

## NOTICE OF FILING

### Details of Filing

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File Title: AUSTRALIAN SECURITIES & INVESTMENTS COMMISSION v  
AMERICAN EXPRESS AUSTRALIA LIMITED (ACN 108 952 085)  
Registry: NEW SOUTH WALES REGISTRY - FEDERAL COURT OF AUSTRALIA



*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.



**Concise Statement**

No. NSD of 2022

Federal Court of Australia

District Registry: New South Wales

Division: General

**AUSTRALIAN SECURITIES AND INVESTMENTS COMMISSION**

Plaintiff

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

Defendant

**PART I - IMPORTANT FACTS GIVING RISE TO CLAIM**

**Introduction**

1. This proceeding concerns contraventions of the design and distribution obligations (**DDO**) contained in Part 7.8A of the *Corporations Act 2001* (Cth) (the **Act**), by American Express Australia Limited (**American Express**) in the period between 5 October 2021 and 5 July 2022 (**Relevant Period**).
2. The DDO, which commenced on 5 October 2021, require the issuer of a financial product to make a target market determination (**TMD**) prior to offering the product for distribution to consumers. A TMD must describe the class of retail clients that comprises the target market, specify any conditions and restrictions on retail product distribution in relation to the product (distribution conditions), and specify events and circumstances (review triggers) that would reasonably suggest that the determination is no longer appropriate. The DDO also require an issuer to stop issuing the financial product within 10 business days of becoming aware that a review trigger, or any other event or circumstances that reasonably suggests that the TMD is no longer appropriate, has occurred unless and until they have conducted a review of the TMD.

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Filed on behalf of	the Plaintiff, ASIC
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3. The contraventions in these proceedings arise from deficiencies in the purported target market determinations made by American Express in respect of two co-branded credit cards issued by American Express to retail consumers in David Jones stores, being the David Jones American Express Card (**DJs Amex Card**) and the David Jones American Express Platinum Card (**DJs Amex Platinum Card**) (together, the **Cards**), and the failure of American Express to cease issuing the Cards in circumstances where American Express knew or ought to have known that the determinations were no longer appropriate.

### **The Cards**

4. In around February 2008, American Express and David Jones Pty Ltd (**David Jones**), together with David Jones Financial Services Ltd, entered into an agreement (the **Co-Brand Credit Facilities Agreement**) to issue the Cards.
5. Pursuant to the Co-Brand Credit Facilities Agreement:
  - (a) American Express' obligations included: issuing the Cards and operating the provision of credit; managing all aspects of the relationship with cardholders; and paying commissions to David Jones for each Card activated by a consumer.
  - (b) David Jones' responsibilities included: displaying point of sale promotional materials and application forms for the Cards in David Jones' stores; and offering and promoting the Cards to consumers. David Jones paid "activation incentive payments" to its staff in relation to the Cards.
6. In around February 2008, American Express established a 'David Jones Alliance' team which was responsible for partnering with David Jones in relation to the distribution of the Cards. American Express assigned a 'Product Owner' to the Cards, who had responsibility for managing the performance of the Cards.
7. American Express issued the DJs Amex Card to consumers from August 2008 to 5 July 2022. American Express issued the DJs Amex Platinum Card to consumers from September 2012 to 5 July 2022.
8. The main distribution channel for the Cards was by direct to consumer sales in David Jones' stores. This accounted for approximately 80 to 90 percent of all Cards issued. Consumers could also apply for the Cards online.
9. David Jones' staff encouraged consumers to apply for the Cards at the point of sale of a product in the store. On occasion, David Jones promoted the Cards by offering consumers a discount on their purchases if they applied for a Card at the point of sale. American Express was aware of the promotions run by David Jones that related to the Cards. The application was made on an iPad provided by David Jones staff.

