



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

Case: S ECI 2020 03924
No. S ECI 2020 03924
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B E T W E E N

DAIMIN NATHAN

First Plaintiff

TANIA NATHAN

Second Plaintiff

-and-

MACQUARIE LEASING PTY LTD (ACN 002 674 982)

First Defendant

STATEMENT OF CLAIM

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Filed on behalf of:	The Plaintiffs	DX:	N/A
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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 Defendant (**Macquarie**);
 - (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 8(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 Macquarie;
 - (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 Defendant

3. Macquarie is and at all material times was:
- (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 holder of Australian credit licence 394925; 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**).

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 Macquarie

4. At times presently not known to the Plaintiffs, Macquarie entered into agreements with accredited dealers (**Dealers**) to facilitate the provision of Car Loans to Group Members (**Dealer Agreements**).
5. At all material times, the terms of the Dealer Agreements required Dealers to, among other things (**Dealer Terms**):
 - (a) submit to Macquarie offers from Group Members to enter into Car Loans;
 - (b) comply with directions or operations manuals given by Macquarie related to the provision of Car Loans; and
 - (c) before submitting to Macquarie offers from Group Members to enter into Car Loans, make any enquiries required by Macquarie 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) *Document entitled 'MacLease Application: Business Manager Registration Form' with 'Booran Motors' dated 26 September 2012 (**Booran Motors Registration Form**);*
 - B) *Document entitled 'Introducing New MacLease Functionality – Dealer User Guide as at 1 July 2013' (**MacLease User Guide**);*
 - C) *Document entitled 'Macquarie Leasing: Consumer Loan product' dated March 2014 (**Consumer Loan Product Memo**);*
 - D) *Email from Macquarie 'Sales Operations Team' to 'MCAF Leasing Auto Dealers' with subject 'Welcome to Macquarie Leasing – October 2014' and dated 7 October 2014 (**7 October 2014 Welcome Pack**); and*
 - E) *Letter from Macquarie to Steve Cadden of Booran Motors Sales Pty Ltd dated 14 December 2016 (**Booran Motors 2016 Dealer Agreement**);*
- ii) *As to the matters pleaded in subparagraph (b), the Plaintiffs rely upon:*
 - A) *Booran Motors Registration Form; and*
 - B) *7 October 2014 Welcome Pack;*

- iii) *As to the matters pleaded in subparagraph (c), the Plaintiffs rely upon:*
- A) *Booran Motors Registration Form;*
 - B) *7 October 2014 Welcome Pack; and*
 - C) *Document entitled ‘Supporting Information Check List’ included as part of the 7 October 2014 Welcome Pack (**Supporting Information Check List**).*

6. At all material times, pursuant to the Dealer Terms, Macquarie 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 Macquarie 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 Macquarie;
 - (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 Macquarie to approve the application as detailed in Macquarie’s operations manuals and advised to the Dealer by Macquarie from time to time;

(b) next:

- (i) enter the Group Members’ Car Loan application into Macquarie’s online loan origination platform known as “MacLease”, and
- (ii) provide to Macquarie by fax or email supporting information from the Group Member, which included:
 - (A) a declaration of financial situation;
 - (B) a privacy consent form;

- (C) two current payslips, group certificate or tax return; and
 - (D) a copy of the Group Member's driver's licence;
- (c) if Macquarie 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 provide to the Group Member documentation which included:
- (i) a credit guide; and
 - (ii) a Car Loan agreement, being an offer from the Group Member to borrow the Car Loan amount from Macquarie (**Car Loan Offer**) comprising:
 - (A) a Macquarie loan schedule document; and
 - (B) a Macquarie Consumer Loan Standard Conditions document,
- (e) the Dealer Business Manager arranged for the Group Member to sign the Car Loan Offer;
- (f) the Dealer Business Manager submitted to Macquarie via fax or email:
- (i) the signed Car Loan Offer (pleaded in subparagraph (d) above); and
 - (ii) any necessary supporting documents of the Group Member;
- (g) upon settlement funds comprising the approved loan amount were transferred to the Dealer;
- (h) 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
- (i) at all times the Dealer Business Manager managed communications between the Group Members and Dealer, and between the Group Members and Macquarie.

