

## NOTICE OF FILING AND HEARING

### Filing and Hearing Details

Document Lodged: Originating Application Starting a Representative Proceeding under Part IVA  
Federal Court of Australia Act 1976 - Form 19 - Rule 9.32

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File Title: MARIANNE HAVERKORT v QANTAS AIRWAYS LIMITED ACN 009 661  
901

Registry: VICTORIA REGISTRY - FEDERAL COURT OF AUSTRALIA

Reason for Listing: To Be Advised

Time and date for hearing: To Be Advised

Place: To Be Advised



*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.



Form 19  
Rule 9.32

**Amended Originating Application starting a representative proceeding under Part IVA  
of the Federal Court of Australia Act 1976**

No. VID 650 of 2023

Federal Court of Australia  
District Registry: Victoria  
Division: Commercial and Corporations NPA  
Regulator and Consumer Protection Sub-area

**Marianne Haverkort**

Applicant

**Qantas Airways Limited ACN 009 661 901**

Respondent

To the Respondent

The Applicant applies for the relief set out in this application.

The Court will hear this application, or make orders for the conduct of the proceeding, at the time and place stated below. If you or your lawyer do not attend, then the Court may make orders in your absence.

You must file a notice of address for service (Form 10) in the Registry before attending Court or taking any other steps in the proceeding.

**Time and date for hearing:**

**Place:** Owen Dixon Commonwealth Law Courts Building, 305 William Street, Melbourne

Date: ~~18 August 2023~~ 14 February 2024

Filed on behalf of	Marianne Haverkort, Applicant
Prepared by	Andrew Paull
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## DETAILS OF CLAIM

On the grounds stated in the accompanying further amended statement of claim (**Statement of Claim**), the Applicant claims for herself, and on behalf of Group Members (as described under the heading “Representative Action” below):

*Note: Capitalised terms have the same meaning in the Statement of Claim.*

### *Contract*

1. An order that, to the extent it has not already done so, the Respondent refund to the Applicant and Group Members the amount of the moneys paid ~~by them~~ to purchase the flights that were cancelled.
2. An order that the Respondent reinstate to the Group Members the Qantas Points used ~~by them~~ to purchase the flights that were cancelled, or alternatively refund the value of the Qantas Points.
3. Alternatively, damages for breaches, further or alternatively repudiation, of the respective Contract (between the Respondent and the Applicant or a Group Member, as the case may be).

### *Restitution*

4. Orders that:
  - (a) to the extent it has not already done so, the Respondent make restitution to the Applicant and Group Members of the amount of the moneys paid to purchase the flights that were cancelled;
  - (b) the Respondent make restitution to the Group Members of the Qantas Points used to purchase the flights that were cancelled, or alternatively the value of the Qantas Points;
  - (c) the Respondent make restitution to the Group Members who were entitled to be rebooked at no additional cost and purchased tickets using credits at greater cost than the original fare – the difference between the original purchase price and subsequent ticket price; and
  - (d) The Respondent make restitution of its enrichment by use of the funds in (a) since the date the funds were paid to purchase the flights, alternatively since the date of



the cancellation of the flights. Further or alternatively Qantas is liable to pay restitutionary interest.

*Compensation under ACL*

5. An order pursuant to s 236 and/or s 237 of the ACL that the Respondent pay to the Applicant and Group Members the amount of the loss or damage suffered or likely to be suffered by them by reason of the Respondent's misleading or deceptive conduct in contravention of s 18 of the ACL, further or alternatively the Respondent's unconscionable conduct in contravention of s 21(1) of the ACL.
- 5A. An order under s 267(4) of the ACL that the Respondent pay to the Applicant and Group Members damages for loss or damage suffered by them because of the Respondent's failure to comply with the consumer guarantees in s 60 and/or s 62 of the ACL.

