

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

No. VID 811 of 2010

BETWEEN

**JOHN ANDREWS**

First Applicant

**ANGELO JULIAN SALIBA**

Second Applicant

**EZI DOES IT PTY LTD  
(ACN 123 862 402)**

Third Applicant

and

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

Respondent

**AMENDED FAST TRACK RESPONSE**  
**TO THE AMENDED FAST TRACK STATEMENT DATED 3 MARCH 2011**

*This Fast Track Response responds to the Fast Track Statement This Fast Track Response responds to the Amended Fast Track Statement (Fast Track Statement) filed by the applicants on 3 March 2011 and Substituted Further Particulars filed by the applicants in this proceeding.*

*In this Fast Track Response, the respondent (ANZ) has adopted some, but not all, of the abbreviations and defined terms used in the Application and Fast Track Statement 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 paragraph 10 herein.*

*Save as set out in paragraph 10 or where the context does not permit, ANZ adopts the abbreviations and defined terms used in the Application and Fast Track Statement.*

## A. NATURE OF THE DISPUTE

1. The dispute concerns the question whether ANZ is obligated to repay all or part of the Exception Fees charged to the applicants and the Group Members (or to pay damages to the applicants and the Group Members) by reason of any of the various causes of action alleged by the applicants in the Fast Track Statement.
2. The dispute raises novel claims and contentions by the applicants, particularly in respect of the claims that the Exception Fees were penalties. In paragraph 2(b) of the Fast Track Statement, the applicant advances, as a primary contention, two aspects of its penalty claims that are novel:
  - (a) a contention that the Exception Fees were penalties by reason of the allegations in paragraphs 55 to 59 of the Fast Track Statement;
  - (b) a contention that the Exception Fees are penalties because they cannot be characterised properly (and, implicitly, need to be so characterised) as a genuine ***covenanted or pactional*** pre-estimate of damage (emphasis added), which seems to be a reference to paragraph 52(a) of the Fast Track Statement.

## B. ISSUES LIKELY TO ARISE

3. The questions of fact that are raised in the Fast Track Statement can be grouped into four main categories:
  - (a) The first category concerns the contractual terms and conditions between ANZ and its customers, of which Exception Fees are alleged to form part. The relevant allegations of fact are generally set out in section C.2 of the Fast Track Statement. The areas of dispute in this category are reasonably narrow.
  - (b) The second category concerns the circumstances in which ANZ and its customers entered into contracts providing for payment of Exception Fees. The relevant allegations of fact are set out in paragraph 19 of the Fast Track Statement (and repeated in paragraphs 26, 33 and 40). Many of those allegations are disputed.
  - (c) The third category concerns the quantum of the Exception Fees, particularly whether the quantum was a genuine pre-estimate of damage, whether the quantum substantially exceeded what would be recoverable as unliquidated damages and whether the quantum was extravagant and unconscionable. The relevant allegations of fact are set out in paragraph 52 of the Fast Track Statement (and repeated in paragraph 57). Those allegations are disputed.
  - (d) The fourth category concerns the quantum of any amount to be paid to the applicants and the Group Members if they are successful on any of their causes of action, which includes the question of the costs incurred by, or the loss or damage suffered by, ANZ by reason of the events that gave rise to the charging of the Exception Fees. The relevant allegations of fact are set out in paragraphs 54, 59, 61, 63, 65, 66, 73, 78 and 82 of the Fast Track Statement.