## **Card cancellations and consumer complaints**

10. At all material times since October 2020, American Express was aware of high cancellation rates among consumers who had applied for the Cards at a David Jones store.
11. In the period from October 2020 to October 2021, American Express was aware that the monthly cancellation rates for the Cards applied for by consumers instore ranged from 37% to 59% for the DJs Amex Card and between 31% to 61% for the DJs Amex Platinum Card. American Express was also aware in this period that the cancellation rates for the Cards at two David Jones' stores exceeded 80%.
12. By contrast, in the same period, the monthly cancellation rates for the Cards applied for by consumers online ranged from 10% to 29% for the DJs Amex Card and from 11% to 32% for the DJs Amex Platinum Card.
13. In around August 2021, American Express set a target cancellation rate of 35% for the Cards. This was revised down from an earlier target of 45%.
14. American Express was aware from consumer complaints about the Cards in the period from January 2020 to October 2021 that one of the key reasons for the high instore cancellation rates was that consumers did not understand that they were applying for a credit card rather than a loyalty card.
15. From at least October 2020 to December 2021, American Express and David Jones held monthly meetings called the 'Cancellations Working Group'. The objective of the working group was to identify opportunities to reduce the cancellation rates. This was one of American Express' highest priority initiatives in the David Jones Alliance. Staff members from American Express and David Jones attended meetings of the working group. The Product Owner for the Cards did not attend these meetings.
16. The Cancellations Working Group ceased from around January 2022 to 1 June 2022, at which time it reconvened and was renamed the 'Cancellation and Complaints Forum' to include consideration of complaints received by American Express in relation to the Cards.

## **Target Market Determinations for the Cards**

17. In the period from June 2021 to September 2021, American Express undertook a DDO project to develop TMDs across its full product suite. According to American Express, this involved "retro-fitting TMD requirements to products, like the David Jones American Express products, that have been in market for many years."
18. As part of the process of developing the TMDs, American Express conducted 'Critical Assessments' for the Cards. The Critical Assessments revealed that: "attrition was our achilles heel", driven by the fact that 85% to 90% of acquisition of the Cards occurred in

David Jones' stores; and the Cards were not fit for purpose as the membership benefits associated with the Cards needed to be "refreshed".

19. Despite the results of the Critical Assessments, American Express did not update or amend the 'key eligibility criteria' for the Cards or change the features or membership benefits associated with the Cards.
20. On 5 October 2021, American Express purported to make a TMD for each of the Cards, referred to as the **Determinations** in this Concise Statement.
21. The Determinations for the Cards included:
  - (a) The description of the 'Target Market' of the Cards, being "Consumers that are looking to make purchases on credit with a card that earns either Membership Rewards points or Qantas points and David Jones benefits as listed in the product key features below". The target market for DJs Amex Platinum Card additionally included consumers who were looking to earn travel benefits.
  - (b) The 'Distribution Conditions', which were identical for each of the Cards and provided only that the consumer must "meet the product eligibility requirements."
  - (c) The 'Key Eligibility Criteria', being the consumer must have an annual income of \$40,000 or more (in the case of the DJs Amex Card) and \$65,000 or more (in the case of the DJs Amex Platinum Card), pass responsible lending checks, be aged 18 years or over and be an Australian citizen, permanent resident or holding a long term visa of 12 months or more (but does not include a student visa).
  - (d) The 'Review Triggers' for the Cards included "material or unexpectedly high number of complaints... about the product or distribution of the product". The DJs Amex Card included an additional review trigger, being "abnormal cancellation rates" (**Review Trigger**).
22. The 'Key Eligibility Criteria', and therefore the 'Distribution Conditions', did not include criteria to limit the distribution of the Cards to consumers who are looking to make purchases on credit with a card that earns reward points or other benefits, in accordance with the stated 'Target Market'.
23. The Determinations for the Cards are set out in full in **Schedule A** to this Concise Statement.

### **Review Trigger**

24. Immediately after making the Determinations, the cancellation rates for the months of October 2021 and November 2021 for consumers who applied for a Card instore was 31% and 33% respectively for the DJs Amex Card and 28% and 28% respectively for the DJs Amex Platinum Card. The cancellation rates were within American Express' target cancellation rate of 35%.