*Refund under ACL*

6. An order pursuant to s 237 and s 243(d) of the ACL that, to the extent it has not already done so, the Respondent refund to the Applicant and the Group Members the funds paid by them for flights which were cancelled by the Respondent in circumstances where the Respondent contravened s 18 of the ACL, further or alternatively s 21(1) of the ACL.
7. An order pursuant to s 237 and s 243(d) of the ACL that the Respondent reinstate to the Group Members the Qantas Points used by them to purchase the flights that were cancelled in circumstances where the Respondent contravened s 18 of the ACL, further or alternatively s 21(1) of the ACL, or alternatively compensate them for the value of the Qantas Points.
8. An order pursuant to ss 237 and 243(d) of the ACL directing the Respondent pay to the Applicant and Group Members the value of the Respondent's use of the funds that were paid by the Applicant and Group Members for flights that were cancelled by the Respondent in circumstances where the Respondent contravened s 18 of the ACL, further or alternatively s 21(1) of the ACL.

*Aggregate Damages*

9. Pursuant to s 33Z(1)(f) of the *Federal Court of Australia Act 1976* (Cth), an award of damages in an aggregate amount without specific amounts awarded in respect of individual Group Members.



### *Voucher Group Members*

10. A declaration that each Flight Credit Request between a Voucher Group Member and the Respondent did not amount to a contract.
11. Alternatively, a declaration that each Purported New Contract between a Voucher Group Member and the Respondent is void *ab initio*, having been rescinded by the Voucher Group Member.
12. Alternatively, an order pursuant to s 237 and s 243(a) of the ACL declaring that each Purported New Contract between a Voucher Group Member and the Respondent is void.
13. Alternatively, an order pursuant to s 237 and s 243(c) of the ACL refusing to enforce the Purported New Contract.
14. A declaration under s 250 of the ACL that the Substitution Term in each Purported New Contract between a Voucher Group Member and the Respondent is void as an unfair contract term under ss 23 and 24 of the ACL.
15. Alternatively, an order pursuant to s 237 and s 243(a) of the ACL declaring that the Substitution Term in each Purported New Contract between a Voucher Group Member and the Respondent is void.
16. Alternatively, an order pursuant to s 237 and s 243(c) of the ACL refusing to enforce the Substitution Term in each Purported New Contract between a Voucher Group Member and the Respondent.

### *Other*

17. Interest pursuant to s 51A of the *Federal Court of Australia Act 1976* (Cth).
18. Costs.
19. Such other or further relief as the Court may consider appropriate.

## **QUESTIONS COMMON TO CLAIMS OF GROUP MEMBERS**

The questions of law or fact common between the claims of the Applicant and the Group Members, including questions of commonality, are (using terms as defined in the accompanying Statement of Claim) are:

- 1A. The identity of the parties to the Contract.
- 1B. The identity of the persons entitled to a refund under the Contract in the event of a flight cancellation by Qantas (i.e. the purchaser, the passenger, or both).



1. Whether Qantas made the Representations.
2. Whether the Representations were continuing representations maintained by Qantas during the Relevant Period.
3. Whether at all material times the Applicant and Group Members had an entitlement pursuant to the Cancellation Clause to a refund by Qantas if Qantas cancelled their flights due to the COVID-19 Pandemic.
4. Whether at all material times the Applicant and Group Members had an entitlement pursuant to the Cancellation Clause and Implied Reasonable Time Term to a refund by Qantas within a reasonable time period if Qantas cancelled their flights due to the COVID-19 Pandemic.
5. What constitutes a reasonable time period within the context of the Cancellation Clause and the Contract.
- 5A. Whether at all material times the Applicant and Group Members had an entitlement pursuant to the Within Control Cancellation Clause and Implied Reasonable Time Term to be rebooked at no additional cost or a refund by Qantas if Qantas cancelled their flights due to an Event Within [Qantas'] control.
- 5B. Whether at all material times the Applicant and Group Members had an entitlement to be offered a refund or to be rebooked at no additional cost if Qantas cancelled their flights due to an Event Within [Qantas'] control.
- 5C. Whether the offer had to be made within a reasonable time period.
- 5D. What constitutes a reasonable time period within the context of the Within Control Cancellation Clause and the Contract.
6. What is the value (if any) of flight credits and what was the legal basis (if any) for their provision to the Applicant and Group Members by Qantas.
7. Whether each of the Representations was false, misleading or deceptive, or likely to mislead or deceive at the time it was made.
8. Whether the Purported New Contract amounted to a contract.
9. Whether by the Representations, the Voucher Group Members were induced to agree to the Purported New Contract.
10. Whether the Voucher Group Members can rescind the Purported New Contract.



