

FAST TRACK APPLICATION

**IN THE FEDERAL COURT OF AUSTRALIA
VICTORIAN DISTRICT REGISTRY**

VID 811 of 2010

BETWEEN

JOHN ANDREWS
First Applicant

ANGELO JULIAN SALIBA
Second Applicant

GEOFFREY ALLAN FIELD
EZI DOES IT PTY LTD
(ACN 123 862 402)
Third Applicant

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

**AMENDED APPLICATION UNDER PART IVA
OF THE FEDERAL COURT OF AUSTRALIA ACT 1976
(REDACTED VERSION)**

1. This application is brought by the first, second and third applicants, John Andrews, Angelo Julian Saliba and ~~Ezi Does It Pty Ltd~~Geoffrey Allan Field, on their own behalf and as representative parties.
2. The group members to whom this proceeding relates:
 - (a) at some time in or after May 2004:
 - i. were customers of the respondent, Australia and New Zealand Banking Group Limited (**ANZ**);

Filed on behalf of the applicants

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- ii. held and operated banking facilities with ANZ;
 - iii. were charged by ANZ Exception Fees (as that term is defined in the accompanying Amended Fast Track Statement (Fast Track Statement)); and
- (b) are listed in a compact disc which comprises Schedule 'A' to this application (**Group Members**).
3. On the grounds set out in the accompanying Fast Track Statement:
- (a) the first applicant and second applicant claim for themselves and on behalf of Saving Group Members, Card Group Members (as those terms are defined in the accompanying Fast Track Statement and as particularised in Parts 1 and 2 of Schedule 'A' respectively, collectively **Consumer Group Members**) and Business Group Members (as that term is defined in the accompanying Fast Track Statement and as particularised in Part 4 of Schedule 'A'); and
 - (b) the third applicant claims for itself himself and on behalf of Commercial Card Group Members and Business Group Members (as those terms are defined in the accompanying Fast Track Statement and as particularised in Parts 3 and 4 of Schedule 'A' respectively, collectively **Commercial Group Members**) and Saving Group Members;
 - (c) a declaration pursuant to section 21 of the *Federal Court of Australia Act 1976* (Cth) (**FC Act**) that:
 - i. the Penalty Provisions (as defined in the accompanying Fast Track Statement) (**Penalty Provisions**) and/or the Exception Fees (as defined in the accompanying Fast Track Statement) (**Exception Fees**) being provisions contained in contracts between the applicants, Group Members and ANZ as particularised in the accompanying Fast Track Statement, are wholly void, or in the alternative, unenforceable as a penalty; or
 - ii. *in the alternative to 3(c)(i)*, the Penalty Provisions and/or the Exception Fees, being provisions contained in contracts between the applicants, Group Members and ANZ as particularised in the accompanying Fast

Track Statement, are void, or in the alternative, unenforceable as a penalty to the extent that the Exception Fees charged pursuant to them exceeded the damage suffered by ANZ as a result of the events giving rise to the charging of Exception Fees;

- (d) a declaration pursuant to section 21 of the FC Act that:
- i. the applicants and Group Members are entitled to be repaid the Exception Fees together with any interest charged to the applicants and Group Members on the Exception Fees; or
 - ii. *in the alternative to 3(d)(i)*, the applicants and Group Members are entitled to be repaid the amount by which the Exception Fees exceeded ANZ's actual damage as a result of the events giving rise to the charging of Exception Fees, together with any interest charged to the applicants and Group Members on that part of the Exception Fees that exceeded ANZ's actual damage as a result of the events giving rise to the charging of Exception Fees;
- (e) *further, or alternatively*:
- i. a declaration pursuant to section 21 of the FC Act that ANZ, in entering into and giving effect to the provisions of the contracts as particularised in Parts C.2(I) and (II) of the accompanying Fast Track Statement between the ~~first applicant, the second~~ applicant~~s~~ and Consumer Group Members and ANZ, namely the Penalty Provisions and/or the Exception Fees engaged in unconscionable conduct in contravention of section 12CB of the *Australian Securities and Investments Commission Act 2001* (Cth) (**ASIC Act**) and/or section 8 of the *Fair Trading Act 1999* (Vic) (**FTA**);
 - ii. orders under section 12GM of the ASIC Act:
 1. that the Penalty Provisions and/or the Exception Fees, being provisions contained in contracts between the ~~first applicant, the second~~ applicant~~s~~ and Consumer Group Members and ANZ as particularised in Parts C.2(I) and (II) of the accompanying Fast Track Statement, be declared void;

