



**IN THE SUPREME COURT OF VICTORIA  
AT MELBOURNE  
COMMON LAW DIVISION  
MAJOR TORTS LIST**

**No. S ECI** Case: S ECI 2020 02946  
Filed on: 15/07/2020 12:15 PM

**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

**WRIT**

---

Date of Document:	15 July 2020	Solicitors Code:	564
Filed on behalf of:	The Plaintiffs	DX:	N/A
Prepared by:	Maurice Blackburn Lawyers 21, 380 La Trobe Street Melbourne Victoria 3000	Telephone:	(03) 9605 2700
		Ref:	3052919
		Email:	AWatson@mauriceblackburn.com.au

---

**TO THE DEFENDANTS**

TAKE NOTICE that this proceeding has been brought against you by the plaintiffs for the claim set out in this writ.

IF YOU INTEND TO DEFEND the proceeding, or if you have a claim against the plaintiff which you wish to have taken into account at the trial, YOU MUST GIVE NOTICE of your intention by filing an appearance within the proper time for appearance stated below.

YOU OR YOUR SOLICITOR may file the appearance. An appearance is filed by –

- (a) filing a "Notice of Appearance" in the Prothonotary's office, Level 2, 436 Lonsdale Street, Melbourne, or, where the writ has been filed in the office of a Deputy Prothonotary, in the office of that Deputy Prothonotary; and

- (b) on the day you file the Notice, serving a copy, sealed by the Court, at the plaintiff's address for service, which is set out at the end of this writ.

IF YOU FAIL to file an appearance within the proper time, the plaintiff may OBTAIN JUDGMENT AGAINST YOU on the claim without further notice.

\*THE PROPER TIME TO FILE AN APPEARANCE is as follows –

- (a) where you are served with the writ in Victoria, within 10 days after service;
- (b) where you are served with the writ out of Victoria and in another part of Australia, within 21 days after service;
- (c) where you are served with the writ in Papua New Guinea, within 28 days after service;
- (d) where you are served with the writ in New Zealand under Part 2 of the Trans-Tasman Proceedings Act 2010 of the Commonwealth, within 30 working days (within the meaning of that Act) after service or, if a shorter or longer period has been fixed by the Court under section 13(1)(b) of that Act, the period so fixed;
- (e) in any other case, within 42 days after service of the writ.

FILED

---

PROTHONOTARY

THIS WRIT is to be served within one year from the date it is filed or within such further period as the Court orders.

1. Place of trial – Melbourne.
2. Mode of trial – Judge.
3. This writ was filed for the plaintiffs by Maurice Blackburn Lawyers, 21/380 Latrobe Street, Melbourne Victoria 3000 as solicitors for the plaintiffs.
4. The address of the plaintiffs are as follows:

First Plaintiff: 20 Branch Road, Lara, Victoria 3212

Second Plaintiff: 3 Avilka Place, Beerwah, Queensland 4519

5. The address for service of the plaintiffs is c/- Maurice Blackburn Lawyers, 21/380 Latrobe Street, Melbourne Victoria 3000.
6. The email address for service of the plaintiffs is AWatson@mauriceblackburn.com.au
7. The addresses of the defendants are as follows:

First Defendant: Level 18, 275 Kent Street, Sydney, New South Wales 2000

Second Defendant: Level 18, 275 Kent Street, Sydney, New South Wales 2000

## STATEMENT OF CLAIM

---

Date of Document:	15 July 2020	Solicitors Code:	564
Filed on behalf of:	The Plaintiffs	DX:	N/A
Prepared by:	Maurice Blackburn Lawyers	Telephone:	(03) 9605 2700
	21, 380 La Trobe Street	Ref:	3052919
	Melbourne Victoria 3000	Email:	AWatson@mauriceblackburn.com.au

---

### Table of Contents

<b>FILED</b>	<b>2</b>
<b>A INTRODUCTION</b>	<b>5</b>
A.1 THE GROUP MEMBERS	5
A.2 THE DEFENDANTS	6
<b>B THE CLAIMS OF GROUP MEMBERS</b>	<b>6</b>
B.1 THE CONTRAVENING CONDUCT UNDER THE NCCPA OF THE DEALERS	6
B.1.1 <i>Arrangements between Dealers and the Defendants</i>	6
B.1.2 <i>The Dealers provided credit assistance to Group Members</i>	13
B.1.3 <i>The Dealers were intermediaries between Group Members and the Defendants</i>	14
B.1.4 <i>The Dealers provided a "credit service" to Group Members</i>	14
B.1.5 <i>The Dealers engaged in unfair conduct</i>	14
B.1.6 <i>Consequences of the Dealers' unfair conduct</i>	15
B.2 CLAIM AGAINST THE DEFENDANTS UNDER THE NCCPA FOR THE DEALERS' UNFAIR CONDUCT	16
B.3 CLAIM AGAINST THE DEFENDANTS FOR MISLEADING OR DECEPTIVE CONDUCT	17
B.4 CLAIM AGAINST THE DEFENDANTS FOR MONEY HAD AND RECEIVED AND UNJUST ENRICHMENT	19
<b>C FIRST PLAINTIFF'S CLAIM AGAINST THE FIRST DEFENDANT</b>	<b>22</b>
C.1 THE FIRST PLAINTIFF	22
C.2 THE CONTRAVENING CONDUCT UNDER THE NCCPA OF THE LAKESIDE HYUNDAI	23
C.2.1 <i>Arrangements between Lakeside Hyundai and Westpac</i>	23
C.2.2 <i>Lakeside Hyundai provided credit assistance to Ms Fox</i>	26
C.2.3 <i>Lakeside Hyundai was an intermediary between Ms Fox and Westpac</i>	26
C.2.4 <i>Lakeside Hyundai provided a "credit service" to Ms Fox</i>	27
C.2.5 <i>Lakeside Hyundai engaged in unfair conduct</i>	27
C.2.6 <i>Consequences of Lakeside Hyundai's unfair conduct</i>	28
C.3 CLAIM AGAINST WESTPAC UNDER THE NCCPA FOR LAKESIDE HYUNDAI'S UNFAIR CONDUCT	28
C.4 CLAIM AGAINST WESTPAC FOR MISLEADING OR DECEPTIVE CONDUCT	30
C.5 CLAIM AGAINST WESTPAC FOR MONEY HAD AND RECEIVED AND UNJUST ENRICHMENT	31
<b>D SECOND PLAINTIFF'S CLAIM AGAINST THE SECOND DEFENDANT</b>	<b>34</b>
D.1 THE SECOND PLAINTIFF	34
D.2 THE CONTRAVENING CONDUCT UNDER THE NCCPA OF THE SPRINGWOOD NISSAN	35
D.2.1 <i>Arrangements between Springwood Nissan and St George Finance</i>	35
D.2.2 <i>Springwood Nissan provided credit assistance to Ms Nastasi</i>	38
D.2.3 <i>Springwood Nissan was an intermediary between Ms Nastasi and St George Finance</i>	39
D.2.4 <i>Springwood Nissan provided a "credit service" to Ms Nastasi</i>	39
D.2.5 <i>Springwood Nissan engaged in unfair conduct</i>	39
D.2.6 <i>Consequences of Springwood Nissan's unfair conduct</i>	40
D.3 CLAIM AGAINST ST GEORGE FINANCE UNDER THE NCCPA FOR SPRINGWOOD NISSAN'S UNFAIR CONDUCT	41

D.4	CLAIM AGAINST ST GEORGE FINANCE FOR MISLEADING OR DECEPTIVE CONDUCT .....	42
D.5	CLAIM AGAINST ST GEORGE FINANCE FOR MONEY HAD AND RECEIVED AND UNJUST ENRICHMENT 44	
<b>E</b>	<b>COMMON QUESTIONS OF LAW OR FACT .....</b>	<b>47</b>
E.1	THE CONTRAVENING CONDUCT UNDER THE NCCPA.....	47
E.2	MISLEADING OR DECEPTIVE CONDUCT .....	49
E.3	CLAIM AGAINST THE DEFENDANTS FOR MONEY HAD AND RECEIVED AND UNJUST ENRICHMENT ....	50

## **A INTRODUCTION**

### **A.1 The Group Members**

1. This proceeding is commenced as a representative proceeding pursuant to Part 4A of the *Supreme Court Act 1986 (Vic)* by the plaintiffs on their own behalf and on behalf of all natural persons who (**Group Members**):
  - (a) entered into a finance agreement for the acquisition of an automobile (**Car Loan**);
    - (i) with the Defendants (in this statement of claim **Defendants** means the First and Second Defendant or either of them);
    - (ii) which was obtained through a Dealer as defined in paragraph 5 below who supplied the automobile the subject of the Car Loan;
    - (iii) in which a Flex Commission as defined in paragraph 9(c) below was paid to the Dealer; and
    - (iv) between 1 March 2013 and 31 October 2018:
      - (A) commenced entering into discussions concerning finance with the Dealer; and/or
      - (B) executed that finance agreement.
  - (b) have suffered loss or damage, or are entitled to relief, by reason of the matters and conduct pleaded in this statement of claim; and
  - (c) were not at any material time, and are not as at the date of this statement of claim, any of the following:
    - (i) a related party (as defined by s 228 of the *Corporations Act 2001 (Cth)* (**Corporations Act**) of the Defendants;

- (ii) a Justice or the Chief Justice of the Supreme Court of Victoria, or a Justice or the Chief Justice of the High Court of Australia;
  - (iii) an officer or employee of, or other legal practitioner engaged by, Maurice Blackburn in relation to this proceeding; or
  - (iv) an expert or consultant engaged in relation to this proceeding.
2. Immediately prior to the commencement of this proceeding, there were more than seven Group Members.

## **A.2 The Defendants**

3. The Defendants are and at all material times were:
- (a) incorporated pursuant to the *Corporations Act* and capable of being sued;
  - (b) a person within the meaning of s 1041H of the *Corporations Act*;
  - (c) a person within the meaning of s 12DA of the *Australian Securities and Investments Commission Act 2001* (Cth) (**ASIC Act**);
  - (d) the holders of an Australian credit licence; and
  - (e) subject to the *National Consumer Credit Protection Act 2009* (Cth) (**NCCPA**) and National Credit Code which formed Schedule 1 of the NCCPA (the **Credit Code**).

### **Particulars**

*During the Relevant Period the Defendants held the following Australian credit licences:*

*First Defendant: 233714*

*Second Defendant: 387944*

4. The Second Defendant was a wholly owned indirect subsidiary of the First Defendant.

## **B THE CLAIMS OF GROUP MEMBERS**

### **B.1 The contravening conduct under the NCCPA of the Dealers**

#### ***B.1.1 Arrangements between Dealers and the Defendants***

5. At times presently not known to the Plaintiffs, the Defendants (whether themselves or through their wholly owned or controlled entities) entered into agreements with

accredited dealers (**Dealers**) to facilitate the provision of Car Loans to Group Members (**Dealer Agreements**).

6. At all material times, the terms of the Dealer Agreements required Dealers to, among other things (**Dealer Terms**):
- (a) submit to the Defendants offers from Group Members to enter into Car Loans;
  - (b) comply with any direction given by the Defendants related to the provision of Car Loans; and
  - (c) before submitting to the Defendants offers from Group Members to enter into Car Loans, to make any enquiries required by the Defendants for the purposes of their responsible lending obligations.