4. ~~ANZ has not been able to investigate and determine its response to all allegations of fact in the Fast Track Statement either because the Statement contains insufficient information to enable ANZ to do so or because insufficient time has been available to do so. In those instances, ANZ has not admitted the allegation. ANZ has attempted to identify in this Response the allegations of fact in respect of which ANZ requires further information. This paragraph is not used.~~
5. The questions of law, or mixed law and fact, which are raised in the Fast Track Statement, are:
- (a) whether the Exception Fees were penalties (paragraphs 52 and 58 of the Fast Track Statement);
  - (b) whether the charging of the Exception Fees:
    - (i) caused ANZ to be unjustly enriched (paragraph 63 of the Fast Track Statement);
    - (ii) was an unconscientious exercise of ANZ's legal rights (paragraph 64 of the Fast Track Statement);
    - (iii) was in breach of an implied term of the contracts between ANZ and its customers (paragraph 72 of the Fast Track Statement);
    - (iv) was unconscionable conduct in contravention of sections 12CB or 12CC of the *ASIC Act* and/or section 51AC of the TPA and/or sections 8 or 8A of the FTA (paragraphs 77 and 81 of the Fast Track Statement);
  - (c) whether the Card Contracts were unjust under section 70(1) of the Code or section 76 of the New Code (paragraphs 85 and 89 of the Fast Track Statement); and
  - (d) whether the Exception Fees in the Saving Contracts and the Card Contracts were void under section 32Y of the FTA as unfair terms within the meaning of section 32W of the FTA (paragraph 93 of the Fast Track Statement).
6. Each of the causes of action alleged in the Fast Track Statement, as listed above, relies upon the four categories of factual allegations set out in paragraph 3 above. There are no other material facts alleged in the Fast Track Statement in support of the causes of action.
7. In the circumstances, there would be no cost saving to the Court or the parties from determining the penalty claims prior to the other causes of action, as they each depend on substantially the same allegations of fact.
8. ~~The~~Despite the applicant filing Substituted Further Particulars of its case, the foundations of some of the claims stated in the Fast Track Statement are ~~obscure and it is desirable that these matters be addressed~~defective or unclear. Specifically:
- (a) The applicants' alternative penalty case as stated in paragraphs 55-59 of the Fast Track Statement is inconsistent with the case as stated in paragraph 5 of the Substituted Further Particulars. Paragraph 55 states that the Penalty Provisions are obligations that have a certain characterisation. Paragraph 5 states that the Penalty Provisions define events (rather than impose obligations) which were treated by the applicants and group

members in a certain manner. Further, both formulations of the case are stated at such a level of generality and obscurity that it is not possible to respond meaningfully to the allegations.

- (b) (a) What cause of action is invoked by the allegation that ANZ was unjustly enriched by the receipt of the Exception Fees (The applicants allege, in paragraph 63 of the Fast Track Statement)? and paragraph 6 of the Substituted Further Particulars, an independent claim for unjust enrichment. No such cause of action is recognised in Australia and the allegation should be struck out.
- (c) (b) What ANZ is unable to discern what cause of action is invoked by the allegation that the charging of the Exception Fees was an unconscientious exercise of ANZ's legal rights (alleged by the applicants in paragraph 64 of the Fast Track Statement)? and paragraph 7 of the Substituted Further Particulars, despite the applicant filing Substituted Further Particulars of its case.

9. In the time available to it to prepare this Response, ANZ has not been able to consider adequately whether there is a need for it to bring cross-claims against the applicants and the Group Members in order to address the rights that it would have in the event that the claims of the applicants or Group Members were to be successful in whole or in part. This paragraph is not used.

### C. RESPONSE TO APPLICANTS' CONTENTIONS

10. In this Response:
- (a) **Business Account** means an account to which any of the Business PDSs and Business Fees Documents applied from time to time;
  - (b) **Business Contract** has the meaning given by paragraph 38(a)(i) herein;
  - (c) **Business Group Member** means a Group Member who held, at some time during the period from August 2004 at least one Business Account;
  - (d) **Card Account** means an account to which any of the Conditions of Use applied from time to time;
  - (e) **Card Contract** has the meaning given by paragraph 24(a)(i) 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) **Commercial Card Account** means an account to which any of the Commercial Card Terms and Conditions applied from time to time;
  - (h) **Commercial Card Contract** has the meaning given by paragraph 31(a)(i) herein;
  - (i) **Commercial Card Group Member** means a Group Member who held, at some time during the period from on or around June 2007 at least one Commercial Card Account;
  - (j) **Contracts** has the meaning given by paragraph 73(a) herein;

