



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

Case: S ECI 2020 03365

No. S ECI 2020 03365 Filed 2022 07:02 PM

B E T W E E N

~~STEELE LEE CRAWFORD~~ DANIEL CHRISTIAN O'BRIEN

Plaintiff

-and-

AUSTRALIA AND NEW ZEALAND BANKING GROUP LIMITED
(ACN 005 357 522) and others (in accordance with the Schedule)

Defendants

AMENDED DEFENCE OF THE FIRST DEFENDANT
(amended pursuant to orders made 2 August 2022)

Date of document: 6 September 2022
Filed on behalf of: First Defendant
Prepared by:
Herbert Smith Freehills
Lawyers
Level 22, 80 Collins Street
Melbourne VIC 3000

Solicitor's Code: 420
DX: 240 Melbourne
Tel: (03) 9288 1234
Fax: (03) 9288 1567
Ref: REO:MQ:82705842
Attention: Ruth Overington
Email: ruth.overington@hsf.com

To the further amended statement of claim of the plaintiff dated ~~21 August 2020~~ 8 August 2022
(statement of claim), the first defendant (ANZ) says as follows:

1. To paragraph 1:
 - (a) it admits that the proceeding is sought to be commenced as a representative proceeding pursuant to Part 4A of the *Supreme Court Act 1986* (Vic);
 - (b) it refers to and repeats paragraphs 4 and 10 below;
 - (c) it does not admit that a commission was paid to a Dealer in respect of each credit facility entered into between a group member and it, in relation to customers introduced to it by a Dealer during the period alleged;
 - (d) it denies that the plaintiff and group members have suffered loss or damage, or are entitled to relief, by reason of the matters and conduct pleaded in the statement of claim, and it therefore denies sub-paragraph 1(b);

- (e) it says further that the allegations in sub-paragraphs 1(a)(iv)(A) and (B) are vague and embarrassing;
 - (f) it otherwise denies the allegations in paragraph 1.
- 2. It does not admit the allegations in paragraph 2.
- 3. To paragraph 3:
 - (a) insofar as the allegations are made against it:
 - (i) it admits the allegation in sub-paragraph 3(a);
 - (ii) for the purposes only of responding to the allegation that it is a person to which s 1041H of the *Corporations Act 2001* (Cth) may apply, it admits the allegations in sub-paragraph 3(b);
 - (iii) for the purposes only of responding to the allegation that it is a person to which s 12DA of the *Australian Securities and Investments Commission Act 2001* (Cth) (**ASIC Act**) may apply, it admits the allegations in sub-paragraph 3(c);
 - (iv) it admits the allegation in sub-paragraph 3(d);
 - (v) it admits the allegation in sub-paragraph 3(e);
 - (vi) it otherwise denies the allegations in paragraph 3;
 - (b) insofar as the allegations therein are made against the second ~~and third~~ defendants, it does not admit the allegations.
- 4. To paragraph 4:
 - (a) it admits that between 1 January 2011 and on or about 2 November 2015:
 - (i) it entered into agreements with accredited third-party automotive dealers (**Dealers**) with which it had an origination arrangement (**Esanda Dealer Finance Business**) and from whom it would receive applications for the provision of credit to customers;
 - (ii) the Esanda Dealer Finance Business was part of ANZ's Australia division;
 - (b) it says that the agreements which comprised the arrangements between it and a Dealer:

- (i) contained the terms and conditions set out therein, the full terms and effect of which it will rely on at trial;
 - (ii) until about August 2015, generally comprised:
 - (A) Dealer's Agreement Composite (with attachments) as amended from time to time;
 - (B) Business Partnership and Dealer Arrangement;
 - (C) Personal information collection and disclosure agreement;
 - (D) Abacus System Access Agreement;
 (collectively, the **Dealer Arrangement**);
 - (iii) from about August 2015, any new arrangement entered into between it and a Dealer was governed by the terms and conditions set out in a document styled "Dealer Agreement" (**Revised Dealer Arrangement**);
 - (c) it otherwise denies the allegations in paragraph 4.
5. To paragraph 5:
- (a) it admits that, on 8 October 2015, it announced that it had agreed to sell to the second defendant, among other things:
 - (i) a portfolio including the majority of the credit facilities referred to in paragraph 4(a)(i) above;
 - (ii) retail lending origination arrangements with Dealers;**(Esanda Dealer Finance Portfolio)**;
 - (b) it otherwise denies the allegations in paragraph 5.
6. To paragraph 6:
- (a) it admits that the legal assignment of the retail loan portfolio component of the Esanda Dealer Finance Portfolio occurred on 1 May 2016;
 - (b) it refers to and repeats paragraph 5 above;
 - (c) it otherwise does not admit the allegations in paragraph 6.
7. To paragraph 7:
- (a) it refers to and repeats paragraph 4 above;

- (b) it says that:
 - (i) the Dealer Arrangement and Revised Dealer Arrangement authorised Dealers to submit applications from customers seeking to enter into a credit facility with it;
 - (ii) as part of the process of assisting customers to submit an application to enter into a credit facility with it, customers provided Dealers with personal details and financial information, which Dealers conveyed to it;
 - (iii) Dealers were required to comply with the terms and conditions of the Dealer Arrangement, Revised Dealer Arrangement, or such other agreement or arrangement between it and the Dealer, as well as the Dealers' statutory and general law obligations;
- (c) it otherwise denies the allegations in paragraph 7.

8. To paragraph 8:

- (a) it refers to and repeats paragraphs 4 and 7 above and denies the allegations in paragraph 8;
- (b) it says that for customers seeking to enter into a credit facility with it in connection with the purchase of a motor vehicle, that process involved the obtaining and provision of information about matters including:
 - (i) the legal status of the customer, whether an individual (including sole trader), company, partnership, or trust;
 - (ii) details of the model of the motor vehicle proposed to be purchased by the customer and the subject of the customer's credit facility request;
 - (iii) the amount of the finance (loan) sought by the customer;
 - (iv) the purchase price of the motor vehicle compared to the amount of finance sought;
 - (v) the customer's preferred loan term (required to be no shorter than 12 months and no longer than 84 months), repayment frequency (monthly, fortnightly or other), whether repayments would be made in advance or arrears, and the method for repayment (eg. direct debit);

