22(l), 22(t), 25.2, 35.1, 39.1(a), 39.1(g), 39.1(h), 39.1(i), and 39.1(j) of the

Commercial Rate Loan that comprises part of the small business contract between the defendant and the Sixth BOQ Party (as identified in a confidential schedule provided to the defendant) dated 24 September 2018 (**Sixth BOQ Contract**) is an unfair term within the meaning of s 12BG of the Act.

17. Pursuant to s 12GNB of the Act or alternatively s 21 of the FCA, each of clauses 17.1(c), 17.1(d), 17.1(e), 17.1(g), 17.2, 22(e), 22(l), 22(t), 25.2, 35.1, 39.1(a), 39.1(g), 39.1(h), 39.1(i) and 39.1(j) of the Commercial Rate Loan that comprises part of the Sixth BOQ Contract is void *ab initio*.

Order

18. Pursuant to s 12GNB of the Act, the Fifth BOQ Contract be varied, with effect from the date of the contract, by replacing clauses 17, 22, 25.2, 35.1, 39 and 62 of the Commercial Rate Loan that comprises part of the Sixth BOQ Contract with the clauses specified in the schedule to these orders.

Seventh BOQ Contract

Declarations

19. Pursuant to s 12GND of the Act, each of clauses 2(d), 7(b), 8(c), 9(c), 12(a) (bullets 5, 6 and 15) and 13 of the Business Overdraft and Business Line of Credit General Conditions dated September 2016 (**Overdraft**) that comprises part of the small business contract between the defendant and the Seventh BOQ Party (as identified in a confidential schedule provided to the defendant) dated 24 August 2017 (**Seventh BOQ Contract**) is an unfair term within the meaning of s 12BG of the Act.
20. Pursuant to s 12GNB of the Act or alternatively s 21 of the FCA, each of clauses 2(d), 7(b), 8(c), 9(c), 12(a) (bullets 5, 6 and 15) and 13 of the Overdraft that comprises part of the Seventh BOQ Contract is void *ab initio*.

Order

21. Pursuant to s 12GNB of the Act, the Seventh BOQ Contract be varied, with effect from the date of the contract, by replacing clauses 2(d), 7, 8(c), 9(c), 12(a), 13 and 21(a) of the Overdraft that comprises part of the Seventh BOQ Contract with the clauses specified in the schedule to these orders.

Eighth BOQ Contract

Declarations

22. Pursuant to s 12GND of the Act, each of clauses 2(d), 7(b), 8(c), 9(c), 12(a) (bullets 5, 6 and 15) and 13 of the Overdraft, as defined in the Concise Statement, that comprises part of the small business contract between the defendant and the Eighth BOQ Party (as identified in a confidential schedule provided to the defendant) dated 4 February 2019 (**Eighth BOQ Contract**) is an unfair term within the meaning of s 12BG of the Act.
23. Pursuant to s 12GNB of the Act or alternatively s 21 of the FCA, each of clauses 2(d), 7(b), 8(c), 9(c), 12(a) (bullets 5, 6 and 15) and 13 of the Overdraft that comprises part of the Eighth BOQ Contract is void *ab initio*.

Order

24. Pursuant to s 12GNB of the Act, the Eighth BOQ Contract be varied, with effect from the date of the contract, by replacing clauses 2(d), 7, 8(c), 9(c), 12(a), 13 and 21(a) of the Overdraft that comprises part of the Eighth BOQ Contract with the clauses specified in the schedule to these orders.

Ninth BOQ Contract

Declarations

25. Pursuant to s 12GND of the Act, each of clauses 10.1(c), 10.1(d), 10.1(e), 10.1(f), 10.1(h), 10.2, 13(e), 13(l), 13(t), 16.2, 28, 32.1(a), 32.1(h), 32.1(i), 32.1(j) and 32.1(k), 6.1 of Part C and 4.5 of Part E of the Facility General Conditions dated November 2016 (**General Conditions**) that comprises part of the small business contract between the defendant the Ninth BOQ Party (as identified in a confidential schedule provided to the defendant) dated 4 February 2019 (**Ninth BOQ Contract**) is an unfair term within the meaning of s 12BG of the Act.
26. Pursuant to s 12GNB of the Act or alternatively s 21 of the FCA, each of clauses 10.1(c), 10.1(d), 10.1(e), 10.1(f), 10.1(h), 10.2, 13(e), 13(l), 13(t), 16.2, 28, 32.1(a), 32.1(h), 32.1(i), 32.1(j) and 32.1(k), 6.1 of Part C and 4.5 of Part E of the General Conditions that comprises part of the Ninth BOQ Contract is void *ab initio*.

Order

27. Pursuant to s 12GNB of the Act, the Ninth BOQ Contract be varied, with effect from the date of the contract, by replacing clauses 10, 13, 16.2, 28, 32, and 54 of Part A, 6.1

of Part C and 4.5 of Part E of the General Conditions that comprises part of the Ninth BOQ Contract with the clauses specified in the schedule to these orders.

Tenth BOQ Contract

Declarations

28. Pursuant to s 12GND of the Act, each of clauses 10.1(c), 10.1(d), 10.1(e), 10.1(f), 10.1(h), 10.2, 13(e), 13(l), 13(t), 16.2, 28, 32.1(a), 32.1(h), 32.1(i), 32.1(j) and 32.1(k), 6.1 of Part C and 4.5 of Part E of the General Conditions that comprises part of the small business contract between the defendant and the Tenth BOQ Party (as identified in a confidential schedule provided to the defendant) dated 20 November 2018 (**Tenth BOQ Contract**) is an unfair term within the meaning of s 12BG of the Act.
29. Pursuant to s 12GNB of the Act or alternatively s 21 of the FCA, each of clauses 10.1(c), 10.1(d), 10.1(e), 10.1(f), 10.1(h), 10.2, 13(e), 13(l), 13(t), 16.2, 28, 32.1(a), 32.1(h), 32.1(i), 32.1(j) and 32.1(k), 6.1 of Part C and 4.5 of Part E of the General Conditions that comprises part of the Tenth BOQ Contract is void *ab initio*.

Order

30. Pursuant to s 12GNB of the Act, the Ninth BOQ Contract be varied, with effect from the date of the contract, by replacing clauses 10, 13, 16.2, 28, 32 and 54 of Part A, 6.1 of Part C and 4.5 of Part E of the General Conditions that comprises part of the Tenth BOQ Contract with the clauses specified in the schedule to these orders.

Eleventh BOQ Contract

Declarations

31. Pursuant to s 12GND of the Act, each of clauses 10.1(c), 10.1(d), 10.1(e), 10.1(f), 10.1(h), 10.2, 13(e), 13(l), 13(t), 16.2, 28, 32.1(a), 32.1(h), 32.1(i), 32.1(j) and 32.1(k), 6.1 of Part C and 4.5 of Part E of the General Conditions that comprises part of the small business contract between the defendant and the Eleventh BOQ Party (as identified in a confidential schedule provided to the defendant) dated 20 November 2018 (**Eleventh BOQ Contract**) is an unfair term within the meaning of s 12BG of the Act.
32. Pursuant to s 12GNB of the Act or alternatively s 21 of the FCA, each of clauses 10.1(c), 10.1(d), 10.1(e), 10.1(f), 10.1(h), 10.2, 13(e), 13(l), 13(t), 16.2, 28, 32.1(a), 32.1(h), 32.1(i), 32.1(j) and 32.1(k), 6.1 of Part C and 4.5 of Part E of the General Conditions that comprises part of the Eleventh BOQ Contract is void *ab initio*.

Order

33. Pursuant to s 12GNB of the Act, the Ninth BOQ Contract be varied, with effect from the date of the contract, by replacing clauses 10, 13, 16.2, 28, 32 and 54 of Part A, 6.1 of Part C and 4.5 of Part E of the General Conditions that comprises part of the Eleventh BOQ Contract with the clauses specified in the schedule to these orders.

General - Guarantee

Declarations

34. Pursuant to s 12GND of the Act, any term in the same form as any of clauses 5, 8(b) and 11(a) (bullets 6, 7 and 17) of the Guarantee in any small business contract entered into or amended or renewed on or after 12 November 2016 between the defendant and any of its customers, which incorporates the Guarantee and meets the definition of a small business contract within the meaning of s 12BF(4) of the Act and which is a standard form contract within the meaning of s 12BK of the Act and is a contract for a financial product or a contract for the supply or possible supply of financial services within the meaning of the Act is an unfair term within the meaning of s 12BG of the Act and void pursuant to s 12BF(1) of the Act (**Unfair Guarantee Term**).
35. Pursuant to s 12GNB of the Act or alternatively s 21 of the FCA, any Unfair Guarantee Term is void *ab initio*.

Order

36. Pursuant to s 12GNB of the Act, in any small business contract entered into or amended or renewed on or after 12 November 2016 between the defendant and any of its customers which incorporates the Guarantee and which meets the definition of a small business contract within the meaning of s 12BF(4) of the Act and which is a standard form contract within the meaning of s 12BK of the Act and is a contract for a financial product or a contract for the supply or possible supply of financial services within the meaning of the Act, is varied with effect from the date of the contract, by replacing clauses 5, 8, 11(a) and 20(a) of the Guarantee with the clauses specified in the schedule to these orders.

General - Term Loan

Declarations

37. Pursuant to s 12GND of the Act, any term in the same form as any of clauses 8(b), 9(c), 10(c), 13(a) (bullets 5, 6 and 15) of the Term Loan in any small business contract

entered into or amended or renewed on or after 12 November 2016 between the defendant and any of its customers, which incorporates the Term Loan and meets the definition of a small business contract within the meaning of s 12BF(4) of the Act and which is a standard form contract within the meaning of s 12BK of the Act and is a contract for a financial product or a contract for the supply or possible supply of financial services within the meaning of the Act is an unfair term within the meaning of s 12BG of the Act and void pursuant to s 12BF(1) of the Act (**Unfair Term Loan Term**).

38. Pursuant to s 12GNB of the Act or alternatively s 21 of the FCA, any Unfair Term Loan Term is void *ab initio*.

Order

39. Pursuant to s 12GNB of the Act, any small business contract entered into or amended or renewed on or after 12 November 2016 between the defendant and any of its customers which incorporates the Term Loan and which meets the definition of a small business contract within the meaning of s 12BF(4) of the Act and which is a standard form contract within the meaning of s 12BK of the Act and is a contract for a financial product or a contract for the supply or possible supply of financial services within the meaning of the Act, is varied with effect from the date of the contract, by replacing clauses 8, 9(c), 10(c) and 13(a) and 22(a) of the Term Loan with the clauses specified in the schedule to these orders.

General - Commercial Rate Loan

Declarations

40. Pursuant to s 12GND of the Act, any term in the same form as any of clauses 17.1(c), 17.1(d), 17.1(e), 17.1(g), 17.2, 22(e), 22(l), 22(t), 25.2, 35.1, 39.1(a), 39.1(g), 39.1(h), 39.1(i) and 39.1(j) of the Commercial Rate Loan in any small business contract entered into or amended or renewed on or after 12 November 2016 between the defendant and any of its customers, which incorporates the Commercial Rate Loan and meets the definition of a small business contract within the meaning of s 12BF(4) of the Act and which is a standard form contract within the meaning of s 12BK of the Act and is a contract for a financial product or a contract for the supply or possible supply of financial services within the meaning of the Act is an unfair term within the meaning of s 12BG of the Act and void pursuant to s 12BF(1) of the Act (**Unfair Commercial Rate Loan Term**).

41. Pursuant to s 12GNB of the Act or alternatively s 21 of the FCA, any Unfair Commercial Rate Loan Term is void *ab initio*.

Order

42. Pursuant to s 12GNB of the Act, any small business contract entered into or amended or renewed on or after 12 November 2016 between the defendant and any of its customers which incorporates the Commercial Rate Loan and which meets the definition of a small business contract within the meaning of s 12BF(4) of the Act and which is a standard form contract within the meaning of s 12BK of the Act and is a contract for a financial product or a contract for the supply or possible supply of financial services within the meaning of the Act, is varied with effect from the date of the contract, by replacing clauses 17, 22, 25.2, 35.1, 39 and 62 of the Commercial Rate Loan with the clauses specified in the schedule to these orders.

General - Overdraft

Declarations

43. Pursuant to s 12GND of the Act, any term in the same form as any of clauses 2(d), 7(b), 8(c), 9(c), 12(a) (bullets 5, 6 and 15) and 13 of the Overdraft in any small business contract entered into or amended or renewed on or after 12 November 2016 between the defendant and any of its customers, which incorporates the Overdraft and meets the definition of a small business contract within the meaning of s 12BF(4) of the Act and which is a standard form contract within the meaning of s 12BK of the Act and is a contract for a financial product or a contract for the supply or possible supply of financial services within the meaning of the Act is an unfair term within the meaning of s 12BG of the Act and void pursuant to s 12BF(1) of the Act (**Unfair Overdraft Term**).
44. Pursuant to s 12GNB of the Act or alternatively s 21 of the FCA, any Unfair Overdraft Term is void *ab initio*.

Order

45. Pursuant to s 12GNB of the Act, any small business contract entered into or amended or renewed on or after 12 November 2016 between the defendant and any of its customers which incorporates the Overdraft and which meets the definition of a small business contract within the meaning of s 12BF(4) of the Act and which is a standard form contract within the meaning of s 12BK of the Act and is a contract for a financial

product or a contract for the supply or possible supply of financial services within the meaning of the Act, is varied with effect from the date of the contract, by replacing clauses 2(d), 7, 8(c), 9(c), 12(a), 13 and 21(a) of the Overdraft with the clauses specified in the schedule to these orders.

General Conditions

Declarations

46. Pursuant to s 12GND of the Act, any term in the same form as any of clauses 10.1(c), 10.1(d), 10.1(e), 10.1(f), 10.1(h), 10.2, 13(e), 13(l), 13(t), 16.2, 28, 32.1(a), 32.1(h), 32.1(i), 32.1(j) and 32.1(k), 6.1 of Part C and 4.5 of Part E of the General Conditions in any small business contract entered into or amended or renewed on or after 12 November 2016 between the defendant and any of its customers, which incorporates the General Conditions and meets the definition of a small business contract within the meaning of s 12BF(4) of the Act and which is a standard form contract within the meaning of s 12BK of the Act and is a contract for a financial product or a contract for the supply or possible supply of financial services within the meaning of the Act is an unfair term within the meaning of s 12BG of the Act and void pursuant to s 12BF(1) of the Act (**Unfair General Conditions Term**).
47. Pursuant to s 12GNB of the Act or alternatively s 21 of the FCA, any Unfair General Conditions Term is void *ab initio*.

Order

48. Pursuant to s 12GNB of the Act, any small business contract entered into or amended or renewed on or after 12 November 2016 between the defendant and any of its customers which incorporates the General Conditions and which meets the definition of a small business contract within the meaning of s 12BF(4) of the Act and which is a standard form contract within the meaning of s 12BK of the Act and is a contract for a financial product or a contract for the supply or possible supply of financial services within the meaning of the Act, is varied with effect from the date of the contract, by replacing clauses 10, 13, 16.2, 28, 32 and 54 of Part A, 6.1 of Part C and 4.5 of Part E of the General Conditions with the clauses specified in the schedule to these orders.

Costs

49. The defendant pay the plaintiff's costs on the ordinary basis.

Undertaking

50. The defendant file and serve within seven days of this order an undertaking to the Court in the following terms:

The defendant hereby undertakes to the Court not to use or rely upon any of the terms set out in Schedule 1 of the Statement of Agreed Facts filed by the parties on 23 October 2020 in any small business contract incorporating the Standard Form Terms (as that term is defined in the Statement of Agreed Facts). For the avoidance of doubt, a copy of Schedule 1 of the Statement of Agreed Facts is at Annexure A to this undertaking.

Note: Entry of orders is dealt with in Rule 39.32 of the *Federal Court Rules 2011*.

Schedule to the Orders

Replacement Clause 5(a) of the Guarantee

You agree to indemnify us against all loss or damage we may suffer as a result of issuing a *bank guarantee* or paying a claim to the beneficiary excluding any loss or damage to the extent caused by our mistake, fraud, negligence or wilful misconduct or the mistake, fraud, negligence or wilful misconduct of our employees, officers, contractors or agents, or any receivers we appoint in respect of any *property*.

Replacement Clause 8 of the Guarantee

(a) Current fees and charges

You must pay us the fees and other charges set out in the Facility Details.

You must also pay us any other fees and charges applicable to your facility.

(b) Changes to fees and charges

Unless you are a *small business customer*, we may change fees and charges or add new fees and charges without your consent at any time.

(c) Notification of changes to fees and charges

Where we make a change pursuant to Part 8(b) we will notify you in writing in to the last address recorded by us. Where you have provided us with an email or other electronic address, we may notify you by email or other electronic communication.

We may alternatively notify you of a change pursuant to Part 8(b) where that change is not a new fee or charge or will not materially increase your liability under this agreement by publishing an advertisement of the change in a major Australian newspaper or newspapers or by placing a notice on or with statements of account or other material we send to you or on any online portal page which you may use to access your account.

(d) Small business customers

If you are a *small business customer*, we may, acting reasonably and to the extent reasonably necessary to protect our legitimate business interests, change the fees and charges payable by you under this agreement including introducing or removing fees and charges and changing the amount, method of calculation, frequency of charging or timing of payment of them. For example, we may change or introduce a new fee or charge due to increases in our costs, regulatory change or changes in market conditions. We will provide you with notice of the change in accordance with the table below. We can also give you a shorter notice period (or no notice) of an unfavourable change if it is reasonable for us to manage a material and immediate risk.

Type of change	Minimum notice period
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Changing the amount or manner of charging fees and charges payable to us or introducing a new fee or charge payable to us	30 days or shorter if the change is not adverse to you
Introducing or changing any government charge or tax	30 days or such period as may be required by law or in order to notify you of the changed or new charge or tax or if the change is not adverse to you

For clarity, you may choose to cancel this bank guarantee at any time under clause 3(b) above, without incurring any break fees.

