

**IN THE FEDERAL COURT OF AUSTRALIA (FCA)  
VICTORIA REGISTRY - FEDERAL COURT OF AUSTRALIA  
GENERAL DIVISION**

**No: VID196/2013**

**NOTICE OF FILING**

This document was filed electronically in the FEDERAL COURT OF AUSTRALIA (FCA) on 20/06/2013.

**DETAILS OF FILING**

**Document Lodged:** Defence - Form 33 - Rule 16.32  
**File Number:** VID196/2013  
**File Title:** Lucio Robert Paciocco & Anor v Australia and New Zealand Banking Group Limited  
**District Registry:** VICTORIA REGISTRY - FEDERAL COURT OF AUSTRALIA



★ Dated: 21/06/2013

Registrar

A handwritten signature in blue ink, which appears to read "Warwick Soden".

**Note**

This Notice forms part of the document and contains information that might otherwise appear elsewhere in the document. The Notice must be included in the document served on each party to the proceeding.



## **AMENDED DEFENCE**

VID 196 of 2013

Federal Court of Australia  
District Registry: Victoria  
Division: General

**LUCIO ROBERT PACIOCCO** and another  
Applicants

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

*This Amended Defence responds to the Amended Statement of Claim filed by the applicants on ~~14 March 2013~~ 23 May 2013 (Statement of Claim).*

*In this Amended Defence, the respondent (**ANZ**) has adopted some, but not all, of the abbreviations and defined terms used in the Application and Amended Statement of Claim filed by the applicants in this proceeding.*

*Given ANZ's response to various allegations, it has been necessary for ANZ to adopt different definitions of various terms, and those definitions are set out in Section A herein.*

*Save as set out in Section A or where the context does not permit, ANZ adopts the abbreviations and defined terms used in the Application and Amended Statement of Claim.*

### **A. DEFINITIONS**

In this Amended Defence:

- (a) **Business Account** means an account to which any of the Business PDSs and Business Fees Documents referred to in rows 2 to 15 of Schedule 6 applied.
- (b) **Business Contract** has the meaning given by paragraph 23(a) herein;
- (c) **Business Group Member** means a Group Member who held at least one Business Account during the period after August 2004;
- (d) **Card Account** means an account to which any of the Conditions of Use referred to in rows 2 to 24 of Schedule 4 to the Amended Statement of Claim applied

Filed on behalf of (name & role of party)	Australia and New Zealand Banking Group Limited (ACN 005 357 522) - Respondent
Prepared by (name of person/lawyer)	Fiona Hodgson
Law firm (if applicable)	Ashurst Australia
Tel	03 9679 3000
Fax	03 9679 3111
Email	fiona.hodgson@ashurst.com; martin.james@ashurst.com; michael.tandora@ashurst.com
Address for service	Level 26, 181 William Street, Melbourne VIC 3000

- (e) **Card Contract** has the meaning given by paragraph 15(a) herein;
- (f) **Card Group Member** means a Group Member who held, at some time during the period after March 2004 at least one Card Account;
- (g) **Contracts** has the meaning given by paragraph 69(a) herein;
- (h) **Exception Fee Provisions** are the provisions of the Saving Contracts, Card Contracts and Business Contracts pursuant to which Exception Fees have been charged;
- (i) **Relevant Period** means:
  - (i) in respect of Saving Accounts and Saving Exception Fees, the period from around May 2004 to 14 December 2009;
  - (ii) in respect of Card Accounts and Card Exception Fees, the period from around March 2004;
  - (iii) in respect of Business Accounts and Business Exception Fees, the period from around August 2004;
- (j) **Saving Account** means an account to which any of the PDSs and Fees Documents referred to in rows 2 to 16 of Schedule 1 to the Amended Statement of Claim applied;
- (k) **Saving Contract** has the meaning given by paragraph 7(a) herein;
- (l) **Saving Group Member** means a Group Member who held, at some time during the period between around May 2004 and 14 December 2009, at least one Saving Account;
- (m) wherever ANZ admits herein an allegation in the Amended Statement of Claim that refers to a Business Account, Card Account or Saving Account as those terms are defined in the Amended Statement of Claim, the admission is made only in respect of the Business Accounts, Card Accounts and Saving Accounts as defined herein.