Particulars

At present and prior to discovery the best particulars of the Car Loan Process the Plaintiffs can give are the matters in:

- i) the Booran Motors Registration Form;*

- ii) 7 October 2014 Welcome Pack;
- iii) Consumer Loan Product Memo;
- iv) Supporting Information Check List;
- v) MacLease User Guide;
- vi) Document entitled 'Settlement Checklist' and included in the 7 October 2014 Welcome Pack (**Settlement Checklist**);
- vii) Macquarie Loan Schedule provided to the Plaintiffs dated 16 October 2014;
- viii) Documents entitled 'Macquarie Consumer Loan Standard Conditions (Version 07/2012);
- ix) Credit Guide (Consumer Loan), effective 1 July 2012.

7. At all material times during the Car Loan Process, Macquarie 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 Plaintiffs can give are that the matter is to be inferred from the Car Loan Process, the fact that Dealers were not involved in credit assessment, credit decisions and loan management, nor the administration and servicing of Car Loans.

8. At all material times, pursuant to the Dealer Terms, Macquarie:
- (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**);
 - (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**); and
 - (d) permitted and facilitated the Dealer to set the Contract Rate by first having the Dealer determine the value or percentage of the Flex Commission the Dealer wished to receive, with the Contract Rate then being calculated accordingly.

(the **Flex Commission Calculation Method**).

Particulars

At present and prior to discovery the best particulars the Plaintiffs can give are the matters in:

- i) *Document entitled 'Macquarie Leasing, Rates bulletin Dealer' with effective date 1 October 2014 (1 October 2014 Rates Bulletin);*
- ii) *MacLease User Guide; and*
- iii) *Booran Motors 2016 Dealer Agreement.*

9. 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 Macquarie 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 Plaintiffs can give are the matters in:

- i) *ASIC Consultation Paper 279 entitled 'Flex commission arrangements in the car finance industry' dated March 2017, [9]-[10], and Attachment 2, [86]; and*
- ii) *MacLease User Guide.*

10. At all material times during the Car Loan Process:

- (a) neither Macquarie 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 Macquarie, 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) Macquarie 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 10(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 Macquarie;
 - (ii) the Dealers were merely conduits between the Group Member and Macquarie; and, or alternatively
 - (iii) Dealers were disinterested in the Contract Rate;
- (d) the Group Members were in a comparatively weaker positions to Macquarie 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 the fact that the matters pleaded in subparagraphs (i) to (iii) were not disclosed to them.*
- (ii) As to the matters pleaded in subparagraphs (b), (c) and (d) above, the Plaintiffs rely 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 Plaintiffs rely 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

11. Group Members are natural persons and thereby consumers within the meaning of section 5 of the NCCPA.
12. 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.
13. By reason of the Dealer Agreements 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 Macquarie; or
 - (ii) assisted the Group Members to apply for a Car Loan with Macquarie; or
 - (iii) suggested that the Group Members apply for a Car Loan that was a consumer lease with Macquarie; or
 - (iv) assisted the Group Members to apply for a Car Loan that was a consumer lease with Macquarie.

14. By reason of the matters pleaded in paragraph 13 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 Macquarie

15. The Dealers carried on business in Australia.
16. By reason of the matter pleaded in paragraph 15 the Dealers carried on business in this jurisdiction within the meaning of s 21(2) of the NCCPA.
17. By reason of the Dealer Agreements 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 Macquarie 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 Macquarie; or
 - (b) acted as an intermediary (whether directly or indirectly) between Macquarie, 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 Macquarie.
18. By reason of the matters pleaded in paragraph 17, 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

19. By reason of the matters pleaded in paragraph 14 and, or alternatively, paragraph 18, 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

20. 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 Macquarie; or

- (ii) a Car Loan that was a consumer lease with a credit provider other than Macquarie; 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 Dealers 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 Plaintiffs rely 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].

21. By reason of the matters pleaded in paragraph 20, 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

22. 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 Macquarie 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 will 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.

23. By reason of the matters pleaded in paragraph 22 the Group Members are entitled to claim a remedy against the Dealers pursuant to s 180A of the NCCPA.

B.3 Claim against Macquarie under the NCCPA for the Dealers' Unfair Conduct

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

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

25. By reason of the matters pleaded in paragraph 24, each Dealer was a representative of Macquarie within the meaning of s 5 of the NCCPA.

26. By reason of the matters pleaded in paragraph 19, the Dealers' Unfair Conduct was conduct that related to a credit activity within the meaning of 74(a) of the NCCPA.

27. 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.

28. 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 will 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.