Replacement Clause 11(a) of the Guarantee

If:

- any *money* that you owe us is not paid to us when it is due to be paid; or
- at any time, your *nominated account* does not have sufficient funds to make a payment due at that time;
- you fail to *keep to* the terms of any agreement with us; or
- you fail to *keep to* the terms of any agreement with us; or you fail to *keep to* any terms of any security given to us for payment of the *money owing*; or
- you are unable to pay your debts when they are due to be paid or you are no longer in charge of your own affairs; or
- any promise you made to us, or information you gave to us, is untrue or misleading in any material respect and in circumstances which may materially increase our risk; or
- any *money* that you owe anyone else is not paid when it is due to be paid in circumstances which may materially increase our risk; or
- any money that you owe anyone else becomes payable before its maturity date; or
- this agreement or any *security* does not have effect, or stops having effect, in accordance with its terms, or becomes unenforceable for any reason; or
- some or all of your property is seized by or on behalf of a creditor or under legal process; or
- you stop, or threaten to stop, carrying on all or a material part of your business; or

- you use the *money* for a different purpose from the purpose stated in the Facility Details; or
- you are a company and ownership of any of your shares is transferred without our written consent; or
- you are a partner in a partnership and there is a change in the members of the partnership or the partnership is dissolved, without our written consent; or
- you are a trustee of a trust and:
 - the trust is not properly constituted; or
 - the trust is terminated or the beneficiaries of the trust resolve to terminate it; or
 - you stop being trustee of the trust; or
 - you cease holding the trust in your name; or
 - you commit a breach of trust; or
- *intentionally deleted*
 1. then you are in default under this agreement.
 2. In each such case, before taking any action we will give you notice and allow you a reasonable time (being not less than 30 days) to remedy the default if the default is able to be remedied.

Replacement Clause 20(a) of the Guarantee

In this agreement, unless the context otherwise requires:

'annual percentage rate' means the interest rate applicable under this agreement from time to time;

'authorised person' means a person authorised by you to act on your behalf under this facility, as notified to us

'bank guarantee' means a guarantee issued or to be issued by us under this facility;

'business day' means a day that is a day on which our head office in Brisbane is open for business

'change of credit' means a change in the financial position of you or any person who has given a *guarantee* of your obligations under this agreement or an adverse change in the value of the *property* which we determine would, if it had occurred at the time we approved the facility, have materially affected our decision to provide the facility on the terms set out in this agreement;

'Facility Details' means the details that form part of this agreement.

'facility limit' means the amount set out in the Facility Details;

'guarantee' means a guarantee of your obligations under this agreement;

'guarantor' means a person who gives a guarantee to us;

'keep to' means that you will keep all of your promises and perform all of your obligations under a specified agreement;

'money' means the *facility limit*;

'money owing' means at any time the amount that you owe us under this agreement at that time;

'nominated account' is the current account held with us in your name, nominated by you as the relevant account for crediting and debiting amounts under this facility;

'notices' means any notice, letter, demand or other document;

'property' means the property subject to a security interest;

'PPSA' means the *Personal Property Securities Act 2009* (Cth);

'PPSA law' means:

- (a) the *PPSA*;
- (b) any regulation made pursuant to the *PPSA*; and
- (c) any other legislation or regulation made to implement, or contemplated by, any *PPSA law* referred to in paragraph (a) or (b).

'security' means each security interest stipulated in the Facility Details and any substituted or additional security interest given in connection with this agreement or which otherwise secures your liabilities in connection with this agreement.

'security interest' means:

- (a) any security for the payment of money or performance of obligations including a mortgage, charge, lien, pledge, trust or power or title retention arrangement, guarantee or guarantee and indemnity
- (b) a "security interest" as defined in the *PPSA*; or (c) any document to grant or create anything referred to in either paragraphs (a) or (b) of this definition and any other thing which gives a creditor priority to any other creditor with respect to any asset or an interest in any asset;

You are a *'small business customer'* if:

- (a) you are a small business within the meaning of the Banking Code of

Practice; or

(b) this facility agreement is a small business contract within the meaning of the ASIC Act;

'term' means the period within which you must pay all *money owing* to us. It is set out in the Facility Details.

Replacement Clause 8 of the Term Loan

(a) Current fees and charges

You must pay us the fees and other charges set out in the Facility Details.

You must also pay us any other fees and charges applicable to your *facility*.

(b) Changes to fees and charges

Unless you are a *small business customer*, we may change fees and charges or add new fees and charges without your consent at any time.

(c) Notification of changes to fees and charges

Where we make a change pursuant to Part 8(b) we will notify you in writing in to the last address recorded by us. Where you have provided us with an email or other electronic address, we may notify you by email or other electronic communication.

We may alternatively notify you of a change pursuant to Part 8(b) where that change is not a new fee or charge or will not materially increase your liability under this agreement by publishing an advertisement of the change in a major Australian newspaper or newspapers or by placing a notice on or with statements of account or other material we send to you or on any online portal page which you may use to access your account.

(d) Small business customers

If you are a *small business customer*, we may, acting reasonably and to the extent reasonably necessary to protect our legitimate business interests, change the fees and charges payable by you under this agreement including introducing or removing fees and charges and changing the amount, method of calculation, frequency of charging or timing of payment of them. For example, we may change or introduce a new fee or charge due to increases in our costs, regulatory change or changes in market conditions. We will provide you with notice of the change in accordance with the table below. We can also give you a shorter notice period (or no notice) of an unfavourable change if it is reasonable for us to manage a material and immediate risk.

Type of change	Minimum notice period
Changing the amount or manner of	30 days or shorter if the change is

charging fees and charges payable to us or introducing a new fee or charge payable to us	not adverse to you
Introducing or changing any government charge or tax	30 days or such period as may be required by law or in order to notify you of the changed or new charge or tax or if the change is not adverse to you

If you choose to terminate this contract due to a change made by us under this clause 8(d) then you must give us notice and repay the money owing within the relevant time period specified above. We will not charge you any fees to discharge any *security* but if the interest rate has been fixed then you must still pay us *break costs* in accordance with clause 6(f).

Replacement Clause 9(c) of the Term Loan

If we ask, you will provide us with evidence that is satisfactory to us of your compliance with any one or more of the eligibility criteria for the package.

You must tell us within 14 days if you become aware that you no longer satisfy the eligibility criteria for the Business First Lending Package. If we become aware that you no longer satisfy the eligibility criteria for the Business First Lending Package we will notify you.

In either case, we will notify you what you need to do to satisfy the eligibility criteria for the Business First Lending Package and give you a reasonable period (of not less than 30 days) to satisfy the criteria. If you do not satisfy the eligibility criteria within that period, we will remove the benefits of the Business First Lending Package and notify you that we are doing this. We will also notify you of any changes to your annual percentage rate or repayments on your eligible products as a result of the removal of the package.

If you wish to discontinue the benefits of your Business First Lending Package at any time, you must give us at least 14 days written notice. At the end of this period, we will remove the benefits of the Business First Lending Package.

If you become ineligible for the Business First Lending Package or notify us that you wish to discontinue the package then you will no longer be required to pay the annual package fee.

Replacement Clause 10(c) of the Term Loan

If we ask, you will provide us with evidence that is satisfactory to us of your compliance with any one or more of the eligibility criteria for the package.

You must tell us within 14 days if you become aware that you no longer satisfy the eligibility criteria for the Business Privileges Package. If we become aware that you no longer satisfy the eligibility criteria for the Business Privileges Package we will notify you.

In either case, we will notify you what you need to do to satisfy the eligibility criteria for the Business Privileges Package and give you a reasonable period (of not less than 30 days) to satisfy the criteria. If you do not satisfy the eligibility criteria within that period, we will remove the benefits of the Business Privileges Package and notify you that we are doing this. We will also notify you of any changes to your annual percentage rate or repayments on your eligible products as a result of the removal of the package.

If you wish to discontinue the benefits of your Business Privileges Package at any time, you must give us at least 14 days written notice. At the end of this period, we will remove the benefits of the Business Privileges Package.

If you become ineligible for the Business Privileges Package or notify us that you wish to discontinue the package then you will no longer be required to pay the annual package fee.

Replacement Clause 13(a) of the Term Loan

If:

- any *money* that you owe us is not paid to us when it is due to be paid; or
- you fail to *keep to* the terms of any agreement with us; or
- you fail to *keep to* any terms of any security given to us for payment of the *money owing*; or
- you are unable to pay your debts when they are due to be paid or you are no longer in charge of your own affairs; or
- any promise you made to us, or information you gave to us, is untrue or misleading in any material respect and in circumstances which may materially increase our risk; or
- any *money* that you owe anyone else is not paid when it is due to be paid in circumstances which may materially increase our risk; or
- any *money* that you owe anyone else becomes payable before its maturity date; or
- this agreement or any *security* does not have effect, or stops having effect, in accordance with its terms, or becomes unenforceable for any reason; or

- some or all of your property is seized by or on behalf of a creditor or under legal process; or
 - you stop, or threaten to stop, carrying on all or a material part of your business; or
 - you use the *money* for a different purpose from the purpose stated in the Facility Details; or
 - you are a company and ownership of any of your shares is transferred without our written consent; or
 - you are a partner in a partnership and there is a change in the members of the partnership or the partnership is dissolved, without our written consent; or
 - you are a trustee of a trust and:
 - the trust is not properly constituted; or
 - the trust is terminated or the beneficiaries of the trust resolve to terminate it; or
 - you stop being trustee of the trust; or
 - you cease holding the trust in your name; or
 - you commit a breach of trust; or
 - *intentionally deleted*
1. then you are in default under this agreement.
 2. In each such case, before taking any action we will give you notice and allow you a reasonable time (being not less than 30 days) to remedy the default if the default is able to be remedied.

Replacement Clause 22(a) of the Term Loan

In this agreement, unless the context otherwise requires:

“advance payments” means amounts owing under this agreement that are repaid early. For example, if you have made unscheduled one-off lump sum repayments, repayments more frequently than required or regular repayments of an amount greater than your *repayments* or *elected repayments*;

“annual percentage rate” means the interest rate set out in the Facility Details as changed from time to time;

“base rate” means a base rate we set from time to time as a reference rate for our business term loan product. The *base rate* applying to your *facility* is stipulated in the Facility Details;

“break cost event” has the meaning described in Part 6 (f);

“break costs” are described in Part 6(f);

“change of credit” means a change in the financial position of you or any person who has given a *guarantee* of your obligations under this agreement or an adverse change in the value of the *property* which we determine would, if it had occurred at the time we approved the facility, have materially affected our decision to provide the facility on the terms set out in this agreement;

“date of the first advance” means the first date on which we pay you any of the *money*;

“daily percentage rate” means the *annual percentage rate* divided by 365;

“elected repayments” means the higher of your *repayment* or any other *repayment* amount we may agree with you from time to time;

“extra payment limit” for a *fixed business term loan*, is the amount which is \$5,000 more than your elected repayments in any 12 month period;

“facility” means the Business Term Loan Facility we agree to provide you under this facility agreement;

“facility amount” means the amount set out in the Facility Details;

“Facility Details” means the details that form part of this agreement;

“facility type” means either a *variable business term loan* or *fixed business term loan* as stipulated in the Facility Details and varied from time to time in accordance with this facility agreement;

“fixed business term loan” means a business term loan where the annual percentage rate is fixed

“fixed interest period” means any period for which the annual percentage rate is fixed

“facility limit” means the facility limit stipulated in the Facility Details and as varied from time to time by us in accordance with this facility agreement and any new or replacement limit as you and we agree;

“guarantee” means a guarantee of your obligations under this agreement;

“guarantor” means a person who gives a guarantee to us;

“keep to” means that you will keep all of your promises and perform all of your obligations under a specified agreement;

“money” means the *facility amount*;

“money owing” means at any time the amount that you owe us under this agreement at that time;

“notices” means any notice, letter, demand or other document;

“outstanding amount” means any amount due and payable by you, but unpaid;

“property” means the property subject to a *security*;

‘PPSA’ means the *Personal Property Securities Act 2009* (Cth);

‘PPSA law’ means:

- (a) the *PPSA*;
- (b) any regulation made pursuant to the *PPSA*; and
- (c) any other legislation or regulation made to implement, or contemplated by, any *PPSA law* referred to in paragraph (a) or (b);

“reduction” means a reduction in the *facility limit* due in the manner described in the Facility Details and an equivalent payment;

“reduction date” means the dates upon which reductions are due as stipulated in the Facility Details;

“repayment” means the amount set out in the Facility Details as changed from time to time;

“repayment date” means the same date each month as the day when the loan settles or if there is no such date the last day of the month. In either case, if that day is not a *business day*, the *repayment date* is on the next *business day*;

“repayment type” means any of

- (a) interest only;
- (b) principal; or
- (c) principal and interest,

as stipulated in the Facility Details and varied from time to time in accordance with this facility agreement;

‘security’ means each *security interest* stipulated in the Facility Details and any substituted or additional *security interest* given in connection with this agreement or which otherwise secures your liabilities in connection with this agreement;

‘security interest’ means:

- (a) any security for the payment of money or performance of obligations including a mortgage, charge, lien, pledge, trust or power or title retention arrangement, guarantee or guarantee and indemnity;
- (b) a “security interest” as defined in the *PPSA*; or
- (c) any document to grant or create anything referred to in either paragraphs (a) or (b) of this definition and any other thing which gives a creditor priority to any other creditor with respect to any asset or an interest in any asset;

You are a “*small business customer*” if:

- (a) you are a small business within the meaning of the Banking Code of Practice; or
- (b) this facility agreement is a small business contract within the meaning of the ASIC Act;

“*special reduction*” means a special reduction of the *facility limit* due in the manner described in the Facility Details;

“*special reduction date*” means the date upon which a *special reduction* is due as stipulated in the Facility Details;

“*term*” means the period within which you must pay all *money owing* to us. It is set out in the Facility Details;

“*unpaid daily balance*” means for any day the difference between all amounts credited and all amounts debited to your account under this agreement at the end of that day;

“*variable business term loan*” means a business term loan where the *annual percentage rate* is not fixed

“*variable interest period*” means any period for which the *annual percentage rate* or other *interest rate* applying to your facility (if any) is not fixed

Replacement Clause 17 of the Commercial Rate Loan

17.1 Unless you are a *small business customer*, you indemnify us against, and you must therefore pay us on demand for, liability, loss or costs (*including* consequential or economic loss) we suffer or incur:

- (a) if you default under this *facility agreement* (in which case you will also be liable for any loss arising because we require payment of the *total amount owing* on your *facility account* earlier than its due date);

- (b) if you do not pay us the *total amount owing* on your *facility account*;
- (c) in connection with us or any person acting on our behalf exercising, or not exercising, rights under this *facility agreement*;
- (d) in connection with the *security property*, the monitoring of works or this *facility agreement*;
- (e) as a result of doing anything that we agree to do under any *facility at your request or consequent upon your default*;
- (f) in connection with finance which you request not being provided in accordance with your request for any reason (other than our default); or
- (g) under any indemnity we give a *controller* or administrator appointed:
 - i. in respect of you or a guarantor providing a *security*; or
 - ii. over any *security property*.

17.2 You must pay us an amount equal to any liability, loss or costs (*including* consequential or economic loss) of a kind referred to in clauses 17.1(a) to 17.1(f) suffered or incurred by:

- (a) any *receiver* or *attorney* appointed under this facility agreement or a security;
- (b) any of our employees, officers, agents, contractors or *authorised officers*; or
- (c) any other person such as a lessee, purchaser or occupier of the *security property* to whom we may have a liability in respect of the *security property*.

17.3 If a judgment, order or proof of debt in connection with the *total amount owing* on your *facility account* is expressed in a currency other than that in which the *total amount owing* is due, then you indemnify us against, and you must therefore pay us on demand for:

- (a) any difference arising from converting the other currency, if the exchange rate we use for converting currency when we receive a payment in the other currency is less favourable to us than the exchange rate used for the purpose of the judgment, order or acceptance of proof of debt; and
- (b) the *costs* of conversion.

17.4 If you are a *small business customer*, you indemnify us against, and you must therefore pay us on demand for, liability, loss or costs (*including* consequential or economic loss) we suffer or incur:

- (a) if you default under this *facility agreement* (in which case you will also be liable for any loss arising because we require payment of the *total amount*

owing on your *facility account* earlier than its due date); or

(b) if you do not pay us the *total amount* owing on your *facility account*,

excluding any liability, loss or costs to the extent caused by our mistake, fraud, negligence or wilful misconduct or the mistake, fraud, negligence or wilful misconduct of our employees, officers, contractors or agents, or any *receivers* we appoint in respect of any property.

Replacement Clause 22 of the Commercial Rate Loan

22.1 You are in default if:

- (a) you do not pay on time any amounts due under this *facility agreement* or any *arrangement with us*. This *includes* if our electronic transfer instruction is subsequently reversed by the paying institution;
- (b) an account does not have sufficient funds (or available credit) to debit a payment (in breach of clause 4.4);
- (c) you do something you agree not to do under this *facility agreement*, a security or an *arrangement with us*, or you don't do something you agree to do under this *facility agreement*, a security, or an *arrangement with us*;
- (d) you are, or a *debtor/guarantor* or another person is, in default under a security or any *arrangement with us*, or an event of default, however described, occurs under a security or an *arrangement with us*;
- (e) you give, or a *debtor/guarantor* or another person gives, us incorrect or misleading information (including through your representations, warranties and declarations in this facility agreement) in connection with this *facility agreement* or any *arrangement with us* in any material respect and in circumstances which may materially increase our risk;
- (f) you do not, or another *person* does not, carry out in full an undertaking given in connection with this *facility agreement*, a security or another *arrangement with us*, within the period specified, or within 7 days of our request if no period is specified;
- (g) you (if you are a corporation) are or become, or a *debtor/guarantor* (if it is a corporation) is or becomes, insolvent or steps are taken to make you or the *debtor/guarantor* insolvent;
- (h) you (if you are a corporation) are or become, or a *debtor/guarantor* (if it is a corporation) is or becomes, deregistered, or steps are taken to deregister you or the *debtor/guarantor*;
- (i) you use the *facility* for a different purpose from the purpose stated in the Schedule;

- (j) a *controller* or a *receiver* is appointed to any part of your or a *debtor/guarantor's* property;
- (k) this *facility agreement* is, becomes, or is claimed to be, void or unenforceable;
- (l) *intentionally deleted*;
- (m) we believe on reasonable grounds that urgent action is necessary to protect any *security property*, we have requested you to take such action and you have failed to do so within a reasonable time as specified by us;
- (n) the value of any *security property* materially decreases;
- (o) in the case of a *construction finance facility*, prior to *completion*, an event referred to in clause 22(g), (h), (j), (p) or (t) occurs in respect of the builder of the *works* and:
 - (i) the builder is not replaced (within a reasonable period as determined by us) by another builder who is acceptable to us; and
 - (ii) the replacement builder does not, if requested by us, enter into a tripartite deed with you and us in the form we require;
- (p) a person is appointed to investigate or manage your affairs or the affairs of a *debtor/guarantor*;
- (q) any of the following occurs to you (if you are a corporation) or to a *debtor/guarantor* (if it is a corporation), without our consent:
 - (i) a change takes place in your directors or company secretary;
 - (ii) a transfer of shares in your capital is registered;
 - (iii) new shares, convertible notes or options for shares in your capital are issued; or
 - (iv) your capital is reduced or made capable of being called up only in certain circumstances;
- (r) you (if you are a corporation) or a *debtor/guarantor* (if it is a corporation) cease to be a subsidiary of the corporation which is your holding company or the *debtor/guarantor's* holding company at the date of this *facility agreement* or a corporation ceases to be your or the *debtor/guarantor's* subsidiary;
- (s) you are unable to make the representations, warranties and declarations in clauses 3 and 47 at any time;
- (t) *intentionally deleted*;
- (u) we reasonably believe someone acted fraudulently in connection with this *facility agreement* or an *arrangement with us*;
- (v) the persons who at the date of this *facility agreement* have *control* of you (if you are a corporation) or a *debtor/guarantor* (if it is a corporation) cease to have such *control* or one or more *persons* acquire *control* of you or the

debtor/guarantor after that date, without our written consent;

- (w) (if you are, or a *debtor/guarantor* is, a partnership) the partnership is dissolved, an application is made for its dissolution or more than 20% of the partners retire in any 6 month period, without our written consent; or
- (x) (if you are, or a *debtor/guarantor* is, a joint venture partner) the joint venture is terminated, without our written consent.

