



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

**No. S ECI** Case: S ECI 2020 03365  
Filed on: 21/08/2020 03:55 PM

**B E T W E E N**

**STEELE LEE CRAWFORD**

Plaintiff

**-and-**

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

First Defendant

**MACQUARIE BANK LIMITED (ACN 008 583 542)**

Second Defendant

**MACQUARIE LEASING PTY LTD (ACN 002 674 982)**

Third Defendant

**WRIT**

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Date of Document:	21 August 2020	Solicitors Code:	564
Filed on behalf of:	The Plaintiff	DX:	N/A
Prepared by:	Maurice Blackburn Lawyers 21, 380 La Trobe Street Melbourne Victoria 3000	Telephone:	(03) 9605 2700
		Ref:	3052937
		Email:	AWatson@mauriceblackburn.com.au

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**TO THE DEFENDANTS**

TAKE NOTICE that this proceeding has been brought against you by the plaintiff 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

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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 plaintiff by Maurice Blackburn Lawyers, 21/380 Latrobe Street, Melbourne Victoria 3000 as solicitors for the plaintiff.
4. The address of the plaintiff is as follows:

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

First Defendant: Level 9, 833 Collins Street, Docklands, VIC 3008

Second Defendant: Level 6, 50 Martin Place, Sydney, NSW 2000

Third Defendant: Level 6, 50 Martin Place, Sydney, NSW 2000

## STATEMENT OF CLAIM

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Date of Document: 21 August 2020 Solicitors Code: 564  
Filed on behalf of: The Plaintiff DX: N/A  
Prepared by: Maurice Blackburn Lawyers Telephone: (03) 9605 2700  
21, 380 La Trobe Street Ref: 3052937  
Melbourne Victoria 3000 Email: AWatson@mauriceblackburn.com.au

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### 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 BACKGROUND .....	6
B.2 THE CONTRAVENING CONDUCT UNDER THE NCCPA OF THE DEALERS .....	6
<i>B.2.1 Arrangements between Dealers and ANZ</i> .....	6
<i>B.2.2 The Dealers provided credit assistance to Group Members</i> .....	13
<i>B.2.3 The Dealers were intermediaries between Group Members and ANZ</i> .....	14
<i>B.2.4 The Dealers provided a "credit service" to Group Members</i> .....	15
<i>B.2.5 The Dealers engaged in unfair conduct</i> .....	15
<i>B.2.6 Consequences of the Dealers' unfair conduct</i> .....	16
B.3 CLAIM AGAINST ANZ UNDER THE NCCPA FOR THE DEALERS' UNFAIR CONDUCT .....	16
B.4 CLAIM AGAINST ANZ FOR MISLEADING OR DECEPTIVE CONDUCT .....	18
B.5 CLAIM AGAINST THE DEFENDANTS FOR MONEY HAD AND RECEIVED AND UNJUST ENRICHMENT ...	20
<b>C PLAINTIFF'S CLAIM AGAINST THE FIRST DEFENDANT</b> .....	<b>23</b>
C.1 THE PLAINTIFF .....	23
C.2 THE CONTRAVENING CONDUCT UNDER THE NCCPA OF THE CARS OF MELBOURNE .....	23
<i>C.2.1 Arrangements between Cars of Melbourne and ANZ</i> .....	23
<i>C.2.2 Cars of Melbourne provided credit assistance to Mr Crawford</i> .....	26
<i>C.2.3 Cars of Melbourne was an intermediary between Mr Crawford and ANZ</i> .....	27
<i>C.2.4 Cars of Melbourne provided a "credit service" to Mr Crawford</i> .....	27
<i>C.2.5 Cars of Melbourne engaged in unfair conduct</i> .....	27
<i>C.2.6 Consequences of Cars of Melbourne's unfair conduct</i> .....	28
C.3 CLAIM AGAINST ANZ UNDER THE NCCPA FOR CARS OF MELBOURNE'S UNFAIR CONDUCT .....	29
C.4 CLAIM AGAINST ANZ FOR MISLEADING OR DECEPTIVE CONDUCT .....	30
C.5 CLAIM AGAINST THE DEFENDANTS FOR MONEY HAD AND RECEIVED AND UNJUST ENRICHMENT .....	32
<b>D COMMON QUESTIONS OF LAW OR FACT</b> .....	<b>35</b>
D.1 THE CONTRAVENING CONDUCT UNDER THE NCCPA .....	35
D.2 MISLEADING OR DECEPTIVE CONDUCT .....	37
D.3 CLAIM AGAINST THE DEFENDANTS FOR MONEY HAD AND RECEIVED AND UNJUST ENRICHMENT ...	38

## **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 plaintiff on his 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 First Defendant (**ANZ**);
    - (ii) which was obtained through a Dealer as defined in paragraph 4 below who supplied the automobile the subject of the Car Loan;
    - (iii) in which a Flex Commission as defined in paragraph 10(c) below was paid to the Dealer; and
    - (iv) between 1 January 2011 and 31 March 2016:
      - (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:*

*ANZ: 234527*

*Second Defendant: 237502*

*Third Defendant: 394925*

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

### **B.1 Background**

#### **B.2 The contravening conduct under the NCCPA of the Dealers**

##### ***B.2.1 Arrangements between Dealers and ANZ***

4. At times presently not known to the Plaintiff and until April 2016, ANZ, through a division of ANZ known as 'Esanda' (**Esanda**), entered into agreements with accredited dealers (**Dealers**) to facilitate the provision of Car Loans to Group Members (**Dealer Agreements**).
5. On or around 8 October 2015, ANZ sold to the Second Defendant (**Macquarie Bank Limited**) part of the Esanda business, including:
  - (a) the retail loan portfolio which comprised Car Loans originated through Dealers; and
  - (b) the Dealer Agreements entered into by ANZ through Esanda,