2. *in the alternative to 3(e)(ii)(1)*, that the Penalty Provisions and/or the Exception Fees, being provisions contained in contracts between the ~~first applicant, the second~~ applicants and Consumer Group Members and ANZ as particularised in Parts C.2(I) and (II) of the accompanying Fast Track Statement, be declared void to the extent that the Exception Fees charged pursuant to them exceeded the damage suffered by ANZ as a result of the events giving rise to the charging of Exception Fees;
3. requiring ANZ to repay to the ~~first applicant, the second~~ applicants and Consumer Group Members:
 - A. the Exception Fees charged to the ~~first applicant, the second~~ applicants and Consumer Group Members together with any interest charged to the ~~first applicant, the second~~ applicants and Consumer Group Members on the Exception Fees; or
 - B. *in the alternative to 3(e)(ii)(3)(A)*, the amount by which the Exception Fees charged to the ~~first applicant, the second~~ applicants and Consumer Group Members exceeded ANZ's actual damage as a result of the events giving rise to the charging of Exception Fees, together with any interest charged to the ~~first applicant, the second~~ applicants and Consumer Group Members on that part of the Exception Fees that exceeded ANZ's actual damage as a result of the events giving rise to the charging of Exception Fees;
- iii. further, or in the alternative to 3(e)(ii)(3), an order that ANZ pay to the ~~first applicant, the second~~ applicants and Consumer Group Members statutory compensation pursuant to section 12GF of the ASIC Act and/or section 159 of the FTA;

- iv. a declaration pursuant to section 21 of the FC Act that ANZ, in entering into and giving effect to the provisions of the contracts as particularised in Parts C.2(III) and (IV) of the accompanying Fast Track Statement between the applicants and Commercial Group Members and ANZ, namely the Penalty Provisions and/or the Exception Fees engaged in unconscionable conduct in contravention of section 12CC of the ASIC Act and/or section 51AC of the *Trade Practices Act 1974* (Cth) (**TPA**) and/or section 8A of the FTA;
- v. orders under section 12GM of the ASIC Act and/or section 87 of the TPA:
 - 1. that the Penalty Provisions and/or the Exception Fees, being provisions contained in contracts between the applicants and Commercial Group Members and ANZ as particularised in Parts C.2(III) and (IV) of the accompanying Fast Track Statement, be declared void;
 - 2. *in the alternative to 3(e)(v)(1)*, **that** the Penalty Provisions and/or the Exception Fees being provisions contained in contracts between the applicants and Commercial Group Members and ANZ as particularised in Parts C.2(III) and (IV) of the accompanying Fast Track Statement, be declared void to the extent that the Exception Fees charged pursuant to them exceeded the damage suffered by ANZ as a result of the events giving rise to the charging of Exception Fees;
 - 3. requiring ANZ to repay to the applicants and Commercial Group Members:
 - A. the Exception Fees charged to the applicants and Commercial Group Members together with any interest charged to the applicants and Commercial Group Members on the Exception Fees; or
 - B. *in the alternative to 3(e)(v)(3)(A)*, the amount by which the Exception Fees charged to the applicants and Commercial Group Members exceeded ANZ's actual damage as a result of the events giving rise to the charging of Exception Fees,

together with any interest charged to the applicants and Commercial Group Members on that part of the Exception Fees that exceeded ANZ's actual damage as a result of the events giving rise to the charging of Exception Fees;