- (vi) personal information in relation to the customer, such as date of birth, residential address, marital status, number of dependents, occupation, and employment status and continuity;
- (vii) financial information about the customer which, in relation to individuals making a credit application, included information regarding the customer's income, expenses, assets and liabilities;
- (c) it says further that, as part of the application process:
 - (i) the customer was required to provide evidence of information supplied by the customer, such as proof of identification (eg. photographic driver's licence) and proof of income (eg. payslips);
 - (ii) the customer was provided with information about the credit facility that the customer was applying to enter into, including the amount of credit requested by the customer, the applicable annual percentage interest rate, the total amount of interest to be paid over the term of the facility, the total amount of repayments to be made over the term of the facility, the amount of each repayment, and any applicable fees and charges;
 - (iii) the relevant loan contract required the customer to agree, and confirm and declare, that:
 - (A) the information that was provided by the customer was true and correct;
 - (B) the customer had the financial capacity to meet the commitments being entered into under the proposed transaction;
 - (C) the customer understood that a commission may be paid to the Dealer for the introduction of the customer to ANZ;
 - (D) the customer had received a copy of ANZ's loan terms and conditions and that they formed part of the customer's offer to enter into the credit facility;
 - (iv) the relevant loan contract also:
 - (A) warned the customer not to sign the contract documents if there was anything the customer did not understand;

- (B) informed the customer that he or she could withdraw the customer's offer to enter into the credit facility at any time before the offer was accepted by ANZ;
- (v) prior to the customer's application being submitted and finalised, it required Dealers to provide customers, for their review and agreement, copies of documents including its credit guide, a completed application, the loan contract, and an "Esanda Representative – Applicant Statement (NCCP)";
- (vi) information provided by the customer (as referred to in sub-paragraphs 7(b) and 8(b) above) was entered into the Esanda Lending System, known as Abacus or EsandaNet (being the web-based interface of Abacus), by the relevant authorised and accredited officer or employee of the Dealer with access to that system;
- (vii) upon receipt of the customer's application, it either approved the application subject to conditions, referred the application for further assessment, or declined the application;
- (viii) as part of any settlement and prior to final acceptance of the customer's application, it required copies of documents to be provided to it, including a signed settlement checklist, signed contract documents, a signed privacy consent form, a signed credit application, a tax invoice for the motor vehicle, customer identification evidence, income verification documentation and evidence of comprehensive insurance for the motor vehicle;
- (ix) upon settlement, the loan amount was transferred by it to the Dealer.

9. To paragraph 9:

- (a) it admits that:
 - (i) it was responsible for deciding whether to accept a customer's application for a credit facility with it;
 - (ii) once accepted, the agreement comprising the terms and conditions governing the credit facility was an agreement between it and the customer;

- (b) it refers to and repeats paragraph 8 above;
- (c) it says that the expressions “loan management” and “administration and servicing of car loans”, particularly insofar as these activities relate to the alleged “Car Loan Process” (as defined in paragraph 8 of the statement of claim) are vague and embarrassing, and not capable of being pleaded to without proper particularisation;
- (d) it otherwise denies the allegations in paragraph 9.

10. To paragraph 10:

- (a) it says that, prior to the transfer of the Esanda Dealer Finance Portfolio to the second defendant pursuant to the sale referred to in paragraph 5 above:
 - (i) in relation to credit facilities for customers introduced to it by a Dealer, it set a base rate of interest and cap rate of interest applicable to the customer’s offer to enter into a credit facility with it;
 - (ii) Dealers could propose to the customer, and discuss and negotiate, and then inform ANZ of, the proposed rate of interest to apply to the credit facility (known as the “writing rate”), but the writing rate could not exceed the cap rate;
 - (iii) the cap rate could not exceed 8% above the base rate for any customer;
 - (iv) information provided by the customer and entered into Abacus, was used in setting the applicable base rate and cap rate for that customer;
 - (v) in circumstances where the writing rate on an approved credit facility was higher than the base rate, a Dealer may have been entitled to a proportion of the difference between the base rate and writing rate, in accordance with the terms of the Dealer Arrangement or Revised Dealer Arrangement;
 - (vi) it otherwise denies the allegations in paragraph 10.

11. To paragraph 11:

- (a) it admits that the calculation of the commission payable to Dealers was to encourage writing above the base rate, but says that Dealers were not required

to nominate to or negotiate with a customer, and customers were not required to adopt or make an offer to it with, a rate above the base rate;

(b) it says that:

- (i) the term of the credit facility was not to be shorter than 12 months or longer than 84 months, and that the term of the credit facility was a term which the customer could negotiate and agree to in light of the customer's personal circumstances and preferences;
- (ii) the writing rate was influenced by the rate at which the customer agreed to make an offer to it, having regard to, among other things, the customer's circumstances and preferences, and the Dealer's preference to secure a sale of the motor vehicle to the customer;
- (iii) the ~~Esanda~~ Dealer Arrangement and Revised ~~Esanda~~ Dealer Arrangement provided customers with options and the opportunity to:
 - (A) obtain an initial, obligation-free, quote for a credit facility, providing an indication of, among other things, repayment amounts over the term of the facility;
 - (B) apply for a credit facility with it, after being provided with details about the facility, including the amount of credit requested, the applicable annual percentage interest rate, the total amount of interest to be paid over the term of the facility, the total amount of repayments over the term of the facility, the amount of each repayment, and any applicable fees and charges;
 - (C) compare any initial quote or terms of the proposed credit facility application with other quotes or credit facility terms available to the customer from other credit providers;
 - (D) take the steps set out in sub-paragraphs 11(b)(iii)(A) to (C) above efficiently and effectively;

(c) it says further that in circumstances where:

- (i) the purchase of the motor vehicle and application for a credit facility were arms-length transactions;

- (ii) the customer expressly confirmed, as part of the signed “Esanda Representative – Applicant Statement (NCCP)” that the Dealer was not acting on the customer’s behalf as the customer’s agent, and the Dealer did not owe the customer any duties in respect of the customer’s finance application;

no legally relevant conflict of interest could or did arise, and the allegation in sub-paragraph 11(f) is embarrassing;

- (d) it refers to and repeats paragraph 8 above;
- (e) it otherwise denies the allegations in paragraph 11.

