

## NOTICE OF FILING AND HEARING

### Filing and Hearing Details

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File Number: NSD1038/2022  
File Title: AUSTRALIAN SECURITIES & INVESTMENTS COMMISSION v  
AMERICAN EXPRESS AUSTRALIA LIMITED (ACN 108 952 085)  
Registry: NEW SOUTH WALES REGISTRY - FEDERAL COURT OF AUSTRALIA  
Reason for Listing: To Be Advised  
Time and date for hearing: To Be Advised  
Place: To Be Advised



*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.



## ORIGINATING PROCESS

No. NSD of 2022

**FEDERAL COURT OF AUSTRALIA**  
**DISTRICT REGISTRY: NEW SOUTH WALES**  
**DIVISION: GENERAL**

**IN THE MATTER OF AMERICAN EXPRESS AUSTRALIA LIMITED**  
**ACN 108 952 085**

**AUSTRALIAN SECURITIES AND INVESTMENT COMMISSION**  
Plaintiff

**AMERICAN EXPRESS AUSTRALIA LIMITED (ACN 108 952 085)**  
Defendant

### A. DETAILS OF APPLICATION

This application is made under sections 19 and 21 of the *Federal Court of Australia Act 1976* (Cth) (**FCA Act**), and sections 1317E, 1317G and 1101B of the *Corporations Act 2001* (Cth) (**Corporations Act**).

The Plaintiff seeks declarations of contraventions of the Corporations Act, pecuniary penalty orders and ancillary orders, including costs.

In this Originating Process, terms which are defined in the Concise Statement dated 5 December 2022 have the same meaning as they do in that document.

On the facts stated in the accompanying Concise Statement, the Plaintiff seeks:

#### Declarations

- 1 A declaration under section 21(1) of the FCA Act or section 1317E(1) of the Corporations Act that, by purporting to make a target market determination on 5 October 2021 that failed to include distribution conditions that limit the distribution of the DJs Amex Card to consumers who are looking to make purchases on credit with a card that earns reward points or other benefits, in accordance with the identified target market for the DJs Amex Card:

Filed on behalf of (name & role of party)	the Plaintiff, ASIC		
Prepared by (name of person/lawyer)	Stephen Johnson		
Law firm (if applicable)			
Tel	(02) 9911 5883	Fax	1300 729 000
Email	stephen.johnson@asic.gov.au		
<b>Address for service</b> (include state and postcode)	Level 5, 100 Market Street, Sydney, NSW, 20000		