## **B. RESPONSE TO AMENDED STATEMENT OF CLAIM**

1. ANZ does not plead to paragraphs 1 to 5 as those paragraphs do not contain any allegations of fact or law.

### **Parties and Other Relevant Entities**

2. In respect of paragraph 6, ANZ:
  - (a) admits the allegations in sub-paragraphs (a), (b), (c) and (d);
  - (b) as to sub-paragraph (e) ANZ admits that from 1 July 2010 the first applicant has been and continues to be a debtor within the meaning that is given to that term under the New Code;

- (c) as to sub-paragraph (f) ANZ admits that the first applicant was and is a consumer within the meaning of Part 2B of the FTA;
  - (d) as to sub-paragraph (g) ANZ admits that the first applicant has commenced this proceeding in a representative capacity on behalf of the Group Members who:
    - (i) hold or held a Saving Account at some time during the period from June 1997 to date; and
    - (ii) hold or held a Card Account from June 2006 to date.
3. In respect of paragraph 7, ANZ:
- (a) admits the allegations in sub-paragraphs (a), (c), and (d);
  - (b) admits sub-paragraph (e) and says further that the overdraft limit on the second applicant's ANZ Business Classic account was increased from \$10,000 to \$49,999 from approximately 2 December 2011;
  - (c) does not admit sub-paragraph (b); and
  - (d) in respect of sub-paragraph (f) ANZ admits that the second applicant has commenced this proceeding in a representative capacity on behalf of the Group Members who hold or held a Business Account at some time during the period from December 2008 to date.
4. ANZ does not admit the allegations in paragraph 8 and, in order to investigate the allegations further, will require the account numbers of the accounts that the Group Members allegedly held with ANZ.
5. ANZ admits the allegations in paragraph 9.

## **The Contractual Framework**

### ***Saving Accounts***

6. ANZ admits the allegations in paragraph 10 in respect of the period between May 2004 and 14 December 2009 and otherwise does not admit the allegations.
7. In respect of paragraph 11, ANZ:
- (a) admits that it entered into a contract with each person who opened a Saving Account (including the first applicant and the Saving Group Members) at or about the time that the person opened the Saving Account (**Saving Contract**);
  - (b) admits that in the usual case (and in the case of the first applicant), the terms and conditions stated in the version of the PDS and the Fees Document that was current at the time that each Saving Contract was entered into formed part of the Saving Contract at that time;

- (c) admits that, save for row 1, Columns 1 and 2 of Schedule 1 of the Amended Statement of Claim indicate the dates on which the versions of the PDSs and the Fees Documents were current;
  - (d) admits that in the usual case (and in the case of the first applicant), each Saving Contract was varied from time to time to incorporate the terms and conditions stated in the subsequent versions of the PDS or Fees Document;
  - (e) otherwise denies the allegations.
8. In respect of paragraph 12, ANZ:
- (a) admits that, in the usual case and subject to the changes indicated in Schedule 2 of the Amended Statement of Claim, the Saving Contracts contained, inter alia, the terms stated in paragraph 12, other than sub-paragraph (c);
  - (b) admits the allegations in sub-paragraph 12(c) in so far as they relate to payments upon a cheque and not to payments more generally;
  - (c) says further that it relies upon the full terms of the versions of the PDS and Fees Document as current from time to time;
  - (d) otherwise denies the allegations.
9. In respect of paragraph 13, ANZ:
- (a) admits that the PDSs and the Fees Documents were amended by subsequent versions as indicated in Schedule 2 to the Amended Statement of Claim; and
  - (b) otherwise denies the allegations.
10. ANZ does not plead to paragraph 14 as it contains no allegations against it.
11. ANZ admits paragraph 15.
12. In respect of paragraph 16, ANZ:
- (a) admits that, in the usual case, ANZ and the persons who entered into Saving Contracts with ANZ did not negotiate the terms and conditions contained in the PDS and the Fees Document;
  - (b) admits that ANZ had a contractual right to vary unilaterally the terms and conditions of a Saving Contract;
  - (c) admits that the quantum of Saving Exception Fees provided for in the Saving Contracts would not vary depending upon whether ANZ held security and/or was in a position to combine accounts;
  - (d) admits that ANZ waived a Saving Exception Fee in respect of an individual customer in certain circumstances;

### Particulars

The circumstances included:

- (i) the Exception Fee was the first such fee incurred by the customer and the customer contacted ANZ;
- (ii) the customer was in financial difficulty or suffering hardship.