29. By reason of the matters pleaded in paragraphs 26, 27 and 28, Macquarie is responsible for the Dealers' Unfair Conduct.
30. By reason of s 77 of the NCCPA, Macquarie 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.
31. By reason of s 78(1) of the NCCPA the Group Members have the same remedies against Macquarie that the Group Members have against the Dealers.
32. In the premises, the Group Members are entitled to an order against Macquarie 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) 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.4 Claim against Macquarie for misleading or deceptive conduct

33. 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 Macquarie, 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,

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

34. Macquarie failed to disclose to Group Members the matters pleaded in paragraph 33(a) to (c) above.
35. The conduct of Macquarie 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.
36. The conduct of Macquarie pleaded in paragraph 34 was conduct engaged in by Macquarie:
- (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*.
37. By reason of the matters pleaded in paragraphs 34 to 36 Macquarie contravened:
- (a) s 1041H of the *Corporations Act*; and, or alternatively,
 - (b) s 12DA(1) of the *ASIC Act*.

38. By reason of Macquarie's conduct pleaded in paragraphs 34 to 37, 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 Macquarie 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 38 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.

39. By reason of the matters pleaded in paragraph 38 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 Macquarie for money had and received and unjust enrichment

40. 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 Macquarie, 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 Macquarie that the Group Members have against the Dealers; and
 - (iii) in the premises, would be entitled to obtain orders against Macquarie under s 180A(2) of the NCCPA as pleaded in paragraph 32 above.

41. By reason of the matters pleaded in paragraph 40 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 40 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.

42. By reason of the matters pleaded in paragraphs 40 to 41 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 Macquarie 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 Macquarie, and, alternatively, were not set by someone other than Macquarie, 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, Macquarie was 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 Macquarie all material information, including some or all of the matters pleaded at paragraph 40 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 will 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.

- 43. By reason of the matters pleaded in paragraphs 8, 9, 21 and/or 32 above, each of the beliefs pleaded in paragraph 42 was a unilateral mistake.
- 44. 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 Macquarie at the Contract Rate,
- by reason of one or more of the mistakes pleaded in paragraphs 42 and 43.
- 45. By reason of the Car Loan Process, Flex Commission Features and the Car Loan Circumstances (including the Flex Commission Non-Disclosure, Macquarie:
 - (a) was aware, from those circumstances, of the matters pleaded in paragraphs 40, 41, 42, 43, and/or 44 above;
 - (b) induced the matters pleaded in paragraphs 40, 41, 42, 43, and/or 44 above; and, or alternatively,
 - (c) concealed the matters pleaded in paragraph 40 above.
- 46. By reason of the matters pleaded in paragraphs 44 and 45 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.
- 47. By reason of the matters pleaded in paragraphs 40 to 45 and/or 46 the interest paid under the Car Loans are monies had and received by Macquarie to the use of the Group Members, and Macquarie is obliged to repay those sums to the Group Members.
- 48. Further or alternatively, by reason of the matters pleaded in paragraphs 44 to 45 and/or 46, Macquarie has 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 Macquarie to retain that interest.

C FIRST AND SECOND PLAINTIFFS' CLAIM AGAINST MACQUARIE

C.1 The First and Second Plaintiffs

- 49. The First and Second Plaintiffs (**Mr & Mrs Nathan**) are, and were at all material times:

- (a) natural persons; and
 - (b) residents of the State of Victoria.
50. On or around 16 October 2014, Mr & Mrs Nathan;
- (a) entered into discussions with Booran Dandenong Pty Ltd trading as Booran Motors Dandenong at 25 Lonsdale Street, Dandenong, Victoria (**Booran Motors**) concerning the acquisition of a Kia Grand Carnival automobile with registration number YLY682 (**Kia**) from Booran Motors and the financing thereof;
 - (b) entered into a contract of sale with Booran Motors for the acquisition of the Kia at a purchase price of \$18,990; and
 - (c) paid a \$50 deposit to Booran Motors for the acquisition of the Kia.
51. On or around 16 October 2014, Mr & Mrs Nathan entered into a Car Loan with Macquarie for the sum of \$24,053.88 (**Macquarie Car Loan**) that:
- (a) was obtained through Booran Motors for the purpose of Mr & Mrs Nathan's acquisition of the Kia;
 - (b) had an interest rate of 12.75% per annum; and
 - (c) had a loan term of 60 months.

C.2 The contravening conduct under the NCCPA of the Booran Motors

C.2.1 Arrangements between Booran Motors and Macquarie

52. On or around 26 September 2012, Macquarie entered into a Dealer Agreement with Booran Motors (**Booran Motors Dealer Agreement**).