25. In December 2021, the cancellations rates for consumers who applied for a Card instore increased significantly. The cancellation rate was 49% for the DJs Amex Card and 39% for the DJs Platinum Card.
26. On 4 February 2022, David Jones advised American Express that in January 2022:
  - (a) the cancellation rates for the Cards applied for instore were above 50%;
  - (b) the cancellation rates for the Cards applied for instore were more than double (55.7%) the cancellation rates for online applications (23.9%).
27. In the period after the Determinations were made, American Express continued to receive complaints indicating that there was confusion among consumers as to whether they had applied for a loyalty card or a credit card.
28. The Cancellations Working Group had a responsibility to notify the Product Owner if the cancellation rates constituted a Review Trigger, or an event or circumstance that would reasonably suggest that the Determinations were no longer appropriate. The Product Owner of the Cards had a responsibility to assess whether a Review Trigger had occurred.
29. In the period from January 2022 to 1 June 2022, the Cancellations Working Group and the Product Owner did not consider whether the cancellation rates for the Cards were a Review Trigger, or an event or circumstance that would reasonably suggest that the Determinations were no longer appropriate.
30. By 18 February 2022, American Express did not:
  - (a) cease issuing the Cards;
  - (b) review the Determinations for the Cards and make a new TMD; or
  - (c) inform David Jones to cease distributing the Cards.

## **PART II – RELIEF SOUGHT FROM THE COURT**

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

## **PART III – PRIMARY LEGAL GROUNDS FOR THE RELIEF SOUGHT**

### **Contraventions of s 994B(2)**

32. Despite the matters referred to at paragraphs 10 to 15 and 17 to 18, American Express failed to include distribution conditions in the Determinations that limited the distribution of the Cards to consumers who were looking to make purchases on credit with a card that earned reward points or other benefits, in accordance with the identified target market for each of the Cards.
33. American Express therefore failed to comply with the requirements of s 994B(8)(a) in respect of the Determinations for the Cards. Accordingly, the Determinations made in relation to the

Cards were not 'target market determinations' within the meaning of section 994A(1) of the Act. As a result, from 5 October 2021 to 5 July 2022, American Express contravened section 994B(2) of the Act.

#### **Contraventions of s 994C(4) and (5)**

34. By reason of the matters referred to at paragraphs 10 to 21 and 24 to 27 above, the cancellation rates for the Cards as at 4 February 2022 set out at paragraph 26 above constituted 'abnormal cancellation rates' and therefore a Review Trigger in respect of the DJs Amex Card and/or an event or circumstance in respect of the Cards that would reasonably suggest that the Determinations for the Cards were no longer appropriate (within the meaning of sections 994C(4)(c) and 994C(5)(c) of the Act)
35. By reason of the matters referred to at paragraph 34 above, by 4 February 2022, American Express knew, or ought reasonably to have known, that the cancellation rates were a Review Trigger for the DJs Amex Card and/or an event or circumstance in respect of the Cards that would suggest that the Determinations for the Cards were no longer appropriate.
36. By reason of the matters referred to at paragraphs 29, 30, 34 and 35, from 18 February 2022 to 6 July 2022 American Express contravened:
  - (a) section 994C(4) of the Act by failing to cease issuing the Cards; and
  - (b) section 994C(5) of the Act by failing to take all reasonable steps to ensure that David Jones was informed that it must not continue distributing the Cards, when it knew or ought reasonably to have known that a review trigger, and/or an event or circumstance that would reasonably suggest that the Determinations were no longer appropriate, had occurred.

#### **PART IV - HARM SUFFERED**

37. American Express issued:
  - (a) 9,561 Cards from October 2021 to 30 June 2022; and
  - (b) 4,918 Cards from March 2022 to 30 June 2022.
38. American Express' failure to make Determinations in accordance with the requirements of Part 7.8A of the Act and its failure to cease issuing the Cards in the circumstances referred to above exposed consumers who took out the Cards to the risk that they obtained a financial product that was not appropriate to their needs and objectives.