(e) admits that, at relevant times, each of the banks referred to in Schedule 3 to the Amended Statement of Claim supplied banking services on terms that included the fees particularised in Schedule 3 to the Amended Statement of Claim;

~~(e)~~(f) otherwise denies the allegations;

~~(f)~~(g) says further that:

- (i) the first applicant and the Saving Group Members were entitled, under the Saving Contracts to which they were parties, to terminate the Saving Contract at any time;
- (ii) during the Relevant Period, ANZ offered other products and services which did not incur exception fees or by which customers were able to avoid or reduce the incurring of exception fees;

### Particulars

- (A) ANZ offered a saving account called Access Basic to customers who held a Seniors Concession card, a Pensioner Concession card, a Centrelink Health Care card or a Repatriation Health card. From August 2006, exception fees on that account were reduced to \$10.
- (B) From 2008, ANZ offered a saving account called ANZ Access Limited that was available to individuals for private or domestic use. The account did not have a cheque book facility and did not pay interest, and did not have honour fees, dishonour fees or non-payment fees.
- (C) Customers with Saving Accounts were given the option of "switching off" the overdraft facility on the account which would prevent overdrafts when using ATM machines and EFTPOS facilities (unless the merchant's facility was offline).
- (D) ANZ supplied an overdraft product called ANZ Assured that provided an overdraft of \$500 or \$1,000 for customers with Saving Accounts. The overdraft allowed customers to

overdraw within this limit and thereby avoid honour and dishonour fees.

- (iii) ANZ offered other banking facilities that were substitutable for and competitive with the Saving Accounts; and
- (iv) many other banks and financial institutions offered banking facilities that were substitutable for and competitive with the Saving Accounts offered by ANZ.

13. ANZ denies the allegations in paragraph 17.

**Card Accounts**

14. ANZ admits the allegations in paragraph 18 in respect of the period from March 2004 onwards and otherwise does not admit the allegations.

15. In respect of paragraph 19, ANZ:

- (a) admits that it entered into a contract with each person who opened a Card Account (including the first applicant and the Card Group Members) at or about the time that the person opened the Card Account (**Card Contract**);
- (b) admits that in the usual case (and in the case of the first applicant), the terms and conditions stated in the Card Letters of Offer and the version of the Conditions of Use that was current at the time that each Card Contract was entered into formed part of the Card Contract at that time;
- (c) admits that, save for row 1, Columns 1 and 2 of Schedule 4 of the Amended Statement of Claim indicate the dates on which the versions of the Conditions of Use and the Fees Documents were current;
- (d) admits that in the usual case (and in the case of the first applicant), each Card Contract was varied from time to time to incorporate the terms and conditions stated in the subsequent versions of the Conditions of Use;
- (e) otherwise denies the allegations.

16. In respect of paragraph 20, ANZ:

- (a) admits that, in the usual case and subject to the changes indicated in Schedule 5 of the Amended Statement of Claim, the Card Contracts contained, inter alia, the terms stated in paragraph 20 other than sub-paragraphs (p) and (r);
- (b) admits the allegations in sub-paragraph 20(p) and (r) other than in respect of the ANZ Visa PAYCARD and the Telstra Visa PAYCARD and says that the Conditions of Use did not apply to the ANZ Visa PAYCARD and the Telstra Visa PAYCARD;

- (c) says further that it relies upon the full terms of the versions of the Card Letters of Offer and the Conditions of Use as current from time to time; and
- (d) otherwise denies the allegations.

17. In respect of paragraph 21, ANZ:

- (a) admits that the Conditions of Use and the Fees Documents were amended as indicated in Schedule 5 to the Amended Statement of Claim except as follows:
  - (i) the amendment in row 4 of Schedule 5 was amended by the September 2006 Conditions of Use and not the December 2009 Conditions of Use;
  - (ii) in rows 5 and 6 of Schedule 5, "September 2006 Conditions of Use" should be replaced with "January 2006 Conditions of Use"; and
  - (iii) as to row 8, there was no change to "Late Payment Fee" clause between November 2004 and March 2005 save to replace "Telstra Visa Paycard Accounts" with "ANZ Rewards Visa PAYCARD accounts";
- (b) otherwise denies the allegations.

18. ANZ does not plead to paragraph 22 as it contains no allegations against it.

19. ANZ admits paragraph 23.

20. In respect of paragraph 24, ANZ;

- (a) refers to and repeats the admissions in sub-paragraphs 12(a) to (d) herein save that references to "Saving" in those sub-paragraphs are to be read as "Card" for the purposes of this sub-paragraph;
- (b) otherwise denies the allegations;
- (c) says further that:
  - (i) the first applicant and the Card Group Members were entitled, under the Card Contracts to which they were parties, to terminate the Card Contract at any time;
  - (ii) during the Relevant Period, ANZ offered other products and services which did not incur exception fees or by which customers were able to avoid or reduce the incurring of exception fees; and

#### **Particulars**

- (A) ANZ offered a saving account called Access Basic to customers who held a Seniors Concession card, a Pensioner Concession card, a Centrelink Health Care card or a Repatriation Health card. From December 2007, exception fees on credit cards



held by Access Basic account holders were reduced to \$10. From December 2009, exception fees on credit cards held by Access Basic account holders were reduced to \$0.

