

NOTICE OF FILING

Details of Filing

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File Title: DANIEL JEAN-MARIE TOUR v AUSTRALIA AND NEW ZEALAND
BANKING GROUP LTD
Registry: VICTORIA REGISTRY - FEDERAL COURT OF AUSTRALIA



A handwritten signature in blue ink, reading "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.



Proposed Further Amended Statement of Claim

No. VID 706 of 2021

Federal Court of Australia
District Registry: Victoria
Division: General

DANIEL TOUR

Applicant

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

Respondent

A. PARTIES

1. Daniel Tour (the **Applicant**) commences this proceeding as a representative party pursuant to Part IVA of the *Federal Court of Australia Act 1976* (Cth) on its own behalf and on behalf of the Group Members.
2. The Applicant and the persons it represents (**Group Members**) are individuals who:
 - (a) were a party to a credit card contract with the Respondent (**ANZ**) between 1 July 2010 and prior to 1 January 2019 (the **Contract**, collectively the **Contracts**), which contained the terms alleged below;
 - (b) suffered loss and damage by or resulting from the conduct of ANZ alleged below:- and

Particulars

- i. The Applicant was sent a Letter of Offer by ANZ on 25 August 2004.
- ii. ANZ gave or otherwise communicated to the Applicant the following versions of the Conditions of Use that were applicable during the Claim Period:

Filed on behalf of	Daniel Tour (Applicant)
Prepared by	Phi Finney McDonald and Peter Collinson QC and Eloise Dias of counsel
Law firm	Phi Finney McDonald
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1. June 2010;
2. October 2010;
3. April 2011;
4. December 2011;
5. June 2012;
6. October 2012;
7. April 2013;
8. July 2013;
9. March 2014;
10. September 2014;
11. May 2015;
12. July 2015;
13. February 2016;
14. June 2016;
15. October 2017;
16. November 2018.

- iii. The precise dates on which each of the versions of the Conditions of Use were given or otherwise communicated to the Applicant are currently unknown and will be provided after discovery.

~~The precise dates upon which the Letter of Offer, Conditions of Use document and credit card were given or otherwise communicated to, and accepted by, the Applicant is currently unknown and will be provided after discovery.~~

(c) were not, and are not as at the date of this Amended Statement of Claim, any of the following:

- i. a related party (as defined by s 228 of the Corporations Act) of the Respondent;
- ii. a related body corporate (as defined by s 50 of the Corporations Act) of the Respondent;
- iii. an associated entity (as defined by s 50AAA of the Corporations Act) of the Respondent;

- iv. directors or officers or a close associate (as defined by s 9 of the Corporations Act) of the Respondent; or
- v. a Justice, Registrar, District Registrar, or Deputy District Registrar of the High Court of Australia or the Federal Court of Australia.

3. ANZ is and at all times has been a corporation which:

- (a) is registered pursuant to the Corporations Act;
- (b) is a person within the meaning of s 12CA of the *Australian Securities and Investments Commission Act 2001* (Cth) (**ASIC Act**);
- (c) has and had its registered office in the state of Victoria; and
- (d) carries on and carried on, as its sole or principal business, being the business of banking, throughout Australia.

4. At all material times, ANZ:

- (a) engaged in marketing in respect of credit cards offered by it, which included promoting the interest free period applicable to such cards; and
- (b) charged interest in respect of credit card contracts entered into by it with consumers, including the Applicants and Group Members, at annual percentage rates of between 11.49% to 20.24%, with the majority of types of credit card contracts on offer having an interest rate between 18.79% and 20.24%[†].

B. THE CONTRACTS

5. The Contracts were and are:

- (a) consumer contracts within the meaning of section 12BF(3) of the *Australian and Securities Investments Commission Act 2001* (Cth) (**ASIC Act**);

Particulars

Pursuant to the Contracts, ANZ agreed to supply to the Applicant and each Group Member a credit facility that was wholly or predominantly acquired for personal, domestic or household purposes, which credit was to be ordinarily obtained by use of a credit card.

- (b) standard form contracts within the meaning of sections 12BF(1)(b) and 12BK of the ASIC Act by reason of the following:
 - (i) the presumption in section 12BK(1) of the ASIC Act; and
 - (ii) further or alternatively, the fact that:

- A. ANZ had all or most of the bargaining power relating to the transaction;
- B. the documents setting out the written terms of the Contracts were prepared by ANZ before any discussion relating to the transaction occurred between the parties;
- C. the Applicant and the Group Members were, in effect, required either to accept or reject the terms of the Contracts in the form in which they were presented;
- D. the Applicant and the Group Members were not given an effective opportunity to negotiate the terms of the Contracts;
- E. the terms of the Contracts did not take into account the specific characteristics of the Applicant or the Group Members; and
- F. ANZ had a contractual right to vary unilaterally terms or conditions of the Contracts; and

(c) a financial product within the meaning of section 12BF(1)(c)(i) and section 12BAA of the ASIC Act.

