

NOTICE OF FILING

This document was lodged electronically in the FEDERAL COURT OF AUSTRALIA (FCA) on 27/05/2022 12:20:00 PM AEST and has been accepted for filing under the Court's Rules. Details of filing follow and important additional information about these are set out below.

Details of Filing

Document Lodged: Concise Statement
File Number: VID285/2022
File Title: AUSTRALIAN SECURITIES AND INVESTMENTS COMMISSION v
AUSTRALIA AND NEW ZEALAND BANKING GROUP LIMITED
Registry: VICTORIA REGISTRY - FEDERAL COURT OF AUSTRALIA



Dated: 27/05/2022 12:39:38 PM AEST

A handwritten signature in blue ink that reads 'Sia Lagos'.

Registrar

Important Information

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

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

CONCISE STATEMENT

VID



Federal Court of Australia

District Registry: Victoria

Division: General

AUSTRALIAN SECURITIES AND INVESTMENTS COMMISSION

Plaintiff

AUSTRALIA AND NEW ZEALAND BANKING GROUP LIMITED (ACN 005 357 522)

Defendant

A INTRODUCTION

1. The plaintiff (**ASIC**) claims that since at least 27 May 2016, the defendant (**ANZ**) overstated the available funds and balances in credit card accounts but nonetheless charged customers fees and interest on withdrawals (sometimes known as cash advances) which were covered by funds which were displayed as standing to the credit of their account. In doing so, ANZ contravened ss 12DA(1), 12DB(1)(e) and 12DB(1)(g) of the *Australian Securities and Investments Commission Act 2001* (Cth) (**ASIC Act**). ANZ also contravened ss 47(1)(a) and 47(4) of the *National Consumer Credit Protection Act 2009* (Cth) (**NCCPA**) in failing to do all things necessary to ensure that the credit activities authorised by its credit licence were engaged in efficiently, honestly and fairly, by reason of its conduct in circumstances where ANZ was or should have been aware that the available funds and balances were overstated.

B IMPORTANT FACTS GIVING RISE TO THE CLAIM

Background to the conduct

2. ANZ is one of Australia's major banks and largest listed companies, and holds an Australian financial services licence and an Australian credit licence. It provides a range of services and products, including credit card account products to personal customers on standard terms.
3. ANZ's Conditions of Use for Consumer Credit Cards stated '*You may avoid being charged interest on a cash advance if your credit card account is in credit (by at least the amount of the cash advance) at the time of the cash advance. Your account may be in credit if, for example, you have previously paid more off your account than you owe*'. At all material times before 17 November 2018, ANZ's 'Personal Banking Account Fees and Charges Booklet' (**Booklet**) provided, with respect to 'Cash Advance Fees' charged on credit card accounts: '*If the account (based on transactions processed by ANZ) is in credit balance at the time we process the cash advance, the credit amount will offset the amount of the cash advance in the calculation of the 2% fee.*' At all material times before 17 November 2018, ANZ's consumer credit card letters of offer (**Letters of Offer**) provided that a Cash Advance Fee of 2% would be charged if a customer obtained a cash advance from their credit card account and an ATM operator fee may also apply. At all material times from at least January 2017 until 17 November 2018, the Letter of Offer also stated that: '*If the account (based on transactions*

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processed by ANZ) is in credit balance at the time we process the cash advance, the credit amount will offset the amount of the cash advance in the calculation of the... fee.'

4. At all material times until about 23 September 2021, ANZ's website www.anz.com stated that the 'Current Balance' incorporates all transactions that have been processed to the account and that it may include funds which have been deposited but not yet cleared and therefore are not available for withdrawal. At all material times before May 2018, ANZ's website www.anz.com stated that 'Available Funds' was the total amount of funds in the account currently available for withdrawal and 'will include credit limits' and 'may include all funds that have been deposited but not yet cleared, such as cheques waiting clearance' and 'will include recent transactions that are in the process of being posted to your account'.

