

NOTICE OF FILING

Details of Filing

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File Number:	NSD1039/2023
File Title:	AUSTRALIAN SECURITIES & INVESTMENTS COMMISSION v BIT TRADE PTY LTD ACN 163 237 634
Registry:	NEW SOUTH WALES REGISTRY - FEDERAL COURT OF AUSTRALIA



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

Registrar

Important Information

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 of the filing of the document is determined pursuant to the Court's Rules.



Amended Concise Statement

Filed pursuant to an order made by Nicholas J on 12 October 2023

No. NSD 1039 of 2023

Federal Court of Australia

District Registry: New South Wales

Division: Commercial and Corporations

AUSTRALIAN SECURITIES AND INVESTMENTS COMMISSION

Plaintiff

BIT TRADE PTY LTD (ACN 163 237 634)

Defendant

A. IMPORTANT FACTS GIVING RISE TO THE CLAIM

Introduction

1. The Plaintiff (**ASIC**) alleges that the Defendant (**Bit Trade**) has contravened the design and distribution requirements relating to financial products for retail clients (**DDO**) contained in Part 7.8A of the *Corporations Act 2001* (Cth) (**Corporations Act**) by offering a product known as “Margin Extensions” (**Product**) to retail clients from 5 October 2021 and continuing as at the date of the originating process filed in these proceedings (**Relevant Period**) without first making a “target market determination” as required by ss 994B(1) and (2) of the Corporations Act.
2. The obligation to prepare a target market determination, and the DDOs in general, were introduced to ensure that financial products were sold to retail clients consistently with their objectives, financial circumstances and needs. During the Relevant Period, Bit Trade issued the Product (which involves extending credit to purchase crypto-assets) to over 1160 clients, 968 of whom have suffered losses.

Bit Trade’s Product

3. Bit Trade provides services to Australian customers, including a digital asset exchange on which its customers can purchase and sell certain digital assets, including crypto-assets, and fiat currencies via the website www.kraken.com and a mobile application (**Kraken Exchange**). Bit Trade provides other services, including the Product, in connection with the purchase and sales of digital assets. Bit Trade provides, and at all

Filed on behalf of (name & role of party)	The Plaintiff, Australian Securities and Investments Commission		
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material times has provided, its services in Australia pursuant to Terms of Service, varied from time to time but generally available at the website www.kraken.com (the **Terms**).

4. Bit Trade commenced offering the Product to Australian customers on 9 January 2020.
5. The Product involves Bit Trade offering customers an extension of credit (described by Bit Trade as 'margin extension') in the form of digital assets or legal tender for use in the purchase and sale of certain digital assets when executing a spot transaction on the Kraken Exchange.
6. For customers who wish to use the Product, Bit Trade establishes, for their benefit and in their name, a platform (the **Margin Account**) for the customer to use to receive legal tender and digital assets (each as defined in the Terms) from Bit Trade to make spot trades through the customer's Kraken Account. The Margin Account is a part of the Kraken Exchange and is available in connection with a client's Kraken Account.
7. To obtain an extension of margin, customers must meet or exceed a minimum balance requirement imposed on their account at the time of accessing the margin extension. The customer must have sufficient collateral in their account to support the margin extension and the collateral must be in assets that are approved as collateral from time to time. Customers can receive an extension of margin of up to five times the value of their collateral.
8. Once a digital asset is purchased, even if purchased using margin extension, the asset is held by Bit Trade for the benefit and on behalf of the customer.
9. Bit Trade charges an opening fee and rollover fee for the extension of margin, such fees vary dependent on the type of funds made available pursuant to the margin extension.
10. Once the margin has been extended the customer must keep in their account a specified minimum amount of assets approved as collateral. The minimum amount of collateral is determined by Bit Trade and if the collateral level falls below the required minimum, Bit Trade may sell assets purchased with the extended margin and apply the proceeds towards repaying the margin extension and liquidate any other assets necessary to repay the margin extension or to restore the value of the collateral assets to an amount equal to the minimum margin requirement.
11. There are no term limits on the margin extension and a customer may elect to maintain open positions on margin for an unlimited duration (until demand) so long as they have sufficient collateral in their account to support the extended margin.

12. A margin extension may be repaid by either directing immediately available funds in the customer's account to Bit Trade or selling the requisite collateral or other assets in their account and applying the proceeds to terminating the corresponding margin extension.

No Target Market Determination

13. Section 994B of the Corporations Act requires certain persons to make a target market determination (**TMD**) prior to engaging in retail product distribution conduct in relation to the product or (as applicable) as required by the regulations: s 994B(1) and (2). A TMD must satisfy the conditions applicable in s 995B(5). A person who makes a TMD must make it available to the public: s 994B(9).
14. Bit Trade was, from 5 October 2021, required by ss 994B(1)(ba)(i) and 994B(2) to make a TMD, but has failed to do so and in failing to do so has contravened section 994B(2) of the Corporations Act. Bit Trade has and continues to engage in retail product distribution of the Product without having made and published a target market definition.
15. Section 994B(2) is a civil penalty provision and a financial services civil penalty provision pursuant to s 1317E(3) of the Corporations Act.