12. To paragraph 12:

- (a) it admits that it did not require Dealers to inform customers of the base rate or cap rate, or of the terms of the Dealer Arrangement or Revised Dealer Arrangement in relation to commissions to which Dealers may be entitled if customers entered into a credit facility at an interest rate above the base rate;
- (b) it says that:
 - (i) Dealers were not prevented by it from informing customers of the matters referred to in sub-paragraph 12(a) above;
 - (ii) the writing rate was not ‘set’ by Dealers, but was the rate nominated by the Dealer for the customer to accept or reject, or in respect of which the customer could put a counter-proposal;
 - (iii) save for his own circumstances, the plaintiff does not know and cannot say what was said or not said by Dealers to other customers during the relevant period in relation to, among other things, the matters referred to in sub-paragraph 12(b) of the statement of claim;
 - (iv) when submitting an application for a credit facility and as part of the loan contract, customers confirmed and declared that they understood that ANZ may pay a commission to the Dealer for the introduction of the customer;
 - (v) during the relevant period, “flex commission” arrangements were used by numerous credit providers in the automobile industry;

- (vi) by the terms of the Dealer Arrangement and Revised Dealer Arrangement:
 - (A) it prohibited Dealers communicating to customers a writing rate above the cap rate;
 - (B) it required, and Dealers agreed, that Dealers not misrepresent, including by omission, any of the key features of any credit facility, and that Dealers not make any false or misleading or deceptive representations;
 - (vii) Dealers were not obliged to obtain or procure applications, requests or offers to obtain finance from it, in connection with the sale of a motor vehicle to a customer;
 - (viii) consumers were not obliged to purchase a motor vehicle from a Dealer with funds advanced from a credit facility entered into with it;
 - (ix) customers were able to negotiate with Dealers lower rates than initial, indicative writing rates stated by Dealers;
 - (x) it was not obliged to ensure disclosure by Dealers of the matters alleged in sub-paragraph 12(b) of the statement of claim, and it was not obliged to have systems, processes and procedures in place to ensure such disclosure;
 - (xi) the allegations in sub-paragraphs 12(a) and (c) of the statement of claim that group members were in “comparatively weaker positions” and “not treated equally” are vague and embarrassing;
 - (c) it refers to and repeats paragraphs 8, 10 and 11 above;
 - (d) it otherwise denies the allegations in paragraph 12.
13. It refers to and repeats paragraph 1 above and otherwise admits the allegations in paragraph 13.
14. To paragraph 14:
- (a) it says that insofar as credit facilities provided by it were not wholly or predominantly for personal, domestic or household purposes, they were not

credit contracts within the meaning of section 4 of the *Credit Code* or section 5 of the *National Consumer Credit Protection Act 2009* (Cth) (**NCCP Act**);

- (b) it otherwise admits the allegations in paragraph 14.
15. To paragraph 15:
- (a) it admits that Dealers dealt with customers who wanted to make an application for a credit facility;
 - (b) it says that:
 - (i) when a Dealer was provided with information from a customer, and the Dealer conveyed that information to it as part of an application, or potential application, for a credit facility by a customer, the Dealer assisted the customer in connection with that credit facility;
 - (ii) the customer confirmed and acknowledged that the Dealer was not acting as the customer's agent in the process referred to in sub-paragraph 15(b)(i) above;
 - (iii) the Dealer was not acting as its agent in the process referred to in sub-paragraph 15(b)(i) above, save for the limited purposes specified in the Dealer Arrangement and the Revised Dealer Arrangement;
 - (c) it refers to and repeats paragraphs 7 and 8 above;
 - (d) it otherwise denies the allegations in paragraph 15.
16. To paragraph 16:
- (a) it refers to and repeats paragraphs 14 and 15 above;
 - (b) it admits that Dealers provided credit assistance within the meaning of sections 7(a) and 8 of the NCCP Act when undertaking steps referred to in paragraphs 7(b), 8(b), 8(c)(i), 8(c)(ii), 8(c)(v), 8(c)(vi), 8(c)(viii), 15(a) and 15(b)(i) above (**Dealer Assistance**);
 - (c) it otherwise denies the allegations in paragraph 16.
17. It admits that Dealers carried on business during part or all of the relevant period, and that Dealers have business operations located in Australia, and otherwise does not admit the allegations in paragraph 17.

18. To paragraph 18:
 - (a) it refers to and repeats paragraph 17 above;
 - (b) it admits that Dealers carried on business during the period in this jurisdiction, as defined in section 21 of the NCCP Act;
 - (c) it otherwise does not admit the allegations in paragraph 18.
19. To paragraph 19:
 - (a) it admits that Dealers acted as an intermediary between it and customers applying for a credit facility with it when providing Dealer Assistance;
 - (b) it otherwise denies the allegations therein.
20. To paragraph 20:
 - (a) it refers to and repeats paragraph 19 above;
 - (b) it admits the allegations in paragraph 20 insofar as they relate to the Dealer Assistance and involved credit contracts provided to customers wholly or predominantly for personal domestic or household use;
 - (c) it otherwise denies the allegations in paragraph 20.
21. To paragraph 21:
 - (a) it refers to and repeats paragraphs 16 and 20 above;
 - (b) it admits the allegations in paragraph 21 insofar as they relate to the Dealer Assistance and involved credit contracts provided to customers wholly or predominantly for personal domestic or household use;
 - (c) it otherwise denies the allegations in paragraph 21.
22. To paragraph 22:
 - (a) it refers to and repeats paragraphs 8, 10, 11 and 12 above and denies the allegations in paragraph 22;
 - (b) it says further:
 - (i) as to the allegations in sub-paragraphs 22(a) and 22(c), whether customers were at a special disadvantage, or whether the alleged "Car Loan Circumstances" involved a technique that should not in good

conscience have been used or manipulated customers, is a matter to be assessed having regard to all the relevant circumstances, including the personal and financial circumstances of the customer, the information provided to the customer in the application process, the options available to the customer, the customer's decision to voluntarily enter into the credit contract, the advantages and benefits which accrued to the customer in consequence of securing a credit facility and which were inherent in or incidental to ownership and use of a motor vehicle, and that the determination of whether a customer was at a special disadvantage, or was manipulated, (all of which is denied), involves an assessment of the individual facts and circumstances relevant to each transaction and does not involve a question common to all group members;

- (ii) as to the allegations in sub-paragraph 22(b):
 - (A) save for his own circumstances, the plaintiff does not know and cannot say whether customers were unable, or considered themselves unable, to enter into a credit contract (for the purpose of purchasing a motor vehicle) with another credit provider, and the particulars relied on by the plaintiff do not support either allegation;
 - (B) it offered consumer leases through Dealers that were wholly or predominantly for personal, domestic or household use;
- (iii) as to the allegations in sub-paragraph 22(d), while it was willing to provide credit facilities to customers on the terms set out in relevant agreements (in conformity with its obligations at general law and under statute), and it was involved in setting the terms on which it was prepared to agree to provide credit to a customer for use in purchasing a motor vehicle, the terms entered into were not imposed by it on customers, involved customers identifying their preferred loan term (of between 12 to 84 months), repayment frequency (monthly, fortnightly or other), whether repayments would be made in advance or arrears, and the method for repayment, and that the interest payable was capable of

negotiation and, if not agreed to by the customer, could be rejected by the customer;

- (iv) as to the allegations in sub-paragraph 22(e), in determining whether the terms of a credit facility were less favourable to the terms of a comparable transaction involves identification of the relevant terms of such a transaction in respect of the same motor vehicle and associated accessories (none of which are alleged or properly particularised by the plaintiff) and proof of availability to the particular customer at the relevant time, and that even if an alternate credit facility were available to the customer on terms more favourable, it does not render its conduct or any Dealer's conduct unfair within the meaning of section 180A of the NCCP Act.