22.2 If you are a *small business customer*:

- (a) before we act on a default, we will allow you a reasonable time (being not less than 30 days) to remedy the default if it is able to be remedied, and notify you of this time period. However, we do not have to do this if it is reasonable for us to act to manage a material and immediate risk relating to:
 - (i) the default;
 - (ii) your particular circumstances; or
 - (iii) the value of a *security*; and
- (b) we will then only act on the default if the default by its nature is material, or we reasonably consider the event has had, or is likely to have, a material impact on:
 - (i) you or a *debtor/guarantor's* ability to meet your or their financial obligations (or our ability to assess these);
 - (ii) our security risk (or our ability to assess it); or
 - (iii) our legal or reputation risk where clauses 22.1(i) or 22.1(u) applies.

Replacement Clause 25.2 of the Commercial Rate Loan

25.2 Unless you are a *small business customer*, we may reduce or cancel the undrawn portion of the *facility limit* at any time.

Replacement Clause 35.1 of the Commercial Rate Loan

35.1 Unless you are a *small business customer*, we may give you a certificate about a matter or about an amount payable in connection with this *facility agreement*. The certificate is sufficient evidence of the matter or amount, unless it is proved to be incorrect.

Replacement Clause 39 of the Commercial Rate Loan

39.1 Unless you are a *small business customer*, we may change any of the following at any time without your consent:

- (a) the undrawn portion of the *facility limit* in accordance with clause 25.2;

- (b) the *customer margin* in accordance with clause 24.6, 24.7 or 26.2;
- (c) the *default rate* provided it does not at any time exceed the rate specified in clause 24.3;
- (d) the *interest period* and the *interest payment date* provided the adjustments are of a kind referred to in clause 12.5;
- (e) any matter relating to the administration of your *facility* (including business day conventions, timing of debits and credits and methods of calculation) where the change is not materially prejudicial to you;
- (f) the *commercial rate loan base rate* (provided that such change does not take effect during an *interest period*);
- (g) the Business Banking Guide to Fees and Charges;
- (h) the Business Lending Supplementary Terms and Conditions as specified in and in accordance with those terms;
- (i) any other terms and conditions of the *nominated account* or *facility account* in accordance with the terms and conditions for those accounts;
- (j) the amount and type of fees and charges and when they are payable (including by imposing new fees and charges or changing the method of calculation of a fee or charge) provided that the variation is consistent with changes we make to our contracts with customers in similar circumstances and who have the same type of *facility* as you;
- (k) any other matter or thing expressly permitted elsewhere in this *facility agreement*;
- (l) the change is required by or to comply with law; or
- (m) the change does not materially prejudice your rights or obligations under this agreement..

39.2 The notice period and manner of notification for changes to this *facility agreement* under clause 39.1 must be in accordance with the law and any code to which we subscribe and which applies to this *facility agreement*.

39.3 Subject to clause 39.2, in respect of a change referred to in clause 39.1(g), (j), (l) or (m), we:

- (a) will notify you in writing to your last address recorded by us if the change is a new fee or charge or will materially increase your liability under this *facility agreement*; and
- (b) may notify you of any other change by publication of an advertisement of the change in a major Australian newspaper or newspapers or by placing a notice on or with statements of account or other material we send to you or on any online portal page which you may use to access your *nominated account*, *facility account* or any electronic functionality associated with them or by notice in writing to your last address recorded by us.

39.4 Except as specified in clause 39.1, a term of this *facility agreement*, or right or obligation created under it, may not be waived or varied except in writing signed by the party or parties to be bound.

39.5 If you are a *small business customer*, we may, acting reasonably and to the extent reasonably necessary to protect our legitimate business interests, change any of the following at any time without your consent, subject to clause 39.6:

- (a) the *customer margin* in accordance with clause 24.6, 24.7 or 26.2;
- (b) the *default rate* provided it does not at any time exceed the rate specified in clause 24.3;
- (c) the *interest period* and the *interest payment date* provided the adjustments are of a kind referred to in clause 12.5;
- (d) any matter relating to the administration of your *facility* (including business day conventions, timing of debits and credits and methods of calculation) where the change is not unfavourable to you;
- (e) the commercial rate loan base rate (*provided that such change does not take effect during an interest period*);
- (f) the Business Banking Guide to Fees and Charges;
- (g) the Business Lending Supplementary Terms and Conditions as specified in and in accordance with those terms;
- (h) any other terms and conditions of the *nominated account* or *facility account* in accordance with the terms and conditions for those accounts;
- (i) the amount and type of fees and charges and when they are payable (including by imposing new fees and charges or changing the method of calculation of a fee or charge) provided that the variation is consistent with changes we make to our contracts with customers in similar circumstances and who have the same type of *facility* as you;¹
- (j) the change is required by or to comply with law; or
- (k) the change is not unfavourable to your rights or obligations under this agreement.

39.6 Where a change is unfavourable to you, we will provide you with 30 days' notice, or such longer period as may be required under the law or any code to which we subscribe (including the Banking Code of Practice), subject to the following

¹ For example, we may change or introduce a new fee or charge due to increases in our costs, regulatory change or changes in market conditions.

exceptions:

- (a) If we change an interest rate, we will tell you no later than the date of the change, unless we are not able to because the interest rate is calculated according to a money market rate or some other external rate, or a rate otherwise designated as a variable rate;
- (b) Where there is a change to or introduction of, a government fee or charge, we will tell you reasonably promptly after the government notifies us (however, we do not have to tell you if the government publicises the change to, or introduction of, the fee or charge);
- (c) We may give you a shorter notice period (or no notice) of an unfavourable change if we reasonably believe doing so is necessary for us to avoid, or to reduce, a material increase in our credit risk or our loss.

Where a change is not unfavourable to you, we will tell you about the change as soon as reasonably possible (which may be before or after the change is made).

If you choose to terminate this contract due to a change made by us under this clause 39.5, then you must give us notice and repay *the total amount owing* within the relevant time period specified above. We will not charge you any fees to discharge any *security* but if the interest rate has been fixed then you must still pay us *break costs* in accordance with clause 20.

Replacement Clause 62 of the Commercial Rate Loan

accountable taxes means taxes imposed by a *relevant country* other than those which would not be required to be deducted by you if we provided your with any of our name, address, registration number or similar details or any relevant tax exemption or similar details.

annual percentage rate means a per annum rate of interest. The *annual percentage rate* applying to your *facility* is stipulated in the Schedule. The *annual percentage rate* may change from time to time in the manner permitted by this *facility agreement*. You can find out your current *annual percentage rate* by contacting us.

arrangement with us means an arrangement (*including* an agreement or a *security interest*) under which a *debtor/guarantor* has or could in the future have obligations to us or any of our related entities. It includes any agreement or *security interest* assigned to us.

attorney means each attorney appointed by you under clause 46.

authorised officer means:

- (a) for us, a director or secretary, or an officer whose titled contains the word "director", "chief", "head", "president" or "manager" or a person performing the functions of any of them or any other person nominated by us as an authorised officer for the purposes of any *arrangement with us*; and

(b) for you, a *person* appointed by you to act as your *authorised officer* for the purposes of any *arrangement with us*.

balance owing means, depending upon the context, at any time the difference between all amounts credited and all amounts debited to any or all of your *facility account*, *nominated account* and other account held with us in connection with the facility. When the *balance owing* is to be calculated for the end of a day, it *includes* all debits and credits assigned to that day.

break cost event has the meaning described in clause 20.1.

break costs are described in clause 20.

business day means any day on which Bank of Queensland is open for business.

change of credit means a change in the financial position of you or any person who has given a guarantee of your obligations under this *facility agreement* or a adverse change in the value of the *security property* which we determine would, if it had occurred at the time we approved the *facility*, have materially affected our decision to provide the *facility* on the terms set out in the *facility agreement*.

commercial rate loan base rate is the internal rate or rates we set daily for each *facility type* for each of the *interest periods*. You can find out what this rate is for a particular day by contacting your branch.

completion for a *construction finance facility*, means the date of issue of a certificate of practical completion in a form suitable to us by a consultant we appoint or approve for the works.

construction finance facility means a facility which is to be used for construction purposes.

control of a corporation includes the direct or indirect power to directly or indirectly:

- (a) direct the management or policies of the corporation; or
- (b) control the membership of its board of directors, whether or not the power has statutory, legal or equitable force or is based on statutory, legal or equitable rights and whether or not it arises by means of trusts, agreements, arrangements, understandings, practices, the ownership of any interest in shares or stock of the corporation or otherwise.

controller has the meaning given to it in the Corporations Act.

costs include charges and expenses. It also includes costs, charges and expenses in connection with advisers (in the case of legal advisers, on a full indemnity basis or solicitor and own client basis, whichever is high).

creditor payment terms are calculated as:

$$\frac{\text{total trade creditors} \times 365}{\text{purchases} \times (12 / \text{period})}$$

current ratio is calculated as:

$$\frac{\text{current assets} \times 100}{\text{current liabilities}}$$

customer margin means the *customer margin* specified in the Schedule.

debtor days are calculated as

$$\frac{\text{average debtors} \times 365}{\text{sales}}$$

debtor/guarantor means:

- (a) you;
- (b) any *person* who guarantees payment of any part of the *total amount owing* on any account;
- (c) if any part of the *total amount owing* on any account *includes* obligations you owe under a *guarantee*, the person whose obligations you guarantee and any other *person* who guarantees that other *person's* obligations; and
- (d) any other *person* you and we agree is to be a "*debtor/guarantor*" for the purpose of this *facility agreement*.

default rate means a per annum rate of interest payable under clauses 24.1 to 24.4. The *default rate* may change from time to time in the manner permitted by this *facility agreement*.

directive means a treaty, a law, an official directive or request having the force of law, and an official directive, request, guideline or policy with which financiers carrying on business in Australia generally comply. Directive *includes* any Australian Prudential Regulation Authority or Reserve Bank of Australia directive.

drawdown date means each date on which the facility is drawn down (such as by the advance of loan funds to you).

equity ratio is calculated as:

$$\frac{\text{total shareholder funds (net of inter-related loans)} \times 100}{\text{total tangible assets}}$$

facility means the Commercial Rate Loan Facility we agree to provide you under this *facility agreement*.

facility account means the account held with us in your name where we will debit

some amounts (*including* all drawdowns) in connection with your *facility*.

facility agreement means these General Conditions, the Facility Details and the Schedule setting out the particulars of your *facility agreement*.

Facility Details means the details that form part of this facility agreement.

facility establishment date means the date we open your *facility account* under this *facility agreement*.

facility limit means the *facility limit* stipulated in the Schedule and as varied from time to time by us in accordance with this *facility agreement* and any new or replacement limit as you and we agree.

facility type means any of the *variable commercial rate loan, interest capitalised variable commercial rate loan, interest capitalized variable commercial rate loan, fixed commercial rate loan* or *interest prepaid commercial rate loan* as stipulated in the Schedule and varied from time to time in accordance with this *facility agreement*.

financial market transaction means one or more transactions that are or will be entered into between you and us and that are governed by the Master Agreement for Financial Markets Transactions between you and us.

fixed commercial rate loan means a *facility* where the *interest period* may be any of 1, 2, 3, 4 or 5 years.

fixed charge/interest cover is calculated as:

$$\frac{\text{earnings before interest tax and depreciation}}{\text{total interest paid plus lease expense and hire purchase payments}}$$

for example see including.

General Conditions means these general conditions that form part of this *facility agreement*.

governing body means each entity which manages or administers any shared scheme of which any *security property* is part.

gross profit margin is calculated as:

$$\frac{\text{gross profit} \times 100}{\text{sales}}$$

GST has the same meaning as in the A New Tax System (Goods & Services Tax) Act 1999 (Cth).

guarantee includes an indemnity.

including, such as or for example, when introducing an example, does not limit the meaning of the words to which the example relates to that example or examples of a similar kind.

insolvent means a person who:

- (a) is (or state that they are) an insolvent under administration or insolvent (each as defined in the Corporations Act);
- (b) has a controller appointed, is in liquidation, in provisional liquidation, under administration or wound up or has had a receiver appointed to any part of their property;
- (c) is subject to any arrangement, assignment, moratorium or composition, or protected from creditors under any statute, or dissolved (in each case, other than to carry out a reconstruction or amalgamation while solvent on terms approved by us);
- (d) is no longer in control of their affairs;
- (e) has an application or order made (and in the case of an application, it is not stayed, withdrawn or dismissed within 30 days), resolution passed, proposal put forward, or any other action taken, in each case in connection with them, which is preparatory to or could result in any of the things referred to above;
- (f) is taken (under section 459F of the Corporations Act) to have failed to comply with a statutory demand;
- (g) is the subject of an event described in section 459C(2)(b) or section 585 of the Corporations Act (or they make a statement from which we reasonably deduce they are so subject);
- (h) is otherwise unable to pay their debts when they fall due; or
- (i) has something substantially similar to any of the things referred to above happen to them under the law of any jurisdiction.

interest capitalisation component means, if you have an interest capitalised *variable commercial rate loan*, that amount of the *facility limit* described as such in the Schedule.

interest capitalised variable commercial rate loan means a *variable commercial rate loan* where:

- (a) the *interest period* may be any of 1, 2 or 3 months; and
- (b) subject to these General Conditions, interest is debited to the *facility account*.

interest cover is calculated as:

$$\frac{\text{earnings before interest tax and depreciation}}{\text{total interest paid}}$$

interest payment date means:

- (a) for a *variable commercial rate loan* and an *interest capitalised variable commercial rate loan* - the last day of each *interest period*;
- (b) for a *fixed commercial rate loan* - subject to clause 12.7(c)(ii), the same date in each month as the drawdown date;
- (c) for an *interest prepaid commercial rate loan* - the *drawdown date* for the first *interest period*, and the anniversary of the *draw down date* for any subsequent *interest period*.

If your *interest payment date* falls on the 29th, 30th or 31st of a month, and a particular month does not have that date, your *interest payment date* falls due and owing on the last day of that month.

interest period means the period stipulated in the Schedule (as varied in accordance with this *facility agreement*). We may agree to change the *interest period* in the manner provided for in this *facility agreement*.

interest prepaid commercial rate loan means a facility where:

- (a) the *interest period* is for 1 year; and
- (b) interest is paid annually in advance.

interest prepayment for an *interest prepaid commercial rate loan* means, the interest payment prepaid at the start of any *interest period*.

minimum net worth means the minimum of your net worth. Your net worth is your consolidated capital and revenue reserves excluding all tangible assets and future tax benefits.

nominated account means the business transaction account held with us in your name, nominated by you as the relevant account for crediting and debiting amounts in accordance with this *facility agreement*.

person includes an individual, a firm, a body corporate, an unincorporated association and an authority.

PPSA means the Personal Property Securities Act 2009 (Cth).

PPSA law means:

- (a) the *PPSA*;
- (b) any regulation made pursuant to the *PPSA*; and

- (c) any other legislation or regulation made to implement, or contemplated by, any *PPSA law* referred to in paragraph (a) or (b).

premises means the premises where you intend to carry out, or you are carrying out, works using financial assistance provided under a *construction finance facility*.

quasi-capital ratio is calculated as:

$$\frac{\text{surplus of tangible assets plus and/or minus} \\ \text{shareholders/beneficiaries loans}}{\text{total tangible assets}}$$

receiver includes receiver, or receiver and manager and has the meaning given to it in the Corporations Act.

redraw is described in clause 19.

reduced facility limit means the *facility limit* following any reductions or special reductions.

reduction means the amount of the reduction (if any) which is specified in the Schedule.

reduction date means the dates (if any) upon which reductions are due as stipulated in the Schedule.

related entity has the meaning given to it in the Corporations Act.

relevant country means any country, or political sub-division of one or more countries, or any federation or association of countries in which a *debtor/guarantor* is either incorporated or is resident or domiciled for any tax purpose or in which a *debtor/guarantor* carries on business or owns or leases property or from which, or through which, any payment under an arrangement with us is made.

request notice means a *request notice* (if any) in the form contained in the Schedule or any other form notified to you from time to time.

Schedule means the schedule that forms part of this *facility agreement*.

security means each security interest stipulated in the Facility Details under "Security" and any substituted or additional security interest given in connection with this *facility agreement*.

security interest means:

- (a) any security for the payment of money or performance of obligations including a mortgage, charge, lien, pledge, trust or power or title retention arrangement or *guarantee*;

- (b) a "security interest" as defined in the *PPSA*; or
- (c) any document to grant or create anything referred to in either paragraphs (a) or (b) of this definition and any other thing which gives a creditor priority to any other creditor with respect to any asset or an interest in any asset.

security property means property over which a *security* is held and which is stipulated in the Facility Details and any substituted or additional security property.

shared scheme means each scheme or plan regulated by a *shared scheme* law that affects any *security property*. Examples of properties which are often part of a shared scheme are strata or stratum title home units and town houses and properties in integrated developments.

You are a *small business customer* if:

- (a) you are a small business within the meaning of the Banking Code of Practice; or
- (b) this facility agreement is a small business contract within the meaning of the ASIC Act.

special reduction means the amount of the one off *special reduction* (if any) which is specified in the Schedule.

special reduction date means the date (if any) upon which a *special reduction* is due as stipulated in the Schedule.

stock turnover is calculated as:

$$\frac{\text{average value (finished goods and work in progress and raw materials)} \times 365}{\text{cost of goods} \times (12 / \text{period})}$$

such as see including.

taxes means taxes, levies, imposts, charges and duties (*including* stamp and transaction duties) imposed by any authority together with any related interest, penalties, fines and expenses in connection with them, except if imposed on our overall net income.

term means the term specified in the Schedule. The term may change from time to time in the manner permitted by this *facility agreement*.

total amount owing means, depending upon the context at any time, the *balance owing* on any or all of your *facility account*, *nominated account* and any other account held with us in connection with the facility at that time plus all accrued interest charges, any default interest charges and other amounts which you must pay under this *facility agreement* but which have not been debited to your accounts at that time.