- (B) No later than December 2007, customers with Card Accounts were given the option of "switching off" the overdraw facility on the account which would prevent overdraws when using ATM machines and EFTPOS facilities (unless the merchant's facility was offline).
- (C) ANZ offered a "CardPay Direct" facility whereby a customer could have its minimum monthly credit card payment debited automatically from another account.
- (D) ANZ supplied an overdraft product called ANZ Assured that provided an overdraft of \$500 or \$1,000 for customers with Saving Accounts. The overdraft allowed customers to overdraw within this limit and thereby avoid honour and dishonour fees.

- (iii) many other banks and financial institutions offered banking facilities that were substitutable for and competitive with the Card Accounts offered by ANZ.

21. ANZ denies the allegations in paragraph 25.

### ***Business Accounts***

22. ANZ admits the allegations in paragraph 26 in respect of the period from August 2004 onwards and otherwise does not admit the allegations.

23. In respect of paragraph 27, ANZ:

- (a) admits that it entered into a contract with each person who opened a Business Account (including the second applicant and the Business Group Members) at or about the time that the person opened the Business Account (**Business Contract**);
- (b) admits that in the usual case (and in the case of the second applicant), the terms and conditions stated in the Business PDS and the Business Fees Document that was current at the time that each Business Contract was entered into formed part of the Business Contract at that time;
- (c) admits that, save for row 1, Columns 1 and 2 of Schedule 6 to the Amended Statement of Claim indicate the dates on which the versions of the Business PDSs and the Business Fees Documents were current;

- (d) admits that in the usual case (and in the case of the applicants), each Business Contract was varied from time to time to incorporate the terms and conditions stated in the subsequent versions of the Business PDS or a Business Fees Document;
- (e) otherwise denies the allegations.

24. In respect of paragraph 28, ANZ:

- (a) admits that, in the usual case and subject to the changes indicated in Schedule 9 of the Amended Statement of Claim, the Business Contracts contained, inter alia, the terms stated in paragraph 28 other than sub-paragraphs (m), (n) and (o);
- (b) denies the allegations in sub-paragraphs 28(m), (n) and (o) and says that the relevant term provides as follows:

ANZ does not agree to provide any credit in respect of your offset account and you must not overdraw. If the account becomes overdrawn then, although ANZ may in its discretion honour your withdrawal, immediate repayment will be required and you may be charged a fee and interest on the debit balance (PDS at page 12);

- (c) says further that it relies upon the full terms of the versions of the Business PDSs and the Business Fees Documents as current from time to time;
- (d) otherwise denies the allegations.

25. In respect of paragraph 29, ANZ:

- (a) admits that the Business PDSs and the Business Fees Documents were amended as indicated in Schedule 9-7 to the Amended Statement of Claim; and
- (b) otherwise denies the allegations.

26. ANZ does not plead to paragraph 30 as it contains no allegations against it.

27. ANZ admits the allegations in paragraph 31.

28. In respect of paragraph 32, ANZ:

- (a) refers to and repeats the admissions in sub-paragraphs 12(a) to (d) herein save that references to "Saving" in those sub-paragraphs are to be read as "Business" for the purposes of this sub-paragraph;
- (b) otherwise denies the allegations;
- (c) says further that:

- (i) the second applicant and the Business Group Members were entitled, under the Business Contracts to which they were parties, to terminate the Business Contract at any time;
- (ii) many other banks and financial institutions offered banking facilities that were substitutable for and competitive with the Business Accounts offered by ANZ; and
- (iii) during the Relevant Period, ANZ offered other products and services which did not incur exception fees or by which customers were able to avoid or reduce the incurring of exception fees;

### **Particulars**

Customers with Business Accounts were given the option of "switching off" the overdraft facility on the account which would prevent overdrafts when using ATM machines and EFTPOS facilities (unless the merchant's facility was offline).

29. ANZ denies the allegations in paragraph 33.

### **The Exception Fees Charged**

#### ***Saving Accounts***

30. In respect of paragraph 34, ANZ:

- (a) admits that ~~during the Relevant Period~~~~prior to around 14 December 2009~~ ANZ it charged the first applicant Saving Honour Fees, ~~Saving Dishonour Fees~~ and Saving Non-Payment Fees;

(b) denies that it charged the first applicant Saving Dishonour Fees during the Relevant Period;

- ~~(b)(c)~~ otherwise does not admit the allegations and, in order to investigate the allegations in respect of Saving Group Members further, will require the account numbers of the Saving Accounts that the Saving Group Members allegedly held with ANZ.