6. The express written terms of the Contracts were and are contained in the ANZ Credit Cards Conditions of Use document available on the ANZ website as varied from time to time by ANZ (**Conditions of Use**) and the letter of offer sent to each of the Applicant and the Group Members by ANZ (**Letter of Offer**), as varied by ANZ from time to time.

Particulars

Copies of the Applicant's Conditions of Use can be provided on request from the Applicant's solicitors. ~~The Applicant does not presently have the Letter of Offer sent to him by ANZ, a copy of which will be provided following discovery.~~ The dates, copies and any relevant variation of the Conditions of Use and Letters of Offer applicable to the Group Members' Contracts are currently unknown and will be provided following the trial of the Applicant's claim.

7. At all materials times the Conditions of Use contained ~~the following express terms~~ the following effect:

- (a) "credit card contract" means the Letter of Offer and Parts A and B of the Conditions of Use;
- (b) "account holder" means the person in whose name the credit card account has been opened;
- (c) "credit card account" means the account set out in the Letter of Offer or any other account opened in accordance with the Contract, for example, if the credit card is lost or stolen;

- (d) The credit card account must be used wholly and exclusively for personal, domestic or household use;
- (e) “purchase” means: (a) a purchase of goods or services (other than one falling within any of paragraphs (b) to (f) of the definition of cash advance); or (b) any other use of your credit card account treated by us as a purchase (which may include anything falling within any of paragraphs (b) to (f) of the definition of cash advance), and includes the amount of such purchase or other use (and any related amount charged by the merchant in connection with the purchase or other use);
- (f) “purchases balance” means (as modified or adjusted (if applicable) by the Conditions of Use) the total amount outstanding on the credit card account at any time in respect of the following amounts:
 - (i) Credit provided in respect of purchases.
 - (ii) ANZ Fees debited to the credit card account, other than Specific Fees (as defined);
 - (iii) Stamp duty and other government charges debited to the credit card account, other than Specific Stamp Duty and Charges (as defined);
 - (iv) Interest charges debited to the credit card account in respect of purchases, general fees or general charges;
 - (v) Interest charges in respect of the above interest, and also interest charges in respect of other interest referred to in this paragraph, debited to the credit card account;
- (g) “statement of account” means, in relation to a particular statement period, the statement issued by ANZ to the account holder, which shows how much the account holder must pay to ANZ and when payment is due;
- (h) “statement period” means a period determined by ANZ not exceeding 40 days, commencing from the start of the credit card contract or, if later, the day after the end of the previous statement period;
- (i) “Closing Balance” means, in relation to a statement period, the outstanding balance on the credit card account as at the close of the statement period (and, for the avoidance of doubt, includes the Instalment Plan and Buy Now Pay Later plan balances as at the close of that statement period);

- (j) “Due Date” means, in relation to a statement period, the date identified as such in the statement of account for that statement period;
- (k) the account holder must pay the “Minimum Monthly Payment” shown on each statement of account by the due date shown on the statement of account (the **DUE DATE**), in addition to any amount shown on the statement of account as being payable immediately;
- (l) ANZ may at any time change the way in which interest is calculated or applied and change any term of the Contract.

Particulars

The terms were contained in writing in the Conditions of Use as varied from time to time, copies of which can be provided on request by the Applicant’s solicitors.

8. At all materials times the Contract contained terms by which ANZ agreed to provide the Applicant and the Group Members with a maximum interest free period of up to 55 days on the credit provided in respect of purchases (**interest free period**).

Particulars

The Letter of Offer received by the Applicant contained words which informed the Applicant that he received a maximum interest free period on the purchases balance of up to 55 Days.

The Conditions of Use defined the term “purchases balance” to mean the total amount outstanding on the credit card account at any time in respect of, inter alia, the amount of credit provided in respect of purchases.

9. At all materials times the Contract contained ~~the following express~~ terms in respect of interest charges to the following effect (the **Interest Term**):

Interest charges on the purchases balance

What is interest charged on?

(a) Subject to paragraph (b), we charge interest on the following amounts. The total amount outstanding on the credit card account at any time in respect of the following amounts is referred to as the ‘purchases balance’.

(i) Credit provided in respect of purchases.

(ii) ANZ Fees debited to the credit card account, other than Specific Fees (as defined) (‘general fees’).