This definition applies:

- (a) irrespective of the capacity in which you or we became entitled to the amount concerned;
- (b) irrespective of the capacity in which you or we became liable in respect of the amount concerned;
- (c) whether you or we are liable as principal debtor, as surety, or otherwise;
- (d) whether you are liable alone, or together with another *person*;
- (e) even if you owe an amount or obligation to us because it was assigned to us, whether or not:
 - (i) the assignment was before, at the same time as, or after this *facility agreement* is executed;
 - (ii) you consented to or were aware of the assignment; or
 - (iii) the assigned obligation was secured;
- (f) even if this *facility agreement* was assigned to us, whether or not:
 - (i) you consented to or were aware of the assignment; or
 - (ii) any of the *total amount owing* on any account was previously unsecured; and
- (g) if you are a trustee, whether or not you have a right of indemnity from the trust fund.

A reference to the *total amount owing* also includes any part of it.

variable commercial rate loan means a *facility* where the *interest period* may be any of 1, 2, 3 or 6 months.

variation date means the effective date of any variation to your *facility agreement* as agreed between you and us.

we, us and our means Bank of Queensland Limited ABN 32 009 656 740 and its successors and assigns.

works means the works specified in the Facility Details (if any) and any building work, excavation or earthworks on the premises or any *security property*, work demolishing, removing or altering any part of the *premises* or any *security property*, or any building or development work required by an authority in connection with the *premises* or any *security property*.

you and your means the *person* or *persons* named in the Facility Details as the customer. If there are more than one, you means each of you separately and

every two or more of you jointly. You *includes* your successors and assigns. In the definition of *total amount owing* it also refers to you as so defined whether as a principal or as a surety.

Replacement Clause 2(d) of the Overdraft

Unless you are a *small business customer*, we may at any time reduce or cancel the *facility limit by notice to you*. We may also refuse at any time to provide any further credit under this agreement by notice to you.

For the purposes of this clause, you are a *small business customer* if:

- (a) you are a small business within the meaning of the Banking Code of Practice; or
- (b) this facility agreement is a small business contract within the meaning of the ASIC Act.

Replacement Clause 7 of the Overdraft

(a) Current fees and charges

You must pay us the fees and other charges set out in the Facility Details.

You must also pay us any other fees and charges applicable to your facility. We may debit fees and charges to your account.

(b) Changes to fees and charges

Unless you are a *small business customer*, we may change fees and charges or add new fees and charges without your consent at any time.

(c) Notification of changes to fees and charges

Where we make a change pursuant to Part 7(b) we will notify you in writing in to the last address recorded by us. Where you have provided us with an email or other electronic address, we may notify you by email or other electronic communication.

We may alternatively notify you of a change pursuant to Part 7(b) where that change is not a new fee or charge or will not materially increase your liability under this agreement by publishing an advertisement of the change in a major Australian newspaper or newspapers or by placing a notice on or with statements of account or other material we send to you or on any online portal page which you may use to access your account.

(d) Small business customers

If you are a *small business customer*, we may, acting reasonably and to the extent reasonably necessary to protect our legitimate business interests, change the fees and charges payable by you under this agreement including introducing or removing fees and charges and changing the amount, method of calculation, frequency of charging or timing of payment of them. For example, we may change or introduce a

new fee or charge due to increases in our costs, regulatory change or changes in market conditions. We will tell you about changes as soon as reasonably possible (which may be before or after the change is made) or, where the change is unfavourable to you, by providing you with notice of the change in accordance with the table below. We can also give you a shorter notice period (or no notice) of an unfavourable change if it is reasonable for us to manage a material and immediate risk.

Type of change	Minimum notice period
Changing the amount or manner of charging fees and charges payable to us or introducing a new fee or charge payable to us	30 days or shorter if the change is not adverse to you
Introducing or changing any government charge or tax	30 days or such period as may be required by law or in order to notify you of the changed or new charge or tax or if the change is not adverse to you

For clarity, you may choose to terminate this contract at any time under clause 6(b) above, without incurring any break fees. If you choose to terminate this contract due to a change made by us under this clause 7(d), we will not charge you any fees to discharge any security.

Replacement Clause 8(c) of the Overdraft

If we ask, you will provide us with evidence that is satisfactory to us of your compliance with any one or more of the eligibility criteria for the package.

You must tell us within 14 days if you become aware that you no longer satisfy the eligibility criteria for the Business First Lending Package. If we become aware that you no longer satisfy the eligibility criteria for the Business First Lending Package we will notify you.

In either case, we will notify you what you need to do to satisfy the eligibility criteria for the Business First Lending Package and give you a reasonable period (of not less than 30 days) to satisfy the criteria. If you do not satisfy the eligibility criteria within that period, we will remove the benefits of the Business First Lending Package and notify you that we are doing this. We will also notify you of any changes to your

annual percentage rate or repayments on your eligible products as a result of the removal of the package.

If you wish to discontinue the benefits of your Business First Lending Package at any time, you must give us at least 14 days written notice. At the end of this period, we will remove the benefits of the Business First Lending Package.

If you become ineligible for the Business First Lending Package or notify us that you wish to discontinue the package then you will no longer be required to pay the annual package fee.

Replacement Clause 9(c) of the Overdraft

If we ask, you will provide us with evidence that is satisfactory to us of your compliance with any one or more of the eligibility criteria for the package.

You must tell us within 14 days if you become aware that you no longer satisfy the eligibility criteria for the Business Privileges Package. If we become aware that you no longer satisfy the eligibility criteria for the Business Privileges Package we will notify you.

In either case, we will notify you what you need to do to satisfy the eligibility criteria for the Business Privileges Package and give you a reasonable period (of not less than 30 days) to satisfy the criteria. If you do not satisfy the eligibility criteria within that period, we will remove the benefits of the Business Privileges Package and notify you that we are doing this. We will also notify you of any changes to your annual percentage rate or repayments on your eligible products as a result of the removal of the package.

If you wish to discontinue the benefits of your Business Privileges Package at any time, you must give us at least 14 days written notice. At the end of this period, we will remove the benefits of the Business Privileges Package.

If you become ineligible for the Privileges Lending Package or notify us that you wish to discontinue the package then you will no longer be required to pay the annual package fee.

Replacement Clause 12(a) of the Overdraft

If:

- any money that you owe us is not paid to us when it is due to be paid; or
- you fail to *keep to* the terms of any agreement with us; or
- you fail to *keep to* any terms of any security given to us for payment of the *money owing*; or
- you are unable to pay your debts when they are due to be paid or you are no

longer in charge of your own affairs; or

- any promise you made to us, or information you gave to us, is untrue or misleading in any material respect and in circumstances which may materially increase our risk or;
- any *money* that you owe anyone else is not paid when it is due to be paid in circumstances which may materially increase our risk; or
- any money that you owe anyone else becomes payable before its maturity date; or
- this agreement or any *security* does not have effect, or stops having effect, in accordance with its terms, or becomes unenforceable for any reason; or
- some or all of your property is seized by or on behalf of a creditor or under legal process; or
- you stop, or threaten to stop, carrying on all or a material part of your business; or
- you use the *money* for a different purpose from the purpose stated in the Facility Details; or
- you are a company and ownership of any of your shares is transferred without our written consent; or
- you are a partner in a partnership and there is a change in the members of the partnership or the partnership is dissolved, without our written consent; or
- you are a trustee of a trust and:
 - the trust is not properly constituted; or
 - the trust is terminated or the beneficiaries of the trust resolve to terminate it; or
 - you stop being trustee of the trust; or
 - you cease holding the trust in your name; or
 - you commit a breach of trust; or

- *intentionally deleted*

1. then you are in default under this agreement.

2. In each such case, before taking any action we will give you notice and allow you a reasonable time (being not less than 30 days) to remedy the default if the default is able to be remedied.

Replacement Clause 13 of the Overdraft

Unless you are a *small business customer*, as well as the things set out elsewhere in this agreement, we may, without your consent, from time to time, make any changes to this agreement.

We will give you notice of any material change to this agreement once they have been made. The notice period and manner of notification for changes to this agreement must also be in accordance with the law and any code to which we subscribe and which applies to this agreement.

For the purposes of this clause, you are a *small business customer* if:

- (a) you are a small business within the meaning of the Banking Code of Practice;
or
- (b) this facility agreement is a small business contract within the meaning of the ASIC Act.

Replacement Clause 21(a) of the Overdraft

In this agreement, unless the context otherwise requires:

“annual percentage rate” means the interest rate set out in the Facility Details as changed from time to time;

“business day” means a day that is a day on which our head office in Brisbane is open for business;

“daily percentage rate” means the *annual percentage rate* divided by 365;

“Facility Details” means the details that form part of this agreement;

“facility limit” means the amount set out in the Facility Details;

“guarantee” means a guarantee of your obligations under this agreement;

“guarantor” means a person who gives a guarantee to us;

“keep to” means that you will keep all of your promises and perform all of your obligations under a specified agreement;

“money” means the *facility amount*;

“money owing” means at any time the amount that you owe us under this agreement at that time;

“notices” means any notice, letter, demand or other document;

“outstanding amount” means any a

mount due and payable by you, but unpaid;

“*overlimit rate*” is 3% above the *annual percentage rate* on that day.

“*property*” means the property subject to a *security*;

“*PPSA*” means the *Personal Property Securities Act 2009* (Cth);

“*PPSA law*” means:

- (a) the *PPSA*;
- (b) any regulation made pursuant to the *PPSA*; and
- (c) any other legislation or regulation made to implement, or contemplated by, any *PPSA law* referred to in paragraph (a) or (b);

“*security*” means each *security interest* stipulated in the Facility Details and any substituted or additional *security interest* given in connection with this agreement or which otherwise secures your liabilities in connection with this agreement;

“*security interest*” means:

- (a) any security for the payment of money or performance of obligations including a mortgage, charge, lien, pledge, trust or power or title retention arrangement, guarantee or guarantee and indemnity;
- (b) a “*security interest*” as defined in the *PPSA*; or
- (c) any document to grant or create anything referred to in either paragraphs (a) or (b) of this definition and any other thing which gives a creditor priority to any other creditor with respect to any asset or an interest in any asset;

You are a “*small business customer*” if:

- (a) you are a small business within the meaning of the Banking Code of Practice; or
- (b) this facility agreement is a small business contract within the meaning of the ASIC Act;

“*term*” means the period specified in the Facility Details (if any) or, if the *facility limit* or this agreement is fully cancelled earlier by you or us in accordance with this agreement, the period ending on the date that cancellation takes effect.

“*unpaid daily balance*” means for any day the difference between all amounts credited and all amounts debited to your account under this agreement at the end of that day.

Replacement Clause 10 of Part A of the General Conditions

10.1 Unless you are a *small business customer*, you indemnify us against, and you must therefore pay us on demand for, liability, loss or costs (*including* consequential or economic loss) we suffer or incur:

- (a) if you default under this *facility agreement* (in which case you will also be liable for any loss arising because we require payment of the *total amount owing* on your *facility account* earlier than its due date);
- (b) if you do not pay us the *total amount owing* on your *facility account*;
- (c) in connection with us or any person acting on our behalf exercising, or not exercising, rights under this *facility agreement*;
- (d) in connection with the security property, the monitoring of *works* or this *facility agreement*;
- (e) as a result of doing anything that we agree to do under any *facility* at your request or consequent upon your default;
- (f) our reliance on a facsimile, email or other electronic notice from or purporting to be from you or a *person* authorised by you;
- (g) in connection with finance which you request not being provided in accordance with your request for any reason (other than our default); or
- (h) under any indemnity we give a *controller* or administrator appointed:
 - (i) in respect of you or a guarantor providing a *security*; or
 - (ii) over any *security property*.

10.2 You must pay us an amount equal to any liability, loss or costs (*including* consequential or economic loss) of a kind referred to in clauses 10.1(a) to 10.1(g) of this Part A suffered or incurred by:

- (a) any *receiver* or *attorney* appointed under this facility agreement or a *security*;
- (b) any of our employees, officers, agents, contractors or *authorised officers*; or
- (c) any other person such as a lessee, purchaser or occupier of the *security property* to whom we may have a liability in respect of the *security property*.

10.3 If a judgment, order or proof of debt in connection with the *total amount owing* on your *facility account* is expressed in a currency other than that in which the *total amount owing* is due, then you indemnify us against, and you must therefore pay us on demand for:

- (a) any difference arising from converting the other currency, if the exchange rate we use for converting currency when we receive a payment in the other

currency is less favourable to us than the exchange rate used for the purpose of the judgment, order or acceptance of proof of debt; and

(b) the costs of conversion.

10.4 If you are a *small business customer*, you indemnify us against, and you must therefore pay us on demand for, liability, loss or costs (*including* consequential or economic loss) we suffer or incur:

(a) if you default under this *facility agreement* (in which case you will also be liable for any loss arising because we require payment of the *total amount owing* on your *facility account* earlier than its due date); or

(b) if you do not pay us the *total amount* owing on your *facility account*,

excluding any liability, loss or costs to the extent caused by our mistake, fraud, negligence or wilful misconduct or the mistake, fraud, negligence or wilful misconduct of our employees, officers, contractors or agents, or any *receivers* we appoint in respect of any property.

Replacement Clause 13 of Part A of the General Conditions

13.1 You are in default if:

(a) you do not pay on time any amounts due under this *facility agreement* or any *arrangement with us*. This *includes* if our electronic transfer instruction is subsequently reversed by the paying institution;

(b) an account does not have sufficient funds (or available credit) to debit a payment (in breach of clause 4.4 of this Part A);

(c) you do something you agree not to do under this *facility agreement*, a security or an *arrangement with us*, or you don't do something you agree to do under this *facility agreement*, a security, or an *arrangement with us*;

(d) you are, or a *debtor/guarantor* or another person is, in default under a security or any *arrangement with us*, or an event of default, however described, occurs under a security or an *arrangement with us*;

(e) you give, or a *debtor/guarantor* or another person gives, us incorrect or misleading information (including through your representations, warranties and declarations in this *facility agreement*) in connection with this *facility agreement* or any *arrangement with us* in any material respect and in circumstances which may materially increase our risk;

(f) you do not, or another *person* does not, carry out in full an undertaking given in connection with this *facility agreement*, a security or another *arrangement with us*, within the period specified, or within 7 days of our request if no period is specified;

- (g) you (if you are a corporation) are or become, or a *debtor/guarantor* (if it is a corporation) is or becomes, insolvent or steps are taken to make you or the *debtor/guarantor* insolvent;
- (h) you (if you are a corporation) are or become, or a *debtor/guarantor* (if it is a corporation) is or becomes, deregistered, or steps are taken to deregister you or the *debtor/guarantor*;
- (i) you use the *facility* for a different purpose from the purpose stated in the Schedule unless agreed otherwise in accordance with this *facility agreement*;
- (j) a *controller* or a *receiver* is appointed to any part of your or a *debtor/guarantor's* property;
- (k) this *facility agreement* is, becomes, or is claimed to be, void or unenforceable;
- (l) *intentionally deleted*;
- (m) we believe on reasonable grounds that urgent action is necessary to protect any *security property*, we have requested you to take such action and you have failed to do so within a reasonable time as specified by us;
- (n) the value of any *security property* materially decreases;
- (o) in the case of a *construction finance facility*, prior to *completion*, an event referred to in clause 13(g), (h), (j), (p) or (t) of this Part A occurs in respect of the builder of the *works* and:
 - (i) the builder is not replaced (within a reasonable period as determined by us) by another builder who is acceptable to us; and
 - (ii) the replacement builder does not, if requested by us, enter into a tripartite deed with you and us in the form we require;
- (p) a person is appointed to investigate or manage your affairs or the affairs of a *debtor/guarantor*;
- (q) any of the following occurs to you (if you are a corporation) or to a *debtor/guarantor* (if it is a corporation), without our consent:
 - (i) a change takes place in your directors or company secretary;
 - (ii) a transfer of shares in your capital is registered;
 - (iii) new shares, convertible notes or options for shares in your capital are issued; or
 - (iv) your capital is reduced or made capable of being called up only in certain circumstances;
- (r) you (if you are a corporation) or a *debtor/guarantor* (if it is a corporation) cease to be a subsidiary of the corporation which is your holding company or the *debtor/guarantor's* holding company at the date of this *facility agreement* or a corporation ceases to be your or the *debtor/guarantor's* subsidiary;

- (s) you are unable to make the representations, warranties and declarations in clauses 3 and 40 of this Part A at any time;
- (t) *intentionally deleted*;
- (u) we reasonably believe someone acted fraudulently in connection with this *facility agreement* or an *arrangement with us*;
- (v) the persons who at the date of this *facility agreement* have *control* of you (if you are a corporation) or a *debtor/guarantor* (if it is a corporation) cease to have such *control* or one or more *persons* acquire *control* of you or the *debtor/guarantor* after that date, without our written consent;
- (w) (if you are, or a *debtor/guarantor* is, a partnership) the partnership is dissolved, an application is made for its dissolution or more than 20% of the partners retire in any 6 month period, without our written consent; or
- (x) (if you are, or a *debtor/guarantor* is, a joint venture partner) the joint venture is terminated, without our written consent.

13.2 If you are a *small business customer*:

- (a) before we act on a default, we will allow you a reasonable time (being not less than 30 days) to remedy the default if it is able to be remedied, and notify you of this time period. However, we do not have to do this if it is reasonable for us to act to manage a material and immediate risk relating to:
 - (i) the default;
 - (ii) your particular circumstances; or
 - (iii) the value of a *security*; and
- (b) we will then only act on the default if the default by its nature is material, or we reasonably consider the event has had, or is likely to have, a material impact on:
 - (i) you or a *debtor/guarantor's* ability to meet your or their financial obligations (or our ability to assess these);
 - (ii) our security risk (or our ability to assess it); or
 - (iii) our legal or reputation risk where clauses 13.1(i) or 13.1(u) applies.

Replacement Clause 16.2 of Part A of the General Conditions

16.2 Unless you are a *small business customer*, we may by notice to you reduce or cancel:

- (a) the undrawn portion of the *facility limit* for a *commercial rate loan* or *bank guarantee facility*; or

(b) the *facility limit* of a *business overdraft* or *business line of credit*,

at any time. Except as specified elsewhere in this *facility agreement*, we cannot reduce or cancel any of the *facility limit* for a *business term loan* or the drawn portion of the *facility limit* for a *commercial rate loan* or *bank guarantee facility*. Despite the rest of this clause 16.2, if the *Facility Details* expressly state that a *commercial rate loan* is a *committed facility*, then no portion of the *facility limit* for that *commercial rate loan* may be cancelled under this clause 16.2.

Replacement Clause 28 of Part A of the General Conditions

28.1 Unless you are a *small business customer*, we may give you a certificate about a matter or about an amount payable in connection with this *facility agreement*. The certificate is sufficient evidence of the matter or amount, unless it is proved to be incorrect.

28.2 We may rely on certificates provided by any other *person* with a *security interest* over the *security property* as to a matter or about an amount that is owed to them.