#### ***Card Accounts***

31. In respect of paragraph 35, ANZ:

- (a) admits that since June 2006 ANZ has charged the first applicant Late Payment Fees and Overlimit Fees;
- (b) admits that the first applicant continues to have a Card Account on contractual terms that include the potential payment of Late Payment Fees and Overlimit Fees; and

- (c) otherwise does not admit the allegations and, in order to investigate the allegations in respect of Card Group Members further, will require the account numbers of the Card Accounts that the Card Group Members allegedly held with ANZ.

### ***Business Accounts***

32. In respect of paragraph 36, ANZ:

- (a) admits that since December 2008 ANZ has charged the second applicant Business Honour Fees and Business Dishonour Fees;
- (b) denies that ANZ has charged the second applicant ~~Business Dishonour Fees~~ ~~or~~ Business Non-Payment Fees;
- (c) admits that the second applicant continues to have a Business Account on contractual terms that include the potential payment of Honour Fees, Dishonour Fees and Non-Payment Fees;
- (d) otherwise does not admit the allegations and, in order to investigate the allegations in respect of Business Group Members further, will require the account numbers of the Business Accounts that the Business Group Members allegedly held with ANZ.

### ***The Exception Fees***

33. ANZ does not plead to paragraph 37 as it contains no allegations against it.

### ***The Penalty Argument***

#### ***Penalty imposed upon breach of contract***

34. In respect of paragraph 38, ANZ:

- (a) denies the allegations;
- (b) says that Saving Exception Fees were payable upon the occurrence of the events stated in the applicable Exception Fee Provisions.

35. In respect of paragraph 39, ANZ:

- (a) denies the allegations;
- (b) says that the Card Exception Fees were payable upon the occurrence of the events stated in the applicable Exception Fee Provisions.

36. In respect of paragraph 40, ANZ:

- (a) denies the allegations;
- (b) says that the Business Exception Fees were payable upon the occurrence of the events stated in the applicable Exception Fee Provisions.

37. In respect of paragraph 41, ANZ:

- (a) denies the allegations;
- (b) refers to and repeats the allegations in paragraphs 34(b), 35(b) and 36(b) herein.

38. In respect of paragraph 42, ANZ:

- (a) admits that it charged the first applicant Saving Exception Fees pursuant to the terms of the Saving Contracts entered into with the first applicant;
- (b) admits that it charged the first applicant Card Exception Fees pursuant to the terms of the Card Contracts entered into with the first applicant;
- (c) admits that it charged the second applicant Business Exception Fees pursuant to the terms of the Business Contracts entered into with the second applicant;
- (d) otherwise does not admit the allegations in paragraph 42 and, in order to investigate the allegations in respect of Group Members further, will require the account numbers of the accounts that the Group Members allegedly held with ANZ.

39. In respect of paragraph 43, ANZ:

- (a) admits that, during the Relevant Period:
  - (i) the quantum of each Exception Fee that was included in the terms and conditions of the Saving Account, Card Account and Business Account products offered to the public by ANZ was determined by ANZ;
  - (ii) ANZ did not determine the quantum of each Exception Fee by reference to a sum that would have been recoverable as unliquidated damages;
- (b) otherwise denies the allegations;
- (c) says further that the occurrence of the events that gave rise to each Exception Fee charged to each applicant and group member constituted the supply of one or more services by ANZ for the benefit of the applicant or group member (as applicable);

#### **Particulars**

- (A) In the case of Saving Exception Fees and Business Exception Fees:
  - (I) the services supplied in connection with honour fees, dishonour fees and non-payment fees included the assessment of a request made by the customer for the

supply of credit in amounts not previously agreed by ANZ;

- (II) the services supplied in connection with dishonour fees and non- payment fees also included the assessment of a request for the processing of a payment instrument or method not previously agreed with ANZ;
- (III) the services supplied in connection with honour fees also included the supply of credit at the request of the customer in amounts not previously agreed by ANZ;

(B) In the case of Card Exception Fees:

- (I) the services supplied in connection with late payment fees included the supply of credit at the request of the customer for periods of time not previously agreed by ANZ;
- (II) the services supplied in connection with overlimit fees included the assessment of a request made by the customer for the supply of credit in amounts not previously agreed by ANZ;
- (III) the services supplied in connection with overlimit fees included the supply of credit at the request of the customer in amounts not previously agreed by ANZ.

(d) says further or in the alternative that, at the time that ANZ entered into a Saving Contract, Card Contract or Business Contract with an applicant or group member, or the time at which the amount of Exception Fees able to be charged by ANZ pursuant to any such contract was varied, whichever was the later, the costs, loss or damage that ANZ might have suffered or incurred as a result of or in connection with the occurrence of an event upon which an Exception Fee might have been charged was not reasonably capable of being calculated or ascertained.