First Representation

5. At all material times until about 23 September 2021, the Current Balance and Available Funds amounts for a customer's credit card account were communicated by display via ANZ's website www.anz.com and ANZ's mobile banking application (**digital channels**), and ATM screen and receipt account balances; was set out in confirmation of balance letters from ANZ; and was communicated verbally via ANZ phone banking and by ANZ employees and representatives. The **Current Balance** amount, being either a negative balance representing the amount spent on a credit card or a positive balance representing the amount deposited into the account over and above the amount spent, was displayed on the ANZ website as the 'Current balance', on the ATM screen as the 'Account Balance', on ATM receipts as the 'Balance' and on ANZ's mobile banking application as the 'Current' amount. The **Available Funds** amount, being the amount of any unused credit limit plus any amount the customer has deposited over the credit limit, was displayed on the ANZ website as the 'Available funds', on the ATM screen as the 'Available Balance', on ATM receipts as 'Avail Bal', and on ANZ's mobile banking application as 'Available'. For example, if a customer had a credit limit of \$5,000 and had spent \$500 on their credit card, the Current Balance would display as -\$500 and the Available Funds would display as +\$4,500.
6. In this way, ANZ expressly and/or impliedly represented when credit amounts shown as 'Current Balance' and 'Available Funds' for a customer's credit card account were communicated, that the Current Balance (being the lower amount) could be withdrawn by the customer without incurring any fees or interest or any other adverse consequence (**First Representation**). For example, if a customer had a credit limit of \$5,000 and a zero balance, the Current Balance would display as zero and the Available Funds would display as +\$5,000. If the customer then made a deposit of \$100, the Current Balance would increase to +\$100 in credit, and the Available Funds would increase to +\$5,100. It would thus appear to a customer that after making the deposit, \$100 was or would be immediately available to the customer for withdrawal from their account without incurring any fees or interest or any other adverse consequence.
7. However due to ANZ's systems errors, the 'Available Funds' and 'Current Balance' amounts for the accounts included amounts which had not in fact been credited to the account balance and were not immediately available for withdrawal by the customer without any adverse consequence even though the account appeared to be in credit balance. Specifically, when moneys were paid into a credit card account in excess of any balance owing, those funds were communicated as having increased both the 'Available Funds' and the 'Current Balance' by the amount deposited so that the Current Balance was in credit. This occurred even though the funds would not be cleared and credited to the account until the next business day. This

occurred because at all times, in respect of credit card transactions that occurred on the same day, ANZ in fact processed debits (withdrawals) before it processed credits (deposits).

8. From at least 27 May 2016, ANZ charged fees and interest (including a Cash Advance Fee and interest), to customers who withdrew funds from their credit card after making a payment into the credit card account even though the withdrawal was equal to or less than the 'Current Balance' (where that amount was in credit).
9. ANZ charged fees and interest to around 165,750 credit card accounts from 27 May 2016 to 17 November 2018, and the average Cash Advance Fees and interest that were charged to each customer account was around \$47. Although this caused customers significant financial losses, ANZ has not implemented any fix to its systems to prevent the issue from recurring or causing further customer harm.

ANZ's awareness of available funds and balances issue

10. ANZ knew or should have known that fees and interest were charged to customers in the circumstances described above, since at least June 2015. From at least then ANZ had received complaints about this and other miscommunications of available funds and balances affecting credit card accounts as well as other accounts (deposit accounts and debit card accounts). ANZ treated them as discrete issues and failed to investigate whether the problem was systemic, until after 22 February 2018, when it received a notification from the Financial Ombudsman Service (FOS) of possible systemic issues in relation to the display of available funds and balances, including in relation to credit card accounts and the terms for charging a Cash Advance Fee.
11. In March 2018, ANZ commenced an internal investigation which ultimately identified 20 scenarios where credit card accounts and other accounts (deposit accounts or debit card accounts) were affected by the communication of available funds and balances. These included the scenario described above as well as the following 5 scenarios:
 - (a) when cash deposits or transfers of funds were made at an ANZ Smart ATM between 10:00pm and 11:59pm they were communicated as available, even though they were not processed as having been deposited until the next day;
 - (b) when funds were transferred between linked ANZ accounts via an ANZ Smart ATM between 9.45pm and 11.59pm they were communicated as available, even though they were not processed as having been deposited until the next day;
 - (c) when cash deposits were made at a branch on a weekend they were communicated as available, even though they were not cleared until the next business day;
 - (d) when funds were credited into a direct deposit account from a term deposit account on a Sunday, Monday or the day of or the day after, a public holiday which occurred before the date of maturity of the term deposit, they were communicated as available, even though the credit was treated as having been made only from the maturity date; and
 - (e) when a withdrawal was made prior to the daily cut-off time of the ATM but then reversed after the cut-off time, the reversal was treated as having occurred the next day.

12. It was only after the internal investigation that ANZ commenced implementing fixes to some of the issues.
13. ANZ continued to make the First Representation and to charge fees and interest on credit card accounts in the circumstances described in paragraph 7 above, including from 13 March 2019, even though it was, or should have been, aware of the issues as regards overstatement of available funds and current balances in such accounts from at least March 2018.
14. ANZ's senior management discussed (at internal governance committees) the issues and the extent of customer harm flowing from them, and a working group was established in April 2018 to investigate the various scenarios and fixes, but otherwise no steps were taken to achieve a comprehensive resolution of the issues. Between May and October 2021, ANZ identified 3 additional scenarios that have not yet been resolved.