Replacement Clause 32 of Part A of the General Conditions

32.1 Unless you are a *small business customer*, we may change any of the following at any time without your consent:

- (a) the undrawn portion of the *facility limit* in accordance with clause 16.2;
- (b) the *margin* in accordance with clause 15.11, 15.12 or 17.4;
- (c) anything as specified in clause 17.4;
- (d) the *default rate* provided it does not at any time exceed the rate specified in the Schedule or clause 15.4 or 15.8 (as applicable);
- (e) the *interest period* and the *interest payment date* provided the adjustments are so that the *interest period* ends on *business day*, matches the end of the *term*, better aligns with your rollover or statement dates or similar administrative adjustments;
- (f) any matter relating to the administration of your *facility* (including business day conventions, timing of debits and credits and methods of calculation) where the change is not materially prejudicial to you;
- (g) the *annual percentage rate* (if variable) or any variable component as specified in this *facility agreement*;
- (h) the Business Banking Guide to Fees and Charges;
- (i) the Business Lending Supplementary Terms and Conditions as specified in and in accordance with those terms;
- (j) any other terms and conditions of the *nominated account* or *facility account* in

accordance with the terms and conditions for those accounts;

- (k) the amount and type of fees and charges and when they are payable (*including* by imposing new fees and charges or changing the method of calculation of a fee or charge) provided that the variation is consistent with changes we make to our contracts with customers in similar circumstances and who have the same type of *facility* as you;
- (l) any other matter or thing expressly permitted elsewhere in this *facility agreement*;
- (m) any other change to this *facility agreement* which is not materially prejudicial to your rights or obligations under it or which is required in order to comply with law.

32.2 The notice period and manner of notification for changes to this *facility agreement*

under clause 32.1 must be in accordance with the law and any code to which we subscribe and which applies to this *facility agreement*.

32.3 Subject to clause 32.2, in respect of a change referred to in clause 31.1(h), (k) or (m), we:

- (a) will notify you in writing to your last address recorded by us if the change is a new fee or charge or will materially increase your liability under this *facility agreement*; and
- (b) may notify you of any other change by publication of an advertisement of the change in a major Australian newspaper or newspapers or by placing a notice on or with statements of account or other material we send to you or on any online portal page which you may use to access your *nominated account*, *facility account* or any electronic functionality associated with them or by notice in writing to your last address recorded by us.

32.4 Except as specified in clause 32.1, a term of this *facility agreement*, or right or obligation created under it, may not be waived or varied except in writing signed by the party or parties to be bound.

32.5 If you are a *small business customer*, we may, acting reasonably and to the extent reasonably necessary to protect our legitimate business interests, change any of the following at any time without your consent, subject to clause 32.6:

- (a) the *customer margin* in accordance with clause 15.11, 15.12 or 17.4;
- (b) the *default rate* provided it does not at any time exceed the rate specified in clause 17.4;
- (c) the *interest period* and the *interest payment date* provided the adjustments are so that the *interest period* ends on *business day*, matches the end of the *term*, better aligns with your rollover or statement dates or similar administrative adjustments;

- (d) any matter relating to the administration of your *facility* (including business day conventions, timing of debits and credits and methods of calculation) where the change is not unfavourable to you;
- (e) the *commercial rate loan base rate* (provided that such change does not take effect during an interest period);
- (f) the Business Banking Guide to Fees and Charges;
- (g) the Business Lending Supplementary Terms and Conditions as specified in and in accordance with those terms;
- (h) any other terms and conditions of the *nominated account* or *facility account* in accordance with the terms and conditions for those accounts;
- (i) the amount and type of fees and charges and when they are payable (including by imposing new fees and charges or changing the method of calculation of a fee or charge) provided that the variation is consistent with changes we make to our contracts with customers in similar circumstances and who have the same type of *facility* as you;² or
- (j) any other change to this facility agreement which is not unfavourable to your rights or obligations under it or which is required in order to comply with law.

32.6 Where a change is unfavourable to you, we will provide you with 30 days' notice, or such longer period as may be required under the law or any code to which we subscribe (including the Banking Code of Practice), subject to the following exceptions:

- a) If we change an interest rate, we will tell you no later than the date of the change, unless we are not able to because the interest rate is calculated according to a money market rate or some other external rate, or a rate otherwise designated as a variable rate;
- b) Where there is a change to or introduction of, a government fee or charge, we will tell you reasonably promptly after the government notifies us (however, we do not have to tell you if the government publicises the change to, or introduction of, the fee or charge);
- c) We may give you a shorter notice period (or no notice) of an unfavourable change if we reasonably believe doing so is necessary for us to avoid, or to reduce, a material increase in our credit risk or our loss.

Where a change is not unfavourable to you, we will tell you about the change as soon as reasonably possible (which may be before or after the change is made).

² For example, we may change or introduce a new fee or charge due to increases in our costs, regulatory change or changes in market conditions.

If you choose to terminate this contract due to a change made by us under this clause 32.5, then you must give us notice and repay the total amount owing within the relevant time period specified above. We will not charge you any fees to discharge any *security* but if the *interest rate* has been fixed then you must still pay us break costs in accordance with clause 11.

Replacement Clause 54 of Part A of the General Conditions

accountable taxes means taxes imposed by a *relevant country* other than those which would not be required to be deducted by you if we provided you with any of our name, address, registration number or similar details or any relevant tax exemption or similar details.

annual percentage rate means a per annum rate of interest. The *annual percentage rate* (if any) applying to a particular *facility* may be stipulated in the Schedule. Your *annual percentage rate* may be comprised of a base rate plus a *margin* (if any). The *annual percentage rate* may change from time to time in the manner permitted by this *facility agreement*. You can find out your current *annual percentage rate* by contacting us.

arrangement with us means an arrangement (*including* an agreement or a *security interest*) under which a *debtor/guarantor* has or could in the future have obligations to us or any of our *related entities*. It includes any agreement or *security interest assigned* to us.

attorney means each attorney appointed by you under clause 39 of this Part A.

authorised officer means:

- (c) for us, a director or secretary, or an officer whose title contains the word “director”, “chief”, “head”, “president” or “manager” or a *person* performing the functions of any of them or any other person nominated by us as an authorised officer for the purposes of any *arrangement with us*; and
- (d) for you, a *person* appointed by you to act as your *authorised officer* for the purposes of any *arrangement with us*.

balance owing means, depending upon the context, at any time the difference between all amounts credited and all amounts debited to any or all of your *facility account*, *nominated account* and any other account held with us. For a *bank guarantee facility* the *balance owing* also *includes* all amounts paid by us or claimed by a *beneficiary* under a *bank guarantee* and the face value of any *bank guarantee* not yet expired. When the *balance owing* is to be calculated for the end of a day, it *includes* all debits and credits assigned to that day.

bank guarantee means a bank guarantee provided by us to a *beneficiary* under a *bank guarantee facility*.

bank guarantee facility means a *facility* which is stipulated as a bank guarantee facility in the *bank guarantee facility schedule*.

bank guarantee facility schedule means the Schedule of that name that forms part of this *facility agreement*.

base rate means:

(a) for a *business term loan, business overdraft or business line of credit* - a base rate that we set from time to time as a reference rate for our business term loan, business overdraft or business line of credit products. The *base rate* applying to your *facility* is stipulated in the Schedule;

(b) for a *commercial rate loan* - the *commercial rate loan base rate*.

The *base rate* forms part of your *annual percentage rate*. Information on current *base rate* may be published on our website, or in a national newspaper or newspapers circulating in a State or Territory in which you ordinarily reside. You can find out current *base rates* by contacting us.

beneficiary in relation to a *bank guarantee*, means a person to whom the *bank guarantee* is to be or has been issued.

break cost event has the meaning described in clause 11.1 of this Part A.

break costs are described in clause 21 of this Part A.

business day means any day on which Bank of Queensland is open for business.

business line of credit means a *facility* which is stipulated as a business line of credit in the *business line of credit facility schedule*.

business line of credit facility schedule means the Schedule of that name that forms part of this *facility agreement*.

business overdraft means a *facility* which is stipulated as a business overdraft in the *business overdraft facility schedule*.

business overdraft facility schedule means the Schedule of that name that forms part of this *facility agreement*.

business term loan means a *facility* which is stipulated as a business term loan facility in the *business term loan facility schedule*.

business term loan facility schedule means the Schedule of that name that forms part of this *facility agreement*.

change of credit means a change in the financial position of you or any person who has given a *guarantee* of your obligations under this *facility agreement* or an adverse

change in the value of the *security property* which we determine would, it had occurred at the time we approved the *facility*, have materially affected our decision to provide the *facility* on the terms set out in the *facility agreement*.

commercial rate loan means a *facility* which is stipulated as a commercial rate loan in the *commercial rate loan facility schedule*.

commercial rate loan base rate for a *commercial rate loan*, is the internal rate or rates we set daily for each *facility type* for each of the *interest periods*. You can find out what this rate is for a particular day by contacting your branch.

commercial rate loan facility schedule means the Schedule of that name that forms part of this *facility agreement*.

completion for a *construction finance facility*, means the date of issue of a certificate of practical completion in a form suitable to us by a consultant we appoint or approve for the works.

construction finance facility means a facility which is to be used for construction purposes.

control of a corporation includes the direct or indirect power to directly or indirectly:

- (a) direct the management or policies of the corporation; or
- (b) control the membership of its board of directors,

3. whether or not the power has statutory, legal or equitable force or is based on statutory, legal or equitable rights and whether or not it arises by means of trusts, agreements, arrangements, understandings, practices, the ownership of any interest in shares or stock of the corporation or otherwise.

controller has the meaning given to it in the Corporations Act.

costs include charges and expenses. It also includes costs, charges and expenses in connection with advisers (in the case of legal advisers, on a full indemnity basis or solicitor and own client basis, whichever is high).

creditor payment terms are calculated as:

$$\frac{\text{total trade creditors} \times 365}{\text{purchases} \times (12 / \text{period})}$$

current ratio is calculated as:

$$\frac{\text{current assets}}{\text{current liabilities}}$$

debt servicing ratio is calculated as:

$$\frac{\text{total repayments}}{\text{total gross income}}$$

debtor days are calculated as

$$\frac{\text{average debtors} \times 365}{\text{sales}}$$

debtor/guarantor means:

- (a) you;
- (b) any *person* who guarantees payment of any part of the *total amount owing*
- (c) if any part of the *total amount owing includes* obligations you owe under a *guarantee*, the *person* whose obligations you guarantee and any other *person* who guarantees that other *person's* obligations; and
- (d) any other *person* you and we agree is to be a “debtor/guarantor” for the purpose of this *facility agreement*.

default rate means a per annum rate of interest payable under clauses 15.6 to 15.9 of this Part A. The *default rate* may change from time to time in the manner permitted by this *facility agreement*.

development site means each site where you intend to carry out, or you are carrying out, works using financial accommodation provided under a *construction finance facility*.

directive means a treaty, a law, an official directive or request having the force of law, and an official directive, request, guideline or policy with which financiers carrying on business in Australia generally comply. Directive *includes* any Australian Prudential Regulation Authority or Reserve Bank of Australia directive.

drawdown date means each date on which the facility is drawn down (such as by the advance of loan funds to you or the issue of a *bank guarantee* to a beneficiary).

elected repayments for a *business term loan*, means the higher of your *repayment* or any other *repayment* amount we may agree with you from time to time.

equity ratio is calculated as:

$$\frac{\text{total shareholder funds} - \text{(net of inter-related loans)} \times 100}{\text{total tangible assets}}$$

extra payment limit for a *business term loan* during a *fixed rate period*, is the amount which is \$5,000 more than your *elected repayments* in any 12 month period.

facility means financial accommodation we agree to provide you under this *facility agreement* (including the issue of *bank guarantees*).

facility account means:

- (a) for a *business term loan*, *business overdraft*, *business line of credit* or *commercial rate loan* - the account held with us in your name where we will debit amounts (including all drawdowns) in connection with your *facility*;
- (b) for a *bank guarantee facility* - means the line of credit account held with us in your name and each sub-account established when a *bank guarantee* is issued.

facility agreement means these General Conditions, the Facility Details and the Schedule setting out the particulars of your facility agreement.

facility amount owing means at any time, the total of all amounts which are then due for payment, or which will or may become due for payment to us under this *facility agreement* in relation to a particular *facility*, which has not then been fully and finally paid. For a *bank guarantee facility* the *facility amount owing* also includes all amounts paid by us or claimed by a *beneficiary* under a *bank guarantee* and the face value of any *bank guarantee* not yet expired.

Facility Details means the details that form part of this *facility agreement*.

facility establishment date means the date we open your *facility account* under this *facility agreement*.

facility limit for a *facility* means the facility limit stipulated in the Schedule and as varied from time to time by us in accordance with this *facility agreement* and any new or replacement limit as you and we agree.

facility type means:

- (a) for a *commercial rate loan* - any of the *variable commercial rate loan*, *interest capitalised variable commercial rate loan*, *fixed commercial rate loan* or *interest prepaid commercial rate loan* as stipulated in the *commercial rate loan facility schedule* and varied from time to time in accordance with this *facility agreement*; and
- (b) for a *business term loan* - either a *variable business term loan* or *fixed business term loan* as stipulated in the *business term loan facility schedule* and varied from time to time in accordance with this *facility agreement*.

financial market transaction means one or more transactions that are or will be entered into between you and us and that are governed by the Master Agreement for Financial Markets Transactions between you and us.

fixed business term loan means a *business term loan* where the *annual percentage rate* is fixed.

fixed commercial rate loan means a *facility* where the *interest period* may be any of 1, 2, 3, 4 or 5 years.

final drawdown date for a *progressive draw facility* means the date on which the final drawdown is made. The *final drawdown date* is the last day of the *progressive draw period*.

fixed charge/interest cover is calculated as:

$$\frac{\text{earnings before interest tax and depreciation}}{\text{total interest paid plus lease expense and hire purchase payments}}$$

fixed rate period means any period for which the *annual percentage rate* or other interest rate applying to your *facility* (if any) is fixed. For the purposes of Part A, an *interest period* is a *fixed rate period*

for example see *including*.

General Conditions means these general conditions that form part of this *facility agreement*.

governing body means each entity which manages or administers any shared scheme of which any *security property* is part.

gross income is calculated as:

$$\frac{\text{gross income (this year)} \times 100}{\text{gross income (last year)}}$$

gross profit margin is calculated as:

$$\frac{\text{gross profit} \times 100}{\text{sales}}$$

GST has the same meaning as in the A New Tax System (Goods & Services Tax) Act 1999 (Cth).

guarantee includes an indemnity.

including, such as or for example, when introducing an example, does not limit the meaning of the words to which the example relates to that example or examples of a similar kind.

initial drawdown date means the first *drawdown date*. For a *non-progressive draw facility*, this will be the only date on which the *facility* is drawn down.

insolvent means a person who:

- (a) is (or state that they are) an insolvent under administration or insolvent (each

as defined in the Corporations Act);

- (b) has a controller appointed, is in liquidation, in provisional liquidation, under administration or wound up or has had a receiver appointed to any part of their property;
- (c) is subject to any arrangement, assignment, moratorium or composition, or protected from creditors under any statute, or dissolved (in each case, other than to carry out a reconstruction or amalgamation while solvent on terms approved by us);
- (d) is no longer in control of their affairs;
- (e) has an application or order made (and in the case of an application, it is not stayed, withdrawn or dismissed within 30 days), resolution passed, proposal put forward, or any other action taken, in each case in connection with them, which is preparatory to or could result in any of the things referred to above;
- (f) is taken (under section 459F of the Corporations Act) to have failed to comply with a statutory demand;
- (g) is the subject of an event described in section 459C(2)(b) or section 585 of the Corporations Act (or they make a statement from which we reasonably deduce they are so subject);
- (h) is otherwise unable to pay their debts when they fall due; or
- (i) has something substantially similar to any of the things referred to above happen to them under the law of any jurisdiction.

interest capitalisation component means, if you have an *interest capitalised variable commercial rate loan*, that amount of the *facility limit* described as such in the Schedule.

interest capitalised variable commercial rate loan means a *variable commercial rate loan* where:

- (a) the *interest period* may be any of 1, 2 or 3 months; and
- (b) subject to these General Conditions, interest is debited to the *facility account*.

interest cover is calculated as:

$$\frac{\text{earnings before interest tax and depreciation}}{\text{total interest paid}}$$

interest only for a *business term loan*, means a *repayment type* where you are required to make regular *repayments* of interest calculated on the *balance owing* on your *facility account*.

interest only period for a business term loan, means the period during which you make interest only *repayments*. You will not be required to repay the principal during an interest only period unless you have agreed to make a *reduction* or *special reduction*.

interest payment date means:

- (a) for a *variable commercial rate loan* and an *interest capitalised variable commercial rate loan* - the last day of each *interest period*;
- (b) for a *fixed commercial rate loan* - subject to clause 9.7(c)(iii) of Part D, the same date in each month as the *drawdown date*;
- (c) for an *interest prepaid commercial rate loan* - the *drawdown date* for the first *interest period*, and the anniversary of the *draw down date* for any subsequent *interest period*.

If your *interest payment date* falls on the 29th, 30th or 31st of a month, and a particular month does not have that date, your *interest payment date* falls due and owing on the last day of that month.

interest period for a commercial rate loan means the period stipulated in the *commercial rate loan facility schedule* as varied in accordance with this *facility agreement*. For the purposes of Part A, an *interest period* is a *fixed rate period*.

interest prepaid commercial rate loan means a facility where:

- (a) the *interest period* is for 1 year; and
- (b) interest is paid annually in advance.

interest prepayment for an interest prepaid commercial rate loan means, the interest payment prepaid at the start of any *interest period*.

loan to value ratio is calculated as:

$$\frac{\text{total amount owing} \times 100}{\text{value of security property}}$$

The value of the *security property* is the market value of the *security property* as assessed by us or our advisers.

margin means the *margin* specified in the Schedule for a facility as varied from time to time in accordance with this *facility agreement*. A *margin* is calculated taking into account the nature and amount of risk undertaken by us.

minimum net worth means the minimum of your net worth. Your net worth is your consolidated capital and revenue reserves excluding all tangible assets and future tax benefits.

net profit margin is calculated as:

$$\frac{\text{net profit}}{\text{sales}} \times 100$$

nominated account for a particular *facility*, means the business transaction account held with us in your name, nominated by you as the relevant account for crediting and debiting amounts in accordance with this *facility agreement*.

over limit rate means a per annum rate of interest (if any) payable under clauses 15.2 to 15.5 of this Part A and clause 2.2 of Part C. The *over limit rate* may change from time to time in the manner permitted by this *facility agreement*.

person includes an individual, a firm, a body corporate, an unincorporated association and an authority.

PPSA means the Personal Property Securities Act 2009 (Cth).