Particulars

At present and prior to discovery the best particulars of the Booran Motors Dealer Agreement the Plaintiffs can give are the matters in:

- i) the Booran Motors Registration Form;*
- ii) 7 October 2014 Welcome Pack; and*
- iii) 1 October 2014 Rates Bulletin.*

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

Particulars

At present and prior to discovery the best particulars the Plaintiffs can give are those identified at paragraph 5 above.

54. At all material times, pursuant to the Booran Motors Dealer Terms, Macquarie required Booran Motors to adhere to the Car Loan Process pleaded in paragraph 6 above for the Macquarie Car Loan.

Particulars

At present and prior to discovery the best particulars of the Car Loan Process the Plaintiffs can give are those identified at paragraph 6 above.

55. At all material times during the Car Loan Process that applied to Booran Motors and the Macquarie Car Loan, Macquarie was solely responsible for all aspects of credit assessment, credit decisions, loan management, administration and servicing of the Macquarie Car Loan.

Particulars

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

56. At all material times, pursuant to the Booran Motors Dealer Terms, the Flex Commission Calculation Method as pleaded in paragraph 8 above applied to Booran Motors and the Macquarie Car Loan.

57. The Flex Commissions and the Flex Commission Calculation Method:

- (a) involved Booran Motors setting the Contract Rate for the Macquarie Car Loan at 12.75% per annum;

- (i) in the absence of any objective criteria;
 - (ii) in circumstances where the amount of 12.75% per annum was influenced or determined by the self-interest of Booran Motors; and, or alternatively
 - (iii) significantly higher than Macquarie would have offered Mr & Mrs Nathan had they been approached otherwise than through Booran Motors;
- (b) involved Booran Motors settling the term of the Macquarie Car Loan;
 - (c) provided an incentive for Booran Motors to increase the price of the Macquarie Car Loan and, or alternatively, the term of the Macquarie Car Loan, in a way that depended on the negotiating skills or vulnerability of Mr & Mrs Nathan;
 - (d) created unfairness or a risk of unfairness in relation to the Macquarie Car Loan;
 - (e) was designed to encourage Booran Motors to set the interest rate above the base rate;
 - (f) created a conflict, or a potential for a conflict, between the interests of Booran Motors and the interests of Mr & Mrs Nathan;
- (together and severally, **Booran Motors Flex Commission Features**).

Particulars

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

58. At all material times, during the Car Loan Process that applied to Booran Motors and the Macquarie Car Loan:
- (a) neither Macquarie nor Booran Motors disclosed to Mr & Mrs Nathan:
 - (i) that the Contract Rate of 12.75% per annum and, or alternatively, the term of the Macquarie Car Loan, had been set by someone other than Macquarie, namely, Booran Motors;
 - (ii) that Booran Motors had been interested in the Contract Rate of 12.75% per annum and, or alternatively, the term of the Macquarie Car Loan; and, or alternatively,

- (iii) the Flex Commission, Flex Commission Calculation Method, and/or the Booran Motors Flex Commission Features

(Booran Motors Flex Commission Non-Disclosure);

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

to Mr & Mrs Nathan the matters pleaded in paragraph 58(a)(i) to (iii) above
(Macquarie Conduct);

- (c) a reasonable person in the position of Mr & Mrs Nathan would have understood or assumed at the time they entered into the Macquarie Car Loan that:
 - (i) the Contract Rate of 12.75% per annum and, or alternatively, the term of the Macquarie Car Loan, was set solely by Macquarie;
 - (ii) Booran Motors was merely a conduit between Mr & Mrs Nathan and Macquarie; and, or alternatively
 - (iii) Booran Motors was disinterested in the Contract Rate of 12.75% per annum;
- (d) Mr & Mrs Nathan were in a comparatively weaker position to Macquarie and, or alternatively, Booran Motors;
- (e) Mr & Mrs Nathan was not treated equally in that comparable Group Members were not afforded equal Contract Rates;

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

Particulars

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

C.2.2 Booran Motors provided credit assistance to Mr & Mrs Nathan

- 59. Mr & Mrs Nathan are natural persons and thereby consumers within the meaning of section 5 of the NCCPA.

60. The Macquarie 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.
61. By reason of the Booran Motors Dealer Terms and Car Loan Process, at all material times, Booran Motors:
- (a) dealt directly with Mr & Mrs Nathan in the course of, or as part of, or incidentally to, the business of Booran Motors;
 - (b) and:
 - (i) suggested that Mr & Mrs Nathan apply for the Macquarie Car Loan; and
 - (ii) assisted Mr & Mrs Nathan to apply for the Macquarie Car Loan;
62. By reason of the matters pleaded in paragraph 61 Booran Motors provided credit assistance to Mr & Mrs Nathan within the meaning of sections 7(a) and s 8 of the NCCPA.