- vi. *further, or in the alternative to 3(e)(v)(3), an order that ANZ pay to the applicants and Commercial Group Members statutory compensation pursuant to section 12GF of the ASIC Act and/or section 82 of the TPA and/or section 159 of the FTA;*
- (f) *further, or alternatively:*
- i. a declaration pursuant to section 70(1) of the *Consumer Credit (Victoria) Code (Code)* and section 21 of the FC Act, that any Pre-June 2010 Card Contracts (as defined in the accompanying Fast Track Statement) between the first applicant, the second applicant and Card Group Members and ANZ, are unjust contracts;
 - ii. an order pursuant to section 71(c) of the Code that the Penalty Provisions and/or the Exception Fees, being provisions contained in the Pre-June 2010 Card Contracts between the first applicant, the second applicant and Card Group Members and ANZ as particularised in Part C.2(II) of the accompanying Fast Track Statement, be declared void; and
 - iii. an order pursuant to section 71(g) of the Code requiring ANZ to repay to the first applicant, the second applicant and Card Group Members the Exception Fees charged pursuant to any Pre-June 2010 Card Contracts together with any interest charged to the first applicant, the second applicant and Card Group Members on those Exception Fees; or
 - iv. *in the alternative to 3(f)(ii) and (iii):*
 - 1. an order pursuant to section 71(c) of the Code varying in whole or in part the Penalty Provisions and/or the Exception Fees contained in the Pre-June 2010 Card Contracts so as to provide for the charging of Exception Fees that equate to the damage

suffered by ANZ as a result of the events giving rise to the charging of Exception Fees; and

2. an order pursuant to section 71(g) of the Code requiring ANZ to repay to the first applicant, the second applicant and Card Group Members the amount by which the Exception Fees charged pursuant to the Pre-June 2010 Card Contracts exceeded ANZ's actual damage as a result of the events giving rise to the charging of those Exception Fees, together with any interest charged to the first applicant, the second applicant and Card Group Members on that part of those Exception Fees that exceeded ANZ's actual damage as a result of the events giving rise to the charging of those Exception Fees;
- v. a declaration pursuant to section 76 of the *National Credit Code (New Code)* and section 21 of the FC Act, that the June 2010 Card Contract between the first applicant, the second applicant and Card Group Members and ANZ, is an unjust contract;
- vi. an order pursuant to section 77(c) of the New Code that those Penalty Provisions and/or Exception Fees contained in the June 2010 Card Contract between the first applicant, the second applicant and Card Group Members and ANZ as particularised in Part C.2(II) of the accompanying Fast Track Statement, be declared void; and
- vii. an order pursuant to section 77(g) of the New Code requiring ANZ to repay to the first applicant, the second applicant and Card Group Members those Exception Fees charged pursuant to the June 2010 Card Contract together with any interest charged to the first applicant, the second applicant and Card Group Members on those Exception Fees; or
- viii. *in the alternative to 3(f)(vi) and (vii):*
 1. an order pursuant to section 77(c) of the New Code varying in whole or in part those Penalty Provisions and/or Exception Fees contained in the June 2010 Card Contract so as to provide for the charging of Exception Fees that equate to the damage suffered by

ANZ as a result of the events giving rise to the charging of Exception Fees; and

2. an order pursuant to section 77(g) of the New Code requiring ANZ to repay to the first applicant, the second applicant and Card Group Members the amount by which the Exception Fees charged pursuant to the June 2010 Card Contract~~and charged to the first applicant, the second applicant and Card Group Members~~ exceeded ANZ's actual damage as a result of the events giving rise to the charging of those Exception Fees, together with any interest charged to the first applicant, the second applicant and Card Group Members on that part of those Exception Fees that exceeded ANZ's actual damage as a result of the events giving rise to the charging of those Exception Fees;

(g) *further, or alternatively:*

- i. a declaration pursuant to sections 32Y and 32W of the FTA and section 21 of the FC Act, that the Penalty Provisions and/or the Exception Fees contained in the Saving Contracts and the Card Contracts between the ~~first applicant, the second~~ applicants and Consumer Group Members and ANZ, and as particularised in Parts C.2(I) and (II) of the accompanying Fast Track Statement, are void as unfair terms;
- ii. orders pursuant to section 32ZC(4)(a) or section 32ZC(4)(c) of the FTA requiring ANZ to repay to the ~~first applicant, the second~~ applicants and Consumer Group Members the Exception Fees charged to the ~~first applicant, the second~~ applicants and Consumer Group Members, together with any interest charged on those Exception Fees; or
- iii. *in the alternative to 3(g)(ii):*
 1. an order pursuant to section 32ZC(4)(b) of the FTA varying in whole or in part the Penalty Provisions and/or the Exception Fees contained in the Saving Contracts and the Card Contracts so as to provide for the charging of Exception Fees that equate to the

damage suffered by ANZ as a result of the events giving rise to the charging of Exception Fees; and