B. THE RELIEF SOUGHT FROM THE COURT

16. ASIC seeks the relief set out in the Originating Process, in summary:
 - a. declarations pursuant to s 1317E(1) of Bit Trade's contraventions of 994B(2);
 - b. an order pursuant to s 1317G(1) that Bit Trade pay to the Commonwealth a pecuniary penalty in relation to the contraventions;
 - c. injunctions prohibiting the ongoing contravening conduct; and
 - d. costs.

C. PRIMARY LEGAL GROUNDS FOR THE RELIEF SOUGHT

17. Bit Trade is the issuer of the Product for the purposes of s 761E(2) and 994B(1)(ba)(i) of the Corporations Act.
18. By reason of the Product's features set out in paragraphs 5 to 12 the Product is:
 - a. a contract, arrangement or understanding under which the payment of a debt owed by one person (a **debtor**) to another person (a **credit provider**) is deferred; or one person (a **debtor**) incurs a deferred debt to another person (a **credit provider**);
 - b. a credit facility; and

c. a financial product

for the purposes of section 12BAA(7)(k), which is part of Division 2 of Part 2 of the *Australian Securities and Investments Commission Act 2001* (Cth) (**ASIC Act**), and regulation 2B(1)(a) of the *Australian Securities and Investments Commission Regulations 2001* (Cth) (**ASIC Regulations**).

19. For the purposes of Part 7.8A, the Product is a financial product because s994AA(1)(b) of the Corporations Act applies the definition of financial product as contained in Division 2, Part 2 of the ASIC Act.
20. Bit Trade issued the Product to persons as retail clients on and from 9 January 2020 by making and continuing to make the Product available to its Australian customers on the Kraken Exchange.
21. Bit Trade was required, on and from 5 October 2021 to make a TMD for the Product prior to issuing the Product pursuant to by s 994B(1)(ba)(i) and 994B(2)(a) of the Corporations Act.
22. In contravention of section 994B(1)(ba)(i) and 994B(2), Bit Trade failed to make a TMD for the Product and has not remedied that failure.
23. Section 994B(2) is a civil penalty provision and a financial services civil penalty provision, pursuant to s 1317E(3) of the Corporations Act.
24. In the premises of paragraphs 17 to 23 and by reason of s 1317QA of the Corporations Act, Bit Trade is taken to have committed a separate contravention of s 994B(2) in respect of each day on which it contravened s 994B(2).
25. Where a Court is satisfied that a person has contravened a financial services civil penalty provision, the Court:
 - a. must, pursuant to s 1317E(1) make a declaration of contravention, specifying the matters in s 1317E(2) (a **Declaration of Contravention**); and
 - b. if a Declaration of Contravention has been made, may order, pursuant to s 1317G(1) a person to pay to the Commonwealth a pecuniary penalty if (relevantly) the contravention:
 - i. materially prejudices the interests of acquirers of the Product; or
 - ii. is serious in that the contravention exposes persons who acquire the Product, but for whom the Product is not suitable (who otherwise are intended to be protected by the requirements of s 994B), to large losses exacerbated by the both the leverage inherent in the Product and the volatile investments available

on the Kraken Exchange (for example crypto currency); and the conduct was engaged in by Bit Trade for the apparent object of profiting from the Product.

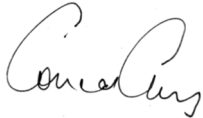
D. THE ALLEGED HARM SUFFERED

26. The contravention materially prejudices the interests of those of Bit Trade's clients who have used the Product because:
 - a. by making available the Product without a TMD, Bit Trade has exposed retail clients to the Product, and the risk of loss that use of the Product carries through both the leverage inherent in the Product and the volatile investments available on the Kraken Exchange, which may not have been consistent with their objectives, financial situation and needs.
 - b. Bit Trade's clients have suffered losses and the Product may have been the cause, or part of the cause, of losses to those clients.
 - c. the conduct of Bit Trade is contrary to the protections afforded by s 994B of the Corporations Act.
27. In the period from 5 October 2021 ~~9 January 2020~~ to 11 August 2023, 1160 retail clients used the Product. 968 of those clients suffered losses on their trading account with Kraken, which totalled AUD \$12,951,083.40.
28. As of 11 August 2023, the value of collateral held for retail clients to support trades made with an extension of margin is equivalent to \$4,863,213 AUD. The value of all open margin positions was equivalent to \$9,227,414 AUD.
29. The contravention is serious because:
 - a. Bit Trade failed to make a TMD in compliance with s 994B(2) upon the introduction of that section on 5 October 2021;
 - b. Bit Trade has made available the Product to people who are not likely to fall within the target market of the Product;
 - c. ASIC brought to Bit Trade's attention its contravention as early as 20 June 2022;
 - d. despite ASIC having brought the contravention to Bit Trade's attention, Bit Trade has:
 - i. failed to remove the Product from its website; and
 - ii. failed to make a TMD in respect of the Product; and
 - iii. instead, in communications with ASIC, maintained that it is not required to make a TMD in respect of the Product.

Certificate of lawyer

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

Date: ~~20 September 2023~~ 12 October 2023



Signed by Conrad Gray

Lawyer for the Plaintiff