IN THE SUPREME COURT OF VICTORIA
AT MELBOURNE
COMMERCIAL COURT
GROUP PROCEEDINGS LIST

No. S ECI 2020 02946

B E T W E E N

ALANNAH FOX

First Plaintiff

BRIDGET NASTASI

Second Plaintiff

-and-

WESTPAC BANKING CORPORATION (ACN 007 457 141)

First Defendant

ST. GEORGE FINANCE LIMITED (ACN 001 094 471)

Second Defendant

~~AMENDED~~ DEFENCE TO AMENDED STATEMENT OF CLAIM

Date of Document:	11 September 2024 ~~8 August 2023~~ ~~20 November 2020~~	Solicitors Code:	8469
Filed on behalf of:	the First Defendant	DX:	113 Sydney
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~~**Amended pursuant to orders made on 3 August 2023 by the Honourable Justice Nichols.**~~

This Defence (**Defence**) to the Amended Writ and Amended Statement of Claim is filed pursuant to order 3 of the orders made on 30 August 2024 by the Honourable Justice Dixon.

In answer to the Amended Writ (**Writ**) and Amended Statement of Claim (**ASOC**) filed by the Plaintiffs on 28 August 2024~~15 July 2020~~, the First Defendant (**Westpac**) says as follows, adopting the definitions in the ASOC unless otherwise stated and without admission as to the accuracy of those definitions:

A. INTRODUCTION

1 In answer to paragraph 1 of the ASOC, Westpac:

(a) admits that the Plaintiffs seek to commence the proceeding as a representative proceeding pursuant to Part 4A of the *Supreme Court Act 1986* (Vic) (**Supreme Court Act**) on their own behalf and on behalf of Group Members;

(b) says that the First Plaintiff:

(i) does not allege a claim on her own behalf against the Second Defendant (**St. George**), and on that basis;

(ii) does not have a maintainable cause of action against St. George on her own behalf, nor can she represent customers who had a Car Loan with St. George;

(c) says that the Second Plaintiff:

(i) does not allege a claim on her own behalf against Westpac, and on that basis;

(ii) does not have a maintainable cause of action against Westpac on her own behalf, nor can she represent customers who had a Car Loan with Westpac;

(d) in the premises, each Plaintiff does not have a claim against each Defendant, as required by section 33C(1) of the Supreme Court Act, and therefore the proceeding is not validly commenced as a representative proceeding in accordance with Part 4A of the Supreme Court Act;

(e) denies that any customer entered into a Car Loan with Westpac before 1 March 2015, in which a Flex Commission (as defined in sub-paragraph 9(f) of this Defence) was paid to the Dealer (as defined in sub-paragraph 5(a) of this Defence);

(f) denies that any customer entered into a Car Loan with St. George on or after 1 March 2015, in which a Flex Commission (as defined in sub-paragraph 9(f) of this Defence) was paid to the Dealer (as defined in sub-paragraph 5(a) of this Defence);

(g) denies that the Plaintiffs and Group Members have suffered loss or damage arising out of the same, similar or related circumstances by or because of the alleged conduct of Westpac or St. George as pleaded in the ASOC; and

(h) in the premises of the Writ, the ASOC and this Defence, denies that all of the "common questions of law or fact" set out in the ASOC are substantial questions of law or fact common to the claims of the Plaintiffs and Group Members; and

(i) by reason of the matters alleged at sub-paragraphs 1(b) to (h) of this Defence, denies the allegations in paragraph 1 of the ASOC.

1A Where the expression "Not Applicable" is used in this Defence, it refers to the fact that a paragraph or sub-paragraph of the ASOC does not contain allegations against Westpac and Westpac does not admit and does not plead to the allegations in that paragraph or sub-paragraph.

1B The terms automobile and car have been used interchangeably in the ASOC and likewise in this Defence.

1C Subject to Westpac's denial of the allegations in paragraph 1 of the ASOC, Westpac says by way of defence to the ASOC as follows.

2 In answer to paragraph 2 of the ASOC, Westpac does not know the facts alleged and cannot admit the allegation in paragraph 2 of the ASOC.

3 In answer to paragraph 3 of the ASOC, Westpac:

(a) admits that it is and was a registered public company limited by shares for the purposes of section 5H of the *Corporations Act 2001* (Cth) (**Corporations Act**) and capable of being sued in its own name during the period 1 March 2015 to 31 October 2018 (**Relevant Period**);

(b) admits that St. George was incorporated pursuant to the Corporations Act;

(c) admits that St. George was capable of being sued in its own name during the Relevant Period;

(d) admits the allegations in sub-paragraphs 3(b) to (e) of the ASOC during the Relevant Period; and

(e) otherwise denies the allegations in paragraph 3 of the ASOC.

4 Westpac admits paragraph 4 of the ASOC.

B. THE CLAIMS OF GROUP MEMBERS

5 In answer to paragraph 5 of the ASOC, Westpac:

(a) admits that during the Relevant Period, it entered into agreements from time to time with automobile dealers (**Dealers**) to facilitate the introduction of credit business to Westpac by Dealers (**Dealer Agreements**); and

(b) otherwise denies the allegations in paragraph 5 of the ASOC.

6 In answer to paragraph 6 of the ASOC, during the Relevant Period, Westpac:

(a) as to sub-paragraph 6(a) of the ASOC, says that Dealer Agreements, among other things, set out the terms on which, and the form and manner in which Dealers were permitted to submit credit offers from customers to enter into Car Loans;

(b) as to sub-paragraph 6(b) of the ASOC, says that the terms of Dealer Agreements, among other things, required Dealers to:

(i) comply with all laws and requirements of authorities in connection with the Dealer's licensing status;

Particulars

Paragraph 2.2(b) of the Dealer Agreements.

(ii) comply with any undertaking given by the Dealer to Westpac, or any direction by Westpac to the Dealer, about the conduct of the Dealer's business to the extent it relates to, or impacts on, Westpac's business or results, or may result, in Westpac suffering liability or loss. For example, the Dealer must complete any training required by Westpac within the time frame Westpac specifies and adhere to any procedures advised by Westpac from time to time;

Particulars

Paragraph 3.3 of the Dealer Agreements.

(iii) comply with any direction Westpac gives in connection with any advertising or use of Westpac's logo or promotional material, use of Westpac's

reputation or the use of any of Westpac's property which is in the Dealer's possession or control; and

Particulars

Paragraph 10(a) of the Dealer Agreements.

(iv) in relation to each credit offer, declare that the Dealer has complied and will comply with all instructions and procedures given by Westpac at any time in respect of the manner of completion and submission to Westpac of each credit offer;

Particulars

Paragraph 6(b) of Schedule 1 of the Dealer Agreements.

(c) admits sub-paragraph 6(c) of the ASOC;

(d) says that the terms of Dealer Agreements provided that the Dealers were under no obligation to obtain or procure credit offers or to do business with Westpac and Dealers acknowledged that if Dealers obtained any credit offer, they did so for the convenience of their customers and in the expectation that it would assist the Dealers' businesses;

Particulars

Paragraph 13.2 of the Dealer Agreements.

(e) relies upon the terms of the Dealer Agreements for their full force and effect;

(f) says that some of the Dealers with whom Westpac had entered into Dealer Agreements had arrangements with other licensees (within the meaning of the NCCPA) to facilitate the introduction of credit business to other licensees; and

(g) otherwise denies the allegations in paragraph 6 of the ASOC.

7 In answer to paragraph 7 of the ASOC, Westpac refers to and repeats paragraph 6 of this Defence and, insofar as a customer sought to finance their acquisition of an automobile

from a Dealer through a Car Loan and the Dealer submitted a loan application to Westpac, says as follows:

(a) as to sub-paragraph 7(a) of the ASOC, says that the relevant employee of the Dealer who had direct contact with customers in relation to loan applications (**Dealer Business Manager**) was required to be accredited by Westpac:

(i) to make reasonable inquiries about a customer's requirements, objectives and financial situation including:

(A) the loan amount required;

(B) the length of time the customer intended to keep the automobile;

(C) the repayment structure the customer wanted or sought to avoid (for example, balloon payment); and

(D) the term of the loan sought, including how quickly the customer planned to pay off the automobile; and

(ii) to assess whether the loan was "not unsuitable" for the customer;

(b) as to sub-paragraph 7(b) of the ASOC:

(i) admits that, pursuant to the terms of the Dealer Agreements, Dealers who wished to submit an application for approval of a proposed credit offer and a customer's credit offer to Westpac were required to submit the application for approval of a proposed credit offer and credit offer in the form and manner required by Westpac and following the procedures specified by Westpac from time to time in connection with anything done before, at the same time as, or after the credit offer was made;

(ii) says that Dealers were permitted to submit a customer's application for approval of a proposed credit offer;

(iii) says that an application for approval of a proposed credit offer could be made through Westpac's automated credit acceptance system (**Sovereign**) or any other method approved by Westpac;

(iv) says that any approval was conditional and subject to final acceptance by Westpac of a credit offer (referred to below as a Car Loan Offer);

(v) says that Westpac had absolute discretion as to whether to accept or reject any credit offer (such acceptance not to be unreasonably withheld if Westpac had approved the credit offer and the Dealer had complied with all of its obligations under the Dealer Agreement); and

Particulars

Clauses 3 and 5 of the Dealer Agreements.

(vi) if a Dealer Business Manager submitted a customer's application for approval of a proposed credit offer, the Dealer Business Manager entered the customer's details into Sovereign, in accordance with the mandatory fields and selections available within Sovereign;

(c) as to sub-paragraph 7(c) of the ASOC, says that if Westpac determined that supporting documentation was required from a customer, Westpac requested that the Dealer Business Manager obtain and provide that supporting documentation;

(d) as to sub-paragraph 7(d) of the ASOC, says that if the details of the proposed credit offer for a customer met the necessary thresholds in Sovereign, or the proposed credit offer was otherwise allowed to progress by Westpac, the Dealer Business Manager was notified and was provided access to automatically generated documentation which included:

(i) a completed application for finance, which included information that was entered into Sovereign by the Dealer Business Manager;

(ii) a credit guide;

(iii) a loan agreement, being an offer from the customer to borrow the loan amount from Westpac (**Car Loan Offer**);

(iv) not used~~Fixed Rate Loan Agreement Standard Terms and Conditions~~; and

(v) a further copy of the Car Loan Offer, for the customer to keep;

(e) as to sub-paragraph 7(e) of the ASOC, says that the Dealer Business Manager provided the documents described in sub-paragraph 7(d) of this Defence, and the Fixed Rate Loan Agreement Standard Terms and Conditions, to the customer;

(f) as to sub-paragraph 7(f) of the ASOC, says that if the customer wished to proceed with their application for finance, the customer was required to sign the completed application, and in so doing would:

(i) declare that the details of the application are true and correct and are not by omission or otherwise misleading;

(ii) acknowledge that the Dealer named in the application is not acting as the customer's agent in relation to the application for finance and is not authorised to negotiate in relation to the loan contract on the customer's behalf;

(iii) acknowledge that the Dealer may perform some activities under the NCCPA on behalf of Westpac as its representative, but it is not Westpac's agent, except in undertaking customer identification or providing documents as legally required;

(iv) acknowledge that, where an origination fee was charged, the customer is liable to pay an origination fee shown in the Car Loan Offer to the Dealer for reimbursement of its administrative costs; and