- 23. It refers to and repeats paragraph 22 above and denies the allegations in paragraph 23.
- 24. Save that it admits that after it accepted the customer's application to enter into a credit facility the customer became liable to pay interest at the rate and for the term set out in the agreement, it refers to and repeats paragraph 23 above and therefore denies the allegations in paragraph 24.
- 25. It refers to and repeats paragraphs 22 to 24 above and denies the allegations in paragraph 25.
- 26. To paragraph 26:
 - (a) it refers to and repeats paragraphs 7, 8, 16, 19, 20 and 21 above, and admits that in the circumstances there set out Dealers acted on behalf of it as a holder of an Australian credit licence;
 - (b) it otherwise denies the allegations in paragraph 26.
- 27. To paragraph 27:
 - (a) it refers to and repeats paragraph 26 above;
 - (b) it says that a Dealer was its representative within the meaning of section 5 of the NCCP Act for the limited purpose of obtaining and providing to it information from the customer in support of the customer's application for a credit facility with it;

- (c) it otherwise denies the allegations in paragraph 27.
28. It refers to and repeats paragraphs 21 and 23 above and denies the allegations in paragraph 28.
 29. Save that it says that what conduct a customer could reasonably be expected to rely on is a question of fact and degree in light of all the circumstances, including the personal circumstances of the customer, and that it refers to and repeats paragraph 23 above, it denies the allegations in paragraph 29.
 30. It refers to and repeats paragraph 29 above and denies the allegations in paragraph 30.
 31. To paragraph 31:
 - (a) it refers to and repeats paragraphs 28 to 30 above;
 - (b) it denies that Dealers engaged in conduct in contravention of section 180A(1) of the NCCP Act or that, if there was such conduct, it was responsible for it within the meaning of sections 74 and 77 of the NCCP Act;
 - (c) it otherwise denies the allegations in paragraph 31.
 32. It denies the allegations in paragraph 32.
 33. It denies the allegations in paragraph 33.
 34. To paragraph 34:
 - (a) it denies the allegations in paragraph 34;
 - (b) it says further that:
 - (i) insofar as the claims of group members for relief under section 180A of the NCCP Act relate to credit facilities entered into with it before 21 August 2014, those claims are statute barred, and it refers to sub-section 180A(5) of the NCCP Act;
 - (ii) section 180A of the NCCP Act commenced operation on 1 March 2013 and, accordingly, any group member who entered into a credit facility with it prior to that date has no claim against it pursuant to section 180A of the NCCP Act, and it refers to sections 2 and 3 of the *Consumer Credit Legislation Amendment (Enhancements) Act 2012* (Cth).

34A. It says further that, for the limited purpose of the allegations in paragraphs 34B to 34D below it adopts the plaintiff's allegations as set out in paragraphs 23 to 25, 28 to 30, and 33 of the statement of claim, and says that in the circumstances alleged therein that if (which is denied) any group member is entitled to an order against it under section 180A(2) of the NCCP Act in the terms alleged in sub-paragraphs 34(a) to (g), then the group member is entitled to the same order against the relevant Dealer.

34B. In further answer to the claims made by the plaintiff on behalf of group members for relief under section 180A(2) of the NCCP Act, it says that:

- (a) the claims include:
 - (i) claims for economic loss made in an action for damages arising from a failure to take reasonable care or a breach of a duty of care;
 - (ii) claims for damages arising from a failure to take reasonable care; or
 - (iii) claims involving a liability for harm consisting of economic loss;

(the **NCCP Act Claims**);
- (b) the NCCP Act Claims are apportionable claims within the meaning of:
 - (i) section 34(1) of the *Civil Liability Act 2002* (NSW) (**NSW Act**);
 - (ii) sections 24AE and 24F(1) of the *Wrongs Act 1958* (Vic) (**Vic Act**);
 - (iii) section 28(1) of the *Civil Liability Act 2003* (Qld) (**Qld Act**);
 - (iv) section 43A(1) of the *Civil Liability Act 2002* (Tas) (**Tas Act**);
 - (v) sections 3(2) and 8(1) of the *Law Reform (Contributory Negligence and Apportionment of Liability) Act 2001* (SA) (**SA Act**);
 - (vi) section 5AI of the *Civil Liability Act 2002* (WA) (**WA Act**);
 - (vii) section 107B(2) of the *Civil Law (Wrongs) Act 2002* (ACT) (**ACT Act**);
 - (viii) section 4(2) of the *Proportionate Liability Act 2005* (NT) (**NT Act**).
- (c) if any alleged act or omission of it caused any of the alleged loss or damage that is the subject of the NCCP Act Claims (which is denied) then, on the grounds referred to in paragraph 34A above, Dealers are concurrent wrongdoers or wrongdoers in relation to the NCCP Act Claims within the meaning of:
 - (i) section 34(2) of the NSW Act;

- (ii) section 24H of the Vic Act;
- (iii) section 30 of the Qld Act;
- (iv) section 43A(2) of the Tas Act;
- (v) sections 3(2) and 8(1) of the SA Act;
- (vi) section 5AI of the WA Act;
- (vii) section 107D of the ACT Act;
- (viii) section 6 of the NT Act.