**(Esanda Sale).**

6. The Esanda Sale was completed during April 2016, and from that time:
  - (a) Macquarie Bank held all of the rights to payment of principal and interest under the Car Loans; and
  - (b) the Third Defendant (**Macquarie Leasing**) serviced the Car Loans.
7. At all material times, the terms of the Dealer Agreements required Dealers to, among other things (**Dealer Terms**):
  - (a) submit to ANZ offers from Group Members to enter into Car Loans;
  - (b) comply with directions or operations manuals given by ANZ related to the provision of Car Loans; and
  - (c) before submitting to ANZ offers from Group Members to enter into Car Loans, to make any enquiries required by ANZ for the purposes of their responsible lending obligations.

#### **Particulars**

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

- i) *As to the matters pleaded in subparagraph (a), the Plaintiff relies upon:*
  - A) *Witness Statement of Guy Samuel Mendelson dated 4 March 2018 (**Mendelson Statement**), filed in the in the Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry (**Royal Commission**), [12],*
  - B) *Clauses 1.1, 4.2, and 4.7 of the dealer agreement exhibited the Mendelson Statement (**Royal Commission Dealer Agreement**).*
- ii) *As to the matters pleaded in subparagraph (b) above, the Plaintiff relies upon:*
  - A) *clauses 1, 3.1, 3.2, 4.4, 4.5, 4.7, 4.16 and 9 of the Royal Commission Dealer Agreement; and*

B) *in the evidence of Guy Samuel Mendelson in the Royal Commission dated 23 March 2018 (**Mendelson Transcript**), T807.33-T809.32, T810.27-T812.43.*

iii) *As to the matters pleaded in subparagraph (c) above, the Plaintiff relies upon:*

A) *clause 4.7 of the Royal Commission Dealer Agreement; and*

B) *The Royal Commission Interim Report, p 96*

8. At all material times, pursuant to the Dealer Terms, ANZ (whether itself 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 to:

- (i) perform ANZ customer identification procedures;
- (ii) undertake necessary interviews and investigations to ensure that the Group Member's application for a Car Loan was complete and accurate;
- (iii) ensure that each application of a Group Member for a Car Loan:
  - (A) was in a form approved by ANZ;
  - (B) accurately recorded the Group Member's instructions;
  - (C) was signed by the Group Member, and where applicable, the Dealer Business Manager; and
  - (D) included all information necessary for ANZ to approve the application as detailed in ANZ's operations manual and advised to the Dealer by ANZ from time to time;

(b) next:

- (i) enter the Group Members' Car Loan application into ANZ's online loan origination platform known as the "Esanda Lending System" or "ELS";  
or



- (ii) submit to ANZ a hard-copy application in a form prescribed by ANZ, which would then be entered into ANZ's online origination platform by an ANZ employee;
- (c) if ANZ 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) the Dealer Business Manager was required to notify Esanda of any:
  - (i) circumstance, event or thing of which the Dealer is aware, that could have an impact on ANZ's assessment of an application, or the subsequent provision of the Car Loan;
  - (ii) change in the customer's circumstances, or any other event or thing of which the Dealer has become aware following ANZ's original assessment of an application and which could reasonably be expected to be relevant to ANZ's decision to subsequently settle a Car Loan with the Group Member;
- (e) the Dealer Business Manager was required to provide to the Group Member 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**);
- (f) the Dealer Business Manager arranged for the Group Member to initial each page of the completed application and sign it;
- (g) the Dealer Business Manager arranged for the Group Member to sign the Car Loan Offer;
- (h) the Dealer Business Manager submitted to ANZ:
  - (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) upon settlement funds comprising the approved loan amount were transferred to the Dealer;
- (j) once the Dealer 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
- (k) 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 Plaintiff can give are the matters in*

- i) the Mendelson Statement, [18]-[23].*
- ii) clauses 2.1, 4.7, 4.9, 4.10, and 4.11 of the Royal Commission Dealer Agreement.*
- iii) the circular letter issued to all Dealers dated 5 December 2015 and exhibited to the Mendelson Statement.*
- iv) Mendelson Transcript, T806.33-T807.27, T T809.32, T810.27-T812.43.*

9. At all material times during the Car Loan Process, ANZ was 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 Plaintiff can give are the matters in the Mendelson Statement, [13(f)] and [18]-[27] and in the Mendelson Transcript, T806.33-44.*

10. At all material times, pursuant to the Dealer Terms, ANZ:
- (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 by 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 Plaintiff can give are the matters in:*

- i) Mendelson Statement, [29];*
- ii) Mendelson Transcript, T815.29-T820.32; and*
- iii) Clause 5.1 and Schedule 1 of the Royal Commission Dealer Agreement.*

11. 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; and, or alternatively
  - (iii) significantly higher than ANZ would have offered the Group Members or other consumers had they been approached otherwise than through a Dealer;
- (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) was designed to encourage writing above the base rate;

- (f) 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 Plaintiff can give are the matters in:*

- i) Mendelson Transcript, T818.14-T820.41;*
- ii) Schedule 1 of the Royal Commission Dealer Agreement;*
- iii) ANZ's submissions to the Royal Commission dated 29 January 2018 [6.71]*
- iv) ASIC Consultation Paper 279 entitled 'Flex commission arrangements in the car finance industry' dated March 2017, [9]-[10], and Attachment 2, [86].*