(v) acknowledge that, where an origination fee was charged, the customer authorises the origination fee to be included in the Car Loan Offer and for Westpac to make the payment on the customer's behalf to the Dealer;

(g) as to sub-paragraph 7(g) of the ASOC, says that if the customer wished to proceed with the Car Loan Offer, the customer signed the Car Loan Offer, and in so doing:

(i) declared that all of the information provided by the customer to Westpac was accurate and not misleading and the customer was aware that Westpac was relying on it;

(ii) acknowledged that before signing the Car Loan Offer, the customer received and read a copy of the Fixed Rate Loan Agreement Standard Terms and Conditions;

(iii) acknowledged that the customer could withdraw from the Car Loan Offer at any time before Westpac accepted it; and

(iv) acknowledged that Westpac would pay commission to the Dealer for the introduction of the customer's credit business;

(h) as to sub-paragraph 7(h) of the ASOC, says that the Dealer Business Manager submitted the following documents to Westpac ~~via Sovereign~~, among other documents:

(i) the signed completed application for finance referred to in sub-paragraph 7(f) of this Defence and the signed Car Loan Offer referred to in sub-paragraph 7(g) of this Defence; and

(ii) any necessary supporting documents from the customer, including:

(A) payslips; and

(B) identification documents;

(i) in answer to sub-paragraph 7(i) of the ASOC, Westpac says that, following its internal verification and credit assessment processes, if the Car Loan Offer was accepted, the Car Loan Offer was signed on behalf of Westpac and returned to the Dealer Business Manager through Sovereign;

(j) in answer to sub-paragraph 7(j) of the ASOC, Westpac says that funds comprising the approved loan amount, less any amounts payable to Westpac or which were to be paid directly to third parties pursuant to the Car Loan, were transferred to the Dealer;

(k) in answer to sub-paragraph 7(k) of the ASOC, says that once the Dealer Business Manager was satisfied that the Dealer had received, or would receive, the settled funds under the Car Loan, he or she would arrange for the car the subject of the Car Loan to be released to the customer;

(l) in answer to sub-paragraph 7(l) of the ASOC, admits that the Dealer Business Manager managed communications between the customer and Westpac; and

(m) otherwise denies the allegations in paragraph 7 of the ASOC.

8 In answer to paragraph 8 of the ASOC, Westpac:

(a) admits the allegations in paragraph 8 of the ASOC during the Relevant Period; and

(b) otherwise denies the allegations in paragraph 8 of the ASOC.

9 In answer to paragraph 9 of the ASOC, during the Relevant Period, Westpac:

(a) says that, as contemplated by Dealer Agreements, Westpac agreed to pay commission to individual Dealers for the introduction of credit business;

(b) says that Westpac notified Dealers individually from time to time of a base rate of interest to be charged on Car Loans (**Base Rate**);

(c) says that the Base Rate was typically reviewed monthly, and could be higher for used vehicles and/or loan terms greater than 60 months;

(d) says that Westpac authorised Dealers to set a rate of interest to be payable by a customer under a Car Loan (subject to Westpac's approval) which was higher than, lower than or equal to the Base Rate (**Contract Rate**);

(e) says that the difference between the Base Rate and the Contract Rate was called the "Margin";

(f) says that, where the Base Rate was lower than the Contract Rate, Westpac notified Dealers individually from time to time of the proportion of the Margin which was used by Westpac to calculate the commission (**Flex Commission**) payable to the Dealer for the introduction of a customer's credit business;

(**Flex Commission Calculation Method**)

(g) says that the term of a Car Loan could not exceed 84 months (**Maximum Term**) and the commission payable to Dealers on Car Loans with a term greater than 60 months was capped as for a Car Loan with a 60 month term;

(h) says that Westpac notified Dealers individually of any minimum commission payable on Car Loans where the Contract Rate was equal to or below the Base Rate;

(i) says that from time to time, Westpac, as part of a time limited promotion agreed with the Dealer, paid the Dealer a flat commission for Car Loans originated at specified interest rates (**Promotional Rates**);

(j) says that the commissions and origination fees were repayable by the Dealer to Westpac if the Car Loan was paid out or was non-accrual within three months of

settlement, or if the automobile was repossessed during the first two years from settlement of the Car Loan;

(k) says that the Contract Rate for some Dealers was subject to a cap of up to 10 percentage points above the Base Rate (**Maximum Rate**);

(l) says that from on or around 1 November 2015, Westpac capped the Contract Rate payable by a customer at 16% per annum (**Rate Cap**);

(m) says that Westpac issued periodic statements to Dealers which recorded, among other things, any Flex Commission paid by Westpac to the Dealer; and

(n) otherwise denies the allegations in paragraph 9 of the ASOC.

10 In answer to paragraph 10 of the ASOC, during the Relevant Period, Westpac:

(a) as to sub-paragraph 10(a) of the ASOC:

(i) refers to and repeats paragraphs 7 and 9 of this Defence;

(ii) admits that the Flex Commissions and Flex Commission Calculation Method allowed Dealers to set the Contract Rate subject to any Promotional Rate, Maximum Rate and the Rate Cap, but says that this occurred subject to:

(A) negotiations with customers regarding the automobile to be purchased;

(B) negotiations with customers regarding the purchase price of the automobile including any accessories or sale extras;

(C) whether customers intended to finance the purchase with cash or credit;

(D) whether customers wished to use finance options available through automobile dealers (**Dealer Finance**), whether with Westpac or not, or source their own finance; and

(E) if customers wished to use Dealer Finance, negotiations with customers regarding the terms of that finance including the amount, interest rate, repayment schedule and term of the loan;

(b) as to sub-paragraph 10(b) of the ASOC, denies that the Flex Commissions and Flex Commission Calculation Method allowed Dealers to set the term of the Car Loan;

(c) further, says that:

(i) customers were free to shop around and choose their own credit provider, and were not obliged to use Dealer Finance in order to make an automobile purchase;

(ii) during the Relevant Period, loan comparison websites were available to customers to access and compare auto finance loans;

Particulars

A. https://www.carloans.com.au/

B. https://mozo.com.au/

C. https://www.canstar.com.au/

(iii) during the Relevant Period, the Australian Securities and Investments Commission (**ASIC**) provided guidance to consumers in relation to finance for purchase of automobiles and recommended that consumers shop around for credit before shopping for a car to find a loan that suits the customer's budget and circumstances and that dealer finance may be convenient but that shopping around may get a better outcome;

Particulars

During the Relevant Period, the ASIC Moneysmart website stated that:

(a) "By shopping around for credit before you go shopping for a car, you can find a loan that suits your budget and circumstances"; and

(b) either:

(i) "While dealer finance might seem convenient you may get a better deal by shopping around"; or

(ii) *"Dealer finance may be convenient, but it's important to shop around to make sure you get a good deal on your loan".*

http://www.moneysmart.gov.au/borrowing-and-credit/car-loans/

(iv) customers were able to negotiate the proposed loan amount, loan term, repayments, payment schedule and interest rate included in their application for finance and Car Loan Offer, which were subject to Westpac's credit approval processes and acceptance;

(v) customers acknowledged that the Dealer was not authorised to negotiate in relation to Car Loan Offers on the customers' behalf; and

(vi) customers were able to withdraw their Car Loan Offer at any time before it was accepted by Westpac, and after acceptance by Westpac before customers obtained credit by telling Westpac in writing, but customers remained liable for any fees or charges already incurred;

(d) says that Contract Rates set by Dealers varied, and included Contract Rates above and below the Base Rate;

(e) refers to and repeats sub-paragraphs 9(d), 9(i) and 9(j) of this Defence;

(f) says that Dealers were paid Flex Commissions by Westpac calculated pursuant to the Flex Commission Calculation Method, and if Dealers did not set a Contract Rate above the Base Rate, Dealers would receive no commission or a minimum commission for the introduction of a customer's credit business, and so to that extent Dealers were self-interested;

(g) as to sub-paragraph 10(a)(iii) of the ASOC, Westpac:

(i) says that the allegations in sub-paragraph 10(a)(iii) of the ASOC are embarrassing and/or prejudicial, and liable to be struck out under rule 23.02(c) of the *Supreme Court (General Civil Procedure) Rules 2015* (Vic) (**Civil Procedure Rules**), because the allegation that the Contract Rate was "significantly higher" than Westpac "would have offered the Group

Members", "or other consumers", had it been approached otherwise than through a Dealer is vague, lacking in detail and proper particulars and Westpac is unable to understand the allegation it is required to meet at trial; and

(ii) under cover of that objection, Westpac denies the allegations in sub-paragraph 10(a)(iii) of the ASOC;

(h) as to sub-paragraph 10(c) of the ASOC, says that:

(i) the First Plaintiff does not allege that Group Members were vulnerable; and

(ii) the purchase of an automobile and the negotiation of a Car Loan by a customer from a Dealer represents an arms-length commercial transaction;

(i) as to sub-paragraph 10(d1) of the ASOC,

(i) refers to and repeats paragraph 9, sub-paragraphs 10(a), 10(c), 10(d), 10(f) and 10(h)(ii) of this Defence; and

(ii) otherwise denies the allegations in subparagraph 10(d1) of the ASOC;

(j) as to sub-paragraph 10(e) of the ASOC:

(i) says that Dealers were not acting on behalf of customers in relation to the automobile purchase or the Car Loan, and in those circumstances, denies that an alleged conflict of interest or potential conflict of interest arose;

(ii) denies that Dealers owed a duty to act in the interests of customers in relation to the Car Loan and avoid a conflict of interest;

(iii) says that the First Plaintiff has not identified material facts or a legal doctrine under which a duty to act in the interests of customers and avoid a conflict of interest arose, or a statutory obligation to avoid the alleged conflict of interest, and the allegation of a "conflict of interest" or "potential conflict of interest" is therefore embarrassing and/or prejudicial, and liable to be struck out under rule 23.02(c) of the Civil Procedure Rules; and

(iv) under cover of that objection, Westpac denies any obligation to avoid the alleged conflict of interest and denies the allegations in sub-paragraph 10(e) of the ASOC;

(k) in the premises set out above, denies that the setting of the Contract Rate by Dealers created unfairness or a risk of unfairness in relation to Car Loans as alleged in paragraph 10(d) of the ASOC; and

(l) otherwise denies the allegations in paragraph 10 of the ASOC.