C.2.3 *Booran Motors was an intermediary between Mr & Mrs Nathan and Macquarie*

63. Booran Motors carried on business in Australia.
64. By reason of the matter pleaded in paragraph 63 Booran Motors carried on business in this jurisdiction within the meaning of s 21(2) of the NCCPA.
65. By reason of the Booran Motors Dealer Terms and Car Loan Process, Booran Motors 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 Macquarie and Mr & Mrs Nathan wholly or partly for the purposes of securing a provision of credit for Mr & Mrs Nathan under the Macquarie Car Loan with Macquarie.
66. By reason of the matters pleaded in paragraph 65, Booran Motors acted as an intermediary for the purposes of sections 7(b) and 9 of the NCCPA.

C.2.4 *Booran Motors provided a “credit service” to Mr & Mrs Nathan*

67. By reason of the matters pleaded in paragraph 62 and, or alternatively, paragraph 66, Booran Motors provided a credit service to Mr & Mrs Nathan within the meaning of sections 7 and 180A(1)(a) of the NCCPA.

C.2.5 Booran Motors engaged in unfair conduct

68. By reason of the Car Loan Process, Booran Motors Flex Commission Features and the Macquarie Car Loan Circumstances (including the Booran Motors Flex Commission Non-Disclosure):
- (a) Mr & Mrs Nathan were at a special disadvantage in dealing with Booran Motors in relation to the Macquarie Car Loan; and, or alternatively
 - (b) Mr & Mrs Nathan were unable, or considered themselves unable, to make a Car Loan with a credit provider other than Macquarie; and, or alternatively
 - (c) the Macquarie Car Loan Circumstances (including the Booran Motors Commission Non-Disclosure) involved a technique that:
 - (i) should not in good conscience have been used; or
 - (ii) manipulated Mr & Mrs Nathan; and, or alternatively
 - (d) Booran Motors could determine or significantly influence the terms of the Macquarie Car Loan; and, or alternatively
 - (e) the terms of the Macquarie Car Loan were less favourable to Mr & Mrs Nathan than the terms of a comparable transaction.

Particulars

At present and prior to discovery the best particulars Mr & Mrs Nathan can give are that these matters are to be inferred from the Car Loan Process, Booran Motors Flex Commission Features, and the Macquarie Car Loan Circumstances. In addition, as to the matters pleaded in subparagraph (e) above, Mr & Mrs Nathan rely 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].

69. By reason of the matters pleaded in paragraph 68, Booran Motors 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 (**Booran Motors's Unfair Conduct**).

C.2.6 Consequences of Booran Motors's unfair conduct

70. Booran Motors's Unfair Conduct had the result that Mr & Mrs Nathan:

- (a) entered into the Macquarie Car Loan (pursuant to which they paid interest at the Contract Rate of 12.75% per annum) when they would not have done so apart from that conduct; and, or alternatively
- (b) entered into the Macquarie 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 & Mrs Nathan would otherwise have entered into; and, or alternatively
- (c) became liable to pay interest charges to Macquarie at the Contract Rate of 12.75% per annum.

Particulars

Particulars will be provided at the time of service of Mr & Mrs Nathan's evidence in chief.

71. By reason of the matters pleaded in paragraph 70 Mr & Mrs Nathan are entitled to claim a remedy against Booran Motors pursuant to s 180A of the NCCPA.

C.3 Claim against Macquarie under the NCCPA for Booran Motors's Unfair Conduct

72. By reason of the Booran Motors Car Dealer Terms and the Car Loan Process during the Relevant Period Booran Motors was:

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

73. By reason of the matters pleaded in paragraph 72 Booran Motors was a representative of Macquarie within the meaning of s 5 of the NCCPA.

74. By reason of the matters pleaded in paragraph 67, Booran Motors's Unfair Conduct was conduct that related to a credit activity within the meaning of 74(a) of the NCCPA.

75. Booran Motors's Unfair Conduct was conduct on which Mr & Mrs Nathan could reasonably be expected to rely within the meaning of s 74(b) of the NCCPA.

76. Booran Motors's Unfair Conduct was conduct on which Mr & Mrs Nathan 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 & Mrs Nathan's evidence in chief.