12. At all material times, during the Car Loan Process:

(a) neither ANZ 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 ANZ, 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) ANZ 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 12(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 ANZ;
    - (ii) the Dealers were merely conduits between the Group Member and ANZ; and, or alternatively
    - (iii) Dealers were disinterested in the Contract Rate;
  - (d) the Group Members were in a comparatively weaker positions to ANZ 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 Plaintiff can give are as follows.*

- (i) *As to the matters pleaded in subparagraph (a) above, the Plaintiff relies upon the Mendelson Transcript, T818.17-T820.25.*
- (ii) *As to the matters pleaded in subparagraphs (b), (c) and (d) above, the Plaintiff relies upon the fact that the matters are to be inferred in all of the surrounding circumstances.*
- (iii) *As to the matters pleaded in subparagraph (e) above, the Plaintiff relies upon the ASIC Consultation Paper 279 entitled 'Flex commission arrangements in the car finance industry' dated March 2017, [5]-[7].*

#### **B.2.2 The Dealers provided credit assistance to Group Members**

- 13. Group Members are natural persons and thereby consumers within the meaning of section 5 of the NCCPA.

14. 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.
15. 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 ANZ; or
    - (ii) assisted the Group Members to apply for a Car Loan with ANZ; or
    - (iii) suggested that the Group Members apply for a Car Loan that was a consumer lease with ANZ; or
    - (iv) assisted the Group Members to apply for a Car Loan that was a consumer lease with ANZ.
16. By reason of the matters pleaded in paragraph 15 above, Dealers provided credit assistance to the Group Members within the meaning of sections 7(a) and s 8 of the NCCPA.

***B.2.3 The Dealers were intermediaries between Group Members and ANZ***

17. The Dealers carried on business in Australia.
18. By reason of the matter pleaded in paragraph 17 the Dealers carried on business in this jurisdiction within the meaning of s 21(2) of the NCCPA.
19. 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 ANZ 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 ANZ; or
  - (b) acted as an intermediary (whether directly or indirectly) between ANZ, 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 ANZ or one of them.

20. By reason of the matters pleaded in paragraph 19, the Dealers acted as an intermediary for the purposes of sections 7(b) and 9 of the NCCPA.

**B.2.4 The Dealers provided a “credit service” to Group Members**

21. By reason of the matters pleaded in paragraph 16 and, or alternatively, paragraph 20, the Dealers provided a credit service to the Group Members within the meaning of sections 7 and 180A(1)(a) of the NCCPA.

**B.2.5 The Dealers engaged in unfair conduct**

22. 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) ANZ 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 Plaintiff 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 the ASIC*

*Consultation Paper 279 entitled 'Flex commission arrangements in the car finance industry' dated March 2017, [5]-[7], [9]-[10], and Attachment 2, [86].*

23. By reason of the matters pleaded in paragraph 22, 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.2.6 Consequences of the Dealers' unfair conduct**

24. 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 ANZ and after April 2016, Macquarie Bank at the Contract Rate.

#### **Particulars**

*At present and prior to discovery the best particulars the Plaintiff 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 will be provided at the time of service of the Plaintiff's evidence in chief, or prior to the trial of the individual claims of Group Members following the determination of the common questions.*

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

#### **B.3 Claim against ANZ under the NCCPA for the Dealers' Unfair Conduct**

26. By reason of the Car Dealer Terms and the Car Loan Process during the Relevant Period the Dealers were:
- (a) persons acting on behalf ANZ, being a holder of an Australian credit licence; and, or alternatively
  - (b) credit representatives of ANZ, being persons authorised in writing by ANZ, being a holder of an Australian credit licence, to:



- (i) provide a credit service; and, or alternatively
  - (ii) engage in a credit activity.
27. By reason of the matters pleaded in paragraph 26, each Dealer was a representative of ANZ within the meaning of s 5 of the NCCPA.
28. By reason of the matters pleaded in paragraph 21, the Dealers' Unfair Conduct was conduct that related to a credit activity within the meaning of 74(a) of the NCCPA.
29. 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.
30. 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 Plaintiff 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 will be provided at the time of service of the Plaintiff's evidence in chief, or prior to the trial of the individual claims of Group Members following the determination of the common questions.*

31. By reason of the matters pleaded in paragraphs 28, 29 and 30, ANZ is responsible for the Dealers' Unfair Conduct.
32. By reason of s 77 of the NCCPA, ANZ is 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.
33. By reason of s 78(1) of the NCCPA the Group Members have the same remedies against ANZ that the Group Members have against the Dealers.
34. In the premises, the Group Members are entitled to an order against ANZ under s 180A(2) of the NCCPA that it:
- (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) pay to the Group Members the interest paid to the Defendants under the Car Loans above the Base Rate; and, or alternatively
- (e) pay to the Group Members the interest paid to the Defendants 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) pay to the Group Members the interest paid to the Defendants 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.4 Claim against ANZ for misleading or deceptive conduct**

35. 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 ANZ, 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,
- ANZ would have disclosed such matters or one or more of them to the Group Members.
36. ANZ failed to disclose to Group Members the matters pleaded in paragraph 35(a) to (c) above.
37. The conduct of ANZ 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.
38. The conduct of ANZ pleaded in paragraph 36 was conduct engaged in by ANZ:

- (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*.
39. By reason of the matters pleaded in paragraphs 36 to 38 ANZ contravened:
- (a) s 1041H of the *Corporations Act*, and, or alternatively,
  - (b) s 12DA(1) of the *ASIC Act*.
40. By reason of ANZ's conduct pleaded in paragraphs 36 to 39, 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 ANZ and after April 2016, Macquarie Bank at the Contract Rate.