### **Particulars**

*At present and prior to discovery the best particulars the Plaintiffs can give are as follows.*

- i) As to the matters pleaded in subparagraph (a), the Plaintiffs rely upon:*
  - A) Westpac Banking Corporation – Submissions on Auto Finance Case Study dated 3 April 2018 (**Westpac Royal Commission Submissions**) filed in the Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry Westpac Royal Commission Submissions (**Royal Commission**), [57].*
  - B) Witness Statement of Phillip George Godkin dated 5 March 2018 filed in the Royal Commission (**First Godkin Statement**), [31].*
  - C) Clause 3.1 of the dealer agreement exhibited the First Godkin Statement (**Royal Commission Dealer Agreement**).*
- ii) As to the matters pleaded in subparagraph (b) above, the Plaintiffs rely upon (i)(A) and (B) above and Clause 3.3 of the Royal Commission Dealer Agreement.*
- iii) As to the matters pleaded in subparagraph (b) above, the Plaintiffs rely upon (i)(A) above and Schedule 1, clause 1.1 of the Royal Commission Dealer Agreement.*

7. At all material times, pursuant to the Dealer Terms, the Defendants (whether themselves or through their wholly owned or controlled entities) required Dealers to adhere to a Car Loan application and approval process which included the following features (**Car Loan Process**):
- (a) the employee of the Dealer who had direct contact with Group Members in relation to the origination of a Car Loan for that Group Member (**Dealer Business Manager**) was required:
    - (i) to make reasonable inquiries about the Group Member's requirements, objectives and financial situation; and
    - (ii) to make an assessment as to whether the Car Loan was "not unsuitable" for the Group Member;
  - (b) next, the Dealer Business Manager was required to enter the Group Members' Car Loan application details into the Defendants' online loan origination platform known as 'Sovereign' (**Sovereign**);
  - (c) next, if the Defendants determined that supporting documentation was required from the Group Member to verify income, the Dealer Business Manager was requested to obtain and provide that supporting documentation;
  - (d) next, should the application satisfy the necessary thresholds in Sovereign, or was otherwise approved by the Defendants, the Dealer Business Manager was notified and was provided access to automatically generated documentation which included:
    - (i) a completed application;
    - (ii) a credit guide; and
    - (iii) a Car Loan agreement, being an offer from the Group Member to borrow the Car Loan amount from the Defendants (**Car Loan Offer**);
  - (e) next, the Dealer Business Manager provided the documents pleaded in subparagraph (d) above to the Group Member;
  - (f) next, the Dealer Business Manager arranged for the Group Member to initial each page of the completed application and sign it, and in doing so declare, among other things that:

- (i) he or she acknowledges that the Dealer named in the application may perform activities under the NCCPA on behalf of the Defendants as their representative, but is not their agent, except in undertaking customer identification or providing documents as legally required;
  - (ii) he or she is liable to pay an origination fee shown in the Car Loan Offer to the Dealer for reimbursement of its administrative costs; and
  - (iii) he or she authorises the origination fee to be included in the Car Loan agreement and for the Defendants to make payment on his or her behalf to the Dealer for reimbursement;
- (g) next, the Dealer Business Manager arranged for the Group Member to sign the Car Loan Offer;
- (h) next, the Dealer Business Manager submitted to the Defendants through Sovereign:
  - (i) the signed completed application (pleaded in subparagraph (f) above) and the signed Car Loan Offer (pleaded in subparagraph (g) above); and
  - (ii) any necessary supporting documents of the Group Member (including payslips and identification documents);
- (i) next, should the Car Loan Offer be approved, the Car Loan Offer was signed by or on behalf of the Defendants and sent to the Dealer Business Manager through Sovereign;
- (j) next, funds comprising the approved loan amount were transferred to the Dealer;
- (k) next, once the Dealer Business Manager was satisfied that the Dealer had received the settled funds, he or she would arrange for the car the subject of the Car Loan to be released to the Group Member; and
- (l) at all times the Dealer Business Manager managed communications between the Group Members and Dealer, and between the Group Members and the Defendants.

### **Particulars**

*At present and prior to discovery the best particulars of the Car Loan Process the Plaintiffs can give are the matters deposed to in the First Godkin Statement, [8], [45], [47], [56], [60], [61], [64], [65], [71] and in the evidence of Phillip George Godkin in the Royal Commission dated 21 March 2018 (**Godkin Transcript**), T743.44-45.*

8. At all material times during the Car Loan Process, the Defendants were solely responsible for all aspects of credit assessment, credit decisions, loan management, administration and servicing of Car Loans.

#### **Particulars**

*At present and prior to discovery the best particulars the Plaintiffs can give are the matters in the First Godkin Statement, [20] and in the Godkin Transcript, T745.40-45.*

9. At all material times, pursuant to the Dealer Terms, the Defendants:
- (a) set a base rate of interest to be charged on Car Loans for the specific Dealer (**Base Rate**);
  - (b) authorised the Dealer to set a rate of interest to be payable a Group Member under a Car Loan, in their discretion, and on a case by case basis, higher than the Base Rate (**Contract Rate**); and
  - (c) paid the Dealer a proportion of the difference between the Base Rate and the Contract Rate according to percentages agreed at the time of entering into the relevant Dealer Agreement (**Flex Commission**),
- (the **Flex Commission Calculation Method**).

#### **Particulars**

*At present and prior to discovery the best particulars the Plaintiffs can give are the matters in Westpac Royal Commission Submissions, [39]-[40], First Godkin Statement, Confidential Annexure E, [4] and Godkin Transcript, T752.44-T753.29.*

10. The Flex Commissions and the Flex Commission Calculation Method:
- (a) involved Dealers setting the Contract Rate:
    - (i) in the absence of any objective criteria;
    - (ii) in circumstances where the amount of the Contract Rate would be influenced or determined by the self-interest of the Dealers;
    - (iii) significantly higher than the Defendants would have offered the Group Members or other consumers had they been approached otherwise than through a Dealer; and, or alternatively

- (iv) without any Contract Rate cap as was imposed by the Defendants from August 2016;
  - (b) involved Dealers setting the term of the Car Loan;
  - (c) provided an incentive for Dealers to increase the price of a Car Loan and, or alternatively, the term of the Car Loan, in a way that depended on the negotiating skills or vulnerability of the consumer;
  - (d) created unfairness or a risk of unfairness in relation to Car Loans;
  - (e) created a conflict, or a potential for a conflict, between the interests of the Dealer and the interests of the Group Member or customers of that Dealer;
- (together and severally, **Flex Commission Features**).

### **Particulars**

*At present and prior to discovery the best particulars the Plaintiffs can give are the matters in Westpac Royal Commission Submissions, [40], [41], First Godkin Statement, Confidential Annexure E, [5], Godkin Transcript, T754.16-26, T754.43-755.1, T756.1-39 and ASIC Consultation Paper 279 entitled 'Flex commission arrangements in the car finance industry' dated March 2017, [9]-[10], and Attachment 2, [86].*

11. At all material times, during the Car Loan Process:
- (a) neither the Defendants nor the Dealers disclosed to Group Members:
    - (i) that the Contract Rate and, or alternatively, the term of the Car Loan, had been set by someone other than the Defendants, namely, the Dealers;
    - (ii) that the Dealers had been interested in the Contract Rate and, or alternatively, the term of the Car Loan; and, or alternatively,
    - (iii) the Flex Commission, Flex Commission Calculation Method, and/or the Flex Commission Features,

**(Flex Commission Non-Disclosure);**
  - (b) the Defendants did not:
    - (i) ensure that the Dealers disclosed; and, or alternatively
    - (ii) have appropriate systems, procedures and processes in place to ensure that the Dealers disclosed;

to the Group Members the matters pleaded in paragraph 11(a)(i) to (iii) above  
**(Lender Conduct)**;

- (c) a reasonable person in the position of the Group Members would have understood or assumed at the time that person entered into his or her Car Loan that:
  - (i) the Contract Rate and, or alternatively, the term of the Car Loan, was set solely by the Defendants;
  - (ii) the Dealers were merely conduits between the Group Member and the Defendants; and, or alternatively
  - (iii) Dealers were disinterested in the Contract Rate;
- (d) the Group Members were in a comparatively weaker position to the Defendants and, or alternatively, the Dealers;
- (e) the Group Members were not treated equally in that comparable Group Members were not afforded equal Contract Rates;

(together and severally, **Car Loan Circumstances**).

### **Particulars**

*At present and prior to discovery the best particulars the Plaintiffs can give are as follows.*

- (i) *As to the matters pleaded in subparagraph (a) above, the Plaintiffs rely upon:*
  - A) *Westpac Royal Commission Submissions, [46]*
  - B) *Godkin Transcript, T753.9-13, T754.25-26.*
- (ii) *As to the matters pleaded in subparagraph (b) above, the Plaintiffs rely upon:*
  - A) *the fact that the matters are to be inferred in all of the surrounding circumstances; and*
  - B) *Godkin Transcript, T753.9-13, T754.25-26.*
- (i) *As to the matters pleaded in subparagraph (c) above, the matters are to be inferred in all of the surrounding circumstances.*

(ii) *As to the matters pleaded in subparagraph (d) above, the Plaintiffs rely upon:*

- A) *Westpac Group Assurance Report entitled 'St George Banking Group Retail and Auto Finance' dated 5 August 2015 at pp 8-9.*
- B) *ASIC Consultation Paper 279 entitled 'Flex commission arrangements in the car finance industry' dated March 2017, [5]-[7].*

**B.1.2 The Dealers provided credit assistance to Group Members**

12. Group Members are natural persons and thereby consumers within the meaning of section 5 of the NCCPA.
13. The Car Loans were contracts under which credit was or may be provided and thereby were credit contracts within the meaning of section 4 of the Credit Code and s 5 of the NCCPA.
14. By reason of the Dealer Terms and Car Loan Process, at all material times, Dealers:
  - (a) dealt directly with the Group Members in the course of, or as part of, or incidentally to, the business of the Dealers;
  - (b) and:
    - (i) suggested that the Group Members apply for a Car Loan with the Defendants or one of them; or
    - (ii) assisted the Group Members to apply for a Car Loan with the Defendants or one of them; or
    - (iii) suggested that the Group Members apply for a Car Loan that was a consumer lease with the Defendants or one of them; or
    - (iv) assisted the Group Members to apply for a Car Loan that was a consumer lease with the Defendants or one of them.
15. By reason of the matters pleaded in paragraph 14 Dealers provided credit assistance to the Group Members within the meaning of sections 7(a) and s 8 of the NCCPA.

**B.1.3 The Dealers were intermediaries between Group Members and the Defendants**

16. The Dealers carried on business in Australia.
17. By reason of the matter pleaded in paragraph 16 the Dealers carried on business in this jurisdiction within the meaning of s 21(2) of the NCCPA.
18. By reason of the Dealer Terms and Car Loan Process, Dealers in the course of, or as part of, or incidentally to, the business carried on by them in this jurisdiction:
  - (a) acted as an intermediary (whether directly or indirectly) between the Defendants and Group Members wholly or partly for the purposes of securing a provision of credit for the Group Members under a Car Loan for Group Members with the Defendants; or
  - (b) acted as an intermediary (whether directly or indirectly) between the Defendants, as a lessor, and the Group Members wholly or partly for the purposes of securing a Car Loan that was a consumer lease for the Group Members with the Defendants or one of them.
19. By reason of the matters pleaded in paragraph 18, the Dealers acted as an intermediary for the purposes of sections 7(b) and 9 of the NCCPA.