40. In respect of paragraph 44, ANZ:

(a) denies the allegations in paragraph 44;

40-(b) says further or in the alternative that, by reason of the matters stated in paragraph 39(d) herein, the Exception Fees are not penalties at law or in equity.

41. In respect of paragraph 45, ANZ:

(a) denies the allegations in paragraph 45;

41.(b) says further or in the alternative that, by reason of the matters stated in paragraph 39(d) herein, the Exception Fees are not penalties at law or in equity.

***Penalty in Equity***

42. ANZ denies the allegations in paragraph 46.
43. ANZ denies the allegations in paragraph 47.
44. In respect of paragraph 48:
  - (a) ANZ:
    - (i) admits sub-paragraph 48(a) in respect of the period from March 2004 onwards; and,
    - (ii) otherwise does not admit the allegations.
  - (b) ANZ:
    - (i) admits sub-paragraph 48(b) in respect of the period from March 2004 onwards; and,
    - (ii) otherwise does not admit the allegations.
  - (c) ANZ otherwise denies the allegations.
45. In respect of paragraph 49 ANZ:
  - (a) repeats paragraph 38; and
  - (b) otherwise denies all of the allegations.
46. In respect of paragraph 50 ANZ:
  - (a) admits that the documents identified in Saving Contracts, Card Contracts and Business Contracts were drafted by ANZ;
  - (b) otherwise denies the allegations.
47. ANZ denies the allegations in paragraph 51.
48. In respect of paragraph 52 ANZ:
  - (a) admits that it charged interest on the overdrawn sum;
  - (b) otherwise denies the allegations.
49. In respect of paragraph 53 ANZ:
  - (a) admits that it charged interest on the overdrawn sum;
  - (b) otherwise denies the allegations.
50. ANZ denies the allegations in paragraph 54.
51. ANZ denies the allegations in paragraph 55.



- 52. ANZ denies the allegations in paragraph 56.
- 53. ANZ denies the allegations in paragraph 57.
- 54. ANZ denies the allegations in paragraph 58.
- 55. ANZ denies the allegations in paragraph 59.

***Relief from the alleged penalty provisions***

56. In respect of paragraph 60, ANZ:

(a) denies the allegations ~~in paragraph 60~~; and

56.(b) refers to and repeats the matters stated in paragraph 39(d) herein.

57. In respect of paragraph 61, ANZ:

(a) denies the allegations ~~in paragraph 61~~;

57.(b) says further or in the alternative that, by reason of the matters stated in paragraph 39(d) herein, the Exception Fees are not penalties at law or in equity.

58. In respect of paragraph 62, ANZ:

(a) denies the allegations ~~in paragraph 62~~;

58.(b) says further or in the alternative that, by reason of the matters stated in paragraph 39(d) herein, the Exception Fees are not penalties at law or in equity.

- 59. ANZ denies the allegations in paragraph 63.
- 60. ANZ denies the allegations in paragraph 64.
- 61. ANZ denies the allegations in paragraph 65.
- 62. ANZ denies the allegations in paragraph 66.
- 63. ANZ denies the allegations in paragraph 67.
- 64. ANZ denies the allegations in paragraph 68.
- 65. ANZ denies the allegations in paragraph 69.
- 66. ANZ does not admit the allegations in paragraph 70.
- 67. ANZ denies the allegations in paragraph 71.
- 68. In respect of paragraph 72, ANZ denies that any such debt is due.

**Breach of Implied Term**

69. In respect of paragraph 73, ANZ:

- (a) admits that under the Saving Contracts, Card Contracts and the Business Contracts (collectively referred to in this Amended Defence as **Contracts**),



ANZ had the right to vary the quantum of the Exception Fees upon giving notice to the customer;

- (b) says further that the customer had the right to terminate the Contracts at any time upon notice to ANZ, including if the customer did not agree with any variation to the quantum of the Exception Fees;
- (c) otherwise does not admit the allegations.

70. ANZ denies the allegations in paragraph 74.

71. ANZ denies the allegations in paragraph 75.

72. ANZ denies the allegations in paragraph 76.

### **Unconscionable Conduct**

73. In respect of paragraph 77, ANZ:

- (a) admits that it entered into and gave effect to:
  - (i) the Saving Contracts with the applicants and any Saving Group Members;
  - (ii) the Card Contracts with the first and second applicants and any Card Group Members;
  - (iii) the Business Contracts with the applicants and any Business Group Members,

in trade or commerce and in connection with the supply or possible supply of financial services; and
- (b) otherwise does not admit the allegations.