#### **Particulars**

*At present and prior to discovery the best particulars the Plaintiff can give are that the causative effect of the conduct pleaded in paragraph 40 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 Plaintiff's evidence in chief, or prior to the trial of the individual claims of Group Members following the determination of the common questions.*

41. By reason of the matters pleaded in paragraph 40 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.5 Claim against the Defendants for money had and received and unjust enrichment**

42. 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, had been set by someone other than ANZ, 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 ANZ that the Group Members have against the Dealers; and
    - (iii) in the premises, would be entitled to obtain orders against ANZ under s 180A(2) of the NCCPA as pleaded in paragraph 34 above.
43. By reason of the matters pleaded in paragraph 42 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 42 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.
44. By reason of the matters pleaded in paragraphs 42 to 43 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 ANZ and after April 2016, 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 ANZ, and, or alternatively, were not set by someone other than ANZ, 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 ANZ all material information, including some or all of the matters pleaded at paragraph 42 above.

### **Particulars**

*At present and prior to discovery the best particulars the Plaintiff 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 will be provided at the time of service of the Plaintiff's evidence in chief, or prior to the trial of the individual claims of Group Members following the determination of the common questions.*

45. By reason of the matters pleaded in paragraphs 10, 11, 23 and/or 34 above, each of the beliefs pleaded in paragraph 44 was a unilateral mistake.
46. 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 ANZ after April 2016, Macquarie Bank at the Contract Rate,
- by reason of one or more of the mistakes pleaded in paragraphs 44 and 45.
47. By reason of the Car Loan Process, Flex Commission Features and the Car Loan Circumstances (including the Flex Commission Non-Disclosure), ANZ:
- (a) was aware, from those circumstances, of the matters pleaded in paragraphs 42, 43, 44, 45, and/or 46 above;
  - (b) induced the matters pleaded in paragraphs 42, 43, 44, 45, and/or 46 above; and, or alternatively,
  - (c) concealed the matters pleaded in paragraph 42 above.
48. By reason of the matters pleaded in paragraphs 46 and 47 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.
49. By reason of the matters pleaded in paragraphs 42 to 47 and/or 48 above, 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.
50. Further or alternatively, by reason of the matters pleaded in paragraphs 46 to 47 and/or 48 above, 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 PLAINTIFF'S CLAIM AGAINST THE FIRST DEFENDANT**

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

51. The Plaintiff (**Mr Crawford**) is, and was at all material times:

- (a) a natural person; and
- (b) a resident of the State of Victoria.

52. On or around 17 September 2014, Mr Crawford;

- (a) entered into discussions with Cars of Melbourne Pty Ltd, trading as Cars of Melbourne at 1109 Sydney Road, Coburg North, Victoria (**Cars of Melbourne**) concerning the acquisition of a Holden Commodore SV6 Sedan automobile with Victorian registration number 1CX 7JV (**Holden**) from Cars of Melbourne and the financing thereof;
- (b) entered into a contract for sale with Cars of Melbourne for the acquisition of the Holden at a purchase price of \$20,690; and
- (c) paid a \$300 deposit to Cars of Melbourne for the acquisition of the Holden.

53. On or around 17 September 2014, Mr Crawford entered into a Car Loan with the First Defendant (**ANZ**) for the sum of \$21,818.00 (**ANZ Car Loan**) that:

- (a) was obtained through Cars of Melbourne for the purpose of Mr Crawford's acquisition of the Holden;
- (b) had an interest rate of 14.9507% per annum; and
- (c) had a loan term of 84 months.

54. In or around April 2016, the ANZ Car Loan was assigned to Macquarie Bank.

### **C.2 The contravening conduct under the NCCPA of the Cars of Melbourne**

#### **C.2.1 Arrangements between Cars of Melbourne and ANZ**

55. At times presently not known to Mr Crawford, ANZ entered into a Dealer Agreement with Cars of Melbourne (**Cars of Melbourne Dealer Agreement**).

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

**Particulars**

*At present and prior to discovery the best particulars Mr Crawford can give are those identified at paragraph 7 above.*

57. At all material times, pursuant to the Cars of Melbourne Dealer Terms, ANZ required Cars of Melbourne to adhere to the Car Loan Process pleaded in paragraph 8 above for the ANZ Car Loan.

**Particulars**

*At present and prior to discovery the best particulars of the Car Loan Process Mr Crawford are those identified at paragraph 8 above.*

58. At all material times during the Car Loan Process that applied to Cars of Melbourne and the ANZ Car Loan, ANZ was solely responsible for all aspects of credit assessment, credit decisions, loan management, administration and servicing of the ANZ Car Loan.

**Particulars**

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

59. At all material times, pursuant to the Cars of Melbourne Dealer Terms, the Flex Commission Calculation Method as pleaded in paragraph 10 above applied to Cars of Melbourne and the ANZ Car Loan.