PPSA law means:

- (a) the *PPSA*;
- (b) any regulation made pursuant to the *PPSA*; and
- (c) any other legislation or regulation made to implement, or contemplated by, any *PPSA law* referred to in paragraph (a) or (b).

principal and interest for a *business term loan*, means a *repayment type* where you are required to make regular repayments of the *facility amount owing* together with interest calculated on the *balance owing* on your *facility account*.

progressive draw facility means a *facility* where we allow you to draw down the *facility limit* by a series of drawdowns.

progressive draw period for a *progressive draw facility*, means the period during which we make the *facility limit* available to you by a series of drawdowns. The *progressive draw period* starts on the *initial drawdown date* and ends on the *final drawdown date*.

receiver includes receiver, or receiver and manager and has the meaning given to it in the Corporations Act.

redraw for a *business term loan* is described in clause 10 of Part B and for a *commercial rate loan* is described in clause 11 of Part D.

reduced facility limit means the *facility limit* following any reductions or special reductions.

reduction means a reduction of the *facility limit* due in the manner described in the Schedule and:

- (a) for a *business term loan* or *commercial rate loan*, an equivalent payment; or
- (b) for a *business overdraft* or *business line of credit*, a payment sufficient to ensure that the *facility amount owing* does not exceed the *reduced facility limit*.

reduction date means the dates (if any) upon which reductions are due as stipulated in the Schedule.

related entity has the meaning given to it in the Corporations Act.

relevant country means any country, or political sub-division of one or more countries, or any federation or association of countries in which a *debtor/guarantor* is either incorporated or is resident or domiciled for any tax purpose or in which a *debtor/guarantor* carries on business or owns or leases property or from which, or through which, any payment under an arrangement with us is made.

repayment for a *business term loan*, means the amount of the repayment which is specified in the *business term loan facility schedule* or as notified to you from time to time. The *repayment* may change from time to time in the manner permitted by this *facility agreement*.

repayment date for a *business term loan* means the dates upon which *repayments* are due as stipulated in the *business term loan facility schedule* or as otherwise notified to you at the time of entering into this *facility agreement*.

repayment type for a *business term loan*, means any of

- (a) *interest only*;
- (b) *principal*; or
- (c) *principal and interest*.

as stipulated in the *business term loan facility schedule* and varied from time to time in accordance with this *facility agreement*.

request notice means a *request notice* (if any) in the form contained in the Schedule or any other form notified to you from time to time.

Schedule means the schedule that forms part of this *facility agreement*, as stipulated in the Facility Details.

security means each *security interest* stipulated in the Facility Details under “Security” and any substituted or additional *security interest* given in connection with this *facility agreement* or which otherwise secures your liabilities in connection with this *facility agreement*.

security interest means:

- (a) any security for the payment of money or performance of obligations including a mortgage, charge, lien, pledge, trust or power or title retention arrangement or *guarantee*;
- (b) a "security interest" as defined in the *PPSA*; or
- (c) any document to grant or create anything referred to in either paragraphs (a) or (b) of this definition and any other thing which gives a creditor priority to any other creditor with respect to any asset or an interest in any asset.

security property means property over which a *security* is held and which is stipulated in the Facility Details and any substituted or additional security property.

shared scheme means each scheme or plan regulated by a *shared scheme* law that affects any *security property*. Examples of properties which are often part of a shared scheme are strata or stratum title home units and town houses and properties in integrated developments.

You are a *small business customer* if:

- (a) you are a small business within the meaning of the Banking Code of Practice; or
- (b) this facility agreement is a small business contract within the meaning of the ASIC Act.

special reduction means a special reduction of the *facility limit* due in the manner described in the Schedule and:

- (a) for a *business term loan* or *commercial rate loan*, an equivalent payment; or
- (b) for a *business overdraft* or *business line of credit*, a payment sufficient to ensure that the *facility amount owing* does not exceed the *reduced facility limit*.

special reduction date means the date (if any) upon which a *special reduction* is due as stipulated in the Schedule.

stock turnover is calculated as:

$$\frac{\text{average value (finished goods and work in progress and raw materials)} \times 365}{\text{cost of goods} \times (12 / \text{period})}$$

such as see including.

taxes means taxes, levies, imposts, charges and duties (*including* stamp and transaction duties) imposed by any authority together with any related interest, penalties, fines and expenses in connection with them, except if imposed on our overall net income.

term for each *facility*, means the term specified in the Schedule. The term may change from time to time in the manner permitted by this *facility agreement*.

total amount owing means, at any time, the total of every *facility amount owing* and any other amounts which are then due for payment, or which will or may become due for payment, in connection with this *facility agreement*. You can find out your *total amount owing* by contacting us.

This definition applies:

- (a) irrespective of the capacity in which you or we became entitled to the amount concerned;
- (b) irrespective of the capacity in which you or we became liable in respect of the amount concerned;
- (c) whether you or we are liable as principal debtor, as surety, or otherwise;
- (d) whether you are liable alone, or together with another *person*;
- (e) even if you owe an amount or obligation to us because it was assigned to us, whether or not:
 - (i) the assignment was before, at the same time as, or after this *facility agreement* is executed;
 - (ii) you consented to or were aware of the assignment; or
 - (iii) the assigned obligation was secured;
- (f) even if this *facility agreement* was assigned to us, whether or not:
 - (i) you consented to or were aware of the assignment; or
 - (ii) any of the *total amount owing* on any account was previously unsecured; and
- (g) if you are a trustee, whether or not you have a right of indemnity from the trust fund.

A reference to the *total amount owing* also includes any part of it.

variable business term loan means a *business term loan* where the *annual percentage rate* is not fixed.

variable commercial rate loan means a *facility* where the *interest period* may be any of 1, 2, 3 or 6 months.

variation date means the effective date of any variation to your *facility agreement* as agreed between you and us.

variable rate period means any period for which the *annual percentage rate* or other interest rate applying to your *facility* (if any) is not fixed.

we, us and our means Bank of Queensland Limited ABN 32 009 656 740 and its successors and assigns.

works means the works specified in the Facility Details (if any) and any building work, excavation or earthworks on the *development site* or any *security property*, work demolishing, removing or altering any part of the *development site* or any *security property*, or any building or development work required by an authority in connection with the *development site* or any *security property*.

you and your means the *person* or *persons* named in the Facility Details as the customer. If there are more than one, you means each of you separately and every two or more of you jointly. You *includes* your successors and assigns. In the definition of *total amount owing* it also refers to you as so defined whether as a principal or as a surety.

Replacement Clause 6.1 of Part C of the General Conditions

6.1 Unless you are a *small business customer*, we may end this *facility* at any time for any reason without your consent.

Replacement Clause 4.5 of Part E of the General Conditions

4.5 You indemnify us against all loss or damage we may suffer as a result of issuing a *bank guarantee* or paying a claim to the beneficiary excluding any loss or damage to the extent caused by our mistake, fraud, negligence or wilful misconduct or the mistake, fraud, negligence or wilful misconduct of our employees, officers, contractors or agents, or any *receivers* we appoint in respect of any *security property*.

REASONS FOR JUDGMENT

BANKS-SMITH J:

1 The plaintiff (**ASIC**) seeks a range of declarations and orders relating to certain contracts used by the defendant (**Bank**) which contain terms that ASIC alleges are unfair within the meaning of s 12GB of the *Australian and Securities Investments Commission Act 2001* (Cth) (**Act**) and so are void pursuant to s 12BF(1) of the Act.

2 The Bank accepts that the impugned terms are unfair. The parties filed joint submissions and have jointly proposed declarations and orders for the purpose of resolving the proceedings. The orders sought include orders varying the terms said to be unfair.

3 Since 2019 the Bank has used certain general conditions for small business lending contracts. Various terms in those general conditions, relating to matters such as indemnities, events of default and unilateral variations, are impugned.

4 ASIC does not allege that the Bank has relied upon the impugned terms in a manner that is unfair, or that has caused any customers to suffer loss or damage. The Bank has indicated it is willing to provide an undertaking that it will not use or rely upon any of the impugned terms.

5 The question for the Court is whether it is appropriate to make the orders and declarations sought.

ASIC v Bendigo and Adelaide Bank Limited

6 At the outset it is to be acknowledged that a similar application relating to unfair terms in small business lending contracts was brought by ASIC in *Australian Securities and Investments Commission v Bendigo and Adelaide Bank Limited* [2020] FCA 716 (Gleeson J) (***ASIC v Bendigo***). It is apparent that submissions were filed in that proceeding that were similar to the joint submissions filed in this proceeding, and that similar relief was sought. Therefore, and unsurprisingly, there is a degree of consistency between her Honour's reasons and aspects of these reasons.

Regulatory context

7 Division 2 of Part 2 of the Act is headed 'Unconscionable conduct and consumer protection in relation to financial services'.

8 Subdivision BA of Division 2 is headed 'Unfair contract terms'. The relevant provisions upon which ASIC relies fall within that subdivision: s 12BF - unfair terms of consumer contracts and small business contracts; s 12BG - meaning of *unfair*; s 12BH - examples of unfair terms; and s 12BK - standard form contracts.

9 Subdivision G of Division 2 is headed 'Enforcement and remedies'. The powers of the Court to make the orders and declarations sought are said to arise under s 12GNB - orders to redress loss or damage suffered by non-party consumers; and s 12GNC - kinds of orders that may be made to redress loss or damage suffered by non-party consumers.

10 The various statutory provisions were collected by Gleeson J in *ASIC v Bendigo* at [9]-[14], and I acknowledge that the following summary largely adopts her Honour's summary of those provisions.

11 Section 12BF relevantly provides:

- (1) A term of a ... small business contract is void if:
 - (a) the term is unfair; and
 - (b) the contract is a standard form contract; and
 - (c) the contract is:
 - (i) a financial product; or
 - (ii) a contract for the supply, or possible supply, of services that are financial services.
- (2) The contract continues to bind the parties if it is capable of operating without the unfair term.
- ...
- (4) A contract is a small business contract if:
 - (a) at the time the contract is entered into, at least one party to the contract is a business that employs fewer than 20 persons; and
 - (b) either of the following applies:
 - (i) the upfront price payable under the contract does not exceed \$300,000;
 - (ii) the contract has a duration of more than 12 months and the upfront price payable under the contract does not exceed \$1,000,000.
- (5) In counting the persons employed by a business for the purposes of paragraph (4)(a), a casual employee is not to be counted unless he or she is employed by the business on a regular and systematic basis.

- (6) For the purposes of subsection (4) and despite subsection 12BI(3), in working out the upfront price payable under a contract under which credit is or is to be provided, disregard any interest payable under the contract.

12 Section 12BK(1) provides that if a party to a proceeding alleges that a contract is a standard form contract, it is presumed to be a standard form contract unless another party to the proceeding proves otherwise.

13 Relevantly, s 12BAA(7)(k) provides that, subject to subsection (8), a 'credit facility (within the meaning of the regulations)' is a financial product for the purposes of Division 2.

14 Regulation 2B(1) of the *Australian Securities and Investments Commission Regulations 2001* (Cth) (**Regulations**) provides that the provision of credit for any period is a 'credit facility' for the purposes of s 12BAA(7)(k). By reg 2B(3)(a), 'credit' means a contract, arrangement or understanding under which payment of a debt owed by one person (a debtor) to another person (a credit provider) is deferred or a debtor incurs a deferred debt to a credit provider. By reg 2B(3)(b)(i) and (ix), 'credit' includes any form of financial accommodation and a financial benefit arising from or as a result of a loan.

15 Section 12BG deals with when a term will be 'unfair' and provides that:

- (1) A term of a contract referred to in subsection 12BF(1) is unfair if:
- (a) it would cause a significant imbalance in the parties' rights and obligations arising under the contract; and
 - (b) it is not reasonably necessary in order to protect the legitimate interests of the party who would be advantaged by the term; and
 - (c) it would cause detriment (whether financial or otherwise) to a party if it were to be applied or relied on.
- (2) In determining whether a term of a contract is unfair under subsection (1), a court may take into account such matters as it thinks relevant, but must take into account the following:
- (b) the extent to which the term is transparent;
 - (c) the contract as a whole.
- (3) A term is transparent if the term is:
- (a) expressed in reasonably plain language; and
 - (b) legible; and
 - (c) presented clearly; and
 - (d) readily available to any party affected by the term.

- (4) For the purposes of paragraph (1)(b), a term of a contract is presumed not to be reasonably necessary in order to protect the legitimate interests of the party who would be advantaged by the term, unless that party proves otherwise.

16 Section 12BH provides some examples of the kind of terms that may be unfair including, relevantly:

- (a) a term that permits, or has the effect of permitting, one party (but not another party) to avoid or limit performance of the contract;
- (b) a term that permits, or has the effect of permitting, one party (but not another party) to terminate the contract;
- (c) a term that penalises, or has the effect of penalising, one party (but not another party) for a breach or termination of the contract;
- (d) a term that permits, or has the effect of permitting, one party (but not another party) to vary the terms of the contract;
- ...
- (g) a term that permits, or has the effect of permitting, one party unilaterally to vary financial services to be supplied under the contract;
- (h) a term that permits, or has the effect of permitting, one party unilaterally to determine whether the contract has been breached or to interpret its meaning;
- (i) a term that limits, or has the effect of limiting, one party's vicarious liability for its agents;
- ...
- (k) a term that limits, or has the effect of limiting, one party's right to sue another party;
- ...
- (m) a term that imposes, or has the effect of imposing, the evidential burden on one party in proceedings relating to the contract.

17 Turning to enforcement and remedies, s 12GNB(1) of the Act relevantly provides:

Without limiting the generality of section 12GD, if:

- (a) a person:
 - ...
 - (ii) is a party to a contract who is advantaged by a term (the declared term) of the contract in relation to which the Court has made a declaration under section 12GND; and
- (b) the contravening conduct or declared term caused, or is likely to cause, a class of persons to suffer loss or damage; and
- (c) the class includes persons who are non-party consumers in relation to the contravening conduct or declared term;

the Court may, on the application of ASIC, make such order or orders (other than an award of damages) as the Court thinks appropriate against a person referred to in subsection (2) of this section.

18 Section 12GNB(3) relevantly provides:

- (3) The Court must not make an order under subsection (1) unless the Court considers that the order will:
 - ...
 - (b) prevent or reduce the loss or damage suffered, or likely to be suffered, by the non-party consumers in relation to the contravening conduct or declared term.

19 Section 12GNC relevantly provides:

Without limiting subsection 12GNB(1), the orders that the Court may make under that subsection against a person (the respondent) include all or any of the following:

- (a) an order declaring the whole or any part of a contract made between the respondent and a non-party consumer referred to in that subsection, or a collateral arrangement relating to such a contract:
 - (i) to be void; and
 - (ii) if the Court thinks fit - to have been void ab initio or void at all times on and after such date as is specified in the order (which may be a date that is before the date on which the order is made);
- (b) an order:
 - (i) varying such a contract or arrangement in such manner as is specified in the order; and
 - (ii) if the Court thinks fit - declaring the contract or arrangement to have had effect as so varied on and after such date as is specified in the order (which may be a date that is before the date on which the order is made);

Authorities on unfairness

20 There is now a body of useful authorities which consider unfair terms in contracts. The relevant provisions under the Act were considered in *Australian Competition and Consumer Commission v CLA Trading Pty Ltd* [2016] FCA 377 (Gilmour J). The *Australian Consumer Law (ACL)*, which appears as Schedule 2 to the *Competition and Consumer Act 2010* (Cth), has a corresponding legislative regime to that under the Act. Chapter 2 of the ACL is headed 'General Protections' and includes statutory provisions addressing misleading or deceptive conduct (Part 2-1), unconscionable conduct (Part 2-2) and unfair contract terms (Part 2-3).

Section 24, which falls within Part 2.3, is headed 'unfair terms' and is in identical terms to s 12BG of the Act.

21 The meaning and application of the various elements of s 24 of the ACL have been considered in a number of cases, including *Australian Competition and Consumer Commission v Chrisco Hampers Australia Limited* [2015] FCA 1204; (2015) 239 FCR 33 (Edelman J); *Australian Competition and Consumer Commission v JJ Richards & Sons Pty Ltd* [2017] FCA 1224 (Moshinsky J); and *Australian Competition and Consumer Commission v Ashley & Martin Pty Ltd* [2019] FCA 1436 (Banks-Smith J).

22 In *ASIC v Bendigo* Gleeson J summarised the relevant principles, adopting in part the submission of the parties in that matter and referring in particular to the above cases at [17]-[36]. Those authorities relating to the ACL may be applied to the corresponding s 12BG of the Act. Her Honour's summary was adopted as a whole by the parties in this matter. It is not necessary to repeat that summary, but these reasons should be taken to repeat and apply the principles as summarised by her Honour.

23 I should add that in addition to the matters set out in *ASIC v Bendigo*, in relation to transparency and s 12BG(2)(b) of the Act, it is accepted that some terms in contracts may be inherently unfair, regardless of how comprehensively they may be drawn to the customer's attention: *Australian Competition and Consumer Commission v CLA Trading* at [54]. See also Jackson J's more recent consideration of transparency in the context of s 24(2)(a) of the ACL in *Australian Competition and Consumer Commission v Smart Corporation Pty Ltd (No 3)* [2021] FCA 347 at [69]-[72].

Agreed facts

24 The parties filed a statement of agreed facts made jointly by them for the purposes of s 191 of the *Evidence Act 1995* (Cth).

25 The following matters are agreed.

Parties

26 ASIC is the statutory authority responsible for enforcing the Act.

27 The Bank is a publicly listed entity and the holder of an Australian Financial Services Licence.

28 The Bank is a leading regional bank with branches in every state and territory of Australia except South Australia. In the financial year ended 31 August 2019 it had statutory net profit

after tax of \$298 million, gross loans and advances of \$46,216 million, and a market capitalisation of \$3.721 billion. It is a top 100 listed company on the Australian Securities Exchange.

The Bank's standard form contracts

29 Since November 2016, the Bank used the following general conditions for small business lending contracts:

- (a) Guarantee Facility General Conditions dated September 2016 (**Guarantee**);
 - (b) Business Term Loan General Conditions dated September 2016 (**Term Loan**);
 - (c) Commercial Rate Loan Facility General Conditions dated September 2016 (**Commercial Rate Loan**);
 - (d) Business Overdraft and Business Line of Credit General Conditions dated September 2016 (**Overdraft**); and
 - (e) Facility General Conditions dated November 2016 (**General Conditions**).
- (together, **Standard Form Terms**)

30 Between 16 November 2016 and 30 June 2019, the Bank entered into:

- (a) 1,128 standard form contracts with businesses which incorporated one or more of the Standard Form Terms for which the upfront price payable under the contract did not exceed \$300,000; and
- (b) 1,319 standard form contracts with businesses which incorporated one or more of the Standard Form Terms for which the contract had a duration of more than 12 months and the upfront price payable under the contract exceeded \$300,000 but did not exceed \$1 million.