- (a) it was not reasonable to conclude that, if the DJs Amex Card was issued to consumers in accordance with the distribution conditions, it would be likely that consumers were in the target market; and
  - (b) as a result, American Express failed to make a target market determination in respect of the DJs Amex Card before issuing the DJs Amex Card to consumers in the period 5 October 2021 to 5 July 2022, in contravention of section 994B(2) of the Corporations Act.
- 2 A declaration under section 21(1) of the FCA Act or section 1317E(1) of the Corporations Act that, by purporting to make a target market determination on 5 October 2021 that failed to include distribution conditions that limit the distribution of the DJs Amex Platinum Card to consumers who are looking to make purchases on credit with a card that earns reward points or other benefits, in accordance with the identified target market for the DJs Amex Platinum Card:
  - (a) it was not reasonable to conclude that, if the DJs Amex Platinum Card was issued to consumers in accordance with the distribution conditions, it would be likely that consumers were in the target market; and
  - (b) as a result, American Express failed to make a target market determination in respect of the DJs Amex Platinum Card before issuing the DJs Amex Platinum Card to consumers in the period 5 October 2021 to 5 July 2022, in contravention of section 994B(2) of the Corporations Act.
- 3 A declaration under section 21(1) of the FCA Act or section 1317E(1) of the Corporations Act that American Express contravened section 994C(4) of the Corporations Act in the period from 18 February 2022 to 5 July 2022 by failing to cease issuing the DJs Amex Card in circumstances where American Express knew, or ought reasonably to have known by 4 February 2022, that the cancellation rates were a Review Trigger for the DJs Amex Card or were an event or circumstance for the DJs Amex Card, that would reasonably suggest that the Determination for the DJs Amex Card was no longer appropriate.
- 4 A declaration under section 21(1) of the FCA Act or section 1317E(1) of the Corporations Act that American Express contravened section 994C(4) of the Corporations Act in the period from 18 February 2022 to 5 July 2022 by failing to cease issuing the DJs Amex Platinum Card in circumstances where American Express knew, or ought reasonably to have known by 4 February 2022, that the cancellation rates were an event or circumstance for the DJs Amex Platinum Card, that would reasonably suggest that the Determination for the DJs Amex Platinum Card was no longer appropriate.
- 5 A declaration under section 21(1) of the FCA Act or section 1317E(1) of the Corporations Act that American Express contravened section 994C(5) of the Corporations Act in the period from 18 February 2022 to 5 July 2022 by failing to take all reasonable steps to ensure that David Jones was informed that it must not continue distributing the DJs Amex Card in circumstances where American Express knew by 4 February 2022, that the cancellation rates were a Review Trigger for the DJs Amex Card or were an event or circumstance for the DJs Amex Card, that would reasonably suggest that the Determination for the DJs Amex Card was no longer appropriate.
- 6 A declaration under section 21(1) of the FCA Act or section 1317E(1) of the Corporations Act that American Express contravened section 994C(5) of the Corporations Act in the period from 18 February 2022 to 5 July 2022 by failing to take all reasonable steps to ensure that David Jones was informed that it must not continue distributing the DJs Amex Platinum Card in circumstances where American Express knew by 4 February 2022, that the cancellation rates were an event or circumstance for the DJs Amex



Platinum Card, that would reasonably suggest that the Determination for the DJs Amex Platinum Card was no longer appropriate.

**Penalties**

7 An order under s 1317G(1) of the Corporations Act that, within 30 days of the order, American Express pay to the Commonwealth of Australia such pecuniary penalties as the Court determines to be appropriate in respect of American Express' conduct declared to be contraventions of sections 994B(2), 994C(4) and 994C(5) of the Corporations Act occurring during the period from 5 October 2021 to 5 July 2022.

**Other orders**

8 Such further orders under s1101B(1) of the Corporations Act as the Court considers appropriate in respect of American Express' conduct declared to be contraventions of sections 994B(2), 994C(4) and s 994C(5) of the Corporations Act.

9 An order that the Defendant pay the Plaintiff's costs of and incidental to the proceeding.

10 Such further or other orders as the Court considers appropriate.

Date: 5 December 2022

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Stephen Johnson  
Lawyer for the Plaintiff

This application will be heard by ..... at 184 Phillip Street, Queens Square, NSW, 2000 at ..... \*am/\*pm on .....

**B. NOTICE TO DEFENDANT(S) (IF ANY)**

TO: American Express Australia Limited (ACN 108 952 085)  
12 Shelley Street  
Sydney NSW 2000

If you or your legal practitioner do not appear before the Court at the time shown above, the application may be dealt with, and an order made, in your absence. As soon after that time as the business of the Court will allow, any of the following may happen:

- (a) the application may be heard and final relief given;
- (b) directions may be given for the future conduct of the proceeding;
- (c) any interlocutory application may be heard.



Before appearing before the Court, you must file a notice of appearance, in the prescribed form, in the Registry and serve a copy of it on the plaintiff.

*Note* Unless the Court otherwise orders, a defendant that is a corporation must be represented at a hearing by a legal practitioner. It may be represented at a hearing by a director of the corporation only if the Court grants leave.

**D. FILING**

Date of filing:

.....  
*Registrar*

This originating process is filed by the Plaintiff.

**E. SERVICE**

The plaintiff's address for service is:

Australian Securities and Investments Commission  
Level 5, 100 Market Street, Sydney, NSW 2000  
Email: [stephen.johnson@asic.gov.au](mailto:stephen.johnson@asic.gov.au)

It is intended to serve a copy of this originating process on the defendant.