**Particulars**

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

60. The Flex Commissions and the Flex Commission Calculation Method:
- (a) involved Cars of Melbourne setting the Contract Rate for the ANZ Car Loan at 14.9507% per annum;



- (i) in the absence of any objective criteria;
  - (ii) in circumstances where the amount of 14.9507% per annum was influenced or determined by the self-interest of Cars of Melbourne; and, or alternatively
  - (iii) significantly higher than ANZ would have offered Mr Crawford had they been approached otherwise than through Cars of Melbourne;
- (b) involved Cars of Melbourne setting the term of the ANZ Car Loan;
  - (c) provided an incentive for Cars of Melbourne to increase the price of the ANZ Car Loan and, or alternatively, the term of the ANZ Car Loan, in a way that depended on the negotiating skills or vulnerability of Mr Crawford;
  - (d) created unfairness or a risk of unfairness in relation to the ANZ Car Loan;
  - (e) was designed to encourage Cars of Melbourne to set the interest rate above the base rate;
  - (f) created a conflict, or a potential for a conflict, between the interests of the Cars of Melbourne and the interests of Mr Crawford;
- (together and severally, **Cars of Melbourne Flex Commission Features**).

#### **Particulars**

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

61. At all material times, during the Car Loan Process that applied to Cars of Melbourne and the ANZ Car Loan:
- (a) neither ANZ nor Cars of Melbourne disclosed to Mr Crawford:
    - (i) that the Contract Rate of 14.9507% per annum and, or alternatively, the term of the Car Loan, had been set by someone other than ANZ, namely, Cars of Melbourne;
    - (ii) that Cars of Melbourne had been interested in the Contract Rate of 14.9507% per annum and, or alternatively, the term of the ANZ Car Loan; and, or alternatively,
    - (iii) the Flex Commission, Flex Commission Calculation Method, and/or the Cars of Melbourne Flex Commission Features,

**(Cars of Melbourne Flex Commission Non-Disclosure);**

- (b) ANZ did not:
- (i) ensure that Cars of Melbourne disclosed; and, or alternatively
  - (ii) have appropriate systems, procedures and processes in place to ensure that Cars of Melbourne disclosed;
- to Mr Crawford the matters pleaded in paragraph 61(a)(i) to (iii) above (**ANZ Conduct**);
- (c) a reasonable person in the position of Mr Crawford would have understood or assumed at the time she entered into the ANZ Car Loan that:
- (i) the Contract Rate of 14.9507% per annum and, or alternatively, the term of the ANZ Car Loan, was set solely by ANZ;
  - (ii) Cars of Melbourne was merely a conduit between Mr Crawford and ANZ; and, or alternatively
  - (iii) Cars of Melbourne was disinterested in the Contract Rate of 14.9507% per annum;
- (d) Mr Crawford was in a comparatively weaker positions to ANZ and, or alternatively, Cars of Melbourne;
- (e) Mr Crawford was not treated equally in that comparable Group Members were not afforded equal Contract Rates;

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

**Particulars**

*At present and prior to discovery the best particulars Mr Crawford can give are those identified at paragraph 12 above.*

**C.2.2 Cars of Melbourne provided credit assistance to Mr Crawford**

62. Mr Crawford is a natural person and thereby a consumer within the meaning of section 5 of the NCCPA.
63. The ANZ 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.

64. By reason of the Cars of Melbourne Dealer Terms and Car Loan Process, at all material times, Cars of Melbourne:
- (a) dealt directly with Mr Crawford in the course of, or as part of, or incidentally to, the business of Cars of Melbourne;
  - (b) and:
    - (i) suggested that Mr Crawford apply for the ANZ Car Loan; and
    - (ii) assisted Mr Crawford to apply for the ANZ Car Loan;
65. By reason of the matters pleaded in paragraph 64 Cars of Melbourne provided credit assistance to Mr Crawford within the meaning of sections 7(a) and s 8 of the NCCPA.

**C.2.3 Cars of Melbourne was an intermediary between Mr Crawford and ANZ**

66. Cars of Melbourne carried on business in Australia.
67. By reason of the matter pleaded in paragraph 66 Cars of Melbourne carried on business in this jurisdiction within the meaning of s 21(2) of the NCCPA.
68. By reason of the Cars of Melbourne Dealer Terms and Car Loan Process, Cars of Melbourne 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 ANZ and Mr Crawford wholly or partly for the purposes of securing a provision of credit for Mr Crawford under the ANZ Car Loan with ANZ.
69. By reason of the matters pleaded in paragraph 68, Cars of Melbourne acted as an intermediary for the purposes of sections 7(b) and 9 of the NCCPA.

**C.2.4 Cars of Melbourne provided a “credit service” to Mr Crawford**

70. By reason of the matters pleaded in paragraph 65 and, or alternatively, paragraph 69, Cars of Melbourne provided a credit service to Mr Crawford within the meaning of sections 7 and 180A(1)(a) of the NCCPA.

**C.2.5 Cars of Melbourne engaged in unfair conduct**

71. By reason of the Car Loan Process, Cars of Melbourne Flex Commission Features and the ANZ Car Loan Circumstances (including the Cars of Melbourne Flex Commission Non-Disclosure):

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

### **Particulars**

*At present and prior to discovery the best particulars Mr Crawford can give are that these matters are to be inferred from the Car Loan Process, Cars of Melbourne Flex Commission Features, and the ANZ Car Loan Circumstances. In addition, as to the matters pleaded in subparagraph (e) above, Mr Crawford relies upon ASIC Consultation Paper 279 entitled 'Flex commission arrangements in the car finance industry' dated March 2017, [5]-[7], [9]-[10], and Attachment 2, [86].*

72. By reason of the matters pleaded in paragraph 71, Cars of Melbourne 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 (**Cars of Melbourne's Unfair Conduct**).