34C. In the premises, if, which is denied, it is liable to any group member in respect of the NCCP Act Claims, then:

- (a) for the purposes of the NSW Act, Vic Act, Tas Act, WA Act, ACT Act, and NT Act, Dealers are persons who are one of two or more persons whose acts or omissions caused, independently of each other or jointly, the damage as aforesaid;
- (b) for the purposes of the Qld Act, Dealers are persons who are one of two or more persons whose acts or omissions caused, independently of each other, the damage as aforesaid;
- (c) for the purposes of the SA Act, Dealers were one of two or more wrongdoers, not acting jointly, who committed wrongdoing from which the group members' alleged harm arose;

34D. In the premises, if, which is denied, it is liable to any group member in respect of the NCCP Act Claims then, pursuant to:

- (a) section 35 of the NSW Act;
- (b) section 24AI of the Vic Act;
- (c) section 31 of the Qld Act;
- (d) section 43B of the Tas Act;
- (e) section 8 of the SA Act;
- (f) section 5AK of the WA Act;
- (g) section 107F of the ACT Act;

(h) section 13 of the NT Act,

such liability is limited to an amount reflecting that proportion or percentage of the loss and damage the subject of the NCCP Act Claims that the Court considers just, just and equitable or fair and equitable (as applicable under the legislation referred to in subparagraphs (a) to (g) above) having regard to the extent of its responsibility (if any) for that loss and damage, and judgment must not be given against it for more than that amount.

35. To paragraph 35:

- (a) it refers to and repeats paragraphs 10, 11 and 12 above;
- (b) it says that if, which is not admitted, the plaintiff or group members held the expectation alleged, the expectation was not reasonably held or, alternatively, not one which it was required to satisfy or correct;
- (c) it denies the allegations in paragraph 35.

36. It refers to and repeats paragraph 35 above and denies the allegations in paragraph 36.

37. It refers to and repeats paragraph 36 above and denies the allegations in paragraph 37.

38. To paragraph 38:

- (a) it denies that the provision of credit by it involved conduct in relation to financial services within the meaning of sub-sections 1041H(1) and 1041H(2) of the Corporations Act;
- (b) it does not admit that when it entered into a credit facility with a customer during the relevant period who was introduced to it by a Dealer, the entry into that agreement involved conduct in trade or commerce in relation to financial services within the meaning of section 12DA(1) of the ASIC Act, and denies that it engaged in any conduct in contravention of the ASIC Act;
- (c) it otherwise denies the allegations in paragraph 38.

39. It refers to and repeats paragraphs 36 to 38 above and denies the allegations in paragraph 39.

40. To paragraph 40:

- (a) it admits that after it accepted the customer's application to enter into a credit facility, the customer became liable to pay interest at the rate and for the term set out in the agreement;
- (b) it refers to and repeats paragraphs 23 and 39 above;
- (c) it denies the allegations in paragraph 40.

41. To paragraph 41:

- (a) it refers to and repeats paragraph 40 above and denies the allegations in paragraph 41;
- (b) it says further that insofar as the claims of group members for relief under section 1041I of the Corporations Act or section 12GF of the ASIC Act relate to credit facilities entered into with it before 21 August 2014, those claims are statute barred, and it refers to:
 - (i) section 1317K of the Corporations Act;
 - (ii) section 12GF(2) of the ASIC Act.

41A. It says further that, for the limited purpose of the allegations in paragraphs 41B to 41G below, it adopts the plaintiff's allegations in paragraphs 8, 10, 11 and 12 of the statement of claim, and says that in the circumstances alleged therein that if (which is denied) any group member is entitled to an order against it under section 1041I of the Corporations Act or section 12GF of the ASIC Act, then the group member is entitled to the same order against the relevant Dealer.

41B. In further answer to the claims made by the plaintiff on behalf of group members for relief under 1041I of the Corporations Act for a contravention by it of section 1041H of the Corporations Act, it says that:

- (a) the claims include claims for economic loss made in an action for damages arising from alleged contraventions of section 1041H of the Corporations Act (which contraventions are denied) (the **Corporations Act Claims**);
- (b) the Corporations Act Claims are apportionable claims within the meaning of sub-sections 1041L(1) and (4) of the Corporations Act, to which Part 7.10, Division 2A of that Act applies;

- (c) if any alleged act or omission of it caused any of the alleged loss or damage that is the subject of the Corporations Act Claims (which is denied), then, on the grounds referred to in paragraph 41A above, Dealers are concurrent wrongdoers in relation to the Corporations Act Claims within the meaning of sub-section 1041L(3) of the Corporations Act.
- 41C. In the premises, if, which is denied, it is liable to any group members in respect of the Corporations Act Claims, then Dealers are persons who are one of two or more persons whose acts or omissions caused, independently of each other or jointly, the damage and/or loss as aforesaid.
- 41D. In the premises, if, which is denied, it is liable to any group member in respect of the Corporations Act Claims, then, pursuant to section 1041N of the Corporations Act, such liability is limited to an amount reflecting that proportion of the loss and damage the subject of the Corporations Act Claims that the Court considers just having regard to the extent of its responsibility (if any) for that loss and damage, and judgment must not be given against it for more than that amount.
- 41E. In further answer to the claims made by the plaintiff on behalf of group members for relief under section 12GF of the ASIC Act for a contravention by it of section 12DA(1) of the ASIC Act, it says that:
- (a) the claims include claims for economic loss made in an action for damages arising from alleged contraventions of section 12DA of the ASIC Act (which contraventions are denied) (the **ASIC Act Claims**);
 - (b) the ASIC Act Claims are apportionable claims within the meaning of sub-sections 12GP(1) and (4) of the ASIC Act;
 - (c) if any alleged act or omission of it caused any of the alleged loss or damage that is the subject of the ASIC Act (which is denied), then, on the grounds referred to in paragraph 41A above, Dealers are concurrent wrongdoers in relation to the ASIC Act Claims within the meaning of sub-section 12GP(3) of the ASIC Act.
- 41F. In the premises, if, which is denied, it is liable to any group members in respect of the ASIC Act Claims, then Dealers are persons who are one of two or more persons whose acts or omissions caused, independently of each other or jointly, the damage and/or loss as aforesaid.

41G. In the premises, if, which is denied, it is liable to any group member in respect of the ASIC Act Claims, then, pursuant to section 12GR of the ASIC Act, such liability is limited to an amount reflecting that proportion of the loss and damage the subject of the ASIC Act Claims that the Court considers just having regard to the extent of its responsibility (if any) for that loss and damage, and judgment must not be given against it for more than that amount.

42. To paragraph 42:

- (a) it refers to and repeats paragraphs 12 and 35 above;
- (b) it says that:
 - (i) it was not obliged to inform the plaintiff and/or group members of any of the matters alleged in paragraph 42;
 - (ii) save for his own circumstances, the plaintiff does not know and cannot say what group members were informed of by Dealers in relation to the matters alleged in paragraph 42;
 - (iii) the facts alleged in sub-paragraph 42(d) are not facts which it or any Dealer could inform the plaintiff or any group member of, as each of the matters alleged are legal conclusions drawn from facts;
- (c) it denies the allegations in paragraph 42.