(iii) Stamp duty and other government charges debited to the credit card account, other than Specific Stamp Duty and Charges (as defined) ('general charges').

(iv) Interest charges debited to the credit card account in respect of purchases, general fees or general charges.

(v) Interest charges in respect of the above interest, and also interest charges in respect of other interest referred to in this paragraph (v), debited to the credit card account.

When is interest not charged?

(b) Subject to paragraph (c), we will not charge interest on the relevant part of the purchases balance of the credit card account in the circumstances described below.

(i) In general, we will not charge interest on the purchases balance if you pay the full Closing Balance shown on each statement of account by the applicable DUE DATE.

(ii) Specifically, subject to paragraph (iii), we will not charge interest on a particular debit forming part of the purchases balance (including credit provided in respect of a purchase, a general fee, a general charge, or an interest charge) if you pay by each applicable DUE DATE the full Closing Balance:

(A) shown on the most recent statement of account (if any) ('**the initial paid statement**') issued before that debit first appeared on a statement of account; and

(B) shown on the statement of account on which that debit first appears.

(iii) If you did not pay by the applicable DUE DATE the full Closing Balance shown on the last statement of account (if any) issued before an initial paid statement, paragraph (ii) will not apply to a debit made to the credit card account during the period commencing immediately after the end of the statement period to which the initial paid statement relates up to and including the date on which you paid the full Closing Balance shown on the initial paid statement, in respect of each relevant day during that period.

(c) Paragraph (b) does not apply to No Interest Free Period credit card accounts.

How is interest calculated, if it applies?

(d) Subject to paragraph (b), the interest we charge on the purchases balance is charged on a daily basis, and is calculated by applying the current purchases daily percentage rate (being the current purchases annual percentage rate divided by 365) to the relevant part of the account holder's purchases balance as at the end of the relevant day.

Particulars

The ~~terms~~ Interest Term ~~were~~ was contained in writing in the Conditions of Use as varied from time to time, copies of which can be provided on request by the Applicant's solicitors.

10. At all material times, the Contract contained ~~the following~~ terms to the following effect in respect of when ANZ would debit interest on the credit card account:

(a) Interest charges in respect of a statement period are generally debited to the credit card account as at the last day of the statement period. However, the calculation of the interest charges for that statement period does not include those interest charges themselves.

(b) If ANZ is not yet able at the end of a statement period to determine whether an interest free period will apply to a debit forming part of the purchases balance in respect of a particular day in that statement period, then the interest charges on that debit in respect of that day will be debited to the credit card account as at the last day of the next statement period (if at all) and, again, the calculation of the interest charges for that next statement period does not include those interest charges themselves.

Particulars

The terms were contained in writing in the Conditions of Use as varied from time to time, copies of which can be provided on request by the Applicant's solicitors.

C. INTEREST CHARGED TO THE APPLICANT PURSUANT TO THE CONTRACTS

11. On or around 13 August 2018, the Applicant received a monthly statement from ANZ (**August 2018 Statement**), which said that:

- (a) the statement period was 16 July 2018 to 13 August 2018;
- (b) the purchases, cash advances and other debits on the account during the statement period totalled \$5,440.36;
- (c) the interest debited to the account during the statement period was \$0.00;
- (d) the Minimum Monthly Payment was \$86.00;

- (e) the Due Date (shown above the Minimum Monthly Payment figure) was 7 September 2018;
- (f) the Closing Balance was \$4,297.67.

Particulars

A copy of the August 2018 Statement is available to be inspected on request from the Applicant's solicitors.

- 12. On or around 20 August 2018, before the Due Date shown on the August 2018 Statement, the Applicant paid \$3,500.00 towards their credit card account (**Repayment**).
- 13. On or around 13 September 2018, the Applicant received a monthly statement from ANZ (**September 2018 Statement**) which stated that:
 - (a) the statement period was 14 August 2018 to 13 September 2018;
 - (b) the purchases, cash advances and other debits on the account during the statement period totalled \$13,522.92;
 - (c) the interest debited to the account during the statement period was \$204.05;
 - (d) the Minimum Monthly Payment was \$291.00;
 - (e) the Due Date (shown above the Minimum Monthly Payment figure) was 8 October 2018;
 - (f) the Closing Balance was \$14,524.64.

Particulars

A copy of the September 2018 Statement is available to be inspected on request from the Applicant's solicitors.