11 In answer to paragraph 11 of the ASOC, Westpac:

(a) refers to and repeats paragraphs 9 and 10 of this Defence;

(b) says that, where an origination fee was charged, Westpac disclosed that Dealers were paid an origination fee shown in the Car Loan Offer for reimbursement of its administrative costs and commission for the introduction of credit business, as required by section 17(14) of the Credit Code;

(c) says that, during the Relevant Period, the payment of flex commissions was prevalent in the automobile industry;

(d) says that other than the requirements as set out in sub-paragraph 11(b) of this Defence, there was no obligation to disclose the matters alleged in sub-paragraph 11(a) of the ASOC;

(e) otherwise admits that Westpac did not disclose to customers the matters alleged in sub-paragraph 11(a) of the ASOC, but refers to and repeats sub-paragraphs 7(a), 7(b)(vi), 7(g)(iv) and 10(c) of this Defence;

(f) does not know and cannot admit whether Dealers disclosed to individual Group Members the matters alleged in sub-paragraph 11(a) of the ASOC;

(g) as to sub-paragraph 11(b) of the ASOC:

(i) refers to and repeats sub-paragraphs 11(a) to (f) of this Defence;

(ii) says that Westpac was not obliged to ensure that Dealers disclosed the matters alleged in sub-paragraph 11(a) of the ASOC other than as set out in sub-paragraphs 11(a) to (e) of this Defence; and

(iii) in the premises, says that Westpac was not obliged to have systems, procedures or processes in place to ensure that Dealers disclosed to Group Members the matters described at sub-paragraph 11(a) of the ASOC;

(h) as to sub-paragraph 11(c) of the ASOC:

(i) says that sub-paragraph 11(c) of the ASOC contains no allegations against Westpac or in respect of Westpac's conduct;

(ii) says that the allegations in sub-paragraph 11(c) of the ASOC are embarrassing, and liable to be struck out under rule 23.02(c) of the Civil Procedure Rules, because the allegations are not material to any allegations pleaded against Westpac;

(iii) under cover of that objection, refers to and repeats sub-paragraphs 10(a), 10(c), 10(d), 10(e), 10(j)~~10(i)~~ and 11(b) of this Defence; and

(iv) otherwise denies the allegations in sub-paragraph 11(c) of the ASOC;

(i) as to sub-paragraph 11(d) of the ASOC:

(i) refers to and repeats sub-paragraphs 10(c), 10(d), 10(e), 10(j)~~10(i)~~ and 11(b) of this Defence; and

(ii) does not know and therefore cannot admit the allegations in sub-paragraph 11(d) of the ASOC in relation to Group Members, who are not identified and whose claims are not particularised;

(j) as to sub-paragraph 11(e) of the ASOC:

(i) refers to and repeats sub-paragraphs 10(c), 10(d), 10(e), 10(j)~~10(i)~~ and 11(b) of this Defence;

(ii) says that the Plaintiffs say that whether comparable Group Members were afforded equal Contract Rates was dependent upon the following metrics:

(A) vehicle model;

(B) dealer;

(C) purchase value;

(D) date; and

(E) risk profile;

Particulars

By letter of 25 September 2020 from Maurice Blackburn to King & Wood Mallesons, the Plaintiffs said that the metrics of

comparison for the purposes of sub-paragraph 11(e) of the SOC are limited to:

(a) vehicle model;

(b) dealer;

(c) purchase value;

(d) date; and

(e) risk profile.

(iii) does not know and therefore cannot admit the allegations in sub-paragraph 11(e) of the ASOC in relation to Group Members, who are not identified and whose claims are not particularised; and

(iv) denies that Westpac had any obligation to ensure that customers were afforded the same Contract Rate; and

(k) otherwise denies the allegations in paragraph 11 of the ASOC.

12 Westpac admits the allegations in paragraph 12 of the ASOC.

13 In answer to paragraph 13 of the ASOC, Westpac:

(a) says that:

(i) section 5 of the NCCPA adopts the definition of "credit contract" in the Credit Code;

Particulars

Section 5 of the NCCPA.

(ii) section 4 of the Credit Code provides that a credit contract is one for the provision of credit to which the Credit Code applies;

Particulars

Section 4 of the Credit Code.

(iii) section 5(1)(b) of the Credit Code provides that the Credit Code applies to the provision of credit provided or intended to be provided wholly or predominantly for personal, domestic or household purposes;

Particulars

Section 5(1)(b) of the Credit Code.

(b) says that, in the premises, Car Loans which were not wholly or predominantly for personal, domestic or household purposes were not credit contracts within the meaning of section 4 of the Credit Code and section 5 of the NCCPA; and

(c) otherwise admits the allegations in paragraph 13 of the ASOC.

14 In answer to paragraph 14 of the ASOC, Westpac:

(a) does not know and cannot admit the allegations in sub-paragraphs 14(a) and 14(b)(i) of the ASOC;

(b) denies the allegations in sub-paragraphs 14(b)(iii) and 14(b)(iv) of the ASOC;

(c) refers to and repeats paragraphs 18, 19, 25 and 26 of this Defence;

(d) says that during the Relevant Period:

(i) where Dealers submitted a credit offer to Westpac pursuant to the terms of Dealer Agreements, Dealers assisted customers to apply for Car Loans with Westpac;

(ii) Dealers were not acting on behalf of these customers in undertaking such activity; and

(iii) subject to paragraph 25 of this Defence, Dealers were not acting on behalf of Westpac in undertaking such activity; and

(e) otherwise denies the allegations in paragraph 14 of the ASOC.

15 In answer to paragraph 15 of the ASOC, Westpac:

(a) refers to and repeats paragraph 14 of this Defence;

(b) subject to paragraph 14 of this Defence, admits the allegations in paragraph 15 of the ASOC during the Relevant Period insofar as the allegations concern:

(i) the activity pleaded at sub-paragraph 14(d) of this Defence; and

(ii) credit assistance in respect of credit contracts wholly or predominantly for personal, household or domestic use;

(c) says that Dealers were not acting as representatives of Westpac when providing credit assistance; and

(d) otherwise denies the allegations in paragraph 15 of the ASOC.

16 As to paragraph 16 of the ASOC, Westpac:

(a) admits that Dealers carried on business in Australia during the Relevant Period; and

(b) otherwise does not admit the allegations in paragraph 16 of the ASOC.

17 In answer to paragraph 17 of the ASOC, Westpac:

(a) says that during the Relevant Period, Dealers carried on business in one or more of the jurisdictions of:

(i) each referring State; and / or

(ii) each referring Territory; and

(b) otherwise does not admit the allegations in paragraph 17 of the ASOC.

18 In answer to paragraph 18 of the ASOC, Westpac:

(a) admits that during the Relevant Period, Dealers acted as intermediaries between Westpac and customers in respect of the activities pleaded at sub-paragraph 7(c) of this Defence; and

(b) otherwise denies the allegations in paragraph 18 of the ASOC.

19 In answer to paragraph 19 of the ASOC, Westpac:

(a) refers to and repeats paragraph 18 of this Defence;

(b) subject to paragraph 18 of this Defence, admits the allegations in paragraph 19 of the ASOC insofar as they concern:

(i) the activities pleaded at sub-paragraph 7(c) of this Defence; and

(ii) credit contracts provided to customers wholly or predominantly for personal, domestic or household use;

(c) says that Dealers were not acting as representatives of Westpac when acting as intermediaries; and

(d) otherwise denies the allegations in paragraph 19 of the ASOC.

20 In answer to paragraph 20 of the ASOC, during the Relevant Period, Westpac:

(a) refers to and repeats paragraphs 15 and 19 of this Defence;

(b) subject to paragraphs 15 and 19 of this Defence, admits the allegations in paragraph 20 of the ASOC insofar as they concern credit contracts provided to customers wholly or predominantly for personal, domestic or household use; and

(c) otherwise denies the allegations in paragraph 20 of the ASOC.

21 In answer to paragraph 21 of the ASOC, Westpac:

(a) as to sub-paragraph 21(a) of the ASOC:

(i) refers to and repeats paragraphs 9 and 10 of this Defence;

(ii) says that whether individual Group Members were at a special disadvantage in dealing with Dealers in relation to Car Loans would depend on the idiosyncrasies and individual circumstances of Group Members;

(iii) refers to and repeats sub-paragraph 11(f) of this Defence;

(iv) says that it does not know what matters were known to individual Group Members; and

(v) denies the allegations in sub-paragraph 21(a) of the ASOC;

(b) as to sub-paragraph 21(b) of the ASOC:

(i) says that it does not know and cannot admit the state of mind of individual Group Members;

(ii) says that it does not know and cannot admit the applicability of the matters pleaded in sub-paragraph 21(b) of the ASOC to the circumstances of individual Group Members who are not identified and whose claims are not particularised;

(iii) says that whether Group Members considered themselves unable to make a Car Loan with a credit provider other than Westpac is subjective and would depend on the idiosyncrasies and individual circumstances of each Group Member who obtained a Car Loan;

(iv) says that customers could finance the purchase of the automobile with cash or credit and could source finance with a credit provider other than Westpac; and

(v) says that Westpac did not offer consumer leases through Dealers, that is, for the use of customers for wholly or predominantly personal, domestic or household use;

(c) as to sub-paragraph 21(c) of the ASOC, Westpac:

(i) refers to and repeats paragraphs 9 and 10 of this Defence; and

(ii) otherwise denies the allegations in sub-paragraph 21(c) of the ASOC;

(d) as to sub-paragraph 21(d) of the ASOC:

(i) not used~~says that, subject to its obligations under the NCCPA (with respect to credit contracts to which the NCCPA applied), Westpac could determine the terms on which it was prepared to accept or approve a Car Loan Offer from a customer in its absolute discretion~~;

(ii) says that Group Members could seek finance from other credit providers;

(iii) refers to and repeats paragraphs 6, 7 and 9 and sub-paragraphs 10(c) and 10(d) of this Defence; ~~and~~

(iv) further says that, subject to its obligations under the NCCPA (with respect to credit contracts to which the NCCPA applied), Westpac could determine the terms on which it was prepared to accept or approve a Car Loan Offer from a customer in its absolute discretion; and

(v) otherwise denies the allegations in sub-paragraph 21(d) of the ASOC;

(e) as to sub-paragraph 21(e) of the ASOC:

(i) says that the allegations are embarrassing and/or prejudicial and liable to be struck out under rule 23.02(c) of the Civil Procedure Rules, because the allegation that the terms of Car Loans were “less favourable” to Group Members than the terms of “a comparable transaction” is vague, lacking in detail and proper particulars and Westpac is unable to determine the nature and scope of the allegation it is required to meet; and

(ii) under cover of that objection, denies the allegations in sub-paragraph 21(e) of the ASOC; and

(f) otherwise denies the allegations in paragraph 21 of the ASOC.

22 In answer to paragraph 22 of the ASOC, Westpac:

(a) refers to and repeats paragraph 21 of this Defence; and

(b) denies the allegations in paragraph 22 of the ASOC.

23 In answer to paragraph 23 of the ASOC, Westpac:

(a) says it does not know and cannot admit the state of mind of Group Members;

(b) says that the reasons for entering into a Car Loan were subjective and would depend on the idiosyncrasies and individual circumstances of each Group Member at the time of the Car Loan;

(c) refers to and repeats paragraphs 21 and 22 of this Defence; and

(d) otherwise denies the allegations in paragraph 23 of the ASOC.

24 In answer to paragraph 24 of the ASOC, Westpac:

(a) refers to and repeats paragraphs 21 to 23 of this Defence; and

(b) denies the allegations in paragraph 24 of the ASOC.

25 In answer to paragraph 25 of the ASOC, Westpac:

(a) ~~on the assumption that the reference to the Car Dealer Terms is intended to be a reference to the Dealer Terms,~~ admits that during the Relevant Period, Dealers were persons acting on behalf of Westpac as a holder of an Australian credit licence for the limited purposes set out in sub-paragraphs 7(a)~~,~~ and 7(e) of this Defence (for the purposes of providing the documents described in sub-paragraphs 7(d)(ii), 7(d)(iii), ~~7(d)(iv) and~~ 7(d)(v) and 7(e)), and 7(h)(ii)(B) of this Defence;

(b) refers to and repeats paragraphs 15 and 19 of this Defence; and

(c) otherwise denies the allegations in paragraph 25 of the ASOC.