11. Whether the Substitution Term is unfair within the meaning of ss 23 and 24 of the ACL.
12. Whether by making the Representations, Qantas engaged in conduct in trade or commerce which was misleading or deceptive or likely to mislead or deceive, in contravention of s 18 of the ACL.
13. Whether by reason of Qantas' contravention of s 18 of the ACL, the Applicant and Group Members have suffered, and continue to suffer, loss and damage.
14. Whether Qantas is liable to refund to the Applicant and Group Members the amount of moneys paid ~~by them~~ to purchase flights that were cancelled.
15. Whether Qantas is liable to reinstate to the Group Members the Qantas Points used ~~by them~~ to purchase the flights that were cancelled or alternatively refund the value of the Qantas Points.
- 15A. Whether Qantas is liable, for those Group Members who had their flights cancelled due to an Event Within [Qantas'] Control, to compensate the Group Members for the loss of the opportunity to secure carriage on the flight at the original price.
16. Whether in breach of the Cancellation Clause and the Implied Reasonable Time Term:
  - (a) Qantas has failed to refund the Applicant or the Group Members for the cost of their flight(s) that Qantas cancelled by reason of the COVID-19 Pandemic; and
  - (b) has failed to refund the Applicant and the Group Members within a reasonable time.
- 16A. Whether during the Relevant Period Qantas unilaterally provided flight credits to the Unilateral Conversion Group Members without their request.
- 16B. Whether during the Relevant Period Qantas cancelled flights due to "Events Within Our [Qantas'] Control".
- 16C. Whether in breach of the Within Control Cancellation Clause and the Implied Reasonable Time Term:
  - (a) Qantas has failed to rebook certain Group Members on the next available flight or combination of flights to their booked destination at no additional cost or at their option refund the applicable fare; and
  - (b) whether Qantas failed to offer to rebook or refund; and
  - (c) whether Qantas failed to offer to rebook or refund within a reasonable time.



17. Whether in breach of the Implied Co-operation Terms in the Contract, Qantas;
- (a) in the case of cancellations due to COVID-19, mislead or sought to mislead the Applicant and Group Members as to their entitlement to a refund within a reasonable time under the Contract and failed to refund the Applicant and Group Members for the cost of their flight(s) in accordance with the Contract;  
or
  - (b) in the case of cancellations due to Events Within [Qantas'] Control, misled or sought to mislead the Applicant and Group Members as to their entitlement to a refund or rebooking at no additional cost under the Contract, and failed to offer the same, within a reasonable time, or at all, in accordance with the Contract.
18. Whether in breach of the Implied Good Faith Term in the Contract, Qantas failed to act in good faith with respect to the rights of the Applicant and Group Members ~~its passengers~~ to obtain a refund or rebooking within a reasonable time.
19. Whether by reason of any one or any combination of the alleged breaches of Contract, the Applicant and Group Members have suffered, and continue to suffer, loss and damage.
20. Whether Qantas has repudiated the Contract.
21. Whether the Applicant and Group Members have suffered, and continue to suffer, loss and damage caused by Qantas' repudiation of the Contract.
22. Whether in circumstances where the Applicant and Group Members paid money or used Qantas Points to purchase one or more domestic or international flights in accordance with the Contract, there has been a failure of consideration for the payments of money or use of the Qantas Points.
23. Whether as a consequence of the failure of consideration, Qantas has been unjustly enriched by the moneys paid or the Qantas Points used.
24. Whether Qantas is liable to make restitution to the Applicant and Group Members of the amount of the moneys paid to purchase the flights that were cancelled.
25. Whether Qantas is liable to make restitution to the Group Members of the Qantas Points used to purchase the flights that were cancelled, or alternatively the value of the Qantas Points.