43. To paragraph 43:

- (a) it refers to and repeats paragraph 42 above;
- (b) it says that:
 - (i) the plaintiff does not know and cannot say what group members were informed of by Dealers in relation to the matters alleged in paragraph 42 of the statement of claim;
 - (ii) the plaintiff does not know and cannot say whether such matters as alleged in paragraph 42 of the statement of claim would have been relevant to the decision of a group member to proceed with entry into an agreement with it for the provision of a credit facility;
 - (iii) in any event, it denies that any failure by it to provide such information was relevant to a decision of a group member as alleged, and says that

it required Dealers to provide such information to customers as required by law;

(c) it otherwise denies the allegations in paragraph 43.

44. To paragraph 44:

(a) it refers to and repeats paragraphs 42 and 43 above;

(b) it denies the allegations in paragraph 44.

45. To paragraph 45:

(a) it refers to and repeats paragraphs 10, 11, 23, 34 and 44 above;

(b) it says that:

(i) insofar as any group member held a belief alleged in sub-paragraphs 44(d) to (i) of the statement of claim, that belief was not induced by it;

(ii) it says that the matters alleged in paragraph 44 do not involve any mistake or misunderstanding as to any term, or any fundamental term, of the contract;

(c) it denies the allegations in paragraph 45.

46. It refers to and repeats paragraphs 44 and 45 above, and denies the allegations in paragraph 46.

47. It denies the allegations in paragraph 47.

48. To paragraph 48:

(a) it denies the allegations in paragraph 48;

(b) it says further that:

(i) in relation to the claims of unilateral mistake by group members in connection with any credit facility entered into with it:

(A) before 21 August 2014 in Victoria, New South Wales, Western Australia, Queensland, South Australia, Tasmania or the Australian Capital Territory, those claims are statute barred, by reason of:

1. section 5(1) of the *Limitation of Actions Act 1958* (Vic);

2. section 13(1) of the *Limitation Act 2005* (WA);
 3. section 14(1) of the *Limitation Act 1969* (NSW);
 4. section 10(1) of the *Limitation of Actions Act 1974* (Qld);
 5. section 35(a) of the *Limitation of Actions Act 1936* (SA);
 6. section 4(1) of the *Limitation Act 1974* (Tas);
 7. section 11(1) of the *Limitation Action 1985* (ACT);
- (B) in the Northern Territory, those claims are statute barred, by reason of section 12(1) of the *Limitation Act 1981* (NT);
- (ii) if the group members are entitled to relief of the kind sought in paragraph 48 of the statement of claim (which is denied) such relief should:
- (A) in the discretion of the Court, be refused having regard to all the circumstances including that:
1. it cannot be restored to the position in which it was before the entry into the credit facility with the group member;
 2. the group members have affirmed the terms of the credit facilities entered into with them;
 3. the first defendant is entitled to rely upon the equitable doctrine of laches due to the group members' delay;
- (B) be on terms, requiring the group members to restore to it, and/or to the second defendant as the case may be, the value of the benefit received by the group members from their use of the credit provided under each credit facility;
- (C) not be made without the knowledge and consent of each group member.

49. To paragraph 49:

- (a) it refers to and repeats paragraphs 42 to 48 above;
- (b) it says that:
 - (i) interest paid by group members was pursuant to a valid contract;

- (ii) no claim is available to group members in money had and received while there is a valid and subsisting contract in relation to the credit facility entered into with the group member;
- (iii) no claim is available to group members in money had and received for contracts in relation to credit facilities which have been fully performed;
- (iv) it (and the second defendant) gave good consideration for the interest paid by group members, and group members are not entitled to repayment of any interest paid by them;
- (v) it changed its position, on the faith of the receipt of the application for a credit facility, and the acknowledgements, declarations and promises of the group member set out therein, by entering into an agreement to provide the group member with credit to finance the purchase of a motor vehicle and:
 - (A) transferring money to the Dealer in respect of the group member's purchase of the motor vehicle;
 - (B) assuming and carrying the risk associated with any failure by a group member to repay principal and interest owing in respect of the credit facility provided to each group member;
 - (C) incurred capital and provisioning costs in connection with the credit facilities provided to each group member;
 - (D) entered into, and then completed, the agreement with the ~~first~~ second defendant referred in paragraph 5 above;

and the claims of the group members should, accordingly, be refused entirely or reduced by the extent of the detriment suffered by it;

- (c) it otherwise denies the allegations in paragraph 49.

50. It refers to and repeats paragraph 49 above, and denies the allegations in paragraph 50.

50A. It says further that, for the limited purpose of the allegations in paragraphs 50B to 50D below it adopts the plaintiff's allegations as set out in paragraphs 23, 42 to 44 of the statement of claim, and says that in the circumstances alleged therein that if (which is denied) any group member is entitled to an order against it in the terms alleged at

paragraphs 48 to 50, then the group member is entitled to the same order against the relevant Dealer.

50B. In further answer to the claims made by the plaintiff on behalf of group members for relief in the terms alleged at paragraphs 48 to 50, it says that:

- (a) the claims include:
 - (i) claims for economic loss made in an action for damages arising from a failure to take reasonable care or a breach of a duty of care;
 - (ii) claims for damages arising from a failure to take reasonable care; or
 - (iii) claims involving a liability for harm consisting of economic loss;
 (the **Mistake Claims**);
- (b) the Mistake Claims are apportionable claims within the meaning of:
 - (i) section 34(1) of the NSW Act;
 - (ii) sections 24AE and 24AF(1) of the Vic Act;
 - (iii) section 28(1) of the Qld Act;
 - (iv) section 43A(1) of the Tas Act;
 - (v) sections 3(2) and 8(1) of the SA Act;
 - (vi) section 5AI of the WA Act;
 - (vii) section 107B(2) of the ACT Act;
 - (viii) section 4(2) of the NT Act.
- (c) if any alleged act or omission of it caused any of the alleged loss or damage that is the subject of the Mistake Claims (which is denied) then, on the grounds referred to in paragraph 50A above, Dealers are concurrent wrongdoers or wrongdoers in relation to the Mistake Claims within the meaning of:
 - (i) section 34(2) of the NSW Act;
 - (ii) section 24AH of the Vic Act;
 - (iii) section 30 of the Qld Act;
 - (iv) section 43A(2) of the Tas Act;

- (v) sections 3(2) and 8(1) of the SA Act;
- (vi) section 5AI of the WA Act;
- (vii) section 107D of the ACT Act;
- (viii) section 6 of the NT Act.