#### **C.2.6 Consequences of Cars of Melbourne's unfair conduct**

73. Cars of Melbourne's Unfair Conduct had the result that Mr Crawford:
- (a) entered into the ANZ Car Loan (pursuant to which he paid interest at the Contract Rate of 14.9507%) when he would not have done so apart from that conduct; and, or alternatively
  - (b) entered into the ANZ 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 Mr Crawford would otherwise have entered into; and, or alternatively

- (c) became liable to pay interest charges to ANZ and after April 2016, Macquarie Bank at the Contract Rate of 12.75%.

### **Particulars**

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

74. By reason of the matters pleaded in paragraph 73 Mr Crawford is entitled to claim a remedy against Cars of Melbourne pursuant to s 180A of the NCCPA.

### **C.3 Claim against ANZ under the NCCPA for Cars of Melbourne's Unfair Conduct**

75. By reason of the Cars of Melbourne Car Dealer Terms and the Car Loan Process during the Relevant Period Cars of Melbourne was:

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

76. By reason of the matters pleaded in paragraph 75, and, or alternatively, the matter pleaded in paragraph in **Error! Reference source not found.** above, Cars of Melbourne was a representative of ANZ within the meaning of s 5 of the NCCPA.

77. By reason of the matters pleaded in paragraph 70, Cars of Melbourne's Unfair Conduct was conduct that related to a credit activity within the meaning of 74(a) of the NCCPA.

78. Cars of Melbourne's Unfair Conduct was conduct on which Mr Crawford could reasonably be expected to rely within the meaning of s 74(b) of the NCCPA.

79. Cars of Melbourne's Unfair Conduct was conduct on which Mr Crawford 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 Mr Crawford's evidence in chief.*

80. By reason of the matters pleaded in paragraphs 77, 78, and 79, ANZ is responsible for Cars of Melbourne's Unfair Conduct.

81. By reason of s 77 of the NCCPA ANZ is liable to Mr Crawford in relation to any loss or damage suffered by Mr Crawford as a result of Cars of Melbourne's Unfair Conduct.
82. By reason of s 78(1) of the NCCPA, Mr Crawford has the same remedies against ANZ that Mr Crawford has against Cars of Melbourne.
83. In the premises, Mr Crawford is entitled to an order against ANZ under s 180A(2) of the NCCPA that it:
- (a) refrain from charging Mr Crawford interest under the ANZ Car Loan above the Base Rate; and, or alternatively
  - (b) refrain from charging Mr Crawford interest under the ANZ Car Loan above the interest rate Mr Crawford would or could have obtained on the market at the time the ANZ Car Loan was entered into; and, or alternatively
  - (c) refrain from charging Mr Crawford interest under the ANZ Car Loan above the average market rate prevailing at the time the ANZ Car Loan was entered into; and, or alternatively
  - (d) pay to Mr Crawford the interest paid to the Defendants under the ANZ Car Loan above the Base Rate; and, or alternatively
  - (e) pay to Mr Crawford the interest paid to the Defendants under the ANZ Car Loan above the rate Mr Crawford would or could have obtained on the market at the time the ANZ Car Loan was entered into; and, or alternatively
  - (f) pay to Mr Crawford the interest paid to the Defendants under the ANZ Car Loan above the average market rate prevailing at the time the ANZ 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 ANZ for misleading or deceptive conduct**

84. Further or alternatively, in the circumstances pleaded above Mr Crawford had a reasonable expectation that had:
- (a) the Contract Rate of 14.9507% per annum and, or alternatively, the term of the ANZ Car Loan, been set by someone other than ANZ, namely, Cars of Melbourne;

- (b) Cars of Melbourne been interested in the Contract Rate of 12.75% per annum and, or alternatively, the term of the ANZ Car Loan; and, or alternatively,
- (c) the ANZ Car Loan included features of the same or similar kind as the Flex Commission, Flex Commission Calculation Method, and/or the Cars of Melbourne Flex Commission Features,

ANZ would have disclosed such matters or one or more of them to Mr Crawford.

- 85. ANZ failed to disclose to Mr Crawford the matters pleaded in paragraph 84(a) to (c) above.
- 86. The conduct of ANZ in failing to disclose those matters or one or more of them to Mr Crawford prior to or at the time the Car Loans were entered into, and in engaging in the ANZ Conduct, was misleading or deceptive or likely to mislead or deceive.
- 87. The conduct of ANZ pleaded in paragraph 85 was conduct engaged in by ANZ:
  - (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*.
- 88. By reason of the matters pleaded in paragraphs 85 to 87 ANZ contravened:
  - (a) s 1041H of the *Corporations Act*, and, or alternatively,
  - (b) s 12DA(1) of the *ASIC Act*.
- 89. By reason of ANZ's conduct pleaded in paragraphs 85 to 88, Mr Crawford:
  - (a) entered into the ANZ Car Loan (pursuant to which he paid interest at the Contract Rate of 14.9507% per annum) when he would not have done so apart from that conduct; and, or alternatively
  - (b) entered into the ANZ 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 Mr Crawford would otherwise have entered into; and, or alternatively
  - (c) became liable to pay interest charges to ANZ and after April 2016, Macquarie Bank at the Contract Rate of 14.9507% per annum.