(together, **Standard Form Contracts**)

31 As at 30 June 2019, the Bank had on foot:

- (a) 938 active standard form contracts with businesses which incorporated one or more of the Standard Form Terms for which the upfront price payable under the contract did not exceed \$300,000; and
- (b) 1,148 active standard form contracts with businesses which incorporated one or more of the Standard Form Terms for which the contract had a duration of

more than 12 months and the upfront price payable under the contract exceeded \$300,000 but did not exceed \$1 million.

32 At least some, and likely a significant number, of the counterparties to the Standard Form Contracts are businesses that employed fewer than 20 persons at the time of entry into the Standard Form Contract. It is not known how many of the Standard Form Contracts are small business contracts within the meaning of s 12BF(4) of the Act because the Bank does not store data in relation to numbers of employees as part of its lending process.

33 Accordingly, at least some, and likely a significant number, of the Standard Form Contracts are small business contracts within the meaning of s 12BF(1) and s 12BF(4) of the Act.

34 Each Standard Form Contract is a standard form contract within the meaning of s 12BF(1)(b) and s 12BK of the Act.

35 Each Standard Form Contract is a credit facility within the meaning of s 12BAA(7)(k) of the Act and the Regulations and a financial product within the meaning of s 12BF(1)(c)(i) of the Act.

The eleven BOQ contracts

36 The originating process identifies eleven particular contracts made between customers and the Bank. They are defined as the First BOQ Contract, Second BOQ Contract and so on, and fall within the group of Standard Form Contracts. They are referred to collectively as the **Schedule Contracts** (ASIC has disclosed the parties to those contracts to the Bank by way of a confidential schedule but their identity is otherwise confidential).

37 Each of the Schedule Contracts is a small business contract within the meaning of s 12BF(1) and s 12BF(4) of the 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 five years. At the time of entry into the contract, the other party to the contract conducted a business that had 17 employees (and ASIC's senior counsel noted that in *International Litigation Partners Pte Ltd v Chameleon Mining NL (Receivers and Managers Appointed)* [2012] HCA 45; (2012) 246 CLR 455 at [28], the High Court found, although in the context of cognate corporations legislation, that a bank guarantee is relevantly a credit facility, because it is financial accommodation);

- (b) the Second BOQ Contract is a guarantee facility that incorporates the terms of the Guarantee with a limit of \$13,441 for five years. At the time of entry into the contract, the other party to the contract conducted a business that had five 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 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 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 three years. At the time of entry into the contract, the other party to the contract conducted a business that had one 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 five years. At the time of entry into the contract, the other party to the contract conducted a business that had two 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 conducted a business that had three 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 conducted a business that had three 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 conducted a business that had three 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 conducted a business that had two employees; and

- (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 conducted a business that had four employees.

38 Each of the Schedule Contracts is a standard form contract within the meaning of s 12BF(1)(b) and s 12BK of the Act.

39 Each of the Schedule Contracts is a credit facility within the meaning of s 12BAA(7)(k) of the Act and the Regulations and a financial product within the meaning of s 12BF(1)(c)(i) of the Act.

Identified unfair terms

40 Annexure A to these reasons contains the relevant impugned clauses extracted from each of the Guarantee, Term Loan, Commercial Rate Loan, Overdraft and General Conditions. A sample copy of the Guarantee is contained in Annexure B to these reasons. A sample copy of the Term Loan is contained in Annexure C. A sample copy of the Commercial Rate Loan is contained in Annexure D. A sample copy of the Overdraft is contained in Annexure E. A sample copy of the General Conditions is contained in Annexure F. Those annexures bear pagination from the statement of agreed facts which is not part of the source documents and may be ignored for present purposes.

41 The Standard Form Terms include:

- (a) indemnification clauses that apply to losses not caused by a customer's default and that have the effect of limiting the Bank's vicarious liability for its agents (Guarantee clause 5; Commercial Rate Loan clauses 17.1(c), 17.1(d), 17.1(e), 17.1(g) and 17.2; General Conditions clauses 10.1(c), 10.1(d), 10.1(e), 10.1(f), 10.1(h) and 10.2 and clause 4.5 of Part E);
- (b) event of default clauses that allow the Bank 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(1); Overdraft clause 12(a) (bullet 15); General Conditions clause 13(1));

- (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 material change in 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 material change in 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));
- (e) unilateral variation clauses which permit the Bank to vary the upfront price of the contract, the financial services to be supplied under the contract and other terms of the contract (Guarantee clause 8(b), Term Loan clauses 8(b), 9(c) and 10(c), Commercial Rate Loan clauses 25.2, 39.1(a), 39.1(g), 39.1(h), 39.1(i), 39.1(j); Overdraft clauses 2(d), 7(b), 8(c) 9(c) and 13; General Conditions clauses 16.2, 32.1(a), 32.1(h), 32.1(i), 32.1(j) and 32.1(k) and clause 6.1 of Part C); 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 35.1; General Conditions clause 28). 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.

It is accepted that the clauses are unfair

42 The parties agree that each of the clauses identified in [41] above is unfair within the meaning of s 12BG of the Act (and therefore void as a result of s 12BF(1) of the Act) for the following reasons:

- (a) each clause causes a significant imbalance in the parties' rights and obligations arising under the relevant Schedule Contract and in the Standard Form Contracts because it provides rights and entitlements to the Bank without

incorporating commensurate or ameliorating rights or entitlements for the customer;

- (b) it is not reasonably necessary in order to protect the legitimate interests of the Bank; and
- (c) it would cause detriment to the relevant counterparty if relied upon.

The Bank has not used impugned clauses in unfair manner

43 Since the commencement of these proceedings, the Bank has used three of the impugned terms in the manner set out below:

- (a) pursuant to clause 8(b) of the Guarantee, the Bank increased the 'agreed credit advance fee' from 2.50% p.a. to 2.95% p.a. effective 24 January 2020. The Bank gave written notice to existing customers on 17 December 2019;
- (b) pursuant to clause 8(b) of the Business Term Loan, the Bank increased the 'service fee' from \$20 per month to \$25 per month effective on the next payment date on or after 31 January 2020. The Bank provided written notice to existing customers on 18 December 2019; and
- (c) pursuant to clause 39.1(j) of the Commercial Rate Loan, the Bank increased the Security Release Fee from \$320 to \$350 effective on 10 February 2020. The Bank placed a notice in *The Australian* on 10 January 2020.

44 However, ASIC does not contend that the Bank has deployed these terms unfairly. Further, ASIC does not allege that the Bank has relied upon any of the clauses in the Standard Form Contracts in a manner that is unfair, or that has caused any customers detriment or to suffer loss or damage. This application is preventative in nature.

Agreement as to unfairness

45 The following paragraphs reflect the joint submissions of the parties and their agreement as to the unfairness of the respective clauses.

46 The impugned terms in the Standard Form Terms fall broadly into four categories, being: indemnification clauses; event of default clauses; unilateral variation or termination clauses; and conclusive evidence clauses. Expressed generally, each of the impugned terms is said to be unfair within the meaning of s 12BG of the Act because each term:

- (a) causes a significant imbalance in the parties' rights and obligations arising under the contract because it provides rights and entitlements to the Bank without incorporating commensurate or ameliorating rights or entitlements for the customer;
- (b) is not reasonably necessary in order to protect the legitimate interests of the Bank; and
- (c) would cause detriment to the customer if relied upon.

47 For the purpose of establishing that the terms are not reasonably necessary to protect the legitimate interest of the Bank, ASIC relies on the presumption at s 12BG(4), and the Bank does not seek to rebut that presumption.

Indemnification clauses

48 Clause 5 of the Guarantee; clauses 17.1(c), 17.1(d), 17.1(e), 17.1(g) and 17.2 of the Commercial Rate Loan; and clauses 10.1(c), 10.1(d), 10.1(e), 10.1(f), 10.1(h) and 10.2 and clause 4.5 of Part E of the General Conditions are indemnification clauses which on a proper construction, can be relied on by the Bank to make the customer liable for liability, loss or costs suffered or incurred by the Bank that:

- (a) the customer has not caused; and/or
- (b) has been caused by the Bank's, mistake, error or negligence; and/or
- (c) could have been avoided or mitigated by the Bank.

49 In the case of the Commercial Rate Loan and the General Conditions, this indemnification extends to the Bank's servants and agents (by clauses 17.2 and 10.2 respectively).

50 These terms create a significant imbalance in the parties' rights and obligations in that:

- (a) the customer has no corresponding rights;
- (b) the circumstances in which the liability, loss or costs may be incurred are not within the customer's control; and
- (c) the Bank controls at least some of the circumstances in which the liability, loss or costs may be incurred and can avoid or mitigate that liability, loss or costs.

51 These terms would cause detriment to the customer if applied or relied upon because in the above circumstances the customer may be required to pay monies to the Bank in which the

liability, loss or costs incurred are not within the customer's control, and may not have been caused by the customer, and may have been caused by the mistake, error or negligence of the Bank or its agents, and could have been avoided or mitigated by the Bank or its agents.

52 When regard is had to each of the Guarantee, the Commercial Rate Loan and the General Conditions as a whole, there is nothing otherwise within the terms of those documents which mitigates the unfairness of the impugned terms.

53 I note that similar terms were found to be unfair by Gleeson J in *ASIC v Bendigo* at [49]-[53].

Event of default clauses

54 Each of clause 11(a) (bullets 6, 7 and 17) of the Guarantee; clause 13(a) (bullets 5, 6 and 15) of the Term Loan; clause 12(a) (bullets 5, 6 and 15) of the Overdraft; clauses 22(e), 22(l) and 22(t) of the Commercial Rate Loan; and clauses 13(e), 13(l) and 13(t) of the General Conditions are event of default clauses which are impugned.

55 The significant imbalance in the event of default impugned terms is created:

- (a) first, by the disproportionately severe default consequences set out at [56]-[57] below;
- (b) secondly, because none of the event of default clauses permit the customer to remedy a default which may be capable of remedy;
- (c) thirdly, because each of the clauses creates a default based on events that may not involve any credit risk to the Bank (for example by providing misleading or untrue information such as a director's date of birth or by failing to keep to an agreement with a third party); and
- (d) fourth, in relation to the following clauses, because they create an event of default in the circumstances set out below:
 - (i) an untrue or misleading statement being made or repeated by the customer (or its guarantors) which can in the context of the contract be insignificant (for example an error as to a director's date of birth): Guarantee clause 11(a) (bullet 6); Term Loan clause 13(a) (bullet 5); Overdraft clause 12(a) (bullet 5); Commercial Rate Loan clause 22(e); General Conditions clause 13(e);

- (ii) the Bank unilaterally forms an opinion that something has happened where the Bank's opinion may be wrong or it may also be reasonable to hold the opposite opinion and the customer has no entitlement to rectify any matter on which the Bank's opinion is based: Guarantee clause 11(a) (bullet 17); Term Loan clause 13(a) (bullet 15); Overdraft clause 12(a) (bullet 15); Commercial Rate Loan clause 22(1); General Conditions clause 13(1).

56 Default consequences under the Guarantee, the Term Loan and the Overdraft include:

- (a) the Bank is entitled to make the outstanding sum due under the facility with the customer payable immediately and on demand: Guarantee clauses 11(b), 13(a); Term Loan clause 13(b); Overdraft clause 12(b). In the case of the Guarantee, the Bank is permitted to claim the outstanding sum including the face value of all current bank guarantees: clause 11(b);
- (b) the Bank is entitled to pay out any security interest that has priority to its security on any property and add that amount to the money the customer owes the bank: Guarantee clause 17(g); Term Loan clause 19(g); Overdraft clause 18(g);
- (c) in the case of the Term Loan, the customer might be liable for an unspecified amount of break costs. It is not clear from the terms of the Term Loan how those costs are calculated: clause 6(f)(c). BOQ submits that, to calculate break costs, the Bank applies a formula to determine the cost incurred to re-arrange its own funding as a result of the break cost event. The customer does not know what formula is used and cannot calculate the break costs themselves, but can contact the Bank to find out the amount of any break costs without incurring an administration fee;
- (d) the Bank is entitled to enforce its rights under the agreement or any security: Guarantee clause 11(b); Term Loan clause 13(b); Overdraft clause 12(b). The customer indemnifies the Bank and may be held liable for all costs (including the Bank's legal costs) of enforcing the agreement or any security: Guarantee clauses 11(b), 14; 17(c); Term Loan clauses 13(b), 16, 19(c); Overdraft clauses 12(b), 15, 18(c). Those costs are of an unspecified amount and are incurred in circumstances where the customer has no control over how they

are incurred. Further, the customer is liable to the Bank whether or not the Bank has actually paid any money: Guarantee clause 17(c), Term Loan clause 19(c); Overdraft clause 18(c);

- (e) the Bank is entitled to debit any account the customer holds with the Bank to satisfy the amounts payable as set out in subparagraphs (a) to (d) above: Guarantee clauses 6(a), 17(b); Term Loan clause 18(b); Overdraft clause 18(b);
- (f) there is no right of set-off for the customer but there is for the Bank: Guarantee clause 13(a); Term Loan clause 15(a); Overdraft clause 14(a);
- (g) the customer is automatically in default under every other agreement with the Bank, potentially triggering additional payments: Guarantee clause 11(b), Term Loan clause 13(b), Overdraft clause 12(b);
- (h) in the case of the Guarantee, the Bank is entitled to terminate any of its obligations under the facility: clause 12(b);
- (i) the customer does not have any right to prevent any of the above by demonstrating that it has remedied (or will remedy) any default that can be remedied or that there is no credit risk to the Bank; and
- (j) the Bank may be required to give notice before the exercise of any of these powers but it is not clear in what circumstances that will be so or how much notice will be given: Guarantee clause 11(b), Term Loan clause 13(b), Overdraft clause 12(b).

57 Default consequences under the Commercial Rate Loan and the General Conditions include:

- (a) the Bank is entitled to make the outstanding sum due under the facility with the customer payable immediately and on demand: Commercial Rate Loan clause 23.1; General Conditions clauses 5.1, 14.1;
- (b) the Bank is entitled to pay out any security interest that has priority to its security on any property and add that amount to the money the customer owes the Bank: Commercial Rate Loan clause 50; General Conditions clause 43;
- (c) the customer might also be liable for an unspecified amount of break costs. It is not clear from the terms of the Commercial Rate Loan or the General Conditions respectively how those costs are calculated: Commercial Rate Loan clause 20.1(c), General Conditions clause 11.1(e). BOQ submits that, to

calculate break costs, the Bank applies a formula to determine the cost incurred to re-arrange its own funding as a result of the break cost event: Commercial Rate Loan clauses 20.2-20.9, General Conditions clauses 11.2-11.9. The customer does not know what formula is used and cannot calculate the break costs themselves, but can contact the Bank to find out the amount of any break costs without incurring an administration fee: Commercial Rate Loan clause 20.12, General Conditions clause 11.12;

- (d) the Bank is entitled to enforce its rights under the agreement or any security: Commercial Rate Loan clause 23.4(c); General Conditions clause 14.4(d). The customer indemnifies the Bank and may be held liable for all costs (including the Bank's legal costs) of enforcing the agreement or any security: Commercial Rate Loan clauses 15.1, 17.1(c), 23.4(d); General Conditions clauses 8.1(a), 10.1(c) 14.4(e). Those costs are of an unspecified amount and are incurred in circumstances where the customer has no control over how they are incurred. Further, the customer is liable to the Bank whether or not the Bank has actually paid any money: Commercial Rate Loan clause 45, General Conditions clause 38;
- (e) the Bank is entitled to debit any account the customer holds with the Bank to satisfy the amounts payable as set out in subparagraphs (a) to (d) above without notice to the customer: Commercial Rate Loan clauses 4.2, 15.2, 23.4(f); General Conditions clauses 4.2, 8.2, 14.4(g);
- (f) the Bank is entitled to refuse to make any undrawn portion of the facility limit available: Commercial Rate Loan: clause 24.3(g); General Conditions clause: clause 14.4(h), (i);
- (g) the Bank is entitled to terminate any of its obligations under the facility: Commercial Rate Loan clause 23.4(h); General Conditions clause 14.4(i).
- (h) there is no right of set-off for the customer but there is for the Bank: Commercial Rate Loan clause 33; General Conditions clause 26;
- (i) the customer does not have any right to prevent any of the above by demonstrating that it has remedied (or will remedy) any default that can be remedied or that there is no credit risk to the Bank; and
- (j) the Bank may be required to give notice before the exercise of any of these powers but it is not clear in what circumstances that will be so or how much

notice will be given: Commercial Rate Loan clause 23, General Conditions clause 14.

58 Each of the impugned event of default clauses would cause detriment to the customer if relied upon within the meaning of s 12BG(1) because of the relevant default consequences outlined above.

59 The impugned event of default terms fall within the list of examples of terms set out in s 12BH(1) that may be unfair: see s 12BH(1)(b) and (h). When regard is had to each of the Guarantee, Term Loan, the Overdraft, the Commercial Rate Loan and the General Conditions as a whole, there is nothing otherwise within the terms of those documents which mitigates the unfairness of the impugned terms.

60 ASIC had initially submitted that the event of default clauses were not transparent, but at the hearing indicated it no longer submitted that was the case, having regard to the findings of Gleeson J in *ASIC v Bendigo Bank* at [63]-[65] to the effect that similar clauses did not lack transparency. I would follow Gleeson J's reasons and in this case am not persuaded that the relevant clauses lack transparency.

Unilateral variation or termination clauses

61 Clause 8(b) of the Guarantee; clauses 8(b), 9(c) and 10(c) of the Term Loan; clauses 2(d), 7(b), 8(c), 9(c), 13 of the Overdraft, clauses 25.2, 39.1(a), 39.1(g), 39.1(h), 39.1(i) and 39.1(j) of the Commercial Rate Loan; and clauses 16.2, 32.1(a), 32.1(h), 32.1(i), 32.1(j), 32.1(k) and clause 6.1 of Part C of the General Conditions are unilateral variation or termination clauses which permit the Bank to vary the upfront price of the contract, the financial services to be supplied under the contract and other terms of the contract.

62 These terms create a significant imbalance in the parties' rights and obligations because:

- (a) some terms allow the Bank to vary the financial services or permit the Bank to reduce the amount of funds that the customer would otherwise be able to utilise without any notice to the customer: Overdraft clauses 2(d), 13; Commercial Rate Loan clauses 25.2, 39.1(a); General Conditions clauses 16.2, 32.1(a);
- (b) they permit the Bank to unilaterally vary the contract and the obligations of the parties at will; and

(c) the customer has no corresponding rights.