77. By reason of the matters pleaded in paragraphs 74, 75, and 76 Macquarie is responsible for Booran Motors's Unfair Conduct.
78. By reason of s 77 of the NCCPA Macquarie is liable to Mr & Mrs Nathan in relation to any loss or damage suffered by Mr & Mrs Nathan as a result of Booran Motors's Unfair Conduct.
79. By reason of s 78(1) of the NCCPA, Mr & Mrs Nathan has the same remedies against Macquarie that Mr & Mrs Nathan have against Booran Motors.
80. In the premises, Mr & Mrs Nathan are entitled to an order against Macquarie under s 180A(2) of the NCCPA that it:
- (a) refrain from charging Mr & Mrs Nathan interest under the Macquarie Car Loan above the Base Rate; and, or alternatively
 - (b) refrain from charging Mr & Mrs Nathan interest under the Macquarie Car Loan above the interest rate Mr & Mrs Nathan would or could have obtained on the market at the time the Macquarie Car Loan was entered into; and, or alternatively
 - (c) refrain from charging Mr & Mrs Nathan interest under the Macquarie Car Loan above the average market rate prevailing at the time the Macquarie Car Loan was entered into; and, or alternatively
 - (d) repay to Mr & Mrs Nathan the interest paid under the Macquarie Car Loan above the Base Rate; and, or alternatively
 - (e) repay to Mr & Mrs Nathan the interest paid under the Macquarie Car Loan above the rate Mr & Mrs Nathan would or could have obtained on the market at the time the Macquarie Car Loan was entered into; and, or alternatively

- (f) repay to Mr & Mrs Nathan the interest paid under the Macquarie Car Loan above the average market rate prevailing at the time the Macquarie 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 Macquarie for misleading or deceptive conduct

81. Further or alternatively, in the circumstances pleaded above Mr & Mrs Nathan had a reasonable expectation that had:

- (a) the Contract Rate of 12.75% per annum and, or alternatively, the term of the Macquarie Car Loan, been set by someone other than Macquarie, namely, Booran Motors;
- (b) Booran Motors been interested in the Contract Rate of 12.75% per annum and, or alternatively, the term of the Macquarie Car Loan; and, or alternatively,
- (c) the Macquarie Car Loan included features of the same or similar kind as the Flex Commission, Flex Commission Calculation Method, and, or alternatively, the Booran Motors Flex Commission Features,

Macquarie would have disclosed such matters or one or more of them to Mr & Mrs Nathan.

82. Macquarie failed to disclose to Mr & Mrs Nathan the matters pleaded in paragraph 81(a) to (c) above.

83. The conduct of Macquarie in failing to disclose those matters or one or more of them to Mr & Mrs Nathan prior to or at the time the Macquarie was entered into, and in engaging in the Macquarie Conduct, was misleading or deceptive or likely to mislead or deceive.

84. The conduct of Macquarie pleaded in paragraph 82 was conduct engaged in by Macquarie:

- (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*.

85. By reason of the matters pleaded in paragraphs 82 to 84 Macquarie contravened:
- (a) s 1041H of the *Corporations Act*; and, or alternatively,
 - (b) s 12DA(1) of the *ASIC Act*.
86. By reason of Macquarie's conduct pleaded in paragraphs 82 to 85, Mr & Mrs Nathan:
- (a) entered into the Macquarie Car Loan (pursuant to which they paid interest at the Contract Rate of 12.75% per annum) when they would not have done so apart from that conduct; and, or alternatively
 - (b) entered into the Macquarie 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 & Mrs Nathan would otherwise have entered into; and, or alternatively
 - (c) became liable to pay interest charges to Macquarie at the Contract Rate of 12.75% per annum.
87. By reason of the matters pleaded in paragraph 86 above, Mr & Mrs Nathan have suffered loss and damage.

Particulars

The loss and damage suffered by Mr & Mrs Nathan will be calculated by:

- A) *the difference between the Contract Rate of 12.75% per annum and the Base Rate;*
- B) *alternatively, the difference between the Contract Rate of 12.75% per annum and the rate Mr & Mrs Nathan would have obtained on the market; and*
- C) *alternatively, the difference between the Contract Rate of 12.75% per annum and the average market rate prevailing at the time the Macquarie Car Loan was entered into.*

C.5 Claim against Macquarie for money had and received and unjust enrichment

88. Further or alternatively, Mr & Mrs Nathan were not at any stage prior to applying for or entering into the Macquarie Car Loan, informed, either sufficiently or at all, of one or more of the following facts:
- (a) the Contract Rate of 12.75% per annum and, or alternatively, the term of the Macquarie Car Loan, been set by someone other than Macquarie, namely, Booran Motors;