**B.1.4 The Dealers provided a “credit service” to Group Members**

20. By reason of the matters pleaded in paragraph 15 and, or alternatively, paragraph 19, the Dealers provided a credit service to the Group Members within the meaning of sections 7 and 180A(1)(a) of the NCCPA.

**B.1.5 The Dealers engaged in unfair conduct**

21. By reason of the Car Loan Process, Flex Commission Features and the Car Loan Circumstances (including the Flex Commission Non-Disclosure ):
  - (a) Group Members were at a special disadvantage in dealing with the Dealers in relation to the Car Loan; and, or alternatively
  - (b) Group Members were unable, or considered themselves unable, to make:
    - (i) a Car Loan with a credit provider other than the Defendants; or
    - (ii) a Car Loan that was a consumer lease with a credit provider other than the Defendants; and, or alternatively

- (c) the Car Loan Circumstances (including the Flex Commission Non-Disclosure) involved a technique that:
  - (i) should not in good conscience have been used; or
  - (ii) manipulated the Group Members; and, or alternatively
- (d) the Defendants could determine or significantly influence the terms of the Car Loans; and, or alternatively
- (e) the terms of the Car Loan were less favourable to the Group Members than the terms of a comparable transaction.

### **Particulars**

*At present and prior to discovery the best particulars the Plaintiffs can give are that these matters are to be inferred from the Car Loan Process, Flex Commission Features, and the Car Loan Circumstances. In addition, as to the matters pleaded in subparagraph (e) above, the Plaintiff relies upon Westpac Group Assurance Report entitled 'St George Banking Group Retail and Auto Finance' dated 5 August 2015 at pp 8-9; and ASIC Consultation Paper 279 entitled 'Flex commission arrangements in the car finance industry' dated March 2017, [5]-[7], [9]-[10], and Attachment 2, [86].*

- 22. By reason of the matters pleaded in paragraph 21, the Dealers engaged in conduct in connection with the provision of a credit service that was unfair within the meaning of s 180A(1)(b) of the NCCPA (**Dealers' Unfair Conduct**).

#### **B.1.6 Consequences of the Dealers' unfair conduct**

- 23. The Dealers' Unfair Conduct had the result that the Group Members:
  - (a) entered into the Car Loans (pursuant to which they paid interest at the Contract Rate) when they would not have done so apart from that conduct; and, or alternatively
  - (b) entered into Car Loans whereby the interest rate was higher and, or alternatively, the terms were longer, than the interest rate on, or the terms of, loans the Group Members would otherwise have entered into; and, or alternatively
  - (c) became liable to pay interest charges to the Defendants at the Contract Rate.

### **Particulars**

*At present and prior to discovery the best particulars the Plaintiffs can give are that reliance of the Group Members is to be inferred by reason of the Group Members'*

*entry into the Car Loans and payment of the Contract Rate in the circumstances pleaded above.*

*Further particulars may be provided at the time of service of the Plaintiffs' evidence in chief, or prior to the trial of the individual claims of Group Members following the determination of the common questions.*

24. By reason of the matters pleaded in paragraph 23 the Group Members are entitled to claim a remedy against the Dealers pursuant to s 180A of the NCCPA.

## **B.2 Claim against the Defendants under the NCCPA for the Dealers' Unfair Conduct**

25. By reason of the Car Dealer Terms and the Car Loan Process during the Relevant Period the Dealers were:

- (a) persons acting on behalf of the Defendants, being a holders of an Australian credit licence; and, or alternatively
- (b) credit representatives of the Defendants, being persons authorised in writing by a Defendant, being a holder of an Australian credit licence, to:
  - (i) provide a credit service; and, or alternatively
  - (ii) engage in a credit activity.

26. By reason of the matters pleaded in paragraph 25, and, or alternatively, the matter pleaded in paragraph in 7(f)(i) above, each Dealer was a representative of the Defendants within the meaning of s 5 of the NCCPA.

27. By reason of the matters pleaded in paragraph 20, the Dealers' Unfair Conduct was conduct that related to a credit activity within the meaning of 74(a) of the NCCPA.

28. The Dealers' Unfair Conduct was conduct on which the Group Members could reasonably be expected to rely within the meaning of s 74(b) of the NCCPA.

29. The Dealers' Unfair Conduct was conduct on which the Group Members did rely in good faith within the meaning of s 74(c) of the NCCPA.

### **Particulars**

*At this stage and prior to discovery the best particulars the Plaintiffs can give is that reliance of the Group Members is to be inferred by reason of the Group Members entry into the Car Loans and payment of the Contract Rate.*

*Further particulars may be provided at the time of service of the Plaintiffs' evidence in chief, or prior to the trial of the individual claims of Group Members following the determination of the common questions.*

30. By reason of the matters pleaded in paragraphs 27, 28 and 29, the Defendants are responsible for the Dealers' Unfair Conduct.
31. By reason of s 77 of the NCCPA the Defendants are liable to the Group Members in relation to any loss or damage suffered by the Group Members as a result of the Dealers' Unfair Conduct.
32. By reason of s 78(1) of the NCCPA the Group Members have the same remedies against the Defendants that the Group Members have against the Dealers.
33. In the premises, the Group Members are entitled to an order against the Defendants under s 180A(2) of the NCCPA that it or they:
  - (a) refrain from charging the Group Members interest under the Car Loans above the Base Rate; and, or alternatively
  - (b) refrain from charging the Group Members interest under the Car Loans above the interest rate the Group Members would or could have obtained on the market at the time the Car Loans were entered into; and, or alternatively
  - (c) refrain from charging the Group Members interest under the Car Loans above the average market rate prevailing at the time the Car Loans were entered into; and, or alternatively
  - (d) repay to the Group Members the interest paid under the Car Loans above the Base Rate; and, or alternatively
  - (e) repay to the Group Members the interest paid under the Car Loans above the rate the Group Members would or could have obtained on the market at the time the Car Loans were entered into; and, or alternatively
  - (f) repay to the Group Members the interest paid under the Car Loans above the average market rate prevailing at the time the Car Loans were entered into; and, or alternatively
  - (g) pay interest on the sums payable under (d), (e) or (f) above.

**B.3 Claim against the Defendants for misleading or deceptive conduct**

34. Further or alternatively, in the circumstances pleaded above Group Members had a reasonable expectation that had:

- (a) the Contract Rate and, or alternatively, the term of the Car Loan, been set by someone other than the Defendants, namely, the Dealers;
- (b) the Dealers been interested in the Contract Rate and, or alternatively, the term of the Car Loan; and, or alternatively,
- (c) the Car Loans included features of the same or similar kind as the Flex Commission, Flex Commission Calculation Method and/or, the Flex Commission Features,

the relevant Defendant would have disclosed such matters or one or more of them to the Group Members.

- 35. The Defendants failed to disclose to Group Members the matters pleaded in paragraph 34(a) to (c) above.
- 36. The conduct of the Defendants in failing to disclose those matters or one or more of them to Group Members prior to or at the time the Car Loans were entered into, and in engaging in the Lender Conduct, was misleading or deceptive or likely to mislead or deceive.
- 37. The conduct of the Defendants pleaded in paragraph 35 was conduct engaged in by the Defendants:
  - (a) in relation to financial services, within the meaning of subsections 1041H(1) and 1041H(2)(b) of the *Corporations Act*; and, or alternatively,
  - (b) in trade or commerce, in relation to financial services within the meaning of section 12DA(1) of the *ASIC Act*.
- 38. By reason of the matters pleaded in paragraphs 35 to 37 the Defendants contravened:
  - (a) s 1041H of the *Corporations Act*; and, or alternatively,
  - (b) s 12DA(1) of the *ASIC Act*.
- 39. By reason of the Defendants' conduct pleaded in paragraphs 35 to 38, the Group Members:
  - (a) entered into the Car Loans (pursuant to which they paid interest at the Contract Rate) when they would not have done so apart from that conduct; and, or alternatively

- (b) entered into Car Loans whereby the interest rate was higher and, or alternatively, the terms were longer, than the interest rate on, or the terms of, loans the Group Members would otherwise have entered into; and, or alternatively
- (c) became liable to pay interest charges to the Defendants at the Contract Rate.

#### **Particulars**

*At present and prior to discovery the best particulars the Plaintiffs can give are that the causative effect of the conduct pleaded in paragraph 39 is to be inferred by reason of the Group Members entry into the Car Loans and payment of the Contract Rate in the circumstances pleaded above.*

*Further particulars may be provided at the time of service of the Plaintiffs' evidence in chief, or prior to the trial of the individual claims of Group Members following the determination of the common questions.*

- 40. By reason of the matters pleaded in paragraph 39 above, the Group Members have suffered loss and damage.

#### **Particulars**

*The loss and damage suffered by the Group Members will be calculated by:*

- A) *the difference between the Contract Rate and the Base Rate;*
- B) *alternatively, the difference between the Contract Rate and the rate the Group Members would have obtained on the market; and*
- C) *alternatively, the difference between the Contract Rate and the average market rate prevailing at the time the Car Loans were entered into.*

#### **B.4 Claim against the Defendants for money had and received and unjust enrichment**

- 41. Further or alternatively, the Group Members were not at any stage prior to applying for or entering into the Car Loan, informed, either sufficiently or at all, of one or more of the following facts:
  - (a) the Contract Rate and, or alternatively, the term of the Car Loan, been set by someone other than the Defendants, namely, the Dealers;
  - (b) the Dealers had been interested in the Contract Rate and, or alternatively, the term of the Car Loan;
  - (c) the Car Loans included features of the same or similar kind as the Flex Commission, Flex Commission Calculation Method, and/or the Flex Commission Features; and, or alternatively

- (d) the existence of the Dealers Unfair Conduct, and by reason thereof, the Group Members:
  - (i) would be entitled to claim a remedy against the Dealers pursuant to s 180A of the NCCPA;
  - (ii) would, under s 78(1) of the NCCPA, have the same remedies against the Defendants that the Group Members have against the Dealers; and
  - (iii) in the premises, would be entitled to obtain orders against the Defendants under s 180A(2) of the NCCPA as pleaded in paragraph 33 above.
  
- 42. By reason of the matters pleaded in paragraph 41 above, prior to applying for or entering into the Car Loan, the Group Members did not know one or more of the matters pleaded in paragraph 41 above, each of which constitute material information that would have been relevant to the decision of the Group Members whether to proceed with the entry into the Car Loan.
  
- 43. By reason of the matters pleaded in paragraphs 41 to 42 the Group Members:
  - (a) entered into the Car Loans (pursuant to which they paid interest at the Contract Rate) when they would not have done so; and, or alternatively
  - (b) entered into Car Loans whereby the interest rate was higher and, or alternatively, the terms were longer, than the interest rate on, or the terms of, loans the Group Members would otherwise have entered into; and, or alternatively
  - (c) became liable to pay interest charges to the Defendants at the Contract Rate, under one or more of the following causative mistaken beliefs:
    - (d) the Contract Rate and/or the term of the Car Loan were set by the Defendants, and, alternatively, were not set by someone other than the Defendants, namely, the Dealers;
    - (e) the Dealers were not interested in the Contract Rate and, or alternatively, the term of the Car Loan;

- (f) the Car Loans did not include features of the same or similar kind as the Flex Commission, Flex Commission Calculation Method, and/or the Flex Commission Features;
- (g) the conduct of the Dealers was not unfair within the meaning of s 180A(1)(b) of the NCCPA;
- (h) the Group Members were under a legal obligation to pay interest charges at the Contract Rate and, or alternatively for the term of the Car Loans and, or alternatively, the Defendants were legally entitled to payment of such moneys; and, or alternatively,
- (i) at the time of making the decision to enter into the Car Loan, they had received from the Dealer and the Defendants all material information, including some or all of the matters pleaded at paragraph 41 above.