- (k) Exception Fee Provisions are the provisions of the Saving Contracts, Card Contracts, Commercial Card Contracts and Business Contracts pursuant to which Exception Fees have been charged;
- (l) ~~(k)~~ **Pre-July 2010 Card Contracts** has the meaning given by paragraph 86(a) herein;
- (m) Relevant Period means the period during which the Exception Fees, that are the subject of the claims for relief in this proceeding, have been charged by ANZ;
- (n) ~~(l)~~ **Saving Account** means an account to which any of the PDSs and Fees Documents applied from time to time;
- (o) ~~(m)~~ **Saving Contract** has the meaning given by paragraph 17(a)(i) herein;
- (p) ~~(n)~~ **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;
- (q) ~~(o)~~ wherever ANZ admits herein an allegation in the Fast Track Statement that refers to a Business Account, Card Account, Commercial Card Account or Saving Account as those terms are defined in the Fast Track Statement, the admission is made only in respect of the Business Accounts, Card Accounts, Commercial Card Accounts and Saving Accounts as defined herein.

### C.1 Parties and Other Relevant Entities

11. In respect of paragraph 8, ANZ:

- (a) admits the allegations in sub-paragraphs (a), (b), (c) and (d);
- (b) as to sub-paragraph 8(e) ANZ:
- (i) admits that the first applicant was and is a debtor within the meaning that was given to that term under the Code;
- (ii) denies that the first applicant is currently a debtor under any contract currently regulated by the Code;
- (c) admits that the first applicant has commenced this proceeding in a representative capacity on behalf of the Group Members who:
- (i) held a Saving Account at some time ~~during the period from July 2003~~prior to March 2009;
- (ii) held a Card Account at some time during the period from March 2004 to ~~22 September 2010~~date; and
- (iii) held a Business Account at some time during the period from August 2005 to ~~22 September 2010~~March 2009; and
- (d) otherwise does not admit the allegations.

12. In respect of paragraph 9, ANZ:

- (a) admits the allegations in sub-paragraphs (a), ~~(b)~~ and (b);
- ~~(b)~~ admits the allegations in sub-paragraph (c) insofar as they relate to the particulars a. and b. and insofar as they relate to the Business Classic Account referred to in particular c. for the period from July 2007; ~~c);~~
- ~~(b)~~ ~~(c)~~ as to sub-paragraph 9(d):
  - (i) admits that the second applicant was and is a debtor within the meaning that was given to that term under the Code;
  - (ii) denies that the second applicant is currently a debtor under any contract currently regulated by the Code;
- ~~(c)~~ ~~(d)~~ admits that the second applicant has commenced this proceeding in a representative capacity on behalf of the Group Members who:
  - (i) held a Saving Account at some time during the period from November 2004 to January 2010;
  - (ii) held a Card Account at some time during the period from March 2006 to ~~22 September 2010~~ date; and
  - (iii) held a Business Account at some time during the period ~~July 2007~~ from October 2004 to ~~22 September 2010~~ date; and
- ~~(d)~~ ~~(e)~~ otherwise does not admit the allegations.

13. In respect of paragraph 10, ANZ:

- (a) admits the allegations in sub-paragraphs (a), ~~(b)~~, (c) and (d);
- (b) admits that the third applicant has commenced this proceeding in a representative capacity on behalf of the Group Members who:
  - ~~(i)~~ held a Saving Account at some time during the period from June 1997 to date;
  - ~~(i)(ii)~~ held a Commercial Card Account at some time during the period from June November 2007 to 22 September 2010 date; and
  - ~~(ii)(iii)~~ held a Business Account at some time during the period from February 2007 March 2005 to ~~22 September 2010~~ date; and
- (c) otherwise does not admit the allegations.