- (b) Booran Motors was interested in the Contract Rate of 12.75% per annum and, or alternatively, the term of the Macquarie Car Loan;
- (c) the Macquarie Car Loan included features of the same or similar kind as the Flex Commission, Flex Commission Calculation Method, and/or the Booran Motors Flex Commission Features; and, or alternatively,
- (d) the existence of Booran Motors's Unfair Conduct, and by reason thereof, Mr & Mrs Nathan:
 - (i) would be entitled to claim a remedy against Booran Motors pursuant to s 180A of the NCCPA;
 - (ii) would, under s 78(1) of the NCCPA, have the same remedies against Macquarie that Mr & Mrs Nathan has against Booran Motors; and
 - (iii) in the premises, would be entitled to obtain orders against Macquarie under s 180A(2) of the NCCPA as pleaded in paragraph 80 above.

89. By reason of the matters pleaded in paragraph 88 above, prior to applying for or entering into the Macquarie Car Loan, Mr & Mrs Nathan did not know one or more of the matters pleaded in paragraph 88 above, each of which constitute material information that would have been relevant to the decision of Mr & Mrs Nathan whether to proceed with the entry into the Macquarie Car Loan.

90. By reason of the matters pleaded in paragraphs 88 to 89 Mr & Mrs Nathan:

- (a) entered into the Macquarie Car Loan (pursuant to which they paid interest at the Contract Rate of 12.75% per annum) when they would not have done so; and, or alternatively
- (b) entered into the Macquarie 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 & Mrs Nathan would otherwise have entered into; and, or alternatively
- (c) became liable to pay interest charges to Macquarie at the Contract Rate of 12.75% per annum,

under one or more of the following causative mistaken beliefs:

- (d) the Contract Rate of 12.75% per annum and, or alternatively, the term of the Macquarie Car Loan, was not set by someone other than Macquarie, namely, Booran Motors;
- (e) Booran Motors was not interested in the Contract Rate of 12.75% per annum and, or alternatively, the term of the Macquarie Car Loan;
- (f) the Macquarie Car Loan did not include features of the same or similar kind as the Flex Commission, Flex Commission Calculation Method, and/or the Booran Motors Flex Commission Features;
- (g) the conduct of Booran Motors was not unfair within the meaning of s 180A(1)(b) of the NCCPA;
- (h) Mr & Mrs Nathan were under a legal obligation to pay interest charges at the Contract Rate of 12.75% per annum and, or alternatively, for the term of the Macquarie Car Loan and, or alternatively, Macquarie was legally entitled to payment of such moneys; and, or alternatively,
- (i) at the time of making the decision to enter into the Macquarie Car Loan, Mr & Mrs Nathan had received from Booran Motors and Macquarie all material information, including some or all of the matters pleaded at paragraph 88 above.

Particulars

Further particulars will be provided at the time of service of Mr & Mrs Nathan's evidence in chief.

- 91. By reason of the matters pleaded in paragraphs 8, 57, 69 and/or 80 above, each of the beliefs pleaded in paragraph 90 was a unilateral mistake.
- 92. Mr & Mrs Nathan:
 - (a) entered into the Macquarie Car Loan (pursuant to which they paid interest at the Contract Rate of 12.75% per annum) when they would not have done so; and, or alternatively
 - (b) entered into the Macquarie 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 & Mrs Nathan would otherwise have entered into; and, or alternatively

- (c) became liable to pay interest charges to Macquarie at the Contract Rate of 12.75% per annum,

by reason of one or more of the mistakes pleaded in paragraphs 90 and 91.

93. By reason of the Car Loan Process, Booran Motors Flex Commission Features and the Macquarie Car Loan Circumstances (including the Booran Motors Flex Commission Non-Disclosure) Macquarie:

- (a) was aware, from those circumstances, of the matters pleaded in paragraphs 88, 89, 90, 91 and/or 92 above;
- (b) induced the matters pleaded in paragraphs 88, 89, 90, 91 and/or 92 above; and, or alternatively,
- (c) concealed the matters pleaded in paragraph 88 above.

94. By reason of the matters pleaded in paragraphs 92 and 93 above:

- (a) Mr & Mrs Nathan are entitled to rescind the Macquarie Car Loan;
- (b) the Macquarie Car Loan is void; and, or alternatively,
- (c) the term of the Macquarie Car Loan requiring payment of the Contract Rate at 12.75% per annum is void.