### **Particulars**

*At present and prior to discovery the best particulars the Plaintiffs can give are that reliance of the Group Members is to be inferred by reason of the Group Members entry into the Car Loans and payment of the Contract Rate in the circumstances pleaded above.*

*Further particulars may be provided at the time of service of the Plaintiffs' evidence in chief, or prior to the trial of the individual claims of Group Members following the determination of the common questions.*

- 44. By reason of the matters pleaded in paragraphs 9, 10, 22 and/or 33 above, each of the beliefs pleaded in paragraph 43 was a unilateral mistake.
- 45. The Group Members:
  - (a) entered into the Car Loans (pursuant to which they paid interest at the Contract Rate) when they would not have done; and, or alternatively
  - (b) entered into Car Loans whereby the interest rate was higher and, or alternatively, the terms were longer, than the interest rate on, or the terms of, loans the Group Members would otherwise have entered into; and, or alternatively
  - (c) became liable to pay interest charges to the Defendants at the Contract Rate, by reason of one or more of the mistakes pleaded in paragraphs 43 and 44.

46. By reason of the Car Loan Process, Flex Commission Features and the Car Loan Circumstances (including the Flex Commission Non-Disclosure, the Defendants:
- (a) were aware, from those circumstances, of the matters pleaded in paragraphs 41, 42, 43, 44, and/or 45 above;
  - (b) induced the matters pleaded in paragraphs 41, 42, 43, 44, and/or 45 above; and, or alternatively,
  - (c) concealed the matters pleaded in paragraph 41 above.
47. By reason of the matters pleaded in paragraphs 45 and 46 above:
- (a) the Group Members are entitled to rescind the Car Loans;
  - (b) the Car Loans are void; and, or alternatively,
  - (c) the terms of the Car Loans requiring payment of the Contract Rate is void.
48. By reason of the matters pleaded in paragraphs 41 to 46 and/or 47 the interest paid under the Car Loans are monies had and received by the Defendants to the use of the Group Members, and the Defendants are obliged to repay those sums to the Group Members.
49. Further or alternatively, by reason of the matters pleaded in paragraphs 45 to 46 and/or 47, the Defendants have been unjustly enriched by the receipt of interest at the Contract Rate at the expense of the Group Members and it would be unconscionable for the Defendants to retain that interest.

## **C FIRST PLAINTIFF'S CLAIM AGAINST THE FIRST DEFENDANT**

### **C.1 The First Plaintiff**

50. The First Plaintiff (**Ms Fox**) is, and was at all material times:
- (a) a natural person; and
  - (b) a resident of the State of Victoria.
51. On or around 20 August 2015, Ms Fox;
- (a) entered into discussions with Harrison Motoring Group Pty Ltd, trading as Lakeside Hyundai at 1131-1139 Western Highway, Caroline Springs, Victoria (**Lakeside Hyundai**) concerning the acquisition of a Hyundai ix35 Highlander

automobile with registration number SLU955 (**Hyundai**) from Lakeside Hyundai and the financing thereof;

- (b) entered into a Contract for Sale of New Motor Vehicle No 29172 with Lakeside Hyundai for the acquisition of the Hyundai at a purchase price of \$43,390; and
- (c) paid a \$500 deposit to Lakeside Hyundai for the acquisition of the Hyundai.

52. On or around 27 August 2015, Ms Fox entered into a Car Loan with the First Defendant (**Westpac**) for the sum of \$47,323.07 (**Westpac Car Loan**) that:

- (a) was obtained through Lakeside Hyundai for the purpose of Ms Fox's acquisition of the Hyundai;
- (b) had an interest rate of 12.99% per annum; and
- (c) had a loan term of 84 months.

## **C.2 The contravening conduct under the NCCPA of the Lakeside Hyundai**

### ***C.2.1 Arrangements between Lakeside Hyundai and Westpac***

53. At times presently not known to Ms Fox, Westpac entered into a Dealer Agreement with Lakeside Hyundai (**Lakeside Hyundai Dealer Agreement**).

54. At all material times, the terms of the Lakeside Hyundai Dealer Agreement required Lakeside Hyundai to, among other things (**Lakeside Hyundai Dealer Terms**):

- (a) submit to Westpac offers from Group Members to enter into Car Loans;
- (b) comply with any direction given by Westpac related to the provision of Car Loans; and
- (c) before submitting to Westpac offers from Group Members to enter into Car Loans, to make any enquiries required by Westpac for the purposes of their responsible lending obligations.

### **Particulars**

*At present and prior to discovery the best particulars Ms Fox can give are those identified at paragraph 6 above.*

55. At all material times, pursuant to the Lakeside Hyundai Dealer Terms, Westpac required Lakeside Hyundai to adhere to the Car Loan Process pleaded in paragraph 7 above for the Westpac Car Loan.

### **Particulars**

*At present and prior to discovery the best particulars of the Car Loan Process Ms Fox are those identified at paragraph 7 above.*

56. At all material times during the Car Loan Process that applied to Lakeside Hyundai and the Westpac Car Loan, Westpac was solely responsible for all aspects of credit assessment, credit decisions, loan management, administration and servicing of the Westpac Car Loan.

**Particulars**

*At present and prior to discovery the best particulars Ms Fox can give are those identified at paragraph 8 above.*

57. At all material times, pursuant to the Lakeside Hyundai Dealer Terms, the Flex Commission Calculation Method as pleaded in paragraph 9 above applied to Lakeside Hyundai and the Westpac Car Loan.

**Particulars**

*At present and prior to discovery the best particulars Ms Fox can give are those identified at paragraph 9 above.*

58. The Flex Commissions and the Flex Commission Calculation Method:
- (a) involved Lakeside Hyundai setting the Contract Rate for the Westpac Car Loan at 12.99% per annum;
    - (i) in the absence of any objective criteria;
    - (ii) in circumstances where the amount of 12.99% per annum was influenced or determined by the self-interest of Lakeside Hyundai;
    - (iii) significantly higher than Westpac would have offered Ms Fox had it been approached otherwise than through Lakeside Hyundai; and, or alternatively
    - (iv) without any Contract Rate cap as was imposed by Westpac from August 2016;
  - (b) involved Lakeside Hyundai setting the term of the Westpac Car Loan;
  - (c) provided an incentive for Lakeside Hyundai to increase the price of the Westpac Car Loan and, or alternatively, the term of the Westpac Car Loan, in a way that depended on the negotiating skills or vulnerability of Ms Fox;
  - (d) created unfairness or a risk of unfairness in relation to the Westpac Car Loan;

- (e) created a conflict, or a potential for a conflict, between the interests of the Lakeside Hyundai and the interests of Ms Fox;

(together and severally, **Lakeside Hyundai Flex Commission Features**).

### **Particulars**

*At present and prior to discovery the best particulars Ms Fox can give are those identified at paragraph 10 above.*

59. At all material times, during the Car Loan Process that applied to Lakeside Hyundai and the Westpac Car Loan:

- (a) neither Westpac nor Lakeside Hyundai disclosed to Ms Fox:
  - (i) that the Contract Rate of 12.99% per annum and, or alternatively, the term of the Car Loan, had been set by someone other than Westpac, namely, Lakeside Hyundai;
  - (ii) that Lakeside Hyundai had been interested in the Contract Rate of 12.99% per annum and, or alternatively, the term of the Westpac Car Loan; and, or alternatively,
  - (iii) the Flex Commission, Flex Commission Calculation Method, and/or the Lakeside Hyundai Flex Commission Features,

**(Lakeside Hyundai Flex Commission Non-Disclosure);**

- (b) Westpac did not:
  - (i) ensure that Lakeside Hyundai disclosed; and, or alternatively
  - (ii) have appropriate systems, procedures and processes in place to ensure that Lakeside Hyundai disclosed;

to Ms Fox the matters pleaded in paragraph 59(a)(i) to (iii) above **(Westpac Conduct)**;

- (c) a reasonable person in the position of Ms Fox would have understood or assumed at the time she entered into the Westpac Car Loan that:
  - (i) the Contract Rate of 12.99% per annum and, or alternatively, the term of the Westpac Car Loan, was set solely by Westpac;

- (ii) Lakeside Hyundai was merely a conduit between Ms Fox and Westpac; and, or alternatively
  - (iii) Lakeside Hyundai was disinterested in the Contract Rate of 12.99% per annum;
  - (d) Ms Fox was in a comparatively weaker position to Westpac and, or alternatively, Lakeside Hyundai;
  - (e) Ms Fox was not treated equally in that comparable Group Members were not afforded equal Contract Rates;
- (together and severally, **Westpac Car Loan Circumstances**).

### **Particulars**

*At present and prior to discovery the best particulars Ms Fox can give are those identified at paragraph 11 above.*

#### **C.2.2 Lakeside Hyundai provided credit assistance to Ms Fox**

- 60. Ms Fox is a natural person and thereby a consumer within the meaning of section 5 of the NCCPA.
- 61. The Westpac Car Loan was a contract under which credit was or may be provided and thereby was a credit contract within the meaning of section 4 of the Credit Code and s 5 of the NCCPA.
- 62. By reason of the Lakeside Hyundai Dealer Terms and Car Loan Process, at all material times, Lakeside Hyundai:
  - (a) dealt directly with Ms Fox in the course of, or as part of, or incidentally to, the business of Lakeside Hyundai;
  - (b) and:
    - (i) suggested that Ms Fox apply for the Westpac Car Loan; and
    - (ii) assisted Ms Fox to apply for the Westpac Car Loan.
- 63. By reason of the matters pleaded in paragraph 62 Lakeside Hyundai provided credit assistance to Ms Fox within the meaning of sections 7(a) and s 8 of the NCCPA.

#### **C.2.3 Lakeside Hyundai was an intermediary between Ms Fox and Westpac**

- 64. Lakeside Hyundai carried on business in Australia.

65. By reason of the matter pleaded in paragraph 64 Lakeside Hyundai carried on business in this jurisdiction within the meaning of s 21(2) of the NCCPA.
66. By reason of the Lakeside Hyundai Dealer Terms and Car Loan Process, Lakeside Hyundai in the course of, or as part of, or incidentally to, the business carried on by them in this jurisdiction acted as an intermediary (whether directly or indirectly) between the Westpac and Ms Fox wholly or partly for the purposes of securing a provision of credit for Ms Fox under the Westpac Car Loan with Westpac.
67. By reason of the matters pleaded in paragraph 66, Lakeside Hyundai acted as an intermediary for the purposes of sections 7(b) and 9 of the NCCPA.

**C.2.4 Lakeside Hyundai provided a “credit service” to Ms Fox**

68. By reason of the matters pleaded in paragraph 63 and, or alternatively, paragraph 67, Lakeside Hyundai provided a credit service to Ms Fox within the meaning of sections 7 and 180A(1)(a) of the NCCPA.