### **Certificate of lawyer**

I, Stephen Johnson, 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 Concise Statement.

Date: 5 December 2022



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Signed by Stephen Johnson

Lawyer for the Plaintiff



# Schedule A



## The David Jones American Express Card

<b>Issuer</b>	American Express Australia Limited ABN 92 108 952 085, Australian Credit Licence No. 291313
<b>Date of Target Market Determination</b>	5 <sup>th</sup> October 2021
<b>Description of Target Market (TM)</b>	This rewards card has been designed for consumers that are looking to make purchases on credit with a card that earns either Membership Rewards points or Qantas points and David Jones benefits as listed in the product key features below.

### Product

<b>Key Features</b>	<p><b>Payment Tool</b> Allows consumers to make purchases on credit. Options to enrol in extended payment plans. This product has a minimum credit limit of \$2000.</p> <p><b>Reward Points</b> Earn 3 Rewards Points per \$1 spent at major supermarkets and major petrol stations in Australia, 2 Rewards Points per \$1 spent at David Jones and 1 Reward Point per \$1 spent everywhere else. There is a choice of Rewards Programs which converts 1 Rewards Point to either 1 Membership Rewards Point or 0.5 Qantas Point.</p> <p><b>Other benefits</b> Access to exclusive David Jones events, offers and benefits.</p>
<b>Other Key Attributes</b>	<p><b>Annual Fee:</b> \$99. <b>Annual Percentage Rate:</b> 20.74% p.a. unless the full closing balance is paid by the statement due date. Up to 44 days interest free provided the full closing balance is paid by the due date. <b>Late Payment Fee:</b> \$30.</p>
<b>Key Eligibility Criteria</b>	<p>Annual income of \$40,000 or more. Pass responsible lending checks. Aged 18 years or over. Australian citizen, permanent resident or holding long term visa (long term means 12 months or over and does not include a student visa).</p>

## Purpose

<b>TM's likely Objectives</b>	Ability to earn and redeem Membership Rewards points or earn Qantas Points. Seeks rewards for being a David Jones customer.	
<b>TM's Financial Situation</b>	Income above \$40,000. Ability to make repayments without experiencing financial hardship.	
<b>TM's Needs</b>	Looking to make purchases of goods and services on a credit card and manage cash flow.	
<b>Appropriateness and Unsuitability</b>	<p>This product's key features, attributes and eligibility criteria as listed above are likely to be consistent with the objectives, financial situation and needs of consumers in the Target Market. This rewards card is unsuitable for:</p> <ul style="list-style-type: none"> <li>• Consumers who do not meet the Key Eligibility Criteria and Likely Financial Situation.</li> <li>• Consumers who cannot make repayments without experiencing financial hardship.</li> <li>• Consumers who will carry a substantial balance over a prolonged period (unless opted into interest free extended payment plans).</li> <li>• Consumers who cannot take advantage of any of the key product features.</li> </ul>	
<b>Distribution Conditions</b>	<ul style="list-style-type: none"> <li>• American Express Channels: Online applications and product transfers.</li> <li>• Other distributors: Paid card comparison websites and content hubs.</li> <li>• Other referrer: David Jones online and instore.</li> <li>• Conditions: Consumers must meet the product eligibility requirements.</li> </ul>	
<b>Review Triggers</b>	<ul style="list-style-type: none"> <li>• Material change to the key product features, attributes, eligibility and/or terms and conditions.</li> <li>• Material changes to fees or interest rates.</li> <li>• High default rates, abnormal cancellation rates, high hardship rates or evidence of unmitigated risks to vulnerable consumers.</li> <li>• Material or unexpectedly high number of complaints (as defined in section 994A(1) of the Act) about the product or distribution of the product.</li> <li>• The use of Product Intervention Powers, regulatory orders or directions that affect the product.</li> </ul>	
<b>Review Period</b>	Initial Review: 1 year. Subsequent review: 3 years.	
<b>Distributor Information Reporting Requirements</b>	<b>Reporting requirements</b>	<b>Reporting Period</b>
	Complaints (as defined in section 994A(1) of the Act) relating to the product design, product availability and distribution. The distributor should provide all the content of the complaint, having regard to privacy.	Within 10 business days following end of calendar quarter.
	Significant dealing outside of target market, under s994F(6) of the Act. Reporting to include the dates, description and volumes of the significant dealings.	As soon as practicable but no later than 10 business days after distributor becomes aware of the significant dealing.