- 25A. Whether Qantas is liable to make restitution for those Group Members who were entitled to be rebooked at no additional cost and purchased tickets using credits at greater cost than the original fare, of the difference between the original purchase price and subsequent ticket price.
26. Whether Qantas is liable to make restitution of its enrichment by its use of the funds since the date the funds were paid, or alternatively since the date of the cancellation of the flights.
- 26A. Whether Qantas failed to comply with the implied guarantee, under s 60 of the ACL, that its services would be rendered with due care and skill.
- 26B. Whether the failure is a major failure under s 268(1)(a) of the ACL.
- 26C. Whether by reason of Qantas' contravention of s 60 of the ACL, the Applicant and Group Members have suffered, and continue to suffer loss and damage, which was reasonably foreseeable by Qantas.
- 26D. Whether Qantas failed to comply with the implied guarantee, under s 62 of the ACL, that its services would be provided within a reasonable time.
- 26E. Whether the failure is a major failure under s 268(1)(a) of the ACL.
- 26F. Whether the failure did not occur only because of an act, default or omission of, or a representation made by, any person other than Qantas or its agent or employee, or a cause independent of human control that occurred after the services were supplied.
- 26G. Whether by reason of Qantas' contravention of s 60 of the ACL, the Applicant, the Applicant and Group Members have suffered, and continue to suffer loss and damage, which was reasonably foreseeable by Qantas.
27. What is the value of Qantas Points.
28. Whether during the Relevant Period Qantas knew, or ought to have known, that:
- (a) the Applicant and Group Members were entitled to a refund under the Contract if and when Qantas cancelled their flights due to the COVID-19 pandemic; and/or
  - (b) the Applicant and Group Members were entitled to be offered to be rebooked at no additional cost or refunded within a reasonable time if and when Qantas cancelled their flights due to "Events Within Qantas' Control";
  - (c) the Applicant and Group Members were entitled to the refund, or offer of rebooking or refund within a reasonable time period; and



- (d) Qantas had cancelled, intended to cancel, or was likely to cancel the flights of Applicant and Group Members due to the COVID-19 Pandemic or another reason.
29. Whether Qantas was in a stronger bargaining position than the Applicant and the Group Members with respect to the cancellation of flights and the consequences of cancellation.
30. Whether as a result of the conduct engaged in by Qantas with respect to the cancellation of flights and the consequences of cancellation, the Applicant and Group Members were required to comply with conditions, and urged to accept flight credits in substitution for their rights ~~to refunds~~, that were not reasonably necessary for the protection of the legitimate interests of Qantas.
31. Whether the Applicant and Group Members were not able to ascertain, in the context of the Representations, that they had a contractual right to a refund pursuant to the Cancellation Clause, and/or right to an offer to be rebooked at no additional cost or refunded pursuant to the Within Control Cancellation Clause, and that Qantas was required to provide ~~a refund~~ the same within a reasonable time on cancellation of their flights, and the communications from Qantas did not inform them about these matters.
32. Whether unfair tactics were used by Qantas to:
- (a) seek to persuade the Applicant and Group Members to accept flight credits in lieu of their contractual entitlements ~~to a refund~~; and
  - (b) void its contractual obligation to provide a refund or offer of refund or rebooking upon their cancellation of the flights purchased by the Applicant and Group Members due to COVID-19.
33. Whether Qantas unreasonably failed to disclose to the Applicant and Group Members that:
- (a) they had a contractual entitlement to a refund within a reasonable time;
  - (b) where Qantas cancelled flights due to Events Within [Qantas'] Control, customers had an entitlement to be rebooked or refunded;
  - (c) the contractual entitlement ~~to a refund~~ may be affected by acceptance of the flight credits;
  - (d) the flight credit was less valuable than a refund or being rebooked at no cost, because there were restrictions imposed on how the flight credit could be used; and