### **Particulars**

*Further particulars may be provided at the time of service of Mr Crawford's evidence in chief.*

90. By reason of the matters pleaded in paragraph 89 above, Mr Crawford has suffered loss and damage.

#### **Particulars**

*The loss and damage suffered by Mr Crawford will be calculated by:*

- D) the difference between the Contract Rate of 14.9507% per annum and the Base Rate;*
- E) alternatively, the difference between the Contract Rate of 14.9507% per annum and the rate Mr Crawford would have obtained on the market; and*
- F) alternatively, the difference between the Contract Rate of 14.9507% per annum and the average market rate prevailing at the time the ANZ Car Loan was entered into.*

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

91. Further or alternatively, Mr Crawford was not at any stage prior to applying for or entering into the ANZ Car Loan, informed, either sufficiently or at all, of one or more of the following facts:

- (a) the Contract Rate of 14.9507% per annum and, or alternatively, the term of the ANZ Car Loan, been set by someone other than ANZ, namely, Cars of Melbourne;
- (b) Cars of Melbourne was interested in the Contract Rate of 14.9507% per annum and, or alternatively, the term of the ANZ Car Loan;
- (c) the ANZ Car Loan included features of the same or similar kind as the Flex Commission, Flex Commission Calculation Method, and/or the Cars of Melbourne Flex Commission Features; and, or alternatively,
- (d) the existence of Cars of Melbourne's Unfair Conduct, and by reason thereof, Mr Crawford:
  - (i) would be entitled to claim a remedy against Cars of Melbourne pursuant to s 180A of the NCCPA;
  - (ii) would, under s 78(1) of the NCCPA, have the same remedies against ANZ that Mr Crawford has against Cars of Melbourne; and



- (iii) in the premises, would be entitled to obtain orders against ANZ under s 180A(2) of the NCCPA as pleaded in paragraph 83 above.

92. By reason of the matters pleaded in paragraph 91 above, prior to applying for or entering into the ANZ Car Loan, Mr Crawford did not know one or more of the matters pleaded in paragraph 91 above, each of which constitute material information that would have been relevant to the decision of Mr Crawford whether to proceed with the entry into the ANZ Car Loan.

93. By reason of the matters pleaded in paragraphs 91 to 92 Mr Crawford:

- (a) entered into the ANZ Car Loan (pursuant to which he paid interest at the Contract Rate of 12.75% per annum) when he would not have done so; and, or alternatively
- (b) entered into the ANZ 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 Mr Crawford would otherwise have entered into; and, or alternatively
- (c) became liable to pay interest charges to ANZ and after April 2016, Macquarie Bank at the Contract Rate of 14.9507% per annum,

under one or more of the following causative mistaken beliefs:

- (d) the Contract Rate of 14.9507% per annum and, or alternatively, the term of the ANZ Car Loan, was not set by someone other than ANZ, namely, Cars of Melbourne;
- (e) Cars of Melbourne was not interested in the Contract Rate of 14.9507% per annum and, or alternatively, the term of the ANZ Car Loan;
- (f) the ANZ Car Loan did not include features of the same or similar kind as the Flex Commission, Flex Commission Calculation Method, and, or alternatively, the Cars of Melbourne Flex Commission Features;
- (g) the conduct of Cars of Melbourne was not unfair within the meaning of s 180A(1)(b) of the NCCPA;
- (h) Mr Crawford was under a legal obligation to pay interest charges at the Contract Rate of 14.9507% per annum and, or alternatively, for the term of the ANZ Car Loan and, or alternatively, ANZ and after April 2016, Macquarie Bank were legally entitled to payment of such moneys; and, or alternatively,

- (i) at the time of making the decision to enter into the ANZ Car Loan, Mr Crawford had received from Cars of Melbourne and ANZ all material information, including some or all of the matters pleaded at paragraph 91 above.

### **Particulars**

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

94. By reason of the matters pleaded in paragraphs 10, 11, 60 and/or 83 above, each of the beliefs pleaded in paragraph 93 was a unilateral mistake.

95. Mr Crawford:

- (a) entered into the ANZ Car Loan (pursuant to which he paid interest at the Contract Rate of 14.9507% per annum) when he would not have done so; and, or alternatively
- (b) entered into the ANZ 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 Mr Crawford would otherwise have entered into; and, or alternatively
- (c) became liable to pay interest charges to ANZ and after April 2016, Macquarie Bank at the Contract Rate of 14.9507%,

by reason of one or more of the mistakes pleaded in paragraphs 93 and 94.

96. By reason of the Car Loan Process, Cars of Melbourne Flex Commission Features and the ANZ Car Loan Circumstances (including the Cars of Melbourne Flex Commission Non-Disclosure) ANZ:

- (a) was aware, from those circumstances, of the matters pleaded in paragraphs 91, 92, 93, 94, and/or 95 above;
- (b) induced the matters pleaded in paragraphs 91, 92, 93, 94, and/or 95 above; and, or alternatively,
- (c) concealed the matters pleaded in paragraph 91 above.

97. By reason of the matters pleaded in paragraphs 95 and 96 above:

- (a) Mr Crawford is entitled to rescind the ANZ Car Loan;
- (b) the ANZ Car Loan is void; and, or alternatively,

(c) the term of the ANZ Car Loan requiring payment of the Contract Rate at 14.9507% per annum is void.

98. By reason of the matters pleaded in paragraphs 91 to 96 and/or 97, the interest paid under the ANZ Car Loan is monies had and received by the Defendants to the use of Mr Crawford, and the Defendants are obliged to repay those sums to Mr Crawford.
99. Further or alternatively, by reason of the matters pleaded in paragraph 95 to 96 and/or 97, the Defendants have been unjustly enriched by the receipt of interest at the Contract Rate at 14.9507% per annum at the expense of Mr Crawford and it would be unconscionable for the Defendants to retain that interest.