63 Terms which allow the Bank to cancel any part of the facility would cause the customer detriment if relied upon because they reduce the amount of funds available to the customer. If the customer wishes to terminate the facility as a result of the Bank relying on one of these terms, unspecified fees and break costs may be payable (although the Bank submits that a customer may contact the Bank to find out the amount of any break costs without incurring an administration fee, as noted at [56(c)] and [57(c)] above): see for example Commercial Rate Loan 39.1(a) read together with clause 18-20; General Conditions clause 16.2, 32.1 read together with clause 11. That would have the effect of imposing a termination fee regardless of the reason for termination.

64 Terms which allow the Bank unilaterally to vary the terms of the contract, unless used to benefit the customer (for example, to reduce fees and charges or interest payable) would cause detriment if relied upon because:

(a) if the customer accepts the change, it will incur higher fees and charges (or some other consequence which is detrimental to it); and

(b) if the customer elects to terminate unspecified fees and break costs may be payable (noting the Bank's submission, again, that the customer may contact the Bank to find out the amount of any break costs without incurring an administration fee, as noted at [56(c)] and [57(c)] above): see for example Term Loan clause 6(f), Commercial Rate Loan clauses 18-20, General Conditions clause 11. That would have the effect of imposing a termination fee regardless of the reason for termination.

65 These terms fall within the list of examples of terms set out in s 12BH(1) that may be unfair: see s 12BH(1)(a), (b), (d) and (g). When regard is had to each of the Guarantee, Term Loan, the Overdraft, the Commercial Rate Loan and the General Conditions as a whole, there is nothing otherwise within the terms of those documents which mitigates the unfairness of the impugned terms.

66 I note that similar terms were found to be unfair by Gleeson J in *ASIC v Bendigo* at [66]-[69].

Conclusive evidence clauses

67 Clause 35.1 of the Commercial Rate Loan and clause 28 of the General Conditions have the effect of imposing an evidential burden on the customer in proceedings relating to the contract.

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 created by the Bank by a stated date, in circumstances where the certificate created by the Bank is conclusive evidence of the amount claimed unless the customer is able to prove that the certificate is incorrect.

68 These terms create a significant imbalance in the parties' rights and obligations because:

- (a) the terms allow the Bank to impose, by the issuing of a certificate, an evidential burden on the customer about matters upon which the Bank is best placed to provide primary evidence;
- (b) the Bank has no additional duty; and
- (c) the customer has no corresponding right.

69 Each of the terms would cause detriment if relied upon because it requires the customer to disprove matters about which the Bank is best placed to provide primary evidence. Further, it would cause detriment if relied upon in circumstances where the certificate was wrong but the customer could not or did not seek to disprove it.

70 These terms fall within the list of examples of terms set out in s 12BH(1) that may be unfair: see s 12BH(1)(l) and (m). When regard is had to the Commercial Rate Loan and the General Conditions as a whole, there is nothing otherwise within those documents which mitigates the unfairness of these terms.

71 Again, similar terms were found to be unfair by Gleeson J in *ASIC v Bendigo* at [75]-[78].

Section 12BG(2)

72 I should add that under s 12BG(2), the Court is obliged to take into account the extent to which it considers a term is transparent in determining whether a term of a contract is unfair and must take into account the contract as a whole. Save for the submission referred to at [60] above, ASIC did not submit that any of the other impugned terms the subject of these proceedings lacked transparency. The parties jointly submitted that in any event, regardless of whether the terms were transparent, the terms were unfair.

73 Although I have received no submissions addressing transparency in the context of the other impugned terms, and there might be room for different views were the matters to be fully argued in other matters, I have reviewed all of the impugned terms, having regard to the particular clauses, the contracts as a whole and, in particular, the matters drawn to my attention

by way of counsel's submissions with reference to the aide memoire (see [74] below). In my view, to the extent any issues of transparency might arise, their effect has been addressed in the course of determining whether the various terms are unfair, having regard to the elements of s 12BG(1). Therefore, I am satisfied that the extent of any transparency has been considered, and I am not persuaded that any particular term lacks transparency within the meaning of s 12BG(3). That does not detract from the overarching findings that the impugned terms are unfair, the objective question of the three criteria in s 12BG(1) having been satisfied in any event.

Conclusion

74 I am satisfied that each of the impugned terms is unfair. I accept the joint submissions in that regard. I should add that in addition to the joint written submissions, senior counsel for ASIC orally addressed a detailed aide memoire (that was accepted by way of submission), taking the Court to what were described as paradigm examples of unfair clauses. That exercise assisted greatly in revealing the reasons why the joint submissions should be accepted.

Relief

Declarations that terms unfair

75 Section 12GND(2), read with s 12GND(3), empowers the Court to declare that a term of a small business contract, that is a standard form contract and a financial product, is an unfair term, on application by ASIC: *ASIC v Bendigo* at [84]. I am satisfied that the matters required to be established to enliven the Court's power to make declarations as set out in s 12GND(2) and (3) of the Act have been made out.

76 In *ASIC v Bendigo*, Gleeson J was satisfied that the requirements for making a declaration pursuant to those provisions were satisfied in respect of each of the impugned terms because (at [88]):

- (1) There is a significant legal controversy in this case which is being resolved. The proposed declarations relate to conduct that contravenes the Act and the matters in issue have been identified and particularised by the parties with precision.
- (2) It is in the public interest for the ASIC to seek to have the proposed declarations made and for the proposed declarations to be made. ASIC, as the statutory authority responsible for enforcing the Act has a genuine interest in seeking the declaratory relief.
- (3) The Bank is a proper contradictor because it is the respondent and is the subject of the proposed declarations. The Bank therefore has an interest in opposing the making of the proposed declarations.

77 Those same findings are applicable in this case.

78 Further, the declarations sought are appropriate because they serve to record the Court's disapproval of the contravening conduct, vindicate the claim by ASIC that the Bank had contravened the Act, assist ASIC to carry out the duties conferred upon it by the Act, and deter other corporations from entering into contracts containing unfair terms: *ASIC v Bendigo* at [90]; *Australian Competition and Consumer Commission v Coles Supermarkets Australia Pty Ltd* [2014] FCA 1405 (*ACCC v Coles*) at [78].

79 Finally, there is also utility in making the declarations because they serve to enliven the Court's power under s 12GNB to make orders that are sought: *ASIC v Bendigo* at [91].

Declarations that terms void

80 Pursuant to s 12BF(1), any term of a small business contract that is unfair is void. ASIC submits, in relation to each term found to be unfair, that it is appropriate, for all of the reasons given above at [75]-[79], for corresponding declarations to be made.

81 The parties submit that the power to make such a declaration is to be found in s 21 of the *Federal Court of Australia Act 1976* (Cth).

82 The principles with respect to the grant of declaratory relief, and this Court's jurisdiction to make declarations under s 21 of the *Federal Court of Australia Act*, were recently extensively analysed and addressed by the Full Court in *Clarence City Council v Commonwealth of Australia* [2020] FCAFC 134 at [57]-[75]. The following summary of the factors that it is said must be present before there can be a declaratory order, from Young P AO, *Declaratory Orders* (2nd ed, Butterworths, 1984), is also useful and was cited in *Clarence City Council* at [68]:

1. There must exist controversy between the parties ...;
2. The proceedings must involve a 'right' ...;
3. The proceedings must be brought by a person who has a proper or tangible interest in obtaining the order, which is usually referred to as 'standing' or 'locus standi' ...;
4. The controversy must be subject to the court's jurisdiction both within the court's own charter and also within the jurisdiction so far as private international law rules are concerned ...;
5. The defendant must be a person having a proper or tangible interest in opposing the plaintiff's claim ...;
6. The issue must be ripe ... It must not be merely of academic interest, hypothetical or one whose resolution would be of no practical utility.

83 The express provision in s 12GND(5) that that section does not limit any other power to make
declarations forecloses any argument that the power in that section limits the Court's
jurisdiction under s 21.

84 The parties submit, in addition, that s 12GNB provides the Court with power to make such a
declaration.

85 In *ASIC v Bendigo* the breadth of the orders that the Court can make under s 12GNB was
referred to by Gleeson J at [100].

86 As is apparent from the terms of s 12GNC, relief can extend to orders declaring a contract or
parts of a contract to be void, and to orders varying the terms of a contract in a specific manner.

87 I note in particular her Honour's reference at [101] to *ACCC v Coles* and the making of orders
by consent in civil penalty proceedings brought by the Australian Competition and Consumer
Commission. Relevantly, Gordon J said in *ACCC v Coles*:

[70] The applicable principles are well established. First, there is a well-recognised
public interest in the settlement of cases under the Act: *NW Frozen Foods Pty
Ltd v Australian Competition & Consumer Commission* (1996) 71 FCR 285
at 291. Second, the orders proposed by agreement of the parties must be not
contrary to the public interest and at least consistent with it: *Australian
Competition & Consumer Commission v Real Estate Institute of Western
Australia Inc* (1999) 161 ALR 79 at [18].

[71] Third, when deciding whether to make orders that are consented to by the
parties, the Court must be satisfied that it has the power to make the orders
proposed and that the orders are appropriate: *Real Estate Institute* at [17] and
[20] and *Australian Competition & Consumer Commission v Virgin Mobile
Australia Pty Ltd (No 2)* [2002] FCA 1548 at [1]. Parties cannot by consent
confer power to make orders that the Court otherwise lacks the power to make:
Thomson Australian Holdings Pty Ltd v Trade Practices Commission (1981)
148 CLR 150 at 163.

[72] Fourth, once the Court is satisfied that orders are within power and appropriate,
it should exercise a degree of restraint when scrutinising the proposed
settlement terms, particularly where both parties are legally represented and
able to understand and evaluate the desirability of the settlement: *Australian
Competition & Consumer Commission v Woolworths (South Australia) Pty Ltd
(Trading as Mac's Liquor)* [2003] FCA 530 at [21]; *Australian Competition
& Consumer Commission v Target Australia Pty Ltd* [2001] FCA 1326 at [24];
Real Estate Institute at [20]-[21]; *Australian Competition & Consumer
Commission v Econovite Pty Ltd* [2003] FCA 964 at [11] and [22] and
*Australian Competition & Consumer Commission v The Construction,
Forestry, Mining and Energy Union* [2007] FCA 1370 at [4].

[73] Finally, in deciding whether agreed orders conform with legal principle, the
Court is entitled to treat the consent of Coles as an admission of all facts
necessary or appropriate to the granting of the relief sought against it:
Thomson Australian Holdings at 164.

88 As Gleeson J noted in *ASIC v Bendigo*, those principles also apply in cases of this kind.

89 Each counter-party to each Standard Form Contract in relation to which a declaration has been made pursuant to s 12GND is a non-party consumer for the purpose of s 12GNB(1)(c).

90 The parties jointly submit that the term 'suffer loss' in s 12GNB(1)(b) should not be read as importing a requirement that the Bank in relying on an impugned term has acted unfairly and improperly. However neither actual unfairness nor actual loss or damage is a precondition to the exercise of power under s 12GNB. The orders sought are preventative in nature. Importantly, the Court must not make the order unless it is satisfied that the order will prevent or reduce the loss or damage relevantly likely to be suffered by the non-party consumers in relation to the declared term: s 12GNB(3)(b).

91 Accordingly, and I accept, the Court need not be satisfied that any 'declared term' has actually caused a non-party consumer to suffer loss or damage as referred to in s 12GNB(1)(b), or of any of the matters in s 12GNB(3)(a).

92 In this case I am satisfied as to the matters in s 12GNB(3)(b). I accept the joint submissions that:

- (a) each of the impugned terms is unfair within the meaning of s 12BG;
- (b) reliance by the Bank on any of the impugned terms would cause or be likely to cause the counter-party to suffer loss or damage; and
- (c) it is not necessary for the Court to make any findings as to the nature of the loss or damage likely to be suffered, but the loss or damage would likely be what is characterised as detriment in relation to each of the impugned terms in Annexure A to these reasons.

93 Having regard to the principles that I have discussed and the statutory terms, I am satisfied that the Court has power to make the declarations sought to the effect that the impugned terms are void *ab initio*, as set out specifically in the orders. I also accept the parties' submission that it is appropriate to make such declarations.

General orders

94 It is apparent from the agreed facts set out at [30]-[33] above that there are more small business contracts containing the terms that ASIC submits are unfair than are the subject of evidence in these proceedings. The parties submitted that in these circumstances it is appropriate for the

declaratory relief sought in respect of the specific contracts in evidence to be extended to all small business contracts containing the impugned terms. The proposed orders are based on the form of declaratory and injunctive relief granted (by consent) by Moshinsky J in *ACCC v JJ Richards & Sons*. I am satisfied that such declarations are appropriate and accept the parties' submissions in that regard.

Varying the terms

95 The parties agree that orders should be made varying the various identified BOQ contracts and more generally varying the impugned clauses where utilised in standard form contracts. Orders to that effect can be made where appropriate under s 12GNB of the Act and having regard to s 12GNC(b). Orders were made by Gleeson J under s 12GNB varying the relevant contracts in *ASIC v Bendigo*.

96 Upon making the various declarations, each impugned term will be a 'declared term' under s 12GND: s 12GNB(1)(a)(ii).

97 The Bank is a person referred to in s 12GNB(2)(b): s 12GNB(1).

98 Each counter-party to each Standard Form Contract in relation to which a declaration has been made pursuant to s 12GND is a non-party consumer for the purpose of s 12GNB(1)(c).

99 As already noted, the Bank accepts that the impugned terms are terms which are likely to cause a class of persons, being those customers of BOQ who have small business contracts with BOQ which incorporate the Standard Form Terms, to suffer loss and damage: s 12GNB(1)(b). The Court need not be satisfied that any impugned term in relation to which a declaration has been made has actually caused a non-party consumer to suffer loss or damage: s 12GNB(1)(b). The orders sought are preventative in nature. The parties submit that the term 'suffer loss' in s 12GNB(1)(b) should not be read as importing a requirement that the Bank in relying on an impugned term has acted unfairly or improperly.

100 Again, the Court must not make the order unless it is satisfied that the order will prevent or reduce the loss or damage (relevantly) likely to be suffered by the non-party consumers in relation to the declared term: s 12GNB(3)(b).

101 In relation to the Guarantee, the parties agree that the matters in s 12GNB(3)(b) are satisfied because:

- (a) each of clauses 5, 8(b) and 11(a) (bullets 6, 7 and 17) is unfair within the meaning of s 12BG;
- (b) reliance by the Bank on any of those clauses would cause or be likely to cause the counter-party to suffer loss or damage in the form of the detriment referred to in [51], [56], [58] and [63]-[64] above; and
- (c) the orders are drafted to vary clauses 5(a), 8, 11(a) such that they are no longer unfair within the meaning of the Act. This is largely because if the proposed variations are made the terms would not apply to small business contracts or would apply in a manner that is appropriately restricted. The orders are also drafted to vary clause 20(a) to incorporate a definition for 'small business customer'.

102 In relation to the Term Loan, the parties agree that the matters in s 12GNB(3)(b) are satisfied because:

- (a) each of clauses 8(b), 9(c), 10(c) and 13(a) (bullets 5, 6 and 15) is unfair within the meaning of s 12BG;
- (b) reliance by the Bank on any of those clauses would cause or be likely to cause the counter-party to suffer loss or damage in the form of detriment referred to in [56], [58] and [63]-[64] above; and
- (c) the orders are drafted to vary clauses 8, 9(c), 10(c) and 13(a) such that they are no longer unfair within the meaning of the Act. This is largely because if the proposed variations are made the terms would not apply to small business contracts or apply in a manner that is appropriately restricted. The orders are also drafted to vary clause 22(a) to incorporate a definition for 'small business customer'.

103 In relation to the Commercial Rate Loan, the parties agree that the matters in s 12GNB(3)(b) are satisfied because:

- (a) each of clauses 17.1(c), 17.1(d), 17.1(e), 17.1(g), 17.2, 22(e), 22(l), 22(t), 25.2, 35.1, 39.1(a), 39.1(g), 39.1(h), 39.1(i) and 39.1(j) is unfair within the meaning of s 12BG;

- (b) reliance by the Bank on any of those clauses would cause or be likely to cause the counter-party to suffer loss or damage in the form of the detriment referred to in [51], [57]-[58], [63]-[64] and [69] above; and
- (c) the orders are drafted to vary clauses 17, 22, 25.2, 35.1 and 39 such that they are no longer unfair within the meaning of the Act. This is largely because if the proposed variations are made the terms would not apply to small business contracts or apply in a manner that is appropriately restricted. The orders are also drafted to vary clause 62 to incorporate a definition for 'small business customer'.

104 In relation to the Overdraft, the Court the parties agree that the matters in s 12GNB(3)(b) are satisfied because:

- (a) each of clauses 2(d), 7(b), 8(c), 9(c), 12(a) (bullets 5, 6 and 15) and 13 is unfair within the meaning of s 12BG;
- (b) reliance by the Bank on any of those clauses would cause or be likely to cause the counter-party to suffer loss or damage⁴ in the form of the detriment referred to in [56], [58] and [63]-[64] above; and
- (c) the orders are drafted to vary clauses 2(d), 7, 8(c), 9(c), 12(a) and 13 such that they are no longer unfair within the meaning of the Act. This is largely because if the proposed variations are made the terms would not apply to small business contracts or apply in a manner that is appropriately restricted. The orders are also drafted to vary clause 21(a) to incorporate a definition for 'small business customer'.

105 In relation to the General Conditions, the parties agree that the matters in s 12GNB(3)(b) are satisfied because:

- (a) each of clauses 10.1(c), 10.1(d), 10.1(e), 10.1(f), 10.1(h), 10.2, 13(e), 13(l), 13(t), 16.2, 28, 32.1(a), 32.1(h), 32.1(i), 32.1(j) and 32.1(k), 6.1 of Part C and 4.5 of Part E is unfair within the meaning of s 12BG;
- (b) reliance by the Bank on any of those clauses would cause or be likely to cause the counter-party to suffer loss or damage in the form of the detriment referred to in [51], [57]-[58], [63]-[64] and [69] above; and

- (c) the orders are drafted to vary clauses 10, 13, 16.2, 28, 32, 6.1 of Part C and 4.5 of Part E such that they are no longer unfair within the meaning of the Act. This is largely because if the proposed variations are made the terms would not apply to small business contracts or apply in a manner that is appropriately restricted. The orders are also drafted to vary clause 54 to incorporate a definition for 'small business customer'.

106 I am satisfied as to the matters referred to in [101]-[105], for the reasons advanced by the parties as set out above.

Undertaking

107 The Bank has agreed to provide an undertaking to ASIC and the Court. That undertaking is broadly consistent with the undertaking given by Bendigo and Adelaide Bank Ltd in the matter of *ASIC v Bendigo*.

Determination

108 It follows that I accept that it is appropriate to make the orders and declarations sought. It is not in issue that the Bank should pay the costs of the proceeding.

I certify that the preceding one hundred and eight (108) numbered paragraphs are a true copy of the Reasons for Judgment of the Honourable Justice Banks-Smith.

Associate:



Dated: 12 August 2021