26 In answer to paragraph 26 of the ASOC, Westpac:

(a) refers to and repeats paragraphs 7, 15, 19 and 25 of this Defence;

(b) subject to paragraphs 15, 19, 25 of this Defence, admits that during the Relevant Period, each Dealer was a representative of Westpac within the meaning of section 5 of the NCCPA for the limited purposes set out in sub-paragraphs 7(a)~~,~~ and 7(e) of this Defence (for the purposes of providing the documents described in

sub-paragraphs 7(d)(ii), 7(d)(iii), ~~7(d)(iv) and~~ 7(d)(v) and 7(e)), and 7(h)(ii)(B) of this Defence; and

(c) otherwise denies the allegations in paragraph 26 of the ASOC.

27 In answer to paragraph 27 of the ASOC, Westpac:

(a) refers to and repeats paragraphs 15, 19, 20, 22, 25, 26 and 40 of this Defence; and

(b) denies the allegations in paragraph 27 of the ASOC.

28 In answer to paragraph 28 of the ASOC, Westpac:

(a) refers to and repeats paragraphs 20 and 22 and sub-paragraphs 10(c), 10(d), 10(e), ~~10(i)~~10(j) and 11(b) of this Defence; and

(b) denies the allegations in paragraph 28 of the ASOC.

29 In answer to paragraph 29 of the ASOC, Westpac:

(a) says it does not know and cannot admit the state of mind of Group Members;

(b) says that the reasons for entering into a Car Loan were subjective and would depend on the idiosyncrasies and individual circumstances of each Group Member at the time of the Car Loan;

(c) refers to and repeats paragraphs 20 and 22 and sub-paragraphs 10(c), 10(d), 10(e), ~~10(i)~~10(j) and 11(b) of this Defence; and

(d) otherwise denies the allegations in paragraph 29 of the ASOC.

30 In answer to paragraph 30 of the ASOC, Westpac:

(a) refers to and repeats paragraphs 27 to 29 of this Defence; and

(b) denies the allegations in paragraph 30 of the ASOC.

31 In answer to paragraph 31 of the ASOC, Westpac:

(a) refers to and repeats paragraphs 15, 19, 20, 22, 25, 26 and 40 of this Defence;

(b) denies that any impugned conduct by the Dealer was conduct as a representative for which Westpac could be liable within the meaning of sections 74 and 77 of the NCCPA;

(c) says that any loss or damage (which is denied) was caused by Group Members; and

(d) otherwise denies the allegations in paragraph 31 of the ASOC.

Particulars

A. Group Members entered into Car Loans in circumstances where they acknowledged that the Car Loan Offer could be negotiated.

B. Group Members had the opportunity to shop around and make inquiries to determine whether Westpac or other credit providers offered similar credit products on more favourable terms and, if they desired to do so, to withdraw their Car Loan Offer made to Westpac.

C. Westpac refers to and repeats paragraph 10 of this Defence.

D. Group Members were able to withdraw their Car Loan Offer at any time before it was accepted by Westpac, and after acceptance by Westpac before the customer obtained credit by telling Westpac in writing, but the customer remained liable for any fees or charges already incurred.

E. Any loss or damage (which is denied) was caused by Group Members' failure to make any or proper inquiries in relation to terms on which finance could be obtained otherwise than through Dealers.

32 In answer to paragraph 32 of the ASOC, Westpac:

(a) denies that Group Members have remedies against Westpac; and

(b) denies the allegations in paragraph 32 of the ASOC.

33 Westpac denies the allegations in paragraph 33 of the ASOC.

Misleading or Deceptive Conduct

34 In answer to paragraph 34 of the ASOC, Westpac:

(a) refers and repeats paragraphs 11 and 35 of this Defence; and

(b) denies the allegations in paragraph 34 of the ASOC.

35 In answer to paragraph 35 of the ASOC, Westpac:

(a) refers to and repeats paragraph 34 of this Defence;

(b) denies that it was required to disclose in the terms alleged in sub-paragraphs 34(a) to (~~e~~e) of the ASOC;

(c) says that Westpac does not know and cannot admit what matters were known to individual Group Members; and

(d) admits that it did not disclose the matters pleaded in sub-paragraphs 34(a) to (e) ~~35~~ of the ASOC.

36 Westpac denies the allegations in paragraph 36 of the ASOC.

37 In answer to paragraph 37 of the ASOC, Westpac:

(a) refers to and repeats paragraph 35 of this Defence;

(b) denies that the conduct of Westpac was conduct engaged in by Westpac in relation to financial services within the meaning of section 1041H of the Corporations Act; and

Particulars

*A credit facility is not a financial product within the meaning of sections 1041H and 765A(1)(h)(i) of the Corporations Act and regulation 7.1.06 of the Corporations Regulations 2001 (Cth) (**Corporations Regulations**).*

(c) otherwise denies the allegations in paragraph 37 of the ASOC.

38 In answer to paragraph 38 of the ASOC, Westpac:

(a) refers to and repeats paragraphs 35 to 37 of this Defence; and

(b) otherwise denies the allegations in paragraph 38 of the ASOC.

39 In answer to paragraph 39 of the ASOC, Westpac:

(a) says it does not know and cannot admit the state of mind of Group Members;

(b) says that the reasons for entering into a Car Loan were subjective and would depend on the idiosyncrasies and individual circumstances of each Group Member at the time of the Car Loan;

(c) refers to and repeats paragraphs 35 to 38 and sub-paragraphs 10(c), 10(d), 10(e), ~~10(i)~~10(j) and 11(b) of this Defence; and

(d) otherwise denies the allegations in paragraph 39 of the ASOC.

40 In answer to paragraph 40 of the ASOC, Westpac:

(a) refers to and repeats paragraph 39 of this Defence;

(b) says that any loss or damage (which is denied) was caused by Group Members; and

(c) otherwise denies the allegations in paragraph 40 of the ASOC.

Particulars

A. Group Members entered into Car Loans in circumstances where they acknowledged that the Car Loan Offer could be negotiated.

B. Group Members had the opportunity to shop around and make inquiries to determine whether Westpac or other credit providers offered similar credit products on more favourable terms and, if they desired to do so, to withdraw their Car Loan Offer made to Westpac.

C. Westpac refers to and repeats paragraph 10 of this Defence.

D. Group Members were able to withdraw their Car Loan Offer at any time before it was accepted by Westpac, and after acceptance by Westpac before the customer obtained credit by telling Westpac in writing, but the customer remained liable for any fees or charges already incurred.

E. Any loss or damage (which is denied) was caused by Group Members' failure to make any or proper inquiries in relation to terms on which finance could be obtained otherwise than through Dealers.

F. Group Members failed to take any steps to obtain, or attempt to obtain, at any relevant time, alternate finance for the purchase of their vehicle.

40A For the purposes of this Defence only, Westpac says that if, which is denied, the Court finds that Westpac contravened section 1041H of the Corporations Act or section 12DA(1) of the

ASIC Act and any Group Member suffered loss or damage that was caused by the actions of Westpac in contravention of section 1041H of the Corporations Act or section 12DA(1) of the ASIC Act as alleged in the ASOC, Westpac says that:

(a) Group Members are responsible in part or wholly for the loss that is the subject of the Group Members' claim against Westpac, pleaded in the ASOC, because the loss resulted partly or wholly from the Group Members' failure to take reasonable care to avoid such loss;

Particulars

Group Members entered into Car Loans in circumstances where:

(a) *the terms of the Car Loan Offer disclosed payment of a commission to Dealers;*

(b) Group Members acknowledged that the Car Loan Offer was open to negotiation; ~~and~~

(c) Group Members failed to make any or proper inquiries in relation to terms on which finance could be obtained otherwise than through Dealers; and

(d) Group Members failed to take any steps to obtain, or attempt to obtain, at any relevant time, alternate finance for the purchase of their vehicle.

(b) Westpac did not intend to cause the loss or damage (if the loss or damage is established, which is denied);

(c) Westpac did not fraudulently cause the loss or damage (if the loss or damage is established, which is denied); and

(d) the damages that Group Members may recover in relation to the loss or damage are to be reduced to the extent to which the Court thinks it is just and equitable having regard to Group Members' share in the responsibility for such loss or damage, in accordance with:

(i) in respect of the alleged contravention of section 12DA(1) of the ASIC Act, section 12GF(1B) of the ASIC Act; and

(ii) in respect of the alleged contravention of section 1041H of the Corporations Act (if maintainable, which is denied), section 1041I(1B) of the Corporations Act.

Mistake

41 In answer to paragraph 41 of the ASOC, Westpac:

(a) refers to and repeats paragraphs 9, 10, 11, 22, 31(c) and ~~33~~ 34 of this Defence;

(b) says that Westpac does not know and cannot admit what matters were known to individual Group Members;

(c) denies that Westpac was obliged to inform Group Members of the matters pleaded in paragraph 41 of the ASOC; and

(d) otherwise denies the allegations in paragraph 41 of the ASOC.

42 In answer to paragraph 42 of the ASOC, Westpac:

(a) refers to and repeats paragraph 41 of this Defence;

(b) says that Westpac does not know and cannot admit what matters were known to individual Group Members;

(c) says that Westpac provided the information to Group Members which it was required to disclose under the NCCPA in relation to Car Loans;

(d) denies that each of the matters alleged was material information that would have been relevant to the decision of Group Members as to whether to proceed with the entry into the Car Loan;

(e) further or alternatively, says that whether a matter constituted material information relevant to the decision of a Group Member as to whether to enter into the Car Loan is subjective and would depend on the idiosyncrasies and individual circumstances of each Group Member; and

(f) otherwise denies the allegations in paragraph 42 of the ASOC.

43 In answer to paragraph 43 of the ASOC, Westpac:

(a) refers to and repeats paragraph 42 of this Defence;

(b) says it does not know and cannot admit the state of mind of Group Members;

(c) says that the reasons for entering into the Car Loans were subjective and would depend on the idiosyncrasies and individual circumstances of each Group Member;

(d) says that the matters alleged in paragraphs 43 to 48 of the ASOC:

(i) do not relate to a fundamental term of the Car Loan; and

(ii) do not disclose a cause of action against Westpac on the grounds of unilateral mistake; and

(e) otherwise denies the allegations in paragraph 43 of the ASOC.

44 In answer to paragraph 44 of the ASOC, Westpac:

(a) refers to and repeats paragraphs 9, 10, 22, 33 and 43 of this Defence; and

(b) denies the allegations in paragraph 44 of the ASOC.

45 Not used. ~~In answer to paragraph 45 of the SOC, Westpac:~~

~~(a) refers to and repeats paragraphs 43 and 44 of this Defence;~~

~~(b) says that it does not know and cannot admit the state of mind of Group Members;~~

~~(c) says that the reasons for entering into Car Loans were subjective and would depend on the idiosyncrasies and individual circumstances of each Group Member; and~~

~~(d) otherwise denies the allegations in paragraph 45 of the SOC.~~

46 Westpac refers to and repeats paragraphs 41, 42, 43, and 44 of this Defence, and denies the allegations in paragraph 46 of the ASOC.

47 In answer to paragraph 47 of the ASOC, Westpac:

(a) says that the parties to the Car Loans cannot be restored to substantially the position they were in before the Car Loans;

(b) denies that Group Members are entitled to rescission of the Car Loans;

(c) refers to and repeats paragraphs ~~45~~ 43, 44 and 46 of this Defence; and

(d) otherwise denies the allegations in paragraph 47 of the ASOC.