74. In respect of paragraph 78, ANZ:

- (a) admits that the financial service supplied by ANZ to:
  - (i) the first applicant and the Saving Group Members pursuant to each Saving Contract entered into with those persons; and
  - (ii) the first applicant and the Card Group Members pursuant to each Card Contract entered into with those persons,

was of a kind ordinarily acquired for personal, domestic or household use;
- (b) otherwise does not admit the allegations.

75. In respect of paragraph 79, ANZ repeats its response to paragraphs 16, 17, 23, 25, 43 and 46-60 of the [Amended Statement of Claim](#).

76. ANZ denies the allegations in paragraph 80.

77. ANZ denies the allegations in paragraph 81.

- 78. ANZ admits paragraph 82.
- 79. ANZ does not admit the allegations in paragraph 83.
- 80. In respect of paragraph 84, ANZ repeats its response to paragraphs 32, 33, 43, and 46-60 of the [Amended](#) Statement of Claim.
- 81. ANZ denies the allegations in paragraph 85.
- 82. ANZ denies the allegations in paragraph 86.

#### **Unjust Transactions Under the Code and the New Code**

- 83. ANZ denies paragraph 87.
- 84. ANZ denies paragraph 88.
- 85. ANZ denies paragraph 89.
- 86. ANZ admits paragraph 90.
- 87. ANZ denies paragraph 91
- 88. ANZ denies paragraph 92.

#### **Unfair Terms**

- 89. ANZ admits paragraph 93.
- 90. In respect of paragraph 94, ANZ repeats its response to paragraphs 16, 17, 23, 25, 43 and 46-60 of the [Amended](#) Statement of Claim.
- 91. In respect of paragraph 95 ANZ:
  - (a) admits that the Exception Fee Provisions were not individually negotiated;
  - (b) otherwise denies the allegations.
- 92. ANZ denies the allegations in paragraph 96.
- 93. In respect of paragraph 97 ANZ:
  - (a) admits that the Card Contracts entered into, renewed or relevantly varied on or after 1 July 2010 were and are consumer contracts within the meaning of section 12BF(3) of the ASIC Act;
  - (b) otherwise denies the allegations.
- 94. In respect of paragraph 98, ANZ repeats its response to paragraphs 23, 25, 43 and 46-60 of the [Amended](#) Statement of Claim.
- 95. In respect of paragraph 99 ANZ:
  - (a) [admits that it charged interest on amounts borrowed by the applicants and group members pursuant to a Saving Contract, Card Contract or Business Contract;](#)

~~(a)~~(b) repeats its response to paragraphs 16, 17, 23 and 25;

~~(b)~~(c) otherwise denies the allegations.

96. ANZ denies the allegations in paragraph 100.

### **Relief Claimed**

97. ANZ denies that the applicants and Group Members are entitled to the relief set out in the Application.

98. ANZ says further that:

- (a) to the extent that any of the applicants or any Group Member claims:
  - (i) under section 12GF(1) of the ASIC Act, loss or damage; or
  - (ii) under section 12GM(2) of the ASIC Act, a compensatory or other order in respect of loss or damage,

suffered by him, her or it more than 6 years prior to the commencement of these proceedings by the applicants, the claim is barred by sections 12GF(2) and 12GM(5) of the ASIC Act respectively;
- (b) to the extent that any of the applicants or any Group Member claims, under section 159(1) of the FTA, loss or damage suffered by him, her or it more than 6 years prior to the commencement of these proceedings by the applicants, the claim is barred by section 159(3) of the FTA;
- (c) to the extent that any of the applicants or any Group Member claims, under section 71 of the Code, an order in respect of a Pre-July 2010 Card Contract that was rescinded, discharged or otherwise came to an end more than 2 years prior to the commencement of these proceedings by the applicants, the claim is barred by section 73 of the Code;
- (d) to the extent that any of the applicants or any Group Member claims, under section 77 of the New Code, an order in respect of a New Code Card Contract that was rescinded, discharged or otherwise came to an end more than 2 years prior to the commencement of these proceedings by the applicants, the claim is barred by section 79 of the New Code;
- (e) to the extent that any of the applicants or any Group Member claims, under or by reason of the Amended Statement of Claim including under or by reason of paragraphs 44, 45, 61, 62, 63, 64, 65, 66, 67, 68, 69, 71, 72, 76 or 96 of the Amended Statement of Claim but excluding the claims referred to in sub-paragraphs (a) to (d) herein, the repayment of, or damages in respect of the payment of, an Exception Fee or any part thereof or any interest thereon:

- (i) that was paid by the applicant or Group Member more than 6 years prior to the commencement of these proceedings, and the claim is one to which section 5 of the *Limitation of Actions Act* 1958 (Vic) applies, the claim is barred by that section;
- (ii) that was paid by the applicant or Group Member more than 6 years prior to the commencement of these proceedings, and the claim is one to which section 14 or 15 of the *Limitation of Actions Act* 1969 (NSW) applies, the claim is barred by that section;
- (iii) that was paid by the applicant or Group Member more than 6 years prior to the commencement of these proceedings, and the claim is one to which section 11 or 12 of the *Limitation of Actions Act* 1985 (ACT) applies, the claim is barred by that section;
- (iv) that was paid by the applicant or Group Member more than 6 years prior to the commencement of these proceedings, and the claim is one to which section 10 of the *Limitation of Actions Act* 1974 (Qld) applies, the claim is barred by that section;
- (v) that was paid by the applicant or Group Member more than 6 years prior to the commencement of these proceedings, and the claim is one to which section 35 of the *Limitation of Actions Act* 1936 (SA) applies, the claim is barred by that section;
- (vi) that was paid by the applicant or Group Member more than 6 years prior to the commencement of these proceedings, and the claim is one to which section 4 of the *Limitation of Actions Act* 1974 (Tas) applies, the claim is barred by that section;
- (vii) that was paid by the applicant or Group Member more than:
  - (A) 2 years prior to the commencement of these proceedings, and the claim is one to which section 38(1)(a) of the *Limitation of Actions Act* 1935 (WA) applies, the claim is barred by that section;
  - (B) 6 years prior to the commencement of these proceedings, and the claim is one to which section 38 (other than 38(1)(a)) of the *Limitation of Actions Act* 1935 (WA) applies, the claim is barred by that section;
- (viii) that was paid by the applicant or Group Member more than 3 years prior to the commencement of these proceedings, and the claim is one to which section 12 or 13 of the *Limitation of Actions Act* 1981 (NT) applies, the claim is barred by that section.

99. To the extent that the applicants or group members seek relief in equity, including but not limited to relief in respect of the allegation that the Exception Fees constituted penalties in equity, the applicants and group members are disentitled to the relief claimed by reason of laches, acquiescence and delay and/or the operation of a limitation by analogy to the limitation periods identified in paragraph 98 above.
100. In the alternative to paragraph 97 herein, if, as alleged by the applicants, any Exception Fee that was paid by an applicant or group member was payable upon breach of the applicable Exception Fee Provisions and is void as a penalty:
- (a) ANZ has incurred loss and damage as a result of the breach of the relevant Exception Fee Provision by the applicant or group member (as applicable);

**Particulars**

The loss and damage comprises the costs that were incurred by ANZ as a consequence of or in connection with the occurrence of the events that gave rise to the Exception Fee. The calculation of the loss and damage will be the subject of expert evidence.

- (b) ANZ claims such loss and damage by way of set-off against the claim of the applicant or group member (as applicable).
101. In the alternative to paragraphs 97 and 100 herein, if, as alternatively alleged by the applicants, any Exception Fee that was paid by an applicant or group member was void as a penalty:
- (a) the applicable Exception Fee was payable upon the occurrence of an event which constituted the supply of a service by ANZ for the benefit of the applicant or group member (as applicable);

**Particulars**

ANZ refers to and repeats the particulars to paragraph 39(c) herein.

- (b) the applicant or group member (as applicable) requested the service to be supplied by ANZ by his, her or its conduct;
- (c) ANZ accepted the request and supplied the service;
- (d) ANZ claims reasonable remuneration for the supply of the service by way of set-off against the claim of the applicant or group member (as applicable).

**Particulars**

The calculation of the reasonable remuneration will be the subject of expert evidence.

- (e) alternatively,
- (i) ANZ has incurred loss and damage as a result of the event;

**Particulars**

The loss and damage comprises the costs that were incurred by ANZ as a consequence of or in connection with the occurrence of the events that gave rise to the Exception Fee. The calculation of the loss and damage will be the subject of expert evidence.

- (ii) ANZ claims monetary recompense or compensation for the occurrence of the particular event by way of set-off against the claim of the applicant or group member (as applicable).

Date: ~~18 April~~ 20 June 2013



Signed by ~~Ashley Wharton~~ Fiona Hudgson

Lawyer for the Respondent

This pleading was prepared by ~~Ashley Wharton~~ Fiona Hudgson, lawyer.

**Certificate of lawyer**

I ~~Ashley Wharton~~Fiona Hudgson certify to the Court that, in relation to the Amended Defence filed on behalf of the Respondent, the factual and legal material available to me at present provides a proper basis for:

- (a) each allegation in the pleading; and
- (b) each denial in the pleading; and
- (c) each non admission in the pleading.

Date: ~~18 April~~20 June 2013



Signed by ~~Ashley Wharton~~Fiona Hudgson

Lawyer for the Respondent