**C.2.5 Lakeside Hyundai engaged in unfair conduct**

69. By reason of the Car Loan Process, Lakeside Hyundai Flex Commission Features and the Westpac Car Loan Circumstances (including the Lakeside Hyundai Flex Commission Non-Disclosure):
- (a) Ms Fox was at a special disadvantage in dealing with Lakeside Hyundai in relation to the Westpac Car Loan; and, or alternatively
  - (b) Ms Fox was unable, or considered herself unable, to make a Car Loan with a credit provider other than Westpac; and, or alternatively
  - (c) the Westpac Car Loan Circumstances (including the Lakeside Hyundai Flex Commission Non-Disclosure) involved a technique that:
    - (i) should not in good conscience have been used; or
    - (ii) manipulated Ms Fox; and, or alternatively
  - (d) Westpac could determine or significantly influence the terms of the Westpac Car Loan; and, or alternatively
  - (e) the terms of the Westpac Car Loan were less favourable to Ms Fox than the terms of a comparable transaction.

**Particulars**

*At present and prior to discovery the best particulars Ms Fox can give are that these matters are to be inferred from the Car Loan Process, Lakeside Hyundai Flex Commission Features, and the Westpac Car Loan Circumstances. In addition, as to the matters pleaded in subparagraph (e) above, Ms Fox relies upon Westpac Group Assurance Report entitled 'St George Banking Group Retail and Auto Finance' dated 5 August 2015 at pp 8-9; and ASIC Consultation Paper 279 entitled 'Flex commission arrangements in the car finance industry' dated March 2017, [5]-[7], [9]-[10], and Attachment 2, [86].*

70. By reason of the matters pleaded in paragraph 69, Lakeside Hyundai engaged in conduct in connection with the provision of a credit service that was unfair within the meaning of s 180A(1)(b) of the NCCPA (**Lakeside Hyundai's Unfair Conduct**).

#### **C.2.6 Consequences of Lakeside Hyundai's unfair conduct**

71. Lakeside Hyundai's Unfair Conduct had the result that Ms Fox:
- (a) entered into the Westpac Car Loan (pursuant to which she paid interest at the Contract Rate of 12.99%) when she would not have done so apart from that conduct; and, or alternatively
  - (b) entered into the Westpac Car Loan whereby the interest rate was higher and, or alternatively, the term was longer, than the interest rate on, or the term of, a loan Ms Fox would otherwise have entered into; and, or alternatively
  - (c) became liable to pay interest charges to Westpac at the Contract Rate of 12.99%.

#### **Particulars**

*Particulars will be provided at the time of service of Ms Fox's evidence in chief.*

72. By reason of the matters pleaded in paragraph 71 Ms Fox is entitled to claim a remedy against Lakeside Hyundai pursuant to s 180A of the NCCPA.

#### **C.3 Claim against Westpac under the NCCPA for Lakeside Hyundai's Unfair Conduct**

73. By reason of the Lakeside Hyundai Car Dealer Terms and the Car Loan Process during the Relevant Period Lakeside Hyundai was:
- (a) a person acting on behalf of Westpac, being a holder of an Australian credit licence; and, or alternatively
  - (b) a credit representative of Westpac, being a person authorised in writing by Westpac, being a holder of an Australian credit licence, to:

- (i) provide a credit service; and, or alternatively
- (ii) engage in a credit activity.

- 74. By reason of the matters pleaded in paragraph 73, and, or alternatively, the matter pleaded in paragraph in 7(f)(i) above, Lakeside Hyundai was a representative of Westpac within the meaning of s 5 of the NCCPA.
- 75. By reason of the matters pleaded in paragraph 68, Lakeside Hyundai's Unfair Conduct was conduct that related to a credit activity within the meaning of 74(a) of the NCCPA.
- 76. Lakeside Hyundai's Unfair Conduct was conduct on which Ms Fox could reasonably be expected to rely within the meaning of s 74(b) of the NCCPA.
- 77. Lakeside Hyundai's Unfair Conduct was conduct on which Ms Fox did rely in good faith within the meaning of s 74(c) of the NCCPA.

#### **Particulars**

*Particulars will be provided at the time of service of Ms Fox's evidence in chief.*

- 78. By reason of the matters pleaded in paragraphs 75, 76, and 77, Westpac is responsible for Lakeside Hyundai's Unfair Conduct.
- 79. By reason of s 77 of the NCCPA Westpac is liable to Ms Fox in relation to any loss or damage suffered by Ms Fox as a result of Lakeside Hyundai's Unfair Conduct.
- 80. By reason of s 78(1) of the NCCPA, Ms Fox has the same remedies against Westpac that Ms Fox has against Lakeside Hyundai.
- 81. In the premises, Ms Fox is entitled to an order against Westpac under s 180A(2) of the NCCPA that it:
  - (a) refrain from charging Ms Fox interest under the Westpac Car Loan above the Base Rate; and, or alternatively
  - (b) refrain from charging Ms Fox interest under the Westpac Car Loan above the interest rate Ms Fox would or could have obtained on the market at the time the Westpac Car Loan was entered into; and, or alternatively
  - (c) refrain from charging Ms Fox interest under the Westpac Car Loan above the average market rate prevailing at the time the Westpac Car Loan was entered into; and, or alternatively

- (d) repay to Ms Fox the interest paid under the Westpac Car Loan above the Base Rate; and, or alternatively
- (e) repay to Ms Fox the interest paid under the Westpac Car Loan above the rate Ms Fox would or could have obtained on the market at the time the Westpac Car Loan was entered into; and, or alternatively
- (f) repay to Ms Fox the interest paid under the Westpac Car Loan above the average market rate prevailing at the time the Westpac Car Loan was entered into; and, or alternatively
- (g) pay interest on the sums payable under (d), (e) or (f) above.

#### **C.4 Claim against Westpac for misleading or deceptive conduct**

82. Further or alternatively, in the circumstances pleaded above Ms Fox had a reasonable expectation that had:

- (a) the Contract Rate of 12.99% per annum and, or alternatively, the term of the Westpac Car Loan, been set by someone other than Westpac, namely, Lakeside Hyundai;
- (b) Lakeside Hyundai been interested in the Contract Rate of 12.99% per annum and, or alternatively, the term of the Westpac Car Loan; and, or alternatively,
- (c) the Westpac Car Loan included features of the same or similar kind as the Flex Commission, Flex Commission Calculation Method, and/or the Lakeside Hyundai Flex Commission Features,

Westpac would have disclosed such matters or one or more of them to Ms Fox.

83. Westpac failed to disclose to Ms Fox the matters pleaded in paragraph 82(a) to (c) above.

84. The conduct of Westpac in failing to disclose those matters or one or more of them to Ms Fox prior to or at the time the Car Loans were entered into, and in engaging in the Westpac Conduct, was misleading or deceptive or likely to mislead or deceive.

85. The conduct of Westpac pleaded in paragraph 83 was conduct engaged in by Westpac:

- (a) in relation to financial services, within the meaning of subsections 1041H(1) and 1041H(2)(b) of the *Corporations Act*; and, or alternatively,

(b) in trade or commerce, in relation to financial services within the meaning of section 12DA(1) of the *ASIC Act*.

86. By reason of the matters pleaded in paragraphs 83 to 85 Westpac contravened:

(a) s 1041H of the *Corporations Act*, and, or alternatively,

(b) s 12DA(1) of the *ASIC Act*.

87. By reason of Westpac's conduct pleaded in paragraphs 83 to 86, Ms Fox:

(a) entered into the Westpac Car Loan (pursuant to which she paid interest at the Contract Rate of 12.99% per annum) when she would not have done so apart from that conduct; and, or alternatively

(b) entered into the Westpac Car Loan whereby the interest rate was higher and, or alternatively, the term was longer, than the interest rate on, or the term of, a loan Ms Fox would otherwise have entered into; and, or alternatively

(c) became liable to pay interest charges to Westpac at the Contract Rate of 12.99% per annum.

#### **Particulars**

*Further particulars will be provided at the time of service of Ms Fox's evidence in chief.*

88. By reason of the matters pleaded in paragraph 87 above, Ms Fox has suffered loss and damage.

#### **Particulars**

*The loss and damage suffered by Ms Fox will be calculated by:*

*D) the difference between the Contract Rate of 12.99% per annum and the Base Rate;*

*E) alternatively, the difference between the Contract Rate of 12.99% per annum and the rate Ms Fox would have obtained on the market; and*

*F) alternatively, the difference between the Contract Rate of 12.99% per annum and the average market rate prevailing at the time the Westpac Car Loan was entered into.*

### **C.5 Claim against Westpac for money had and received and unjust enrichment**

89. Further or alternatively, Ms Fox was not at any stage prior to applying for or entering into the Westpac Car Loan, informed, either sufficiently or at all, of one or more of the following facts:

- (a) the Contract Rate of 12.99% per annum and, or alternatively, the term of the Westpac Car Loan, been set by someone other than Westpac, namely, Lakeside Hyundai;
  - (b) Lakeside Hyundai was interested in the Contract Rate of 12.99% per annum and, or alternatively, the term of the Westpac Car Loan;
  - (c) the Westpac Car Loan included features of the same or similar kind as the Flex Commission, Flex Commission Calculation Method, and/or the Lakeside Hyundai Flex Commission Features; and, or alternatively,
  - (d) the existence of Lakeside Hyundai's Unfair Conduct, and by reason thereof, Ms Fox:
    - (i) would be entitled to claim a remedy against Lakeside Hyundai pursuant to s 180A of the NCCPA;
    - (ii) would, under s 78(1) of the NCCPA, have the same remedies against Westpac that Ms Fox has against Lakeside Hyundai; and
    - (iii) in the premises, would be entitled to obtain orders against Westpac under s 180A(2) of the NCCPA as pleaded in paragraph 81 above.
90. By reason of the matters pleaded in paragraph 89 above, prior to applying for or entering into the Westpac Car Loan, Ms Fox did not know one or more of the matters pleaded in paragraph 89 above, each of which constitute material information that would have been relevant to the decision of Ms Fox whether to proceed with the entry into the Westpac Car Loan.
91. By reason of the matters pleaded in paragraphs 89 to 90 Ms Fox:
- (a) entered into the Westpac Car Loan (pursuant to which she paid interest at the Contract Rate of 12.99% per annum) when she would not have done so; and, or alternatively
  - (b) entered into the Westpac Car Loan whereby the interest rate was higher and, or alternatively, the term was longer, than the interest rate on, or the term of, a loan Ms Fox would otherwise have entered into; and, or alternatively
  - (c) became liable to pay interest charges to Westpac at the Contract Rate of 12.99% per annum,

under one or more of the following causative mistaken beliefs:

- (d) the Contract Rate of 12.99% per annum and, or alternatively, the term of the Westpac Car Loan, was not set by someone other than Westpac, namely, Lakeside Hyundai;
- (e) Lakeside Hyundai was not interested in the Contract Rate of 12.99% per annum and, or alternatively, the term of the Westpac Car Loan;
- (f) the Westpac Car Loan did not include features of the same or similar kind as the Flex Commission, Flex Commission Calculation Method, and, or alternatively, the Lakeside Hyundai Flex Commission Features;
- (g) the conduct of Lakeside Hyundai was not unfair within the meaning of s 180A(1)(b) of the NCCPA;
- (h) Ms Fox was under a legal obligation to pay interest charges at the Contract Rate of 12.99% per annum and, or alternatively, for the term of the Westpac Car Loan and, or alternatively, Westpac was legally entitled to payment of such moneys; and, or alternatively,
- (i) at the time of making the decision to enter into the Westpac Car Loan, Ms Fox had received from Lakeside Hyundai and Westpac all material information, including some or all of the matters pleaded at paragraph 89 above.