- 14. The interest debited by ANZ from the Applicant's account as stated in the September 2018 Statement (being \$204.05) was comprised of the following component amounts, which are not set out in the statement:
 - (a) an amount of interest in respect of the credit provided for each and all purchases made during the August 2018 statement period, charged at the daily rate until the conclusion of the August 2018 statement (~~Retrospective Interest~~);
 - (b) an amount of ~~in~~ interest in respect of the credit provided in respect of the purchases balance at the conclusion of the August 2018 statement period up to and including the ~~conclusion~~ 25th day of the September 2018 statement, being 7 September 2018, charged at the daily rate;

(c) an amount of interest in respect of the credit provided in respect of each and every purchase made during the September 2018 statement period up to and including the 25th day of the September 2018 statement period, being 7 September 2018, charged at the daily rate

(together, Retrospective Interest); and

(d) an amount of interest in respect of the credit provided from the 26th day of the September 2018 statement period, being 8 September 2018, until the end of that statement period.

~~15. The Retrospective Interest referred to in paragraph 14(a) above was charged by ANZ to credit provided for purchases which were:~~

~~(a) made, and debited to the account, during the previous statement period (the August 2018 Statement);~~

~~(b) not subject to interest charges at the time of the purchase or debit;~~

~~(c) not subject to interest charges in the August 2018 Statement; and~~

~~(d) repaid by the Applicant by the Due Date set out in the August 2018 Statement, to the extent of \$3,500.00. Omitted.~~

16. ANZ charged the Retrospective Interest referred to in paragraph 14(a) pursuant to the Terms of the Contract, namely the terms set out at paragraphs 9 to 10 above.

17. During the term of the Contract, ANZ charged the Applicant Retrospective Interest on at least 139 further occasions in the same manner as that set out in paragraphs 11 to ~~1415~~ above, in at least the following statement periods:

(a) the statement period ending 13 March 2011;

(b) the statement period ending 13 February 2012;

(c) the statement period ending 14 July 2013;

(d) the statement period ending 13 January 2014;

(e) the statement period ending 13 July 2014;

(f) the statement period ending 13 January 2015;

(g) the statement period ending 15 November 2015;

(h) the statement period ending 13 July 2016;

(i) the statement period ending 13 December 2016;

(j) the statement period ending 14 May 2017;

(k) the statement period ending 143 January 2018;

(l) the statement period ending 13 June 2018;

(m) the statement period ending 13 September 2018.

18. Each Group Member was charged Retrospective Interest during the terms of their respective Contracts with ANZ in the same manner as set out in paragraphs 11 to 14~~15~~ above.

Particulars

The dates and amounts of Retrospective Interest are currently unknown and will be provided following the trial of the Applicant's claim.

D. UNFAIR TERM

19. The effect of the Interest Term is that it gives ANZ the right to charge Retrospective Interest as illustrated at paragraph 14 above, being interest charged at the daily rate to the balance, or part of a balance, of the credit card on a day purchases made by the account holder during a statement period to which interest did not apply at the time, because of facts or circumstances coming into existence after that day, where the relevant fact or circumstance is if the account holder later failings to pay any part of the Closing Balance by the Due Date shown on a the monthly statement in respect of that statement period (**Retrospective Interest**).
20. The Interest Term is not transparent within the meaning of section 12BG(2)-(3) of the ASIC Act for the following reasons:
- (a) the Interest Term is not presented in a manner that would allow a reasonable person to understand ANZ's right to charge Retrospective Interest to the account holder;
 - (b) the Interest Term is not expressed in reasonably plain language and not presented clearly;
 - (c) the Interest Term is not presented in a manner that would draw the account holder's attention to it such as by way of capitalised, bold or italicised type;
 - (d) the Interest Term is contained in the Conditions of Use which exceeds 70 pages;
 - (e) the Interest Term does not clearly inform the account holder that they will lose the interest free period for all purchases made in the relevant period (where the Closing Balance is not paid in full by the Due Date) even where the amount of a particular purchase is paid in full by the Due Date; and
 - (f) the Interest Term does not expressly state that it applies to credit card accounts to which interest free periods apply.