14. ANZ does not admit the allegations in paragraph 11 and, in order to investigate the allegations further, will require the account numbers of the accounts that the Group Members allegedly held with ANZ.

15. ANZ admits the allegations in paragraph 12.

## C.2 The Contractual Framework

### *Saving Accounts*

16. ANZ admits the allegations in paragraph 13.
17. In respect of paragraph 14, ANZ:
  - (a) admits that:
    - (i) it entered into a contract with each person who opened a Saving Account (including the ~~first and second~~ applicants and the Saving Group Members) at or about the time that the person opened the Saving Account (**Saving Contract**);
    - (ii) in the usual case (and in the case of the ~~first and second~~ applicants), 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;
    - (iii) Columns 1 and 2 of Schedule 1 of the Fast Track Statement indicate the dates on which the versions of the PDSs and the Fees Documents were current;
    - (iv) in the usual case (and in the case of the ~~first and second~~ applicants), 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;
  - (b) otherwise denies the allegations.
18. In respect of paragraph 15, ANZ:
  - (a) admits that, in the usual case and subject to the changes indicated in Schedule 2 of the Fast Track Statement, the Saving Contracts contained, inter alia, the terms stated in paragraph 15, other than sub-paragraph (c);
  - (b) admits the allegations in sub-paragraph 15(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.
19. In respect of paragraph 16, ANZ:
  - (a) admits that the PDSs and the Fees Documents were amended by subsequent versions as indicated in Schedule 2 to the Fast Track Statement; and
  - (b) otherwise denies the allegations.
20. ANZ does not plead to paragraph 17 as it contains no allegations against it.
21. ANZ admits paragraph 18.
22. In respect of paragraph 19, 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 ~~would on occasion waive~~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) otherwise denies the allegations;
- (f) says further that:
  - (i) the ~~first and second~~ applicants 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 September 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) From about September 2006, customers with Saving Accounts and Card Accounts were given the option of "switching off" the overdraw 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) ~~(ii)~~ ANZ offered other banking facilities that were substitutable for and competitive with the Saving Accounts; and

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

### **Card Accounts**

23. ANZ admits the allegations in paragraph 20.

24. In respect of paragraph 21, ANZ:

(a) admits that:

(i) it entered into a contract with each person who opened a Card Account (including the first and second applicants and the Card Group Members) at or about the time that the person opened the Card Account (**Card Contract**);

(ii) in the usual case (and in the case of the first and second applicants), 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;

(iii) Columns 1 and 2 of Schedule 4 of the Fast Track Statement indicate the dates on which the versions of the Conditions of Use and the Fees Documents were current;

(iv) in the usual case (and in the case of the first and second applicants), 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;

(b) otherwise denies the allegations;

(c) says further that from time to time amended fees applicable to Card Contracts were published in the Fees Documents.

25. In respect of paragraph 22, ANZ:

(a) admits that, in the usual case and subject to the changes indicated in Schedule 5 of the Fast Track Statement, the Card Contracts contained, inter alia, the terms stated in paragraph 22 other than sub-paragraphs (p) and (r);

- (b) admits the allegations in sub-paragraph 22(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.
26. In respect of paragraph 23, ANZ:
- (a) admits that the Conditions of Use and the Fees Documents were amended as indicated in Schedule 5 to the Fast Track Statement 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.
27. ANZ does not plead to paragraph 24 as it contains no allegations against it.
28. ANZ admits paragraph 25.
29. In respect of paragraph 26, ANZ;
- (a) refers to and repeats the admissions in sub-paragraphs 22(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 and second applicants 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) as of February 2008, ANZ offered customers who held an Access Basic account a Card Account with a Late Payment Fee and an Overlimit Fee of \$10; and 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 Saving Accounts and Card 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).
- (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.