### **Particulars**

*Further particulars will be provided at the time of service of Ms Fox's evidence in chief.*

- 92. By reason of the matters pleaded in paragraphs 9, 10, 58 and/or 81 above, each of the beliefs pleaded in paragraph 91 was a unilateral mistake.
- 93. Ms Fox:
  - (a) entered into the Westpac Car Loan (pursuant to which she paid interest at the Contract Rate of 12.99% per annum) when she would not have done so; and, or alternatively
  - (b) entered into the Westpac Car Loan whereby the interest rate was higher and, or alternatively, the term was longer, than the interest rate on, or the term of, a loan Ms Fox would otherwise have entered into; and, or alternatively

(c) became liable to pay interest charges to Westpac at the Contract Rate of 12.99%,

by reason of one or more of the mistakes pleaded in paragraphs 91 and 92.

94. By reason of the Car Loan Process, Lakeside Hyundai Flex Commission Features and the Westpac Car Loan Circumstances (including the Lakeside Hyundai Flex Commission Non-Disclosure) Westpac:

(a) was aware, from those circumstances, of the matters pleaded in paragraphs 89, 90, 91, 92, and/or 93 above;

(b) induced the matters pleaded in paragraphs 89, 90, 91, 92, and/or 93 above; and, or alternatively,

(c) concealed the matters pleaded in paragraph 89 above.

95. By reason of the matters pleaded in paragraphs 93 and 94 above:

(a) Ms Fox is entitled to rescind the Westpac Car Loan;

(b) the Westpac Car Loan is void; and, or alternatively,

(c) the term of the Westpac Car Loan requiring payment of the Contract Rate at 12.99% per annum is void.

96. By reason of the matters pleaded in paragraphs 89 to 94 and/or 95, the interest paid under the Westpac Car Loan is monies had and received by Westpac to the use of Ms Fox, and Westpac is obliged to repay those sums to Ms Fox.

97. Further or alternatively, by reason of the matters pleaded in paragraph 93 to 94 and/or 95, Westpac has been unjustly enriched by the receipt of interest at the Contract Rate at 12.99% per annum at the expense of Ms Fox and it would be unconscionable for Westpac to retain that interest.

## **D SECOND PLAINTIFF'S CLAIM AGAINST THE SECOND DEFENDANT**

### **D.1 The Second Plaintiff**

98. The Second Plaintiff (**Ms Nastasi**) is, and was at all material times:

(a) a natural person; and

(b) a resident of the State of Queensland.

99. On or around 26 August 2014, Ms Nastasi;
- (a) entered into discussions with Eastpoint Cars Qld Pty Ltd trading as Springwood Nissan at 3468-3476 Pacific Highway, Springwood, Queensland (**Springwood Nissan**) concerning the acquisition of a Nissan Qashqai TL automobile with registration number 540TXA (**Nissan**) from Springwood Nissan and the financing thereof;
  - (b) entered into a contract of sale with Springwood Nissan with deal number N2156 for the acquisition of the Nissan at a purchase price of \$42,647; and
  - (c) paid a \$300 deposit to Springwood Nissan for the acquisition of the Nissan.
100. On or around 29 August 2014, Ms Fox entered into a Car Loan with the Second Defendant (**St George Finance**) for the sum of \$51,548.64 (**St George Finance Car Loan**) that:
- (a) was obtained through Springwood Nissan for the purpose of Ms Nastasi's acquisition of the Nissan;
  - (b) had an interest rate of 12.99% per annum;
  - (c) had a loan term of 84 months

## **D.2 The contravening conduct under the NCCPA of the Springwood Nissan**

### ***D.2.1 Arrangements between Springwood Nissan and St George Finance***

101. At times presently not known to Ms Nastasi, St George Finance entered into a Dealer Agreement with Springwood Nissan (**Springwood Nissan Dealer Agreement**).
102. At all material times, the terms of the Springwood Nissan Dealer Agreement required Springwood Nissan to, among other things (**Springwood Nissan Dealer Terms**):
- (a) submit to St George Finance offers from Group Members to enter into Car Loans;
  - (b) comply with any direction given by St George Finance related to the provision of Car Loans; and
  - (c) before submitting to St George Finance offers from Group Members to enter into Car Loans, to make any enquiries required by St George Finance for the purposes of their responsible lending obligations.

**Particulars**

*At present and prior to discovery the best particulars Ms Nastasi can give are those identified at paragraph 6 above.*

103. At all material times, pursuant to the Springwood Nissan Dealer Terms, Westpac required St George Finance to adhere to the Car Loan Process pleaded in paragraph 7 above for the St George Finance Car Loan.

**Particulars**

*At present and prior to discovery the best particulars of the Car Loan Process Ms Nastasi are those identified at paragraph 7 above.*

104. At all material times during the Car Loan Process that applied to Springwood Nissan and the St George Finance Car Loan, St George Finance was solely responsible for all aspects of credit assessment, credit decisions, loan management, administration and servicing of the St George Finance Car Loan.

**Particulars**

*At present and prior to discovery the best particulars Ms Nastasi can give are those identified at paragraph 8 above.*

105. At all material times, pursuant to the Springwood Nissan Dealer Terms, the Flex Commission Calculation Method as pleaded in paragraph 9 above applied to Springwood Nissan and the St George Finance Car Loan.

**Particulars**

*At present and prior to discovery the best particulars Ms Nastasi can give are those identified at paragraph 9 above.*

106. The Flex Commissions and the Flex Commission Calculation Method:
- (a) involved Springwood Nissan setting the Contract Rate for the St George Finance Car Loan at 12.99% per annum;
    - (i) in the absence of any objective criteria;
    - (ii) in circumstances where the amount of 12.99% per annum was influenced or determined by the self-interest of Springwood Nissan
    - (iii) significantly higher than St George Finance would have offered Ms Nastasi had they been approached otherwise than through Springwood Nissan and, or alternatively

- (iv) without any Contract Rate cap as was imposed by St George Finance from August 2016;
- (b) involved Springwood Nissan settling the term of the St George Finance Car Loan;
- (c) provided an incentive for Springwood Nissan to increase the price of the St George Finance Car Loan and, or alternatively, the term of the St George Finance Car Loan, in a way that depended on the negotiating skills or vulnerability of Ms Nastasi;
- (d) created unfairness or a risk of unfairness in relation to the St George Finance Car Loan;
- (e) created a conflict, or a potential for a conflict, between the interests of Springwood Nissan and the interests of Ms Nastasi;

(together and severally, **Springwood Nissan Flex Commission Features**).

#### **Particulars**

*At present and prior to discovery the best particulars Ms Nastasi can give are those identified at paragraph 10 above.*

107. At all material times, during the Car Loan Process that applied to Springwood Nissan and the St George Finance Car Loan:

- (a) neither St George Finance nor Springwood Nissan disclosed to Ms Nastasi:
  - (i) that the Contract Rate of 12.99% per annum and, or alternatively, the term of the St George Finance Car Loan, had been set by someone other than St George Finance, namely, Springwood Nissan;
  - (ii) that Springwood Nissan had been interested in the Contract Rate of 12.99% per annum and, or alternatively, the term of the St George Finance Car Loan; and, or alternatively,
  - (iii) the Flex Commission, Flex Commission Calculation Method, and/or the Springwood Nissan Flex Commission Features

**(Springwood Nissan Flex Commission Non-Disclosure);**

- (b) St George Finance did not:
  - (i) ensure that Springwood Nissan disclosed; and, or alternatively

(ii) have appropriate systems, procedures and processes in place to ensure that Springwood Nissan disclosed;

to Ms Nastasi the matters pleaded in paragraph 107(a)(i) to (iii) above (**St George Finance Conduct**);

(c) a reasonable person in the position of Ms Nastasi would have understood or assumed at the time she entered into the St George Finance Car Loan that:

(i) the Contract Rate of 12.99% per annum and, or alternatively, the term of the St George Finance Car Loan, was set solely by St George Finance;

(ii) Springwood Nissan was merely a conduit between Ms Nastasi and St George Finance; and, or alternatively

(iii) Springwood Nissan was disinterested in the Contract Rate of 12.99% per annum;

(d) Ms Nastasi was in a comparatively weaker positions to St George Finance and, or alternatively, Springwood Nissan;

(e) Ms Nastasi was not treated equally in that comparable Group Members were not afforded equal Contract Rates;

(together and severally, **St George Finance Car Loan Circumstances**).

### **Particulars**

*At present and prior to discovery the best particulars Ms Nastasi can give are those identified at paragraph 11 above.*

#### **D.2.2 Springwood Nissan provided credit assistance to Ms Nastasi**

108. Ms Nastasi is a natural person and thereby a consumer within the meaning of section 5 of the NCCPA.

109. The St George Finance Car Loan was a contract under which credit was or may be provided and thereby was a credit contract within the meaning of section 4 of the Credit Code and s 5 of the NCCPA.

110. By reason of the Springwood Nissan Dealer Terms and Car Loan Process, at all material times, Springwood Nissan

- (a) dealt directly with Ms Nastasi in the course of, or as part of, or incidentally to, the business of Springwood Nissan
- (b) and:
  - (i) suggested that Ms Nastasi apply for the St George Finance Car Loan; and
  - (ii) assisted Ms Nastasi to apply for the St George Finance Car Loan;

111. By reason of the matters pleaded in paragraph 110 Springwood Nissan provided credit assistance to Ms Nastasi within the meaning of sections 7(a) and s 8 of the NCCPA.

***D.2.3 Springwood Nissan was an intermediary between Ms Nastasi and St George Finance***

112. Springwood Nissan carried on business in Australia.

113. By reason of the matter pleaded in paragraph 112 Springwood Nissan carried on business in this jurisdiction within the meaning of s 21(2) of the NCCPA.

114. By reason of the Springwood Nissan Dealer Terms and Car Loan Process, Springwood Nissan in the course of, or as part of, or incidentally to, the business carried on by them in this jurisdiction acted as an intermediary (whether directly or indirectly) between the St George Finance and Ms Nastasi wholly or partly for the purposes of securing a provision of credit for Ms Nastasi under the St George Finance Car Loan with St George Finance.

115. By reason of the matters pleaded in paragraph 114, Springwood Nissan acted as an intermediary for the purposes of sections 7(b) and 9 of the NCCPA.

***D.2.4 Springwood Nissan provided a “credit service” to Ms Nastasi***

116. By reason of the matters pleaded in paragraph 111 and, or alternatively, paragraph 115, Springwood Nissan provided a credit service to Ms Nastasi within the meaning of sections 7 and 180A(1)(a) of the NCCPA.

***D.2.5 Springwood Nissan engaged in unfair conduct***

117. By reason of the Car Loan Process, Springwood Nissan Flex Commission Features and the St George Finance Car Loan Circumstances (including the Springwood Nissan Flex Commission Non-Disclosure):

- (a) Ms Nastasi was at a special disadvantage in dealing with Springwood Nissan in relation to the St George Finance Car Loan; and, or alternatively
- (b) Ms Nastasi was unable, or considered herself unable, to make a Car Loan with a credit provider other than St George Finance; and, or alternatively
- (c) the St George Finance Car Loan Circumstances (including the Springwood Nissan Commission Non-Disclosure) involved a technique that:
  - (i) should not in good conscience have been used; or
  - (ii) manipulated Ms Nastasi; and, or alternatively
- (d) St George Finance could determine or significantly influence the terms of the St George Finance Car Loan; and, or alternatively
- (e) the terms of the St George Finance Car Loan were less favourable to Ms Nastasi than the terms of a comparable transaction.