48 In answer to paragraph 48 of the ASOC, Westpac:

(a) refers to and repeats paragraphs ~~0~~ 41 to 44 and 46 to 47 of this Defence;

(b) denies the allegations in paragraph 48 of the ASOC; and

(c) further and in the alternative, says that interest paid under the Car Loans was money legally due and owing under an enforceable contract; and

(d) further says that there is no maintainable claim in monies had and received by Group Members whose Car Loans have been fully performed.

48A In answer to paragraph 48A of the ASOC, Westpac:

(a) refers to and repeats paragraphs 41, 42 and 43 of this Defence; and

(b) otherwise denies the allegations in paragraph 48A of the ASOC.

48B In answer to paragraph 48B of the ASOC, Westpac:

(a) says that the parties to the Car Loans cannot be restored to substantially the position they were in before the Car Loans;

(b) denies that Group Members are entitled to rescission of the Car Loans;

(c) refers to and repeats paragraphs 43 and 48A of this Defence; and

(d) otherwise denies the allegations in paragraph 48B of the ASOC.

49 In answer to paragraph 49 of the ASOC, Westpac:

(a) refers to and repeats paragraphs 41, 42, 43, 48(c), 48A and 48B ~~45 to 48~~ of this Defence;

(b) says that paragraph 49(b) of the ASOC does not disclose a cause of action against Westpac and is liable to be struck out under rule 23.02(a) of the Civil Procedure Rules; ~~and~~

(c) under cover of that objection, denies the allegations in paragraph 49 of the ASOC; and

(d) further says that there is no maintainable claim in monies had and received by Group Members whose Car Loans have been fully performed.

49A In answer to paragraph 49A of the ASOC, Westpac:

(a) refers to and repeats paragraph 1(e) of the Defence; and

(b) otherwise denies the allegations in paragraph 49A of the ASOC.

49AA In further answer to paragraphs 41 to 49 of the ASOC, Westpac says that:

(a) Westpac, acting in good faith, relied to its detriment on the agreement by Group Members to pay interest charges referable to the Car Loans (**Interest Charges**)

and the payment of those Interest Charges by financing the purchase of the car, incurring expenditure and/or other disadvantageous consequences that it would not have otherwise incurred; and

Particulars

In reliance upon the agreement by Group Members to pay Interest Charges and payment of those Interest Charges, Westpac:

(a) financed the purchase of the car;

(b) bore the cost associated with the maintenance of that finance;

(c) bore the risk associated with the provision of that finance including that a Group Member may cease to make repayments and the underlying assets would be insufficient to cover the balance of the loan; and

(d) complied with the prudential standards relating to lending imposed by APRA.

(b) by reason of the change of position pleaded in sub-paragraph 49AA(a) of this Defence, it would be inequitable in all the circumstances to require Westpac to repay the Interest Charges in whole or in part.

49B In further answer to paragraphs 41 to 49 of the ASOC, Westpac says that:

(a) it gave good consideration to any Group Member from whom it received the payment of Interest Charges pursuant to terms of Group Members' respective Car Loans; and

Particulars

A. The particulars to paragraph 49AA of this Defence are repeated.

B. Group Members received cars and other benefits, including insurances and improvements to the cars, and the use/enjoyment of the cars.

(b) by reason of the provision of good consideration pleaded in sub-paragraph 49B(a) of this Defence, Westpac is not obliged to repay to Group Members the Interest Charges received by it in whole or in part.

49C In further answer to paragraphs 41 to 49 of the ASOC, Westpac says that:

(a) the receipt and use of the cars purchased with the Car Loans constitute unequivocal words or conduct by which Group Members have elected to take the benefit of the Car Loans; and

(b) Group Members are not entitled to the repayment of Interest Charges paid in respect of those Car Loans in whole or in part.

49D In further answer to the claims on behalf of Group Members for relief at paragraphs 41 to 49 of the ASOC, Westpac says that:

(a) Group Members have received a benefit from the Car Loans, to the extent that the amount advanced under the Car Loans was used:

(i) to repay an amount owing by a Group Member under another credit contract;

(ii) to finance premiums for comprehensive motor insurance of any "add-on" insurance products;

(iii) to pay for accessories or extras in relation to the automobile purchased; and

(iv) to obtain a valuable asset, being the automobile purchased;

(b) in the premises of the benefit received, set out in sub-paragraph 49D(a) of this Defence, Group Members would be unjustly enriched at Westpac's expense if Westpac were required to repay the Interest Charges received by it and Group Members are not entitled to the remedies or relief sought; and

(c) further or in the alternative, Group Members are not entitled to the remedies or relief sought unless they account for such benefit.

C FIRST PLAINTIFF'S CLAIM AGAINST THE FIRST DEFENDANT

50 In answer to paragraph 50 of the ASOC, Westpac:

(a) admits the allegation in sub-paragraph 50(a) of the ASOC; and

(b) does not know the fact alleged and therefore cannot admit the allegation in sub-paragraph 50(b) of the ASOC.

51 In answer to paragraph 51 of the ASOC, Westpac:

(a) as to sub-paragraph 51(a) of the ASOC:

(i) admits that "Lakeside Hyundai" was a trading name of Harrison Motoring Group Pty Ltd ACN 005.151 280 (**Lakeside Hyundai**);

(ii) says that it does not know and cannot admit when the First Plaintiff entered into discussions with Lakeside Hyundai;

(iii) not used~~denies that SLU955 is the registration number of the Hyundai~~;

(iv) not used~~says that SLU955 was the registration number of a Holden Berlina Sedan traded in by the First Plaintiff~~; and

(v) otherwise admits the allegations in sub-paragraph 51(a) of the ASOC;

(b) admits sub-paragraph 51(b) of the ASOC and says that the contract for sale between the First Plaintiff and Lakeside Hyundai for the acquisition of the Hyundai entered into on or around 20 August 2015 (**Hyundai Contract for Sale**):

(i) was subject to finance;

(ii) included the trade-in of a Holden Berlina Sedan with registration number SLU955 for an allowance of $500; and

(iii) included the following sale extras:

(A) tow bar;

(B) roof racks;

(C) carpet mats;

(D) registration in Victoria for 12 months;

(E) paint, fabric, vinyl, leather protection;

(F) clearguard wear & tear pack 1;

(G) rimpro-tec system silver; and

(H) darkest legal tint; and

(c) admits sub-paragraph 51(c) of the ASOC and says that the First Plaintiff paid the deposit of $500 to Lakeside Hyundai on or before 27 August 2015

52 Westpac admits the allegations in paragraph 52 of the ASOC and says that the interest rate of 12.99% per annum was fixed for the loan term.

53 In answer to paragraph 53 of the ASOC, Westpac admits that it entered into a dealer agreement with Lakeside Hyundai on or around 1 March 2015 (**Lakeside Hyundai Dealer Agreement**).

Particulars

The Lakeside Hyundai Dealer Agreement was in writing and comprised the following documents:

(a) dealer agreement dated 23 June 2010 between St. George, Lakeside Hyundai and J. & K. Harrison Motors Pty Ltd ACN 005 151 280; and

(b) letter dated in or around December 2014 from St. George to Lakeside Hyundai.

54 In answer to paragraph 54 of the ASOC, during the Relevant Period, Westpac:

(a) as to sub-paragraph 54(a) of the ASOC, says that the Lakeside Hyundai Dealer Agreement, among other things, set out the terms on which, and the form and manner in which Lakeside Hyundai was permitted to submit credit offers from customers to enter into Car Loans;

(b) as to sub-paragraph 54(b) of the ASOC, says that the terms of the Lakeside Hyundai Dealer Agreement, among other things, required Lakeside Hyundai to:

(i) comply with all laws and requirements of authorities in connection with Lakeside Hyundai's licensing status;

Particulars

Paragraph 2.2(b) of the Lakeside Hyundai Dealer Agreement.

(ii) comply with any undertaking given by Lakeside Hyundai to Westpac, or any direction by Westpac to Lakeside Hyundai, about the conduct of Lakeside Hyundai's business to the extent it relates to, or impacts on, Westpac's business or results, or may result, in Westpac suffering liability or loss. For example, Lakeside Hyundai must complete any training required by

Westpac within the time frame Westpac specifies and adhere to any procedures advised by Westpac from time to time;

Particulars

Paragraph 3.3 of the Lakeside Hyundai Dealer Agreement.

(iii) comply with any reasonable direction Westpac gives in connection with any advertising or use of Westpac's logo or promotional material, use of Westpac's reputation or the use of any of Westpac's property which is in Lakeside Hyundai's possession or control; and

Particulars

Paragraph 10(a) of the Lakeside Hyundai Dealer Agreement.

(iv) in relation to each credit offer, declare that Lakeside Hyundai has complied and will comply with all instructions and procedures given by Westpac at any time in respect of the manner of completion and submission to Westpac of each credit offer;

Particulars

Paragraph 6(b) of Schedule 1 of the Lakeside Hyundai Dealer Agreement.

(c) admits sub-paragraph 54(c) of the ASOC;

(d) says that the terms of the Lakeside Hyundai Dealer Agreement provided that Lakeside Hyundai was under no obligation to obtain or procure credit offers or to do business with Westpac, and Lakeside Hyundai acknowledged that if Lakeside Hyundai obtained any credit offer, it did so for the convenience of Lakeside Hyundai's customers and in the expectation that it would assist Lakeside Hyundai's business;

Particulars

Paragraph 13.2 of the Lakeside Hyundai Dealer Agreement.

(e) relies upon the terms of the Lakeside Hyundai Dealer Agreement for their full force and effect;

(f) does not know if Lakeside Hyundai had arrangements with other licensees (within the meaning of the NCCPA) to facilitate the introduction of credit business to other licensees; and

(g) otherwise denies the allegations in paragraph 54 of the ASOC.

55 In answer to paragraph 55 of the ASOC, Westpac:

(a) refers to and repeats paragraphs 7 and 54 of this Defence; and

(b) otherwise denies the allegations in paragraph 55 of the ASOC.

56 In answer to paragraph 56 of the ASOC, Westpac:

(a) admits the allegations in paragraph 56 of the ASOC during the Relevant Period; and

(b) otherwise denies the allegations in paragraph 56 of the ASOC.

57 In answer to paragraph 57 of the ASOC, during the Relevant Period, Westpac refers to and repeats paragraph 9 of this Defence and otherwise denies the allegations in paragraph 57 of the ASOC.

58 In answer to paragraph 58 of the ASOC, during the Relevant Period, Westpac:

(a) as to sub-paragraph 58(a) of the ASOC:

(i) refers to and repeats paragraphs 7 and 9 of this Defence;

(ii) admits that the Flex Commissions and Flex Commission Calculation Method as at the time the First Plaintiff entered into the Westpac Car Loan allowed Lakeside Hyundai to set the Contract Rate, but says that this occurred subject to:

(A) negotiations with the First Plaintiff regarding the automobile to be purchased;

(B) negotiations with the First Plaintiff regarding the purchase price of the Hyundai including any accessories or sale extras;

(C) whether the First Plaintiff intended to finance the purchase with cash or credit;

(D) whether the First Plaintiff wished to use Dealer Finance, whether with Westpac or not, or source her own finance; and

(E) negotiations with the First Plaintiff regarding the terms of that finance including the amount, interest rate, repayment schedule and term of the loan;

(b) says that the Hyundai Contract for Sale signed by First Plaintiff stated that the contract was subject to the purchaser obtaining finance approval within the time stated on the contract from the credit provider named in the contract or from a similar type of credit provider;

Particulars

Hyundai Contract for Sale, Terms and Conditions for Sale, clause 12.