- (e) Qantas imposed or intended to impose further restrictions on the flight credits to limit their use to flights of equivalent or greater value.
34. Whether the Contract was a standard form contract, and Qantas was not willing to negotiate its terms and conditions.
  35. Whether Qantas failed to act in good faith.
  36. Whether Qantas has engaged in conduct which was unconscionable, in all the circumstances, in contravention of s 21(1) of the ACL.
  37. Whether Qantas has engaged in a system of conduct or pattern of behaviour (within the meaning of s 21(4) of the ACL) which was unconscionable, in all the circumstances, in contravention of s 21(1) of the ACL.
  38. Whether by reason of Qantas' contravention of s 21(1) of the ACL, the Applicant and Group Members have suffered, and continue to suffer, loss and damage.
  39. Whether Qantas is liable under ss 236 and 237 of the ACL to compensate the Applicant and Group Members for loss and damage suffered because of Qantas's contravention of s 18 and/or s 21 of the ACL.
  40. What are the principles governing the measurement of loss or damage suffered by the Applicant and Group Members by reason of any contraventions alleged in the Statement of Claim.
  41. Whether Qantas is required to pay damages by reference to any profit made by Qantas by reason of its retention of the funds of the Applicant and Group Members during the Relevant Period.
  42. Whether damages suffered by Group Members by reason of each of the contraventions alleged in the Statement of Claim should be awarded in an aggregate amount; and if so, what is the aggregate amount.
  43. Whether Qantas should be ordered under ss 237 and 243(d) of the ACL to refund to the Applicant and Group Members the funds paid by them for flights which were cancelled.
  44. Whether Qantas should be ordered under ss 237 and 243(d) of the ACL to reinstate to Group Members the Qantas Points used by them to purchase the flights that were cancelled.



44A. Whether Qantas should be ordered under ss 237 and 243(d) of the ACL to pay those Group Members who were entitled to be rebooked at no additional cost and purchased tickets using credits at greater cost than the original fare, the difference between the original purchase price and subsequent ticket price.

45. Whether Qantas should be ordered pursuant to ss 237 and 243(d) of the ACL to pay to the Applicant and Group Members the value of its use of the funds that were paid for flights that were cancelled.

### REPRESENTATIVE ACTION

The Applicant brings this application as a representative party under Part IVA of the *Federal Court of Australia Act 1976* (Cth).

The group members (**Group Members**) to whom this proceeding relates are those persons who:

- (a) purchased for themselves, or for another passenger, or had purchased on their behalf, (whether by payment of money, use of frequent flyer points or otherwise) from the Respondent (**Qantas**) at least one domestic or international flight that was scheduled to depart between 1 January 2020 and 1 November 2022 (**Relevant Period**) but was cancelled by Qantas ~~due to the COVID-19 pandemic~~; and
- (b) have suffered loss or damage by reason of the conduct of Qantas and/or at whose expense Qantas was unjustly enriched, as pleaded in the accompanying statement of claim; and
- (c) are not, and have not been at any time since 1 January 2019:
  - (i) a related party (as defined by s 228 of the *Corporations Act 2001* (Cth) (**Corporations Act**) of Qantas; or
  - (ii) a related body corporate (as defined by s 50 of the *Corporations Act*) of Qantas; or
  - (iii) an associated entity (as defined by s 50AAA of the *Corporations Act*) of Qantas; or
  - (iv) an officer of a close associate (as defined by s 9 of the *Corporations Act*) of Qantas; or
  - (v) a Justice, Registrar, District Registrar or Deputy District Registrar of the High Court of Australia or this Court; or



- (vi) an officer or employee of, or other legal practitioner engaged by Echo Law  
in relation to this proceeding.

### **APPLICANT'S ADDRESS**

The Applicant's address for service is:

Place: Echo Law, Level 2, 533 Little Lonsdale Street, Melbourne VIC 3000

Email: [andrew.paull@echolaw.com.au](mailto:andrew.paull@echolaw.com.au)

The Applicant's address is c/- Echo Law, Level 2, 533 Little Lonsdale Street, Melbourne  
VIC 3000

### **SERVICE ON THE RESPONDENT**

It is intended to serve this application on the Respondent.

Date: ~~18 August 2023~~ 14 February 2024

A handwritten signature in black ink, appearing to read 'Andrew Paull'.

.....  
Signed by Andrew Paull  
Echo Law  
Lawyer for the Applicant