#### **Particulars**

*At present and prior to discovery the best particulars Ms Nastasi can give are that these matters are to be inferred from the Car Loan Process, Springwood Nissan Flex Commission Features, and the St George Finance Car Loan Circumstances. In addition, as to the matters pleaded in subparagraph (e) above, Ms Fox relies upon Westpac Group Assurance Report entitled 'St George Banking Group Retail and Auto Finance' dated 5 August 2015 at pp 8-9; and ASIC Consultation Paper 279 entitled 'Flex commission arrangements in the car finance industry' dated March 2017, [5]-[7], [9]-[10], and Attachment 2, [86].*

118. By reason of the matters pleaded in paragraph 117, Springwood Nissan engaged in conduct in connection with the provision of a credit service that was unfair within the meaning of s 180A(1)(b) of the NCCPA (**Springwood Nissan's Unfair Conduct**).

#### **D.2.6 Consequences of Springwood Nissan's unfair conduct**

119. Springwood Nissan's Unfair Conduct had the result that Ms Nastasi:
- (a) entered into the St George Finance Car Loan (pursuant to which she paid interest at the Contract Rate of 12.99% per annum) when she would not have done so apart from that conduct; and, or alternatively
  - (b) entered into the St George Finance Car Loan whereby the interest rate was higher and, or alternatively, the term was longer, than the interest rate on, or the term of, a loan Ms Nastasi would otherwise have entered into; and, or alternatively

- (c) became liable to pay interest charges to St George Finance at the Contract Rate of 12.99% per annum.

### **Particulars**

*Particulars will be provided at the time of service of Ms Nastasi's evidence in chief.*

120. By reason of the matters pleaded in paragraph 119 Ms Nastasi is entitled to claim a remedy against Springwood Nissan pursuant to s 180A of the NCCPA.

### **D.3 Claim against St George Finance under the NCCPA for Springwood Nissan's Unfair Conduct**

121. By reason of the Springwood Nissan Car Dealer Terms and the Car Loan Process during the Relevant Period Springwood Nissan was:

- (a) a person acting on behalf of St George Finance, being a holder of an Australian credit licence; and, or alternatively
- (b) a credit representative of St George Finance, being a person authorised in writing by St George Finance, being a holder of an Australian credit licence, to:
  - (i) provide a credit service; and, or alternatively
  - (ii) engage in a credit activity.

122. By reason of the matters pleaded in paragraph 121, and, or alternatively, the matter pleaded in paragraph in 7(f)(i) above, Springwood Nissan was a representative of St George Finance within the meaning of s 5 of the NCCPA.

123. By reason of the matters pleaded in paragraph 116, Springwood Nissan's Unfair Conduct was conduct that related to a credit activity within the meaning of 74(a) of the NCCPA.

124. Springwood Nissan's Unfair Conduct was conduct on which Ms Nastasi could reasonably be expected to rely within the meaning of s 74(b) of the NCCPA.

125. Springwood Nissan's Unfair Conduct was conduct on which Ms Nastasi did rely in good faith within the meaning of s 74(c) of the NCCPA.

### **Particulars**

*Particulars will be provided at the time of service of Ms Nastasi's evidence in chief.*

126. By reason of the matters pleaded in paragraphs 123, 124, and 125 St George Finance is responsible for Springwood Nissan's Unfair Conduct.

127. By reason of s 77 of the NCCPA St George Finance is liable to Ms Nastasi in relation to any loss or damage suffered by Ms Nastasi as a result of Springwood Nissan's Unfair Conduct.
128. By reason of s 78(1) of the NCCPA, Ms Nastasi has the same remedies against St George Finance that Ms Nastasi has against Springwood Nissan.
129. In the premises, Ms Nastasi is entitled to an order against St George Finance under s 180A(2) of the NCCPA that it:
- (a) refrain from charging Ms Nastasi interest under the St George Finance Car Loan above the Base Rate; and, or alternatively
  - (b) refrain from charging Ms Nastasi interest under the St George Finance Car Loan above the interest rate Ms Nastasi would or could have obtained on the market at the time the St George Finance Car Loan was entered into; and, or alternatively
  - (c) refrain from charging Ms Nastasi interest under the St George Finance Car Loan above the average market rate prevailing at the time the St George Finance Car Loan was entered into; and, or alternatively
  - (d) repay to Ms Nastasi the interest paid under the St George Finance Car Loan above the Base Rate; and, or alternatively
  - (e) repay to Ms Nastasi the interest paid under the St George Finance Car Loan above the rate Ms Nastasi would or could have obtained on the market at the time the St George Finance Car Loan was entered into; and, or alternatively
  - (f) repay to Ms Nastasi the interest paid under the St George Finance Car Loan above the average market rate prevailing at the time the St George Finance Car Loan was entered into; and, or alternatively
  - (g) pay interest on the sums payable under (d), (e) or (f) above.

#### **D.4 Claim against St George Finance for misleading or deceptive conduct**

130. Further or alternatively, in the circumstances pleaded above Ms Nastasi had a reasonable expectation that had:
- (a) the Contract Rate of 12.99% per annum and, or alternatively, the term of the St George Finance Car Loan, been set by someone other than St George Finance, namely, Springwood Nissan;

- (b) Springwood Nissan been interested in the Contract Rate of 12.99% per annum and, or alternatively, the term of the St George Finance Car Loan; and, or alternatively,
- (c) the St George Finance Car Loan included features of the same or similar kind as the Flex Commission, Flex Commission Calculation Method, and, or alternatively, the Springwood Nissan Flex Commission Features,

St George Finance would have disclosed such matters or one or more of them to Ms Nastasi.

- 131. St George Finance failed to disclose to Ms Nastasi the matters pleaded in paragraph 130(a) to (c) above.
- 132. The conduct of St George Finance in failing to disclose those matters or one or more of them to Ms Nastasi prior to or at the time the St George Finance was entered into, and in engaging in the St George Finance Conduct, was misleading or deceptive or likely to mislead or deceive.
- 133. The conduct of St George Finance pleaded in paragraph 131 was conduct engaged in by St George Finance:
  - (a) in relation to financial services, within the meaning of subsections 1041H(1) and 1041H(2)(b) of the *Corporations Act*; and
  - (b) in trade or commerce, in relation to financial services within the meaning of section 12DA(1) of the *ASIC Act*.
- 134. By reason of the matters pleaded in paragraphs 131 to 133 St George Finance contravened:
  - (a) s 1041H of the *Corporations Act*; and, or alternatively,
  - (b) s 12DA(1) of the *ASIC Act*.
- 135. By reason of St George Finance's conduct pleaded in paragraphs 131 to 134, Ms Nastasi:
  - (a) entered into the St George Finance Car Loan (pursuant to which she paid interest at the Contract Rate of 12.99% per annum) when she would not have done so apart from that conduct; and, or alternatively

- (b) entered into the St George Finance Car Loan whereby the interest rate was higher and, or alternatively, the term was longer, than the interest rate on, or the term of, a loan Ms Nastasi would otherwise have entered into; and, or alternatively
- (c) became liable to pay interest charges to St George Finance at the Contract Rate of 12.99% per annum.

#### **Particulars**

*Further particulars will be provided at the time of service of Ms Nastasi's evidence in chief.*

136. By reason of the matters pleaded in paragraph 135 above, Ms Nastasi has suffered loss and damage.

#### **Particulars**

*The loss and damage suffered by Ms Nastasi will be calculated by:*

- A) *the difference between the Contract Rate of 12.99% per annum and the Base Rate;*
- B) *alternatively, the difference between the Contract Rate of 12.99% per annum and the rate Ms Nastasi would have obtained on the market; and*
- C) *alternatively, the difference between the Contract Rate of 12.99% per annum and the average market rate prevailing at the time the St George Finance Car Loan was entered into.*

#### **D.5 Claim against St George Finance for money had and received and unjust enrichment**

137. Further or alternatively, Ms Nastasi was not at any stage prior to applying for or entering into the St George Finance Car Loan, informed, either sufficiently or at all, of one or more of the following facts:
- (a) the Contract Rate of 12.99% per annum and, or alternatively, the term of the St George Finance Car Loan, been set by someone other than St George Finance, namely, Springwood Nissan;
  - (b) Springwood Nissan was interested in the Contract Rate of 12.99% per annum and, or alternatively, the term of the St George Finance Car Loan;
  - (c) the St George Finance Car Loan included features of the same or similar kind as the Flex Commission, Flex Commission Calculation Method, and/or the Springwood Nissan Flex Commission Features; and, or alternatively,

(d) the existence of Springwood Nissan's Unfair Conduct, and by reason thereof, Ms Nastasi:

(i) would be entitled to claim a remedy against Springwood Nissan pursuant to s 180A of the NCCPA;

(ii) would, under s 78(1) of the NCCPA, have the same remedies against St George Finance that Ms Nastasi has against Springwood Nissan; and

(iii) in the premises, would be entitled to obtain orders against St George Finance under s 180A(2) of the NCCPA as pleaded in paragraph 129 above.

138. By reason of the matters pleaded in paragraph 137 above, prior to applying for or entering into the St George Finance Car Loan, Ms Nastasi did not know one or more of the matters pleaded in paragraph 137 above, each of which constitute material information that would have been relevant to the decision of Ms Nastasi whether to proceed with the entry into the St George Finance Car Loan.

139. By reason of the matters pleaded in paragraphs 137 to 138 Ms Nastasi:

(a) entered into the St George Finance Car Loan (pursuant to which she paid interest at the Contract Rate of 12.99% per annum) when she would not have done so; and, or alternatively

(b) entered into the St George Finance Car Loan whereby the interest rate was higher and, or alternatively, the term was longer, than the interest rate on, or the term of, a loan Ms Nastasi would otherwise have entered into; and, or alternatively

(c) became liable to pay interest charges to St George Finance at the Contract Rate of 12.99% per annum,

under one or more of the following causative mistaken beliefs:

(d) the Contract Rate of 12.99% per annum and, or alternatively, the term of the St George Finance Car Loan, was not set by someone other than St George Finance, namely, Springwood Nissan;

(e) Springwood Nissan was not interested in the Contract Rate of 12.99% per annum and, or alternatively, the term of the St George Finance Car Loan;

- (f) the St George Finance Car Loan did not include features of the same or similar kind as the Flex Commission, Flex Commission Calculation Method, and/or the Springwood Nissan Flex Commission Features;
- (g) the conduct of Springwood Nissan was not unfair within the meaning of s 180A(1)(b) of the NCCPA;
- (h) Ms Nastasi was under a legal obligation to pay interest charges at the Contract Rate of 12.99% per annum and, or alternatively, for the term of the St George Finance Car Loan and, or alternatively, St George Finance was legally entitled to payment of such moneys; and, or alternatively,
- (i) at the time of making the decision to enter into the St George Finance Car Loan, Ms Nastasi had received from Springwood Nissan and St George Finance all material information, including some or all of the matters pleaded at paragraph 137 above.

#### **Particulars**

*Further particulars will be provided at the time of service of Ms Nastasi's evidence in chief.*

140. By reason of the matters pleaded in paragraphs 9, 10, 106 and/or 129 above, each of the beliefs pleaded in paragraph 139 was a unilateral mistake.
141. Ms Nastasi:
- (a) entered into the St George Finance Car Loan (pursuant to which she paid interest at the Contract Rate of 12.99% per annum) when she would not have done so; and, or alternatively
  - (b) entered into the St George Finance Car Loan whereby the interest rate was higher and, or alternatively, the term was longer, than the interest rate on, or the term of, a loan Ms Nastasi would otherwise have entered into; and, or alternatively
  - (c) became liable to pay interest charges to St George Finance at the Contract Rate of 12.99% per annum,
- by reason of one or more of the mistakes pleaded in paragraphs 139 and 140.