## Legal disclaimer

This Target Market Determination (TMD) is required under section 994B of the Corporations Act 2001 (Cth) (the Act). It sets out the class of consumers for whom the product, including its key attributes, would likely be consistent with their likely objectives, financial situation and needs. In addition, the TMD outlines the triggers to review the target market and certain other information. It forms part of Issuer's design and distribution arrangements for the product.

This document is not a product disclosure statement and is not a summary of the product features or terms of the product. This document does not take into account any person's individual objectives, financial situation or needs. Persons interested in acquiring this product should carefully read the Product Disclosure Statement or respective Terms and Conditions (PDS) for the Product before making a decision whether to buy this product.

Important terms used in this TMD are defined in the TMD Definitions which supplement this document. Capitalised terms have the meaning given to them in the product's PDS, unless otherwise defined. The PDS can be obtained by contacting American Express <https://www.americanexpress.com/au/contact-us/> or on our website at <https://www.americanexpress.com/australia/>





## The David Jones American Express Platinum Card

<b>Issuer</b>	American Express Australia Limited ABN 92 108 952 085, Australian Credit Licence No. 291313
<b>Date of Target Market Determination</b>	5 <sup>th</sup> October 2021
<b>Description of Target Market (TM)</b>	This rewards card has been designed for consumers that are looking to make purchases on credit with a card that earns either Membership Rewards points or Qantas points, travel benefits and David Jones benefits as listed in the product key features below.

### Product

<b>Key Features</b>	<p><b>Payment Tool</b> Allows consumers to make purchases on credit. Options to enrol in extended payment plans. This product has a minimum credit limit of \$2000.</p> <p><b>Reward Points</b> Earn 4 Rewards Points per \$1 spent at David Jones, 3 Rewards Point per \$1 spent at major supermarkets and major petrol stations in Australia. 1 Reward Point per \$1 spent everywhere else. There is a choice of Rewards Programs which converts 1 Rewards Point to either 1 Membership Rewards Points or 0.5 Qantas Points.</p> <p><b>Travel Benefits</b> Complimentary travel insurance and 2 AXP airport lounge passes per year.</p> <p><b>Other benefits</b> Access to exclusive David Jones events, offers and other premium David Jones benefits.</p>
<b>Other Key Attributes</b>	<p><b>Annual Fee:</b> \$295.  <b>Annual Percentage Rate:</b> 20.74% p.a. unless the full closing balance is paid by the statement due date.            Up to 44 days interest free provided the full closing balance is paid by the due date.  <b>Late Payment Fee:</b> \$30.</p>
<b>Key Eligibility Criteria</b>	<p>Annual income of \$65,000 or more.            Pass responsible lending checks.            Aged 18 years or over.            Australian citizen, permanent resident or holding long term visa (long term means 12 months or over and does not include a student visa).</p>

## Purpose

<b>TM's likely Objectives</b>	Ability to earn and redeem Membership Rewards points or earn Qantas Points. Seeks rewards for being a David Jones customer.	
<b>TM's Financial Situation</b>	Income above \$65,000. Ability to make repayments without experiencing financial hardship.	
<b>TM's Needs</b>	Looking to make purchases of goods and services on a credit card and manage cash flow.	
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