ANZ's amendments to its standard terms

15. Instead, from in or about May 2018, ANZ removed the definition of 'Available Funds' from its digital channels; and on 17 November 2018, ANZ unilaterally amended the description of 'Cash Advance Fee' in the Booklet and the Letters of Offer. Instead of providing that if a credit card account was (based on transactions processed by ANZ) *in credit balance at the time ANZ processes the cash advance* then the credit amount would offset the amount of the cash advance in the calculation of the fee, the amendments provided that the offset would occur if a credit account (based on transactions processed by ANZ) was *in credit balance at the close of the business day prior to the cash advance*. This merely increased the likely confusion in relation to the communication of available funds and balances, and did not correct the First Representation. ANZ commenced notifying existing customers of the changes made to the Letter of Offer from about mid October 2018. Changes to the Booklet were not notified to customers.
16. The November 2018 amendments to the Booklet were inadvertently reversed in September 2019, but remained in the Letters of Offer, thus creating an inconsistency between them. The description of the Cash Advance Fee was amended again in the Letters of Offer on 19 April 2021 (but the inconsistency remained), and in the Booklet on 30 September 2021 (from which point the definitions of 'cash advance fee' were the same in both the Booklet and the Letters of Offer).
17. By at least July 2019, a definition of 'Available Funds' was reinserted on ANZ's digital channels, as *'the total amount available for withdrawal from your account'* and included *'recent transactions that are in the process of being posted to your credit card and 'will not include all funds that have been deposited but not yet cleared'*. This definition was inconsistent with the Letters of Offer and did not enable a customer to understand what funds were in credit balance and available for withdrawal without incurring fees or interest.

Second Representation

18. From about 24 September 2021, the terms 'Available Funds', 'Available Balance' and 'Available' were replaced with the newly defined term 'Funds', and the terms 'Current Balance' and 'Current' were replaced with the newly defined term 'Balance' on ANZ's website www.anz.com and on the new release of ANZ's mobile banking application. The same change was made on ANZ ATM transaction processing screens and receipts from about 7 October 2021. The definition of the terms 'Balance' and 'Funds' was not displayed next to

the terms. Instead, a link to a pop-up window with the definition of these terms was provided on the digital channels, which included for the term ‘Funds’ *‘Sometimes, the amount shown here will be different to what you are able to use without overdrawing your account or exceeding your credit limit.’* The definition of the term ‘Balance’ stated *‘Balance is indicative of the amount in your account or the amount you owe. It can be different to the funds (if any) you may currently be able to use (including for deposit accounts). See the amount under ‘Funds’ for what you may be able to use.’* The ATM display and receipts stated, ‘For what Funds and Balance means, please visit anz.com/labels.’

19. This change did not address or resolve the likely confusion for customers, including because it was not possible for a customer otherwise to ascertain from the communicated Funds and Balance amounts, even if they were both apparently in credit balance, whether they were overstated by including recent deposit transactions which were yet to be processed and cleared. Instead, ANZ expressly and/or impliedly represented when credit amounts shown as ‘Balance’ and ‘Funds’ for a customer’s credit card account were communicated, that the ‘Balance’ (being the lower amount) could be withdrawn by the customer without incurring any fees or interest or any other adverse consequence (**Second Representation**).

ANZ's partial remediation for transactions up until 16 November 2018

20. Hundreds of thousands of unique credit card accounts were affected by the overstatement of available funds and balances. Although ANZ knew, or should have known this, since at least about March 2018, ANZ did not deploy resources for a dedicated remediation team until around September 2018, nor did it commence the remediation of affected customers until around 26 March 2019. Full remediation to customers was delayed and the timelines were extended several times, and ANZ did not complete its remediation of customers up to 17 November 2018 until December 2021.
21. As at June 2021, ANZ remediated approximately 220,761 credit card accounts which were wrongly charged fees or interest in the period 1 July 2015 to 17 November 2018, and paid approximately \$10.4 million in remediation to those customers. ANZ has identified that it expected that over 221,253 accounts would be required to be remediated in the period 1 July 2015 to 17 November 2018. Customers who incurred losses since 17 November 2018 have not been remediated at all.