(c) as to sub-paragraph 58(b) of the ASOC, denies that the Flex Commissions and Flex Commission Calculation Method allowed Lakeside Hyundai to set the term of the Westpac Car Loan;

(d) further, says that:

(i) the First Plaintiff was free to shop around and choose her own credit provider, and was not obliged to use Dealer Finance in order to purchase the Hyundai;

(ii) during the Relevant Period, loan comparison websites were available to the First Plaintiff to access and compare auto finance loans;

Particulars

A. https://www.carloans.com.au/

B. https://mozo.com.au/

C. https://www.canstar.com.au/

(iii) during the Relevant Period, ASIC provided guidance to consumers in relation to finance for the purchase of automobiles and recommended that consumers shop around for credit before shopping for a car to find a loan that suits the consumer's budget and circumstances and that dealer finance may be convenient but that shopping around may get a better outcome;

Particulars

During the Relevant Period, the ASIC Moneysmart website stated that:

(a) "By shopping around for credit before you go shopping for a car, you can find a loan that suits your budget and circumstances"; and

(b) either

(i) "While dealer finance might seem convenient you may get a better deal by shopping around"; or

(ii) "Dealer finance may be convenient, but it's important to shop around to make sure you get a good deal on your loan".

http://www.moneysmart.gov.au/borrowing-and-credit/car-loans/

(iv) the First Plaintiff was able to negotiate the proposed loan amount, loan term, repayments, payment schedule and interest rate included in her application for finance and offer of credit (**Westpac Car Loan Offer**), which were subject to Westpac's credit approval processes and acceptance;

(v) the First Plaintiff acknowledged that Lakeside Hyundai is not authorised to negotiate in relation to the Westpac Car Loan Offer on the First Plaintiff's behalf; and

(vi) the First Plaintiff was able to withdraw her Westpac Car Loan Offer at any time before it was accepted by Westpac, and after acceptance by Westpac before the First Plaintiff obtained credit by telling Westpac in writing, but the First Plaintiff would remain liable for any fees or charges already incurred;

(e) says that Contract Rates set by Lakeside Hyundai varied, and included Contract Rates above and below the Base Rate;

(f) refers to and repeats sub-paragraphs 9(d), 9(i) and 9(j) of this Defence;

(g) says that Lakeside Hyundai was paid Flex Commissions by Westpac calculated pursuant to the Flex Commission Calculation Method, and if Lakeside Hyundai did not set a Contract Rate above the Base Rate, Lakeside Hyundai would receive a minimum commission of $150 plus GST, and so to that extent Lakeside Hyundai was self-interested;

(h) as to sub-paragraph 58(a)(iii) of the ASOC, Westpac:

(i) says that the allegations in sub-paragraph 58(a)(iii) of the ASOC are embarrassing and/or prejudicial, and liable to be struck out under rule 23.02(c) of the Civil Procedure Rules, because the allegation that the Contract Rate was "significantly higher" than Westpac "would have offered Ms Fox" had it been approached otherwise than through Lakeside Hyundai is vague, lacking in detail and proper particulars and Westpac is unable to understand the allegation it is required to meet at trial; and

(ii) under cover of that objection, denies the allegations in sub-paragraph 58(a)(iii) of the ASOC;

(i) as to sub-paragraph 58(c) of the ASOC, says that:

(i) the First Plaintiff does not allege that the First Plaintiff was vulnerable; and

(ii) the purchase of the Hyundai by the First Plaintiff from Lakeside Hyundai represents an arms-length commercial transaction;

(j) as to sub-paragraph 58(d1) of the ASOC,

(i) refers to and repeats paragraph 57, sub-paragraphs 58(a), 58(d), 58(e), 58(g) and 58(i)(ii) of this Defence; and

(ii) otherwise denies the allegations in subparagraph 58(d1) of the ASOC;

(k) as to sub-paragraph 58(e) of the ASOC:

(i) says that Lakeside Hyundai was not acting on behalf of the First Plaintiff in relation to the purchase of the Hyundai or the Westpac Car Loan, and in those circumstances, denies that an alleged conflict of interest or potential conflict of interest arose;

(ii) denies that Lakeside Hyundai owed a duty to act in the interests of the First Plaintiff in relation to the Westpac Car Loan and avoid a conflict of interest;

(iii) says that the First Plaintiff has not identified material facts or a legal doctrine under which a duty to act in the interests of the First Plaintiff and avoid a conflict of interest arose, or a statutory obligation to avoid the alleged conflict of interest, and the allegation of a "conflict of interest" or "potential conflict of interest" is therefore embarrassing and/or prejudicial, and liable to be struck out under rule 23.02(c) of the Civil Procedure Rules; and

(iv) under cover of that objection, Westpac denies any obligation to avoid the alleged conflict of interest and denies the allegations in sub-paragraph 58(e) of the ASOC;

(l) in the premises set out above, denies that the setting of the Contract Rate by Lakeside Hyundai created unfairness or a risk of unfairness in relation to the Westpac Car Loan as alleged in paragraph 58(d) of the ASOC; and

(m) otherwise denies the allegations in paragraph 58 of the ASOC.

59 In answer to paragraph 59 of the ASOC, Westpac:

(a) refers to and repeats paragraphs 57 and 58 of this Defence;

(b) says that Westpac disclosed that Lakeside Hyundai was paid an origination fee shown in the Westpac Car Loan Offer to Lakeside Hyundai for reimbursement of its administrative costs, where an origination fee was charged, and commission for the introduction of credit business, as required by section 17(14) of the Credit Code;

(c) says that, during the Relevant Period, the payment of flex commissions was prevalent in the automobile industry;

(d) says that other than the requirements as set out in sub-paragraph 59(b) of this Defence, there was no obligation to disclose the matters alleged in sub-paragraph 59(a) of the ASOC;

(e) otherwise admits that Westpac did not disclose to the First Plaintiff the matters alleged in sub-paragraph 59(a) of the ASOC, but refers to and repeats sub-paragraphs 7(a), 7(b)(vi), 7(g)(iv) and 10(c) of this Defence;

(f) does not know and cannot admit whether Lakeside Hyundai disclosed to the First Plaintiff the matters alleged in sub-paragraph 59(a) of the ASOC;

(g) as to sub-paragraph 59(b) of the ASOC:

(i) refers to and repeats sub-paragraphs 59(a) to (f) of this Defence;

(ii) says that Westpac was not obliged to ensure that Lakeside Hyundai disclosed the matters alleged in sub-paragraph 59(a) of the ASOC other than as set out in sub-paragraphs 59(a) to (e) of this Defence; and

(iii) in the premises, says that Westpac was not obliged to have systems, procedures or processes in place to ensure that Lakeside Hyundai disclosed to the First Plaintiff the matters described at sub-paragraph 59(a) of the ASOC;

(h) as to sub-paragraph 59(c) of the ASOC:

(i) says that sub-paragraph 59(c) of the ASOC contains no allegations against Westpac or in respect of Westpac's conduct;

(ii) says that the allegations in sub-paragraph 59(c) of the ASOC are embarrassing, and liable to be struck out under rule 23.02(c) of the Civil Procedure Rules, because the allegations are not material to any allegations pleaded against Westpac;

(iii) under cover of that objection, refers to and repeats sub-paragraphs 58(a), ~~58(c),~~ 58(d), 58(e), 58(f), 58(k) ~~58(i)~~ and 59(b) of this Defence; and

(iv) otherwise denies the allegations in sub-paragraph 59(c) of the ASOC;

(i) as to sub-paragraph 59(d) of the ASOC:

(i) refers to and repeats sub-paragraphs ~~58(c),~~ 58(d), 58(e), 58(f), 58(k) ~~58(i)~~ and 59(b) of this Defence; and

(ii) denies the allegations in sub-paragraph 59(d) of the ASOC;

(j) as to sub-paragraph 59(e) of the ASOC:

(i) refers to and repeats sub-paragraphs ~~58(c),~~ 58(d), 58(e), 58(f), 58(k) ~~58(i)~~ and 59(b) of this Defence;

(ii) says that the First Plaintiff says that whether comparable Group Members were afforded equal Contract Rates was dependent upon the following metrics:

(A) vehicle model;

(B) dealer;

(C) purchase value;

(D) date; and

(E) risk profile;

Particulars

By letter of 25 September 2020 from Maurice Blackburn to King & Wood Mallesons, the Plaintiffs said that the metrics of comparison for the purposes of sub-paragraph 11(e) of the SOC are limited to:

(a) vehicle model;

(b) dealer;

(c) purchase value;

(d) date; and

(e) risk profile.

(iii) does not know and therefore cannot admit the allegations in sub-paragraph 59(e) of the ASOC in relation to Group Members, who are not identified and whose claims are not particularised; and

(iv) denies that Westpac had any obligation to ensure that customers were afforded the same Contract Rate; and

(k) otherwise denies the allegations in paragraph 59 of the ASOC.

60 Westpac admits the allegations in paragraph 60 of the ASOC.

61 In answer to paragraph 61 of the ASOC, Westpac:

(a) says that:

(i) section 5 of the NCCPA adopts the definition of “credit contract” in the Credit Code;

Particulars

Section 5 of the NCCPA.

(ii) section 4 of the Credit Code provides that a credit contract is one for the provision of credit to which the Credit Code applies;

Particulars

Section 4 of the Credit Code.

(iii) section 5(1)(b) of the Credit Code provides that the Credit Code applies to the provision of credit provided or intended to be provided wholly or predominantly for personal, domestic or household purposes; and

Particulars

Section 5(1)(b) of the Credit Code.

(b) otherwise admits the allegations in paragraph 61 of the ASOC.

62 In answer to paragraph 62 of the ASOC, Westpac:

(a) does not know and cannot admit the allegations in sub-paragraphs 62(a) and 62(b)(i) of the ASOC;

(b) refers to and repeats paragraphs 66, 67, 73 and 74 of this Defence;

(c) says that:

(i) to the extent that Lakeside Hyundai submitted the Westpac Car Loan Offer to Westpac pursuant to the terms of the Lakeside Hyundai Dealer Agreement, Lakeside Hyundai assisted the First Plaintiff to apply for the Westpac Car Loan Offer with Westpac;

(ii) Lakeside Hyundai was not acting on behalf of the First Plaintiff in undertaking such activity; and

(iii) subject to paragraph 73 of this Defence, Lakeside Hyundai did not act on behalf of Westpac in undertaking such activity; and

(d) otherwise denies the allegations in paragraph 62 of the ASOC.

63 In answer to paragraph 63 of the ASOC, Westpac:

(a) refers to and repeats paragraph 62 of this Defence; and

(b) subject to paragraph 62 of this Defence, admits the allegations in paragraph 63 of the ASOC insofar as the allegations concern the activity pleaded at 62(c) of this Defence;

(c) says that Lakeside Hyundai was not acting as a representative of Westpac when providing credit assistance; and

(d) otherwise denies the allegations in paragraph 63 of the ASOC.