2. an order pursuant to section 32ZC(4)(a) or section 32ZC(4)(c) of the FTA requiring ANZ to repay to the ~~first applicant, the second applicants~~ and Consumer Group Members the amount by which the Exception Fees charged to the ~~first applicant, the second applicants~~ and Consumer Group Members exceeded ANZ's actual damage as a result of the events giving rise to the charging of those Exception Fees, together with any interest charged to the applicants and Consumer Group Members on that part of those Exception Fees that exceeded ANZ's actual damage as a result of the events giving rise to the charging of those Exception Fees;
 - (h) *in the alternative*, damages for breach of contract;
 - (i) *further*, orders pursuant to Order 39(1) of the *Federal Court Rules (FCR)* that:
 - i. an account be taken to determine the amount payable by ANZ to the applicants and Group Members as a consequence of the above declarations and orders; and
 - ii. any amount certified on taking the account to be due to the applicants and Group Members be paid by ANZ to the applicants and Group Members;
 - (j) *further*, interest (to be assessed), pursuant to section 51A of the FC Act;
 - (k) *further*, such order or further relief, including all necessary or appropriate accounts, inquiries, directions or referrals.
4. The questions of law or fact common between the claims of the applicants and the Group Members include but are not limited to the matters set out in paragraphs 2 and 4 to 7 of the Fast Track Statement.
5. The applicants estimate that the initial and separate trial of the preliminary common issues identified at paragraphs 4 and 6 of the Fast Track Statement as to whether the Exception Fees charged to the applicants are wholly void, or in the alternative, unenforceable as a

penalty, described in the Fast Track Statement as the Proposed Penalty Hearing, will last for five days.

6. And the applicants claim by way of interlocutory relief orders that:

(a) they have leave to file in this proceeding, in addition to this Amended Fast Track Application and the Amended Fast Track Statement filed by them on ~~22 September 2010~~ 3 March 2011 (together the **Unredacted Documents**), the following documents:

i. Amended Fast Track Application (Redacted Version); and

ii. Amended Fast Track Statement (Redacted Version);

(b) until further order, the Unredacted Documents (including the various schedules to those documents) remain confidential for the purposes of Order 46 rule 6 inspection, and no person (other than a party to the proceeding) may inspect or copy the Unredacted Documents without leave of the Court or a Judge; and

(c) any applicant for leave to inspect the Unredacted Documents must provide the solicitors for the applicants written notice of the application for leave at least 48 hours prior to the hearing of the application for leave.

Date: ~~22 September 2010~~ 3 March 2011



Maurice Blackburn
Solicitors for the Applicants

NOTICE TO RESPONDENT

To the respondent, Australia and New Zealand Banking Group Limited of ANZ Centre Melbourne, Level 9, 833 Collins Street, Docklands, Victoria 3008

A directions hearing in this application will be heard by the Court at the time and place specified below.

If there is no attendance before the Court by you or a lawyer representing you, the application may be dealt with and judgment may be given or an order made in your absence. Before any attendance at that time, you must file an appearance in the Registry.

Time and date for hearing:

Place: Federal Court of Australia
305 William Street
Melbourne, Victoria 3000

Date: ~~22 September 2010~~ 3 March 2011

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An officer acting with the authority of the
DISTRICT REGISTRAR

FILING AND SERVICE

The applicants' address for service (see Order 7, Rule 6) is c/- Maurice Blackburn Lawyers, Level 10, 456 Lonsdale Street, Melbourne Vic 3000.

The applicants' address is c/- Maurice Blackburn Lawyers, Level 10, 456 Lonsdale Street, Melbourne Vic 3000.

SCHEDULE A

Comprises the compact disc accompanying ~~this application~~ the application filed on 22 September 2010 in this proceeding.

[CONTENTS OF DISC REDACTED]