C. RELIEF SOUGHT FROM THE COURT

22. ASIC seeks the relief set out in the accompanying Originating Process.

D. PRIMARY LEGAL GROUNDS FOR THE RELIEF SOUGHT

23. By making the First Representation to each customer, during the period from 27 May 2016 to 23 September 2021, ANZ:
 - (a) in trade or commerce, in connection with the supply or possible supply of financial services, made a false or misleading representation with respect to the price of the financial services (which relevantly included the provision of credit card account products: see ss 12BAA(7) and (k) and 12BAB(1)(b) of the ASIC Act), in contravention of s 12DB(1)(g) of the ASIC Act; further or alternatively

- (b) in trade or commerce, in connection with the supply or possible supply of financial services, made a false or misleading representation that the financial services have uses or benefits, in contravention of s 12DB(1)(e) of the ASIC Act.
24. Further, by making the Second Representation to each customer, since about 24 September 2021, ANZ engaged in conduct in trade or commerce, in relation to financial services, that was misleading or deceptive or likely to mislead or deceive, in contravention of s 12DA of the ASIC Act.
25. To the extent that the First Representation and Second Representation were with respect to future matters, ASIC relies on s 12BB of the ASIC Act.
26. Further or alternatively, by one or more of the following:
- (a) the removal of the definition of 'Available Funds' from the ANZ website and the ANZ App from in or about May 2018;
 - (b) the change to the description of 'Cash Advance Fee' in the Booklet and Letters of Offer in November 2018;
 - (c) the conduct referred to in paragraph 23 above in the period up until 12 March 2019;
 - (d) charging fees and interest to customers in the circumstances of the First Representation in the period from 27 May 2016 to 12 March 2019;
 - (e) the conduct referred to in paragraph 23 above in the period from 13 March 2019 to 23 September 2021;
 - (f) charging fees and interest to customers in the circumstances of the First Representation in the period from 13 March 2019 to 23 September 2021;
 - (g) the conduct in the period commencing from about 24 September 2021 referred to in paragraph 24 above;
 - (h) charging fees and interest to customers in the circumstances of the Second Representation since 24 September 2021;
 - (i) the reversal of the amendments to the Booklet in September 2019, and the inconsistency in the definitions of Cash Advance Fee between the Booklet and Letters of Offer in the period until 30 September 2021 as referred to in paragraph 16 above;
 - (j) reinserting the definition of 'Available Funds' on ANZ's digital channels in July 2019, until about 24 September 2021 when it was removed as referred to in paragraph 17 above;
 - (k) removing the definition of 'Available Funds' from about 24 September 2021 and adding newly defined terms 'Balance' and 'Funds' to ANZ's digital channels and ATM transaction processing screen and receipts as referred to in paragraphs 18 and 19 above;
 - (l) failing to implement adequate measures to prevent the First Representation in the period from 27 May 2016 up to 12 March 2019;

- (m) failing to implement adequate measures to prevent the First Representation in the period from 13 March 2019 to 23 September 2021; and
- (n) failing to implement adequate measures to prevent the Second Representation in the period since 24 September 2021,

ANZ failed to do all things necessary to ensure that the credit activities covered by its credit licence (which relevantly included the provision of credit card account products), are provided efficiently, honestly and fairly, in contravention of s 47(1)(a) of the NCCPA.

27. Each species of conduct described in paragraphs 26(e) to (k) and (m) and (n) above also constituted a contravention of s 47(4) of the NCCPA.

D. HARM SUFFERED AND PROFITS EARNED FROM THE CONDUCT

28. ANZ's contraventions have affected around 165,750 credit card accounts from 27 May 2016 to 17 November 2018, and the average Cash Advance Fees that were charged to each customer account was about \$47. The affected customers include customers who have suffered pecuniary losses, both directly in the advance fees and interest charged which are likely to have exceeded a total of \$10.4 million, and indirectly in their inability to use funds which would have been available otherwise in their accounts but instead went towards fees and interest. The contraventions continue to occur and to cause losses to customers. The unexpected charging of fees and interest may have caused customers non-pecuniary losses including anguish and inconvenience. In addition, by misleading customers about the funds available to them, ANZ's contravening conduct caused an erosion in affected customers' control of their financial affairs because they were deprived of a true understanding of the funds that were available to them.

Date: 27 May 2022

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DLA Piper
Solicitors for the Plaintiff

This concise statement was prepared by O Bigos QC and F L Shand of counsel.

Certificate of lawyer

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

Date: 27 May 2022

A handwritten signature in black ink, appearing to read 'JWF', written in a cursive style.

Signed by John William Fogarty
DLA Piper Australia
Lawyer for the Applicant