64 Westpac admits the allegations in paragraph 64 of the ASOC.

65 In answer to paragraph 65 of the ASOC, Westpac:

(a) says that during the Relevant Period, Lakeside Hyundai carried on business in the State of Victoria, which is a referring State; and

(b) otherwise does not admit the allegations in paragraph 65 of the ASOC.

66 In answer to paragraph 66 of the ASOC, Westpac:

(a) admits that Lakeside Hyundai acted as an intermediary between Westpac and the First Plaintiff in respect of the activities pleaded at sub-paragraph 7(c) of this Defence; and

(b) otherwise denies the allegations in paragraph 66 of the ASOC.

67 In answer to paragraph 67 of the ASOC, Westpac:

(a) refers to and repeats paragraph 66 of this Defence;

(b) subject to paragraph 66 of this Defence, admits the allegations in paragraph 67 of the ASOC insofar as they concern the activities pleaded at sub-paragraph 7(c) of this Defence;

(c) says that Lakeside Hyundai was not acting as a representative of Westpac when acting as an intermediary; and

(d) otherwise denies the allegations in paragraph 67 of the ASOC.

68 In answer to paragraph 68 of the ASOC, during the Relevant Period, Westpac:

(a) refers to and repeats paragraphs 63 and 67 of this Defence;

(b) subject to paragraphs 63 and 67 of this Defence, admits the allegations in paragraph 68 of the ASOC; and

(c) otherwise denies the allegations in paragraph 68 of the ASOC.

69 In answer to paragraph 69 of the ASOC, Westpac:

(a) as to sub-paragraph 69(a) of the ASOC:

(i) refers to and repeats paragraphs 57 and 58 of this Defence;

(ii) denies that the First Plaintiff was at a special disadvantage in dealing with Lakeside Hyundai in relation to the Westpac Car Loan;

(iii) refers to and repeats sub-paragraph 59(f) of this Defence;

(iv) says that it does not know what matters were known to the First Plaintiff; and

(v) otherwise denies the allegations in sub-paragraph 69(a) of the ASOC;

(b) As to sub-paragraph 69(b) of the ASOC, Westpac:

(i) does not know and cannot admit the state of mind of the First Plaintiff, as to whether the First Plaintiff considered herself unable to make a Car Loan with a credit provider other than Westpac; and

(ii) denies the allegation that the First Plaintiff was unable to make a Car Loan with a credit provider other than Westpac~~Westpac does not plead to sub-paragraph 69(b) of the SOC as the First Plaintiff does not press this allegation against Westpac~~;

(c) denies the allegations in sub-paragraph 69(c) of the ASOC and refers to and repeats paragraphs 57 and 58 of this Defence;

(d) as to sub-paragraph 69(d) of the ASOC:

(i) not used~~says that, subject to its obligations under the NCCPA (with respect to credit contracts to which the NCCPA applied), Westpac could determine the terms on which it was prepared to accept or approve a Westpac Car Loan Offer from the First Plaintiff in its absolute discretion~~;

(ii) says that the First Plaintiff could seek finance from other credit providers;

(iii) refers to and repeats paragraphs 54, 55 and 57 and sub-paragraphs 58(c) and 58(d) of this Defence;

(iv) further says that, subject to its obligations under the NCCPA (with respect to credit contracts to which the NCCPA applied), Westpac could determine the

terms on which it was prepared to accept or approve a Westpac Car Loan Offer from the First Plaintiff in its absolute discretion; and

(v) otherwise denies the allegations in sub-paragraph 69(d) of the ASOC;

(e) as to sub-paragraph 69(e) of the ASOC:

(i) says that the allegations in sub-paragraph 69(e) of the ASOC are embarrassing and/or prejudicial, and liable to be struck out under rule 23.02(c) of the Civil Procedure Rules, because the allegation that the terms of the Westpac Car Loan were "less favourable" to the First Plaintiff than the terms of "a comparable transaction" is vague, lacking in detail and proper particulars and Westpac is unable to determine the nature and scope of the allegation it is required to meet; and

(ii) under cover of that objection, denies the allegations in sub-paragraph 69(e) of the ASOC; and

(f) otherwise denies the allegations in paragraph 69 of the ASOC.

70 In answer to paragraph 70 of the ASOC, Westpac:

(a) refers to and repeats paragraph 69 of this Defence; and

(b) denies the allegations in paragraph 70 of the ASOC.

71 In answer to paragraph 71 of the ASOC, Westpac:

(a) says it does not know and cannot admit the state of mind of the First Plaintiff;

(b) refers to and repeats paragraphs 69 and 70 of this Defence; and

(c) otherwise denies the allegations in paragraph 71 of the ASOC.

72 In answer to paragraph 72 of the ASOC, Westpac:

(a) refers to and repeats paragraphs 69 to 71 of this Defence; and

(b) denies the allegations in paragraph 72 of the ASOC.

73 In answer to paragraph 73 of the ASOC, Westpac:

(a) ~~on the assumption that the reference to the Lakeside Hyundai Car Dealer Terms is intended to be a reference to the Lakeside Hyundai Dealer Terms,~~ admits that during the Relevant Period, Lakeside Hyundai was a person acting on behalf of Westpac as a holder of an Australian credit licence for the limited purposes set out

in sub-paragraphs 7(a)~~,~~ and 7(e) of this Defence (for the purposes of providing the documents described in sub-paragraphs 7(d)(ii), 7(d)(iii), ~~7(d)(iv) and~~ 7(d)(v) and 7(e)), and 7(h)(ii)(B) of this Defence;

(b) refers to and repeats paragraphs 63 and 67 of this Defence; and

(c) otherwise denies the allegations in paragraph 73 of the ASOC.

74 In answer to paragraph 74 of the ASOC, Westpac:

(a) refers to and repeats paragraphs 7, 63, 67 and 73 of this Defence;

(b) subject to paragraphs 63, 67 and 73 of this Defence, admits that during the Relevant Period, Lakeside Hyundai was a representative of Westpac within the meaning of section 5 of the NCCPA for the limited purposes set out in sub-paragraphs 7(a)~~,~~ and 7(e) of this Defence (for the purposes of providing the documents described in sub-paragraphs 7(d)(ii), 7(d)(iii), ~~7(d)(iv) and~~ 7(d)(v) and 7(e)), and 7(h)(ii)(B) of this Defence; and

(c) otherwise denies the allegations in paragraph 74 of the ASOC.

75 In answer to paragraph 75 of the ASOC, Westpac:

(a) refers to and repeats paragraphs 63, 67, 68, 70, 73, 74 and 88 of this Defence; and

(b) denies the allegations in paragraph 75 of the ASOC.

76 In answer to paragraph 76 of the ASOC, Westpac:

(a) refers to and repeats paragraphs 68 and 70 and sub-paragraphs ~~58(c),~~ 58(d), 58(e), 58(f), 58(k)~~58(i)~~ and 59(b) of this Defence; and

(b) denies the allegations in paragraph 76 of the ASOC.

77 In answer to paragraph 77 of the ASOC, Westpac:

(a) says it does not know and cannot admit the state of mind of the First Plaintiff;

(b) refers to and repeats paragraphs 68 and 70 and sub-paragraphs ~~58(c),~~ 58(d), 58(e), 58(f), 58(k)~~58(i)~~ and 59(b) of this Defence; and

(c) otherwise denies the allegations in paragraph 77 of the ASOC.

78 In answer to paragraph 78 of the ASOC, Westpac:

(a) refers to and repeats paragraphs 75 to 77 of this Defence; and

(b) denies the allegations in paragraph 78 of the ASOC.

79 In answer to paragraph 79 of the ASOC, Westpac:

(a) refers to and repeats paragraphs 63, 67, 68, 70, 73, 74 and 88 of this Defence;

(b) denies that any impugned conduct by the Dealer was conduct as a representative for which Westpac could be liable within the meaning of sections 74 and 77 of the NCCPA;

(c) says that any loss or damage (which is denied) was caused by the First Plaintiff; and

(d) otherwise denies the allegations in paragraph 79 of the ASOC.

Particulars

A. The First Plaintiff entered into the Westpac Car Loan in circumstances where she acknowledged that the Westpac Car Loan Offer could be negotiated.

B. The First Plaintiff had the opportunity to shop around and make inquiries to determine whether Westpac or other credit providers offered similar credit products on more favourable terms and, if the First Plaintiff desired to do so, to withdraw the Westpac Car Loan Offer made to Westpac.

C. Westpac refers to and repeats paragraph 10 of this Defence.

D. The First Plaintiff was able to withdraw the Westpac Car Loan Offer at any time before it was accepted by Westpac, and after acceptance by Westpac before the First Plaintiff obtained credit by telling Westpac in writing, but the First Plaintiff remained liable for any fees or charges already incurred.

E. Any loss or damage (which is denied) was caused by the First Plaintiff's failure to make any or proper inquiries in relation to terms on which finance could be obtained otherwise than through the Dealers.

80 In answer to paragraph 80 of the ASOC, Westpac:

(a) denies that the First Plaintiff has remedies against Westpac; and

(b) denies the allegations in paragraph 80 of the ASOC.

81 Westpac denies the allegations in paragraph 81 of the ASOC.

Misleading or Deceptive Conduct

82 In answer to paragraph 82 of the ASOC, Westpac:

(a) refers and repeats paragraphs 59 and 83 of this Defence; and

(b) denies the allegations in paragraph 82 of the ASOC.

83 In answer to paragraph 83 of the ASOC, Westpac:

(a) refers to and repeats paragraph 82 of this Defence;

(b) denies that it was required to disclose in the terms alleged in sub-paragraphs 82(a) to (~~e~~e) of the ASOC;

(c) says that Westpac does not know and cannot admit what matters were known to the First Plaintiff; and

(d) admits that it did not disclose the matters pleaded in sub-paragraphs 82(a) to (e) ~~83~~ of the ASOC.

84 Westpac denies the allegations in paragraph 84 of the ASOC.

85 In answer to paragraph 85 of the ASOC, Westpac:

(a) refers to and repeats paragraph 83 of this Defence;

(b) denies that the conduct of Westpac was conduct engaged in by Westpac in relation to financial services within the meaning of section 1041H of the Corporations Act; and

Particulars

A credit facility is not a financial product within the meaning of sections 1041H and 765A(1)(h)(i) of the Corporations Act and regulation 7.1.06 of the Corporations Regulations.

(c) otherwise denies the allegations in paragraph 85 of the ASOC.

86 In answer to paragraph 86 of the ASOC, Westpac:

(a) refers to and repeats paragraphs 83 to 85 of this Defence; and

(b) otherwise denies the allegations in paragraph 86 of the ASOC.

87 In answer to paragraph 87 of the ASOC, Westpac:

(a) says it does not know and cannot admit the state of mind of the First Plaintiff;

(b) refers to and repeats paragraphs 83 to 86 and sub-paragraphs ~~58(c),~~ 58(d), 58(e), 58(f), 58(k)~~58(i)~~ and 59(b) of this Defence; and

(c) otherwise denies the allegations in paragraph 87 of the ASOC.

88 In answer to paragraph 88 of the ASOC, Westpac:

(a) refers to and repeats paragraph 87 of this Defence;

(b) says that any loss or damage (which is denied) was caused by the First Plaintiff; and

(c) otherwise denies the allegations in paragraph 88 of the ASOC.

Particulars

A. The First Defendant entered into the Westpac Car Loan in circumstances where the First Plaintiff acknowledged that the Westpac Car Loan Offer could be negotiated.