142. By reason of the Car Loan Process, Springwood Nissan Flex Commission Features and the St George Finance Car Loan Circumstances (including the Springwood Nissan Flex Commission Non-Disclosure) St George Finance:
- (a) was aware, from those circumstances, of the matters pleaded in paragraphs 137, 138, 139, 140 and/or 141 above;
  - (b) induced the matters pleaded in paragraphs 137, 138, 139, 140 and/or 141 above; and, or alternatively,
  - (c) concealed the matters pleaded in paragraph 137 above.
143. By reason of the matters pleaded in paragraphs 141 and 142 above:
- (a) Ms Nastasi is entitled to rescind the St George Finance Car Loan;
  - (b) the St George Finance Car Loan is void; and, or alternatively,
  - (c) the term of the St George Finance Car Loan requiring payment of the Contract Rate at 12.99% per annum is void.
144. By reason of the matters pleaded in paragraphs 137 to 142 and/or 143, the interest paid under the St George Finance Car Loan is monies had and received by St George Finance to the use of Ms Nastasi, and St George Finance is obliged to repay those sums to Ms Nastasi.
145. Further or alternatively, by reason of the matters pleaded in paragraph 141 to 142 and/or 143, St George Finance has been unjustly enriched by the receipt of interest at the Contract Rate at 12.99% per annum at the expense of Ms Nastasi and it would be unconscionable for St George Finance to retain that interest.

## **E COMMON QUESTIONS OF LAW OR FACT**

### **E.1 The contravening conduct under the NCCPA**

146. Were the Dealers required to adhere to the Car Loan Process?
147. Did the Car Loans include:
- (a) the Flex Commission Calculation Method?
  - (b) the Flex Commission Features?
148. During the Car Loan Process did the Car Loan Circumstances arise?

149. By reason of the matters pleaded in this Statement of Claim, did Dealers provide credit assistance to the Group Members within the meaning of sections 7(a) and s 8 of the NCCPA?
150. By reason of the matters pleaded in this Statement of Claim, did Dealers act as an intermediary for the purposes of sections 7(b) and 9 of the NCCPA?
151. By reason of the matters pleaded in this Statement of Claim, did Dealers provide a credit service to the Group Members within the meaning of sections 7 and 180A(1)(a) of the NCCPA?
152. By reason of the matters pleaded in this Statement of Claim, did the Dealers engage in conduct in connection with the provision of a credit service that was unfair within the meaning of s 180A(1)(b) of the NCCPA?
153. By reason of the matters pleaded in this Statement of Claim, are the Plaintiffs and the Group Members are entitled to claim a remedy against the Dealers pursuant to s 180A of the NCCPA?
154. By reason of the matters pleaded in this Statement of Claim, was each Dealer a representative of the Defendants within the meaning of s 5 of the NCCPA?
155. By reason of the matters pleaded in this Statement of Claim, was the Dealers' Unfair Conduct conduct that related to a credit activity within the meaning of 74(a) of the NCCPA?
156. Was the Dealers' Unfair Conduct conduct on which the Plaintiffs and Group Members could reasonably be expected to rely within the meaning of s 74(b) of the NCCPA?
157. Was the Dealers' Unfair Conduct conduct on which the Plaintiffs and Group Members did rely in good faith within the meaning of s 74(c) of the NCCPA?
158. By reason of the matters pleaded in this Statement of Claim, are the Defendants responsible for the Dealers' Unfair Conduct?
159. By reason of s 77 of the NCCPA, are the Defendants liable to the Plaintiffs and Group Members in relation to any loss or damage suffered by the Plaintiffs and Group Members as a result of the Dealers' Unfair Conduct?
160. By reason of s 78(1) of the NCCPA, do the Plaintiffs and Group Members have the same remedies against the Defendants that the Plaintiffs and Group Members have against the Dealers?

161. By reason of the matters pleaded in this Statement of Claim, are the Plaintiffs and the Group Members entitled to an order against the Defendants under s 180A(2) of the NCCPA that it or they:

- (a) refrain from charging the Plaintiffs and Group Members interest under the Car Loans above the Base Rate; and, or alternatively
- (b) refrain from charging the Plaintiffs and Group Members interest under the Car Loans above the interest rate the Plaintiffs and Group Members would or could have obtained on the market at the time the Car Loans were entered into; and, or alternatively
- (c) refrain from charging the Plaintiffs and Group Members interest under the Car Loans above the average market rate prevailing at the time the Car Loans were entered into; and, or alternatively
- (d) repay to the Plaintiffs and Group Members the interest paid under the Car Loans above the Base Rate; and, or alternatively
- (e) repay to the Plaintiffs and Group Members the interest paid under the Car Loans above the rate the Plaintiffs and Group Members would or could have obtained on the market at the time the Car Loans were entered into; and, or alternatively
- (f) repay to the Plaintiffs and Group Members the interest paid under the Car Loans above the average market rate prevailing at the time the Car Loans were entered into; and, or alternatively
- (g) pay interest on the sums payable under (d), (e) or (f) above?

## **E.2 Misleading or deceptive conduct**

162. By reason of the matters pleaded in this Statement of Claim, did the Plaintiffs and Group Members have a reasonable expectation that had:

- (a) the Contract Rate and, or alternatively, the term of the Car Loan, been set by someone other than the Defendants, namely, the Dealers;
- (b) the Dealers been interested in the Contract Rate and, or alternatively, the term of the Car Loan; and, or alternatively,

- (c) the Car Loans included features of the same or similar kind as the Flex Commission, Flex Commission Calculation Method, and/or the Flex Commission Features,

the relevant Defendant would have disclosed such matters or one or more of them to the Plaintiffs and Group Members?

- 163. Was the conduct of the Defendants in failing to disclose the matters alleged in paragraph 34(a) to (c) or one or more of them to the Plaintiffs and Group Members prior to or at the time the Car Loans were entered into, and in engaging in the Lender Conduct, misleading or deceptive or likely to mislead or deceive?
- 164. Was the conduct of the Defendants pleaded in paragraph 35 conduct engaged in by the Defendants:
  - (a) in relation to financial services, within the meaning of subsections 1041H(1) and 1041H(2)(b) of the *Corporations Act*; and, or alternatively,
  - (b) in trade or commerce, in relation to financial services within the meaning of section 12DA(1) of the *ASIC Act*?
- 165. By reason of the Defendants' conduct pleaded in paragraphs 35 to 38, did the Defendants contravene:
  - (a) s 1041H of the *Corporations Act*; and, or alternatively,
  - (b) s 12DA(1) of the *ASIC Act*?
- 166. What are the principles governing the quantification of loss or damage (if any) suffered by the Plaintiff and Group Members by reason of any contraventions as alleged in the Statement of Claim which have been established?

**E.3 Claim against the Defendants for money had and received and unjust enrichment**

- 167. Would the Plaintiffs and Group Members who:
  - (a) entered into the Car Loans (pursuant to which they paid interest at the Contract Rate) when they would not have done; and, or alternatively
  - (b) entered into Car Loans whereby the interest rate was higher and, or alternatively, the terms were longer, than the interest rate on, or the terms of,

loans the Group Members would otherwise have entered into; and, or alternatively

- (c) became liable to pay interest charges to the Defendants at the Contract Rate, have been mistaken if they held one or more of the beliefs pleaded in paragraphs 43 and 44 above?
168. By reason of the matters pleaded in paragraphs 45 and 46 above are
- (a) the Group Members entitled to rescind the Car Loans;
  - (b) the Car Loans void; and, or alternatively,
  - (c) the terms of the Car Loans requiring payment of the Contract Rate void?
169. By reason of the Car Loan Process, Flex Commission Features and the Car Loan Circumstances (including the Flex Commission Non-Disclosure:
- (a) were the Defendants aware, from those circumstances, of the matters pleaded in paragraphs 41, 42, 43, 44, and/or 45 above?
  - (b) did the Defendants induce the matters pleaded in paragraphs 41, 42, 43, 44, and/or 45 above?
  - (c) did the Defendants conceal the matters pleaded in paragraph 41 above?
170. By reason of the matters pleaded in paragraphs 41 to 46 and/or 47 is the interest paid under the Car Loans monies had and received by the Defendants to the use of the Plaintiffs and Group Members, such that the Defendants are obliged to repay those sums to the Plaintiffs and Group Members?
171. By reason of the matters pleaded in paragraphs 45 to 46 and/or 47 were the Defendants unjustly enriched by the receipt of interest at the Contract Rate at the expense of the Plaintiff and Group Members such that it would be unconscionable for the Defendants to retain that interest?

**AND THE PLAINTIFFS CLAIM on their own behalf and on behalf of the Group Members:**

- A. An order under s 48 of the *Limitation of Actions Act 1936* (SA) that any Group Member who has a claim for monies had and received by the Defendants to the use of the Group Member that is governed by the law of South Australia and that accrued before

the date of the filing of this Statement of Claim be granted an extension of time until the date of the filing of this Statement of Claim.

- B. An order against the Defendants under s 180A(2) of the NCCPA that they:
- (a) refrain from charging the Plaintiffs and Group Members interest under the Car Loans above the Base Rate; and, or alternatively
  - (b) refrain from charging the Plaintiffs and Group Members interest under the Car Loans above the interest rate the Plaintiffs and Group Members would or could have obtained on the market at the time the Car Loans were entered into; and, or alternatively
  - (c) refrain from charging the Plaintiffs and Group Members interest under the Car Loans above the average market rate prevailing at the time the Car Loans were entered into; and, or alternatively
  - (d) repay to the Plaintiffs and Group Members the interest paid under the Car Loans above the Base Rate; and, or alternatively
  - (e) repay to the Plaintiffs and Group Members the interest paid under the Car Loans above the rate the Plaintiffs and Group Members would or could have obtained on the market at the time the Car Loans were entered into; and, or alternatively
  - (f) repay to the Plaintiffs and Group Members the interest paid under the Car Loans above the average market rate prevailing at the time the Car Loans were entered into; and, or alternatively
  - (g) pay interest on the sums payable under (d), (e) or (f) above.
- C. An order pursuant to:
- (a) section 1041I of the Corporations Act that the Defendants pay compensation to the Plaintiffs and Group Members for damage caused by the conduct of the Defendants in contravention of section 1041H of the Corporations Act; and
  - (b) section 12GF of the ASIC Act that the Defendants pay compensation to the Plaintiffs and Group Members for damage caused by the conduct of the Defendants in contravention of section 12DA(1) of the ASIC Act;
- D. An order that:
- (a) the Car Loans (including the Westpac Car Loan and St George Finance Car Loan) are rescinded;

- (b) the Car Loans (including the Westpac Car Loan and St George Finance Car Loan) are void; and, or alternatively,
  - (c) the terms of the Car Loans (including the Westpac Car Loan and St George Finance Car Loan) requiring payment of the Contract Rate are void.
- E. Judgment in the full amount of the interest paid at the Contract Rate mistakenly paid for.
  - F. Interest pursuant to statute.
  - G. Costs.
  - H. Such further order as the Court determines is appropriate.

Dated: 15 July 2020

J STOLJAR

D J FAHEY

*Maurice Blackburn Lawyers*

.....  
**Maurice Blackburn Lawyers**  
Solicitors for the Plaintiffs