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

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

100. Were the Dealers required to adhere to the Car Loan Process?
101. Did the Car Loans include:
- (a) the Flex Commission Calculation Method?
  - (b) the Flex Commission Features?
102. During the Car Loan Process did the Car Loan Circumstances arise?
103. 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?
104. 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?
105. 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?
106. 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?
107. By reason of the matters pleaded in this Statement of Claim, are the Plaintiff and the Group Members are entitled to claim a remedy against the Dealers pursuant to s 180A of the NCCPA?

108. By reason of the matters pleaded in this Statement of Claim, was each Dealer a representative of ANZ within the meaning of s 5 of the NCCPA?
109. 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?
110. Was the Dealers' Unfair Conduct conduct on which the Plaintiff and Group Members could reasonably be expected to rely within the meaning of s 74(b) of the NCCPA?
111. Was the Dealers' Unfair Conduct conduct on which the Plaintiff and Group Members did rely in good faith within the meaning of s 74(c) of the NCCPA?
112. By reason of the matters pleaded in this Statement of Claim, are the Defendants are responsible for the Dealers' Unfair Conduct?
113. By reason of s 77 of the NCCPA, are the Defendants liable to the Plaintiff and Group Members in relation to any loss or damage suffered by the Plaintiff and Group Members as a result of the Dealers' Unfair Conduct.
114. By reason of s 78(1) of the NCCPA, do the Plaintiff and Group Members have the same remedies against the Defendants that the Plaintiff and Group Members have against the Dealers?
115. By reason of the matters pleaded in this Statement of Claim, are the Plaintiff and the Group Members entitled to an order against ANZ under s 180A(2) of the NCCPA that it:
  - (a) refrain from charging the Plaintiff and Group Members interest under the Car Loans above the Base Rate; and, or alternatively
  - (b) refrain from charging the Plaintiff and Group Members interest under the Car Loans above the interest rate the Plaintiff 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 Plaintiff 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) pay to the Plaintiff and Group Members the interest paid under the Car Loans to the Defendants above the Base Rate; and, or alternatively

- (e) pay to the Plaintiff and Group Members the interest paid under the Car Loans to the Defendants above the rate the Plaintiff and Group Members would or could have obtained on the market at the time the Car Loans were entered into; and, or alternatively
- (f) pay to the Plaintiff and Group Members the interest paid under the Car Loans to the Defendants 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.

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

116. By reason of the matters pleaded in this Statement of Claim, did the Plaintiff 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 ANZ, 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,

ANZ would have disclosed such matters or one or more of them to the Plaintiff and Group Members?

117. Was the conduct of ANZ in failing to disclose the matters alleged in paragraph 35(a) to (c) or one or more of them to the Plaintiff and 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?

118. Was the conduct of ANZ pleaded in paragraph 36 conduct engaged in by ANZ:

- (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*?

119. By reason of ANZ's conduct pleaded in paragraphs 36 to 39, did ANZ contravene:

- (a) s 1041H of the *Corporations Act*, and, or alternatively,
- (b) s 12DA(1) of the *ASIC Act*?

120. 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?

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

121. Would the Plaintiff 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 ANZ and after April 2016, Macquarie Bank at the Contract Rate,

have been mistaken if they held one or more of the beliefs pleaded in paragraphs 44 and 45 above?

122. By reason of the matters pleaded in paragraphs 46 and 47 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?

123. By reason of the Car Loan Process, Flex Commission Features and the Car Loan Circumstances (including the Flex Commission Non-Disclosure:

- (a) was ANZ aware, from those circumstances, of the matters pleaded in paragraphs 42, 43, 44, 45, and/or 46 above?
- (b) did ANZ induce the matters pleaded in paragraphs 42, 43, 44, 45, and/or 46 above?
- (c) did ANZ conceal the matters pleaded in paragraph 42 above?

124. By reason of the matters pleaded in paragraphs 42 to 47 and/or 48 is the interest paid under the Car Loans monies had and received by ANZ and Macquarie to the use of the Plaintiff and Group Members, such that ANZ and Macquarie are obliged to repay those sums to the Plaintiff and Group Members?
125. By reason of the matters pleaded in paragraph 46 to 47 and/or 48 were ANZ and Macquarie 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 ANZ and Macquarie to retain that interest?

**AND THE PLAINTIFF 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 it:
- (a) refrain from charging the Plaintiff and Group Members interest under the Car Loans above the Base Rate; and, or alternatively
  - (b) refrain from charging the Plaintiff and Group Members interest under the Car Loans above the interest rate the Plaintiff 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 Plaintiff 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) pay to the Plaintiff and Group Members the interest paid under the Car Loans to ANZ and Macquarie above the Base Rate; and, or alternatively
  - (e) pay to the Plaintiff and Group Members the interest paid under the Car Loans to ANZ and Macquarie above the rate the Plaintiff and Group Members would or could have obtained on the market at the time the Car Loans were entered into; and, or alternatively

- (f) pay to the Plaintiff and Group Members the interest paid under the Car Loans to the 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 ANZ pay compensation to the Plaintiff and Group Members for damage caused by the conduct of ANZ in contravention of section 1041H of the Corporations Act; and
  - (b) section 12GF of the ASIC Act that ANZ pay compensation to the Plaintiff and Group Members for damage caused by the conduct of ANZ in contravention of section 12DA(1) of the ASIC Act;
- D. An order that:
- (a) the Car Loans (including the ANZ Car Loan) is rescinded;
  - (b) the Car Loans (including the ANZ Car Loan) is void; and, or alternatively,
  - (c) the terms of the Car Loans (including the ANZ 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: 21 August 2020

J STOLJAR

D J FAHEY

*Maurice Blackburn Lawyers*

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**Maurice Blackburn Lawyers**  
Solicitors for the Plaintiff