95. By reason of the matters pleaded in paragraphs 88 to 93 and/or 94, the interest paid under the Macquarie Car Loan is monies had and received by Macquarie to the use of Mr & Mrs Nathan, and Macquarie is obliged to repay those sums to Mr & Mrs Nathan.

96. Further or alternatively, by reason of the matters pleaded in paragraph 92 to 93 and/or 94, Macquarie has been unjustly enriched by the receipt of interest at the Contract Rate at 12.75% per annum at the expense of Mr & Mrs Nathan and it would be unconscionable for Macquarie to retain that interest.

D COMMON QUESTIONS OF LAW OR FACT

D.1 The contravening conduct under the NCCPA

- 97. Were the Dealers required to adhere to the Car Loan Process?
- 98. Did the Car Loans include:

- (a) the Flex Commission Calculation Method?
 - (b) the Flex Commission Features?
99. During the Car Loan Process did the Car Loan Circumstances arise?
100. 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?
101. 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?
102. 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?
103. 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?
104. 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?
105. By reason of the matters pleaded in this Statement of Claim, was each Dealer a representative of Macquarie within the meaning of s 5 of the NCCPA?
106. 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?
107. 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?
108. 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?
109. By reason of the matters pleaded in this Statement of Claim, is Macquarie responsible for the Dealers' Unfair Conduct?

110. By reason of s 77 of the NCCPA, is Macquarie 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.
111. By reason of s 78(1) of the NCCPA, do the Plaintiffs and Group Members have the same remedies against Macquarie that the Plaintiffs and Group Members have against the Dealers?
112. By reason of the matters pleaded in this Statement of Claim, are the Plaintiffs and the Group Members entitled to an order against Macquarie under s 180A(2) of the NCCPA that it:
- (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.

D.2 Misleading or deceptive conduct

113. 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 Macquarie, 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,

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

114. Was the conduct of Macquarie in failing to disclose the matters alleged in paragraph 33(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?

115. Was the conduct of Macquarie pleaded in paragraph 34 conduct engaged in by Macquarie:

- (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*?

116. By reason of Macquarie's conduct pleaded in paragraphs 34 to 37, did Macquarie contravene:

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

117. What are the principles governing the quantification of loss or damage (if any) suffered by the Plaintiffs and Group Members by reason of any contraventions as alleged in the Statement of Claim which have been established?

D.3 Claim against Macquarie for money had and received and unjust enrichment

118. 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 Macquarie at the Contract Rate,
- have been mistaken if they held one or more of the beliefs pleaded in paragraphs 42 and 43 above?
119. By reason of the matters pleaded in paragraphs 44 and 45 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?
120. By reason of the Car Loan Process, Flex Commission Features and the Car Loan Circumstances (including the Flex Commission Non-Disclosure):
- (a) was Macquarie aware, from those circumstances, of the matters pleaded in paragraphs 40, 41, 42, 43, and/or 44 above?
 - (b) did Macquarie induce the matters pleaded in paragraphs 40, 41, 42, 43, and/or 44 above?
 - (c) did Macquarie conceal the matters pleaded in paragraph 40 above?
121. By reason of the matters pleaded in paragraphs 40 to 45 and/or 46 is the interest paid under the Car Loans monies had and received by Macquarie to the use of the Plaintiffs and Group Members, such that Macquarie is obliged to repay those sums to the Plaintiffs and Group Members?

122. By reason of the matters pleaded in paragraph 44 to 45 and/or 46 was Macquarie unjustly enriched by the receipt of interest at the Contract Rate at the expense of the Plaintiffs and Group Members such that it would be unconscionable for Macquarie 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 Macquarie 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 Macquarie under s 180A(2) of the NCCPA that it:
- (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 Macquarie pay compensation to the Plaintiffs and Group Members for damage caused by the conduct of Macquarie in contravention of section 1041H of the Corporations Act; and
 - (b) section 12GF of the ASIC Act that Macquarie pay compensation to the Plaintiffs and Group Members for damage caused by the conduct of Macquarie in contravention of section 12DA(1) of the ASIC Act;
- D. An order that:
- (a) the Car Loans (including the Macquarie Car Loan) are rescinded;
 - (b) the Car Loans (including the Macquarie Car Loan) are void; and, or alternatively,
 - (c) the terms of the Car Loans (including the Macquarie 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: 17 February 2022

J STOLJAR

D J FAHEY

Maurice Blackburn Lawyers

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Solicitors for the Plaintiffs