21. The Interest Term is a term that would cause a significant imbalance in the parties' rights and obligations arising under the Contract to the extent that it purports to give ANZ a right to charge Retrospective Interest because:
- (a) it is not transparent for the reasons set out in paragraph 20 above;
 - (b) it gives ANZ the right to charge Retrospective Interest in respect of purchases that were subject to an interest free period, both as at the time they were made and as at the time of the monthly statement for the relevant period in which they appeared;
 - (c) it gives ANZ the right to charge Retrospective Interest in respect of purchases regardless of whether the amount of the purchase was repaid by the account holder by the Due Date;
 - (d) it gives ANZ the right to charge Retrospective Interest in respect of purchases regardless of how small the amount by which the full Closing Balance was not repaid by the Due Date;
 - (e) it gives ANZ the right to charge Retrospective Interest which is not calculated in proportion to the loss, if any, which it suffered, or is likely to suffer, by reason of non-payment of the full Closing Balance by the Due Date;
 - (f) the account holder is unable to calculate the amount of the Retrospective Interest that they will be charged or, alternatively, is not readily able to do so;
 - (g) the account holder is unable to make an informed decision as to whether they should repay any or all of the Closing Balance or incur Retrospective Interest and interest on that interest;
 - (h) the account holder cannot opt out of the term.
22. The Interest Term is not reasonably necessary in order to protect the legitimate interests of ANZ to the extent that it purports to give ANZ a right to charge Retrospective Interest.
23. The Interest Term is a term that would cause detriment to a party, being the Applicant and Group Members, if it were to be applied or relied on by ANZ to charge Retrospective Interest.
24. As a consequence of the matters pleaded in paragraphs 5 and 20 to 23, the Interest Term is, and was at all relevant times, unfair and void pursuant to sections 12BG(1) and 12BF(1) of the ASIC Act to the extent that it purports to give ANZ a right to charge Retrospective Interest.
25. In charging Retrospective Interest to, and receiving Retrospective Interest from, the Applicant and Group Members, ANZ relied or purported to rely on the Interest Term and thereby contravened Division 2 of the ASIC Act within the meaning of section 12GM(10) of the ASIC Act.
26. The Applicant and Group Members have suffered loss or damage by reason of ANZ's contravening conduct.

Particulars

The loss or damage suffered by the Applicant and Group Members is:

- i. ~~the amount of Retrospective Interest charged by ANZ in respect of purchases or a purchase balance on a statement of account, which amount was later charged by ANZ to, and paid to ANZ by, the Applicant/Group Member a non-payment by the Due Date of the entire Closing Balance shown on the statement; and~~
- ii. the amount of interest charged by ANZ to, and paid to ANZ by, Applicant/Group Member on the amount referred to in paragraph i;
- iii. interest charged on the principal amounts that remained unpaid on a statement of account, which amounts would have been repaid by the Applicant/Group Member but for the charging by ANZ of, and the payment by the Applicant/Group Member of, Retrospective Interest; and
- iv. interest on the amounts in paragraphs i,ii and iii.

E. RESTITUTION FOR MONEY HAD AND RECEIVED ARISING FROM A MISTAKE

27. Further or alternatively, the Retrospective Interest paid by the Applicant and Group Members was paid in the mistaken belief that they were under a legal obligation to pay the amounts, and that ANZ was legally entitled to such payment, under the Contracts.

Particulars

The Applicant and Group Members did not have a legal obligation to pay the Retrospective Interest by reason of the matters pleaded in paragraphs 19 to 24 and were unaware of this at the time of making the payment.

28. In the premises pleaded at paragraphs 19 to 24 and paragraph 27, the Retrospective Interest paid by the Applicant and Group Members is money had and received by ANZ to the use of the Applicant and Group Members and ANZ is obliged to make restitution to the Applicant and Group Members of the same.

FE. UNCONSCIONABLE CONDUCT

29. The Applicant and Group Members refer to and repeat the matters pleaded at paragraphs 5(b) and 9 to 23 above.
30. ANZ marketed, entered into and gave effect to the Contracts with the Applicants and Group Members, including the Interest Term:
- (a) in trade or commerce; and

(b) in connection with the supply or possible supply of a financial service, namely the provision of a financial product being a credit card facility, within the meaning of sections 12CB and 12BAB of the ASIC Act.

31. The financial services provided by ANZ to the Applicant and Group Members pursuant to the Contracts were of a kind ordinarily acquired for personal, domestic or household use.
32. As a consequence of the matters ~~pleaded at~~ pleaded at paragraphs ~~27 29 to 29~~ 27 29 to 29 31, ANZ has engaged in conduct that was, in all the circumstances, unconscionable in contravention of section 12CB of the ASIC Act.
33. The Applicant and Group Members have suffered loss or damage by reason of ANZ's unconscionable conduct.

Particulars

The Applicant and Group Members repeat the particulars to paragraph 26.

F. RELIEF CLAIMED

34. The Applicant and Group Members claim the relief set out in the Application.

Date: ~~29 November 2021~~ ~~22 April 2022~~ 14 April 2023



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Signed by Brett Spiegel
Lawyer for the Applicant

This pleading was prepared by Peter Collison ~~KQC~~ and Eloise Dias.

Certificate of lawyer

I, Brett Spiegel, 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: ~~29 November 2021~~ ~~22 April 2022~~ 14 April 2023



Signed by Brett Spiegel
Lawyer for the Applicant