#### **Commercial Card Accounts**

- 30. ANZ admits the allegations in paragraph 27.
- 31. In respect of paragraph 28, ANZ:
  - (a) admits that:
    - (i) it entered into a contract with each person who opened a Commercial Card Account (including the third applicant and the Commercial Card Group Members) at or about the time that the person opened the Commercial Card Account **(Commercial Card Contract)**;
    - (ii) in the usual case (and in the case of the third applicant), the terms and conditions stated in the Commercial Card Letters of Offer and the version of the Commercial Card Terms and Conditions that was current at the time that each Commercial Card Contract was entered into formed part of the Commercial Card Contract at that time;

- (iii) Columns 1 and 2 of Schedule 6 to the Fast Track Statement indicate the dates on which the versions of the Commercial Card Terms and Conditions and the Commercial Fees Documents were current;
- (iv) in the usual case (and in the case of the third applicant), each Commercial Card Contract was varied from time to time to incorporate the terms and conditions stated in the subsequent versions of the Commercial Card Terms and Conditions;
- (b) otherwise denies the allegations;
- (c) says further that from time to time amended fees applicable to Commercial Card Contracts were published in the Commercial Fees Documents.

32. In respect of paragraph 29, ANZ:

- (a) admits that, in the usual case ~~and subject to the changes indicated in Schedule 7 of the Fast Track Statement~~, the Commercial Card Contracts contained, inter alia, the terms stated in paragraph 29 other than sub-paragraphs (k) ~~and (p)~~;
- (b) denies the allegation in sub-paragraph 29(k) and says that it was a term of the Commercial Card Contract that a customer would be in default under the Commercial Card Contract if any of the obligations stated in the Commercial Card Terms and Conditions were breached;
- (c) denies the allegation in sub-paragraph 29(p) and says that it was a term of the Commercial Card Contracts that an overlimit fee would be charged by ANZ if the closing balance on the customer's statement of account exceeded the customer's approved credit limit by \$100 or more;
- (e)(d) says further that it relies upon the full terms of the versions of the Commercial Card Letters of Offer and the Commercial Card Terms and Conditions;
- (d)(e) otherwise denies the allegations.

33. ~~In respect of paragraph 30, ANZ: ANZ does not admit paragraph 30.~~

- ~~(a) admits that the Commercial Card Terms and Conditions and the Commercial Fees Documents were amended as indicated in Schedule 7 to the Fast Track Statement; and~~
- ~~(b) otherwise denies the allegations.~~

34. ANZ does not plead to paragraph 31 as it contains no allegations against it.

35. ANZ admits the allegations in paragraph 32.

36. In respect of paragraph 33, ANZ:

- (a) refers to and repeats the admissions in sub-paragraphs 22(a) to (d) herein save that references to "Saving" in those sub-paragraphs are to be read as "Commercial Card" for the purposes of this sub-paragraph ~~and references to the first and second applicants are to be read as references to the third applicant;~~

- (b) otherwise denies the allegations;
- (c) says further that:
  - (i) the third applicant and the Commercial Card Group Members were entitled, under the Commercial Card Contracts to which they were parties, to terminate the Commercial Card Contract at any time; and
  - (ii) many other banks and financial institutions offered banking facilities that were substitutable for and competitive with the Commercial Card Accounts offered by ANZ.

### ***Business Accounts***

37. ANZ admits the allegations in paragraph 34.

38. In respect of paragraph 35, ANZ:

- (a) admits that:
  - (i) it entered into a contract with each person who opened a Business Account (including the applicants and the Business Group Members) at or about the time that the person opened the Business Account (**Business Contract**);
  - (ii) in the usual case (and in the case of the applicants), 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;
  - (iii) Columns 1 and 2 of Schedule 8 to the Fast Track Statement indicate the dates on which the versions of the Business PDSs and the Business Fees Documents were current;
  - (iv) 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;
- (b) otherwise denies the allegations.