B. The First Plaintiff had the opportunity to shop around and make inquiries to determine whether Westpac or other credit providers offered similar credit products on more favourable terms and, if the First Plaintiff desired to do so, to withdraw the Westpac Car Loan Offer made to Westpac.

C. Westpac refers to and repeats paragraph 58 of this Defence.

D. The First Plaintiff was able to withdraw the Westpac Car Loan Offer at any time before it was accepted by Westpac, and after acceptance by Westpac before the First Plaintiff obtained credit by telling Westpac in writing, but the First Plaintiff remained liable for any fees or charges already incurred.

E. Any loss or damage (which is denied) was caused by the First Plaintiff's failure to make any or proper inquiries in

relation to terms on which finance could be obtained otherwise than through Lakeside Hyundai.

F. The First Plaintiff failed to take any steps to obtain, or attempt to obtain, at any relevant time, alternate finance for the purchase of her vehicle.

88A For the purposes of this Defence only, Westpac says that if, which is denied, the Court finds that Westpac contravened section 1041H of the Corporations Act or section 12DA(1) of the ASIC Act and the First Plaintiff suffered loss or damage that was caused by the actions of Westpac in contravention of section 1041H of the Corporations Act or section 12DA(1) of the ASIC Act as alleged in the ASOC, Westpac says that:

(a) the First Plaintiff is responsible in part or wholly for the loss that is the subject of the First Plaintiff's claim against Westpac, pleaded in the ASOC, because the loss resulted partly or wholly from the First Plaintiff's failure to take reasonable care to avoid such loss;

Particulars

The First Plaintiff entered into the Westpac Car Loan in circumstances where:

(a) the terms of the Westpac Car Loan Offer disclosed payment of a commission to Lakeside Hyundai;

(b) the First Plaintiff acknowledged that the Westpac Car Loan Offer was open to negotiation;

(c) the First Plaintiff acknowledged in the Hyundai Contract for Sale that finance could be obtained from alternative credit providers; ~~and~~

(d) the First Plaintiff failed to make any or proper inquiries in relation to terms on which finance could be obtained otherwise than through Lakeside Hyundai; and

(e) the First Plaintiff failed to take any steps to obtain, or attempt to obtain, at any relevant time, alternate finance for the purchase of her vehicle.

(b) Westpac did not intend to cause the loss or damage (if the loss or damage is established, which is denied);

(c) Westpac did not fraudulently cause the loss or damage (if the loss or damage is established, which is denied); and

(d) the damages that the First Plaintiff may recover in relation to the loss or damage are to be reduced to the extent to which the Court thinks it is just and equitable having regard to the First Plaintiff's share in the responsibility for such loss or damage, in accordance with:

(i) in respect of the alleged contravention of section 12DA(1) of the ASIC Act, section 12GF(1B) of the ASIC Act; and

(ii) in respect of the alleged contravention of section 1041H of the Corporations Act (if maintainable, which is denied), section 1041I(1B) of the Corporations Act.

Mistake

89 In answer to paragraph 89 of the ASOC, Westpac:

(a) refers to and repeats paragraphs 57, 58, 59, 70, 80 and ~~81~~ 82 of this Defence;

(b) says that Westpac does not know and cannot admit what matters were known to the First Plaintiff;

(c) denies that Westpac was obliged to inform the First Plaintiff of the matters pleaded in paragraph 89 of the ASOC; and

(d) otherwise denies the allegations in paragraph 89 of the ASOC.

90 In answer to paragraph 90 of the ASOC, Westpac:

(a) refers to and repeats paragraph 89 of this Defence;

(b) says that Westpac does not know and cannot admit what matters were known to the First Plaintiff;

(c) says that Westpac provided the information to the First Plaintiff which it was required to disclose under the NCCPA in relation to the Westpac Car Loan;

(d) denies that each of the matters alleged was material information that would have been relevant to the decision of the First Plaintiff as to whether to proceed to enter into the Westpac Car Loan; and

(e) otherwise denies the allegations in paragraph 90 of the ASOC.

91 In answer to paragraph 91 of the ASOC, Westpac:

(a) says it does not know and cannot admit the state of mind of the First Plaintiff;

(b) says that the matters alleged in paragraphs 91 to 96 of the ASOC:

(i) do not relate to a fundamental term of the Westpac Car Loan; and

(ii) do not disclose a cause of action against Westpac on the grounds of unilateral mistake;

(c) refers to and repeats paragraph 90 of this Defence; and

(d) otherwise denies the allegations in paragraph 91 of the ASOC.

92 In answer to paragraph 92 of the ASOC, Westpac:

(a) refers to and repeats paragraphs 9, 10, 56, 57, 70, 81 and 91 of this Defence; and

(b) denies the allegations in paragraph 92 of the ASOC.

93 Not used. ~~In answer to paragraph 93 of the SOC, Westpac:~~

~~(a) refers to and repeats paragraphs 91 and 92 of this Defence;~~

~~(b) says that it does not know and cannot admit the state of mind of the First Plaintiff; and~~

~~(c) otherwise denies the allegations in paragraph 93 of the SOC;~~

94 Westpac refers and repeats paragraphs 89, 90, 91, and 92 of this Defence, and denies paragraph 94 of the ASOC.

95 In answer to paragraph 95 of the ASOC, Westpac:

(a) says that Westpac and the First Plaintiff cannot be restored to substantially the position they were in before the Westpac Car Loan;

(b) denies that the First Plaintiff is entitled to rescission of the Westpac Car Loan;

(c) refers to and repeats paragraphs 91, 92 ~~93~~ and 94 of this Defence; and

(d) otherwise denies the allegations in paragraph 95 of the ASOC.

96 In answer to paragraph 96 of the ASOC, Westpac:

(a) refers to and repeats paragraphs 89 to 92 and 94 to 95 of this Defence;

(b) denies the allegations in paragraph 96 of the ASOC; and

(c) further and in the alternative, says that interest paid under the Westpac Car Loan was money legally due and owing under an enforceable contract; and

(d) further says that there is no maintainable claim in monies had and received by the First Plaintiff whose Westpac Car Loan has been fully performed.

96A In answer to paragraph 96A of the ASOC, Westpac:

(a) refers to and repeats paragraphs 89, 90 and 91 of this Defence;

(b) otherwise denies the allegations in paragraph 96A of the ASOC.

96B In answer to paragraph 96B of the ASOC, Westpac:

(a) says that the First Plaintiff cannot be restored to substantially the position she was in before the Westpac Car Loan;

(b) denies that the First Plaintiff is entitled to rescission of the Westpac Car Loan;

(c) refers to and repeats paragraphs 91 and 96A of this Defence; and

(d) otherwise denies the allegations in paragraph 96B of the ASOC.

97 In answer to paragraph 97 of the ASOC, Westpac:

(a) refers to and repeats paragraphs 89, 90, 91, 96(c), 96(d), 96A and 96B ~~93 to 96~~ of this Defence;

(b) says that paragraph 97(b) of the ASOC does not disclose a cause of action against Westpac and is liable to be struck out under rule 23.02(a) of the Civil Procedure Rules; and

(c) under cover of that objection, denies the allegations in paragraph 97 of the ASOC.

97A In further answer to paragraphs 89 to 92 and 94 to 97 of the ASOC, Westpac says that:

(a) Westpac, acting in good faith, relied to its detriment on the agreement by the First Plaintiff to pay interest charges referable to the Westpac Car Loan (**First Plaintiff Interest Charges**), and the payment of those First Plaintiff Interest Charges, by financing the purchase of the Hyundai, incurring expenditure and/or other disadvantageous consequences that it would not have otherwise incurred; and

Particulars

In reliance upon the agreement by the First Plaintiff to pay the First Plaintiff Interest Charges and payment of those First Plaintiff Interest Charges, Westpac:

(a) financed the purchase of the Hyundai;

(b) bore the cost associated with the maintenance of that finance;

(c) bore the risk associated with the provision of that finance including that the First Plaintiff may cease to make repayments and the underlying asset would be insufficient to cover the balance of the loan; and

(d) complied with the prudential standards relating to lending imposed by APRA.

(b) by reason of the change of position pleaded in sub-paragraph 97A(a) of this Defence, it would be inequitable in all the circumstances to require Westpac to repay the First Plaintiff Interest Charges in whole or in part.

97B In further answer to paragraphs 89 to 92 and 94 to 97 of the ASOC, Westpac says that:

(a) it gave good consideration to the First Plaintiff from whom it received the payment of the First Plaintiff Interest Charges pursuant to the terms of the Westpac Car Loan; and

Particulars

A. The particulars to paragraph 97A *of this Defence are repeated.*

B. The First Plaintiff received the Hyundai and other benefits, including insurances and improvements to the car, and the use/enjoyment of the Hyundai.

(b) by reason of the provision of good consideration pleaded in sub-paragraph 97B(a) of this Defence, Westpac is not obliged to repay to the First Plaintiff the First Plaintiff Interest Charges received by it in whole or in part.

97C In further answer to paragraphs 89 to 92 and 94 to 97 of the ASOC, Westpac says that:

(a) the receipt and use of the Hyundai purchased with the Westpac Car Loan constitute unequivocal words or conduct by which the First Plaintiff has elected to take the benefit of the Westpac Car Loan; and

(b) the First Plaintiff is not entitled to the repayment of the First Plaintiff Interest Charges paid in respect of the Westpac Car Loan in whole or in part.

97D In further answer to the claims on behalf of the First Plaintiff for relief at paragraphs 89 to 92 and 94 to 97 of the ASOC, Westpac:

(a) says that the First Plaintiff has received a benefit from the Westpac Car Loan, on the basis that the amount advanced under the Westpac Car Loan was used:

(i) to finance the premiums of the following insurance products:

(A) Swann Insurance Australia Pty Ltd Consumer Loan Insurance for a term of 84 months (policy number 23128882);

(B) Swann Insurance Australia Pty Ltd Gapcover Insurance for a period of 84 months (policy number 23128881); and

(C) CTP Insurance;

(ii) to pay for accessories or extras in relation to the automobile purchased including a Full Protection Pack and DVD Players;

(iii) to pay a registration fee in relation to the automobile purchased; and

(iv) to obtain a valuable asset, being the Hyundai;

(b) in the premises of the benefit received, set out in paragraph 97D(a) of this Defence, says that the First Plaintiff would be unjustly enriched at Westpac's expense if Westpac were required to repay the First Plaintiff Interest Charges received by it and she is not entitled to the remedies or relief sought; and

(c) further or in the alternative, says that the First Plaintiff is not entitled to the remedies or relief sought unless the First Plaintiff accounts for such benefit.

D SECOND PLAINTIFF'S CLAIM AGAINST THE SECOND DEFENDANT

98 Paragraphs 98 to 145 of the ASOC are Not Applicable.

E COMMON QUESTIONS OF LAW OR FACT

99 Paragraphs 146 to 171 of the ASOC are Not Applicable.

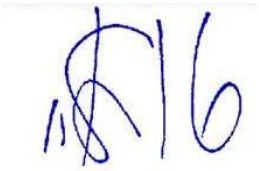
Dated: 11 September 2024~~8 August 2023~~~~20 November 2020~~

D THOMAS SC

~~**P A NESKOVCIN QKC**~~

~~**A SMITH**~~**C HAMILTON-JEWELL**

M FORGÁCS



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King & Wood Mallesons
Solicitors for the First Defendant