50C. In the premises, if, which is denied, it is liable to any group member in respect of the Mistake Claims, then:

- (a) for the purposes of the NSW Act, Vic Act, Tas Act, WA Act, ACT Act, and NT Act, Dealers are persons who are one of two or more persons whose acts or omissions caused, independently of each other or jointly, the damage as aforesaid;
- (b) for the purposes of the Qld Act, Dealers are persons who are one of two or more persons whose acts or omissions caused, independently of each other, the damage as aforesaid;
- (c) for the purposes of the SA Act, Dealers were one of two or more wrongdoers, not acting jointly, who committed wrongdoing from which the group members' alleged harm arose;

50D. In the premises, if, which is denied, it is liable to any group member in respect of the Mistake Claims then, pursuant to:

- (a) section 35 of the NSW Act;
- (b) section 24AI of the Vic Act;
- (c) section 31 of the Qld Act;
- (d) section 43B of the Tas Act;
- (e) section 8 of the SA Act;
- (f) section 5AK of the WA Act;
- (g) section 107F of the ACT Act;
- (h) section 13 of the NT Act,

such liability is limited to an amount reflecting that proportion or percentage of the loss and damage the subject of the Mistake Claims that the Court considers just, just and equitable or fair and equitable (as applicable under the legislation referred to in sub-

paragraphs (a) to (g) above) having regard to the extent of its responsibility (if any) for that loss and damage, and judgment must not be given against it for more than that amount.

51. It admits that the plaintiff is and was a natural person, and otherwise does not admit the allegations in paragraph 51.

52. To paragraph 52:

- (a) it admits that on about ~~17 September~~ 20 October 2014, the plaintiff entered into a contract of sale with ~~Cars of Melbourne~~ Heartland Motors Pty Ltd trading as Heartland Holden Penrith of 2166 Castlereagh Rd, Penrith, New South Wales ~~1109 Sydney Road, Coburg North, Victoria~~ (~~Cars of Melbourne~~ **Heartland Holden Penrith**) for the acquisition of a Holden Commodore SV6 SS-V VE II Utility Sedan automobile with ~~Victorian~~ New South Wales registration number BY97DG 1CX 7JV (Holden), for which he paid a cash deposit of \$300;
- (b) it says that the purchase price of the Holden was \$26,620, not \$26,420 ~~\$20,690~~, for which he paid a cash deposit of \$200;
- (c) it otherwise does not admit the allegations in paragraph 52.

53. To paragraph 53:

- (a) it admits that:
 - (i) on about ~~17 September~~ 20 October 2014, the plaintiff made an application to it for a credit facility in the sum of \$29,073.89 ~~\$21,818.00~~, and that it agreed to accept the plaintiff's offer (~~Crawford~~ **O'Brien Loan**);
 - (ii) the purpose of the plaintiff's application for the ~~Crawford~~ O'Brien Loan was to assist the plaintiff to acquire the Holden;
 - (iii) the applicable annual percentage rate of interest stated on the loan contract for the ~~Crawford~~ O'Brien Loan was 14.950712.3800%, the loan term was 84 ~~60~~ months, and the plaintiff was entitled to apply to it during the life of the ~~Crawford~~ O'Brien Loan to reduce the loan term;
 - (iv) ~~Cars of Melbourne~~ Heartland Holden Penrith assisted the plaintiff in making an application for the ~~Crawford~~ O'Brien Loan, including by

obtaining from Mr ~~Crawford~~ O'Brien information about his personal and financial circumstances and conveying that information to it, and it refers to and repeats paragraph 15 above;

(b) it otherwise denies the allegations in paragraph 53.

54. It admits that the ~~Crawford~~ O'Brien Loan was novated to the second defendant, but otherwise does not admit the allegations in paragraph 54.

55. To paragraph 55:

(a) it admits that at the time of the ~~Crawford~~ O'Brien Loan it had a Dealer Arrangement with ~~Cars of Melbourne~~ Heartland Holden Penrith comprising, at least, a Dealer's Agreement (Composite) and a Business Partnership and Dealer Arrangement;

Particulars

The Dealer's Agreement (Composite) is dated 28 June 2001 and was amended by agreement dated 15 August 2008. The Business Partnership and Dealer Arrangement is dated 15 November 2010.

(b) it otherwise denies the allegations in paragraph 55.

56. To paragraph 56:

(a) it refers to and repeats paragraphs 7 and 55 above;

(b) it says that the Dealer Arrangement with ~~Cars of Melbourne~~ Heartland Holden Penrith contained the terms and conditions set out therein, the full terms and effect of which it will rely on at trial;

(c) it otherwise denies the allegations in paragraph 56.

57. It refers to and repeats paragraph 8 above and denies the allegations in paragraph 57.

58. It refers to and repeats paragraph 9 above and denies the allegations in paragraph 58.

59. To paragraph 59:

(a) it refers to and repeats paragraphs 10, 55 and 56 above;

(b) it says that the relevant commission plan between it and ~~Cars of Melbourne~~ Heartland Holden Penrith is contained in the document styled "Business

Partnership and Dealer Arrangement" dated ~~6 February 2014~~ 15 November 2010;

- (c) it otherwise denies the allegations in paragraph 59.
60. To paragraph 60:
- (a) it refers to and repeats sub-paragraphs 53(a)(iii) and (iv) above;
 - (b) it otherwise denies the allegations therein.
61. To paragraph 61:
- (a) it admits that it did not inform the plaintiff that ~~Cars of Melbourne~~ Heartland Holden Penrith was permitted by it to nominate to the plaintiff a 'writing rate' (being a proposed rate of interest to apply to the putative ~~Crawford O'Brien~~ Loan), and that it had provided details of the base rate and cap rate to ~~Cars of Melbourne~~ Heartland Holden Penrith in respect of the plaintiff's loan application;
 - (b) subject to sub-paragraph (c)(iv) below, it does not admit the allegations in paragraph 61 insofar as they concern what ~~Cars of Melbourne~~ Heartland Holden Penrith said or did not say, or disclosed or did not disclose, to the plaintiff;
 - (c) it says that:
 - (i) the plaintiff was provided with information about the credit facility that he was applying to enter into, including the amount of credit requested by him, the applicable annual percentage interest rate, the total amount of interest to be paid over the term of the facility, the total amount of repayments to be made over the term of the facility, the amount of each repayment, and any applicable fees and charges;
 - (ii) the relevant loan contract forming part of the ~~Crawford O'Brien~~ Loan required the plaintiff to agree, and confirm and declare, which the plaintiff did, that:
 - (A) the information that was provided by the plaintiff was true and correct;
 - (B) the plaintiff had the financial capacity to meet the commitments being entered into under the proposed transaction;