39. In respect of paragraph 36, ANZ:

- (a) admits that, in the usual case and subject to the changes indicated in Schedule 9 of the Fast Track Statement, the Business Contracts contained, inter alia, the terms stated in paragraph 36 other than sub-paragraphs (m), (n) and (o);
- (b) denies the allegations in sub-paragraphs 36(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.
40. In respect of paragraph 37, ANZ:
- (a) admits that the Business PDSs and the Business Fees Documents were amended as indicated in Schedule 9 to the Fast Track Statement; and
  - (b) otherwise denies the allegations.
41. ANZ does not plead to paragraph 38 as it contains no allegations against it.
42. ANZ admits the allegations in paragraph 39.
43. In respect of paragraph 40, ANZ:
- (a) refers to and repeats the admissions in sub-paragraphs 22(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 ~~and references to the first and second applicants are to be read as references to the applicants;~~
  - (b) otherwise denies the allegations;
  - (c) says further that:
    - (i) the applicants and the Business Group Members were entitled, under the Business Contracts to which they were parties, to terminate the Business Contract at any time; and
    - (ii) many other banks and financial institutions offered banking facilities that were substitutable for and competitive with the Business Accounts offered by ANZ.

### C.3 The Exception Fees Charged

#### *Saving Accounts*

44. In respect of paragraph 41, ANZ:
- (a) admits ~~the allegations in so far as they relate~~ that, prior to January 2010, ANZ charged the applicants first applicant and the second applicants; and applicant Saving Honour Fees and Saving Dishonour Fees;
  - ~~(b)~~ admits that prior to January 2010, ANZ charged the third applicant Saving Non-Payment Fees;
  - ~~(b)(c)~~ denies that, prior to January 2010, ANZ charged the first applicant or the second applicant Non-Payment Fees; and
  - ~~(e)(d)~~ (b) 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**

45. In respect of paragraph 42, ANZ:

- (a) admits ~~the allegations in so far as they relate to~~that, since March 2004, ANZ charged the first applicant and the second applicant Late Payment Fees and Overlimit Fees;
- (b) admits that each of the first and second applicants continues to have a Card Account on contractual terms that include the potential payment of Late Payment Fees and Overlimit Fees; and
- (c) ~~(b)~~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.

### **Commercial Card Accounts**

46. In respect of paragraph 43, ANZ:

- (a) ~~denies the allegations in so far as they relate to~~admits that, since ~~June 2007~~April 2008, ANZ charged the third applicant Late Payment Fees ~~er~~and Overlimit Fees;
- (b) admits that the third applicant continues to have a Commercial 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 Commercial Card Group Members further, will require the account numbers of the Commercial Card Accounts that the Commercial Card Group Members allegedly held with ANZ.

### **Business Accounts**

47. In respect of paragraph 44, ANZ:

- (a) admits that, since August 2004, ANZ has charged:
  - (i) the first applicant Honour Fees, Dishonour Fees and Non-Payment Fees;
  - (ii) the second ~~and third~~ applicants Honour Fees and Dishonour Fees;
  - ~~(iii) the third applicant Honour Fees;~~
- (b) denies that, since August 2004, ANZ has charged: the second and third applicants Non-Payment Fees;
  - ~~(i) the second applicant Non-Payment Fees;~~
  - ~~(ii) the third applicant Dishonour Fees or Non-Payment Fees;~~

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

### ***Business Accounts***

47. — In respect of paragraph 44, ANZ:

- (a) — admits the allegations in so far as they relate to the applicants; and
- (b) — ~~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***

48. ANZ does not plead to paragraph 45 as it contains no allegations against it.

## **C.4 The Penalty Argument**

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

49. ~~ANZ denies all of the allegations in paragraph 46.~~ In respect of paragraph 46, ANZ:

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

50. ~~ANZ denies all of the allegations in paragraph 47.~~ In respect of paragraph 47, ANZ:

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

51. ~~ANZ denies all of the allegations in paragraph 48.~~ In respect of paragraph 48, ANZ:

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

52. ~~ANZ denies all of the allegations in paragraph 49.~~ In respect of paragraph 49, ANZ:

(a) denies all of the allegations:

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

53. ~~ANZ denies all~~In respect of the allegations in paragraph 50-50, ANZ:

(a) denies all of the allegations:

(b) refers to and repeats the allegations in paragraphs 49(b), 50(b), 51(b) and 52(b) herein.