- (C) the plaintiff understood that a commission may be paid to the Dealer for the introduction of him to ANZ;
 - (D) the plaintiff had received a copy of ANZ's loan terms and conditions and that they formed part of his offer to enter into the credit facility;
- (iii) the relevant loan contract also:
- (A) warned the plaintiff not to sign the contract documents if there was anything the plaintiff did not understand;
 - (B) informed the plaintiff that he could withdraw his offer to enter into the credit facility at any time before the offer was accepted by ANZ;
- (iv) prior to the plaintiff's application being submitted and finalised, the plaintiff was provided, for his review, ~~the~~ agreement and where applicable signing, copies of documents including its NCC Loan Terms and Conditions ~~credit guide~~, the completed application, the loan contract, ~~and~~ an "Esanda Representative – Applicant Statement (NCCP)", and a declaration and privacy consent form ~~which the plaintiff received and where applicable signed~~;
- (v) the plaintiff was at all times entitled to:
- (A) obtain an initial, obligation-free, quote for a credit facility with it, which would provide an indication of, among other things, repayment amounts over the term of the facility;
 - (B) compare any initial quote or terms of the proposed credit facility application with other quotes or credit facility terms obtained by the plaintiff from other credit providers or other sources;
 - (C) in discussion with ~~Cars of Melbourne~~ Heartland Holden Penrith, seek a lower rate than the first writing rate stated by ~~Cars of Melbourne~~ Heartland Holden Penrith;
 - (D) reject the terms of the proposed ~~Crawford~~ O'Brien Loan;

- (E) not proceed with the purchase of the Holden from ~~Cars of Melbourne~~ Heartland Holden Penrith;
 - (vi) 'flex commission' arrangements were used by numerous credit providers in the automobile industry at the time the plaintiff entered into the ~~Crawford~~ O'Brien Loan;
 - (vii) it was not obliged to ensure disclosure by ~~Cars of Melbourne~~ Heartland Holden Penrith of the matters alleged in sub-paragraph 61(b) of the statement of claim, and it was not obliged to have systems, processes and procedures in place to ensure such disclosure;
 - (viii) the allegations in sub-paragraphs 61(d) and (e) that the plaintiff was in a "comparatively weaker position" and "not treated equally" are vague and embarrassing;
 - (d) it otherwise denies the allegations in paragraph 61.
62. It admits the allegations in paragraph 62.
63. To paragraph 63:
- (a) insofar as the ~~Crawford~~ O'Brien Loan was not wholly or predominantly for personal, domestic or household purposes, it was not a credit contract within the meaning of section 4 of the *Credit Code* or section 5 of the NCCP Act;
 - (b) it otherwise admits the allegations in paragraph 63.
64. To paragraph 64:
- (a) it admits that ~~Cars of Melbourne~~ Heartland Holden Penrith:
 - (i) dealt directly with the plaintiff in connection with his purchase of the Holden and the ~~Crawford~~ O'Brien Loan;
 - (ii) obtained and provided to it personal and financial information from the plaintiff to assist in his application for the ~~Crawford~~ O'Brien Loan;
 - (b) it does not admit the allegation in sub-paragraph 64(b)(i);
 - (c) it says that ~~Cars of Melbourne~~ Heartland Holden Penrith:

- (i) was not acting as the plaintiff's agent during the process of obtaining and providing information to it about the plaintiff, his application for the Crawford O'Brien Loan, and his purchase of the Holden;
 - (ii) was not acting as its agent in that process with the plaintiff, save for the limited purposes specified in the Dealer Arrangement with ~~Cars of Melbourne~~ Heartland Holden Penrith;
 - (d) it otherwise denies the allegations therein.
65. To paragraph 65:
- (a) it refers to and repeats paragraphs 63 and 64 above;
 - (b) it admits that ~~Cars of Melbourne~~ Heartland Holden Penrith provided credit assistance to the plaintiff within the meaning of sections 7(a) and 8 of the NCCP Act when providing the plaintiff with Dealer Assistance in relation to the plaintiff's application for the ~~Crawford O'Brien~~ O'Brien Loan;
 - (c) it otherwise denies the allegations therein.
66. It admits that ~~Cars of Melbourne~~ Heartland Holden Penrith carried on business in ~~Victoria~~ New South Wales at the time of the ~~Crawford O'Brien~~ O'Brien Loan, and therefore admits the allegations in paragraph 66.
67. To paragraph 67:
- (a) it refers to and repeats paragraph 66 above;
 - (b) it therefore admits that ~~Cars of Melbourne~~ Heartland Holden Penrith carried on business at the time of the ~~Crawford O'Brien~~ O'Brien Loan in this jurisdiction, as defined in section 21 of the NCCP Act;
 - (c) it otherwise does not admit the allegations in paragraph 67.
68. To paragraph 68:
- (a) it admits that ~~Cars of Melbourne~~ Heartland Holden Penrith acted as an intermediary between it and the plaintiff when providing the plaintiff with Dealer Assistance in relation to the plaintiff's application for the ~~Crawford O'Brien~~ O'Brien Loan;
 - (b) it otherwise denies the allegations in paragraph 68.

69. To paragraph 69:

- (a) it refers to and repeats paragraph 68 above;
- (b) it admits the allegations in paragraph 69 insofar as they relate to Dealer Assistance provided to the plaintiff in relation to the plaintiff's application for the ~~Crawford~~ O'Brien Loan, and insofar as the ~~Crawford~~ O'Brien Loan was wholly or predominantly for personal domestic or household use;
- (c) it otherwise denies the allegations in paragraph 69.

70. To paragraph 70:

- (a) it refers to and repeats paragraphs 65 to 69 above;
- (b) it admits the allegations in paragraph 69 insofar as they relate to the Dealer Assistance provided to the plaintiff in relation to the plaintiff's application for the ~~Crawford~~ O'Brien Loan, and insofar as the ~~Crawford~~ O'Brien Loan was wholly or predominantly for personal domestic or household use;
- (c) it otherwise denies the allegations in paragraph 69