54. In respect of paragraph 51, ANZ:

- (a) admits that it charged the ~~first and second~~ applicants Saving Exception Fees pursuant to the terms of the Saving Contracts entered into with the ~~first and second~~ applicants;
- (b) admits that it charged the first and second applicants Card Exception Fees pursuant to the terms of the Card Contracts entered into with the first and second applicants;
- (c) admits that it charged the applicants Business Exception Fees pursuant to the terms of the Business Contracts entered into with the applicants;
- (d) ~~denies~~ admits that it charged the third applicant Commercial Card Exception Fees pursuant to the terms of the Commercial Card Contract entered into with the third applicant;
- (e) otherwise does not admit the allegations in paragraph 51 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.

55. In respect of paragraph 52, 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, Commercial 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) 55. ANZ ~~otherwise~~ denies all of the allegations in paragraph 52;

(c) says further that:

(i) 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 and Commercial 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:

56. ANZ denies all of the allegations in paragraph 53.

57. ANZ denies all of the allegations in paragraph 54.

***Penalty imposed upon the occurrence of specified events***

58. ANZ denies all of the allegations in paragraph 55.

59. ANZ denies all of the allegations in paragraph 56.

60. In respect of paragraph 57, ANZ:

(a) ~~60. ANZ denies all of~~ refers to and repeats the allegations in ~~paragraph 57.~~ paragraphs 55(a) and (c) herein:

(b) otherwise denies the allegations.

61. ANZ denies all of the allegations in paragraph 58.

62. ANZ denies all of the allegations in paragraph 59.

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

63. ANZ denies all of the allegations in paragraph 60.

64. ANZ denies all of the allegations in paragraph 61.

65. ANZ denies all of the allegations in paragraph 62.

66. ANZ denies all of the allegations in paragraph 63.

67. ANZ denies all of the allegations in paragraph 64.

68. ANZ denies all of the allegations in paragraph 65.

69. ANZ denies all of the allegations in paragraph 66.

70. ANZ does not admit the allegations in paragraph 67.

71. ANZ denies all of the allegations in paragraph 68.

72. In respect of paragraph 69, ANZ denies that any such debt is due.

**C.5 Breach of Implied Term**

73. In respect of paragraph 70, ANZ:

(a) admits that under the Saving Contracts, Card Contracts, Commercial Card Contracts and the Business Contracts (collectively referred to in this Response 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.

74. ANZ denies all of the allegations in paragraph ~~71 and requests the applicants to specify the matters relied on in support of the allegation.~~71.

75. ANZ denies all of the allegations in paragraph ~~72 and requests the applicants to confirm that the only matters relied on in support of the allegation are those alleged in sub-paragraph 52(c) of the Fast Track Statement.~~72.

76. ANZ denies all of the allegations in paragraph 73.

#### **C.6 Unconscionable Conduct**

77. In respect of paragraph 74, ANZ:

(a) admits that it entered into and gave effect to:

- (i) the Saving Contracts with the ~~first and second~~ applicants and any Saving Group Members;
- (ii) the Card Contracts with the first and second applicants and any Card Group Members;
- (iii) the Commercial Card Contracts with the third applicant and any Commercial Card Group Members;
- (iv) 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.

78. In respect of paragraph 75, ANZ:

(a) admits that the financial service supplied by ANZ to:

- (i) the ~~first and second~~ applicants and the Saving Group Members pursuant to each Saving Contract entered into with those persons; and
- (ii) the first and second applicants 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.

79. In respect of paragraph 76, ANZ repeats its response to paragraphs 19, 26, 52 and 55-57 of the Fast Track Statement.

80. ANZ denies all of the allegations in paragraph 77.

81. ANZ denies all of the allegations in paragraph 78.

82. ANZ does not admit the allegations in paragraph 79.

83. In respect of paragraph 80, ANZ repeats its response to paragraphs 33, 40, 52 and 55-57 of the Fast Track Statement.

84. ANZ denies all of the allegations in paragraph 81.

85. ANZ denies all of the allegations in paragraph 82.

### C.7 Unjust Transactions Under the Code and the New Code

86. In respect of paragraph 83, ANZ:

- (a) admits that the first applicant, the second applicant and the Card Group Members who entered into Card Contracts prior to 1 July 2010 (**Pre-July 2010 Card Contracts**) were debtors within the meaning of the Code;
- (b) admits that the credit provided pursuant to Pre-July 2010 Card Contracts was provided wholly or predominantly for personal, domestic or household purposes;
- (c) admits that charges were made for providing the credit;
- (d) admits that ANZ provided credit pursuant to the Pre-July 2010 Card Contracts in the course of a business of providing credit; and
- (e) otherwise does not admit the allegations.

87. In respect of paragraph 84, ANZ repeats its response to paragraph 26 of the Fast Track Statement.

88. ANZ denies all of the allegations in paragraph ~~85 and requests the applicants to state the circumstances relating to the Pre-June 2010 Card Contracts (as defined in the Fast Track Statement) at the time they were entered into on which the applicants rely.~~85.

89. ANZ denies all of the allegations in paragraph 86.

90. In respect of paragraph 87, ANZ:

- (a) admits that, since 1 July 2010, Card Contracts entered into since 1 July 2010 and Card Contracts that are carried over instruments within the meaning of the *National Consumer Credit Protection (Transitional and Consequential) Provisions Act 2009* (Cth) have been subject to the provisions of the New Code; and
- (b) otherwise does not admit the allegations in paragraph 87.

91. In respect of paragraph 88, ANZ repeats its response to paragraph 26 of the Fast Track Statement.

92. ANZ denies all of the allegations in paragraph ~~89 and requests the applicants to state the circumstances relating to the June 2010 Card Contracts (as defined in the Fast Track Statement) at the time they were entered into on which the applicants rely.~~89.

93. ANZ denies all of the allegations in paragraph 90.

### C.8 Unfair Terms

94. In respect of paragraph 91, ANZ:
- (a) does not admit the allegations;
  - (b) says further that the unfair contract terms provisions of Part 2B of the FTA:
    - (i) commenced on 9 October 2003;
    - (ii) do not apply to consumer contracts entered into prior to 9 October 2003;
    - (iii) in the period prior to 11 June 2009, did not apply to terms contained in a contract to which the Consumer Credit (Victoria) Act 1995 applied.

95. In respect of paragraph 92, ANZ repeats its response to paragraphs 19, 26, 52 and 55-57 of the Fast Track Statement.

96. ANZ denies all of the allegations in paragraph 93.

### **C.9 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 82(1) of the TPA, loss or damage; or
  - (ii) under section 87(1A) of the TPA, 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 82(2) and 87(1CA) of the TPA respectively;
- (b) 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;
- (c) 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;
- (d) 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;
- (e) 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;
- (f) to the extent that any of the applicants or any Group Member claims, under or by reason of the Fast Track Statement including under or by reason of paragraphs 53, 54, 58, 59, 60, 61, 62, 63, 64, 65, 66, 68, 69, 73 or 93 of the Fast Track Statement but excluding the claims referred to in sub-paragraphs (a) to (e) 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. 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).

100. In the alternative to paragraphs 97 and 99 herein, if, as alternatively alleged by the applicants, any Exception Fee that was paid by an applicant or group member was payable upon the occurrence of an event stated in the applicable Exception Fee Provisions and is void as a penalty:

- (a) the event 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 55(c)(i) 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: ~~22-October~~ ~~9-December-2010~~ 25 ~~March~~ 2011

BLAKE DAWSON

Solicitors for the ~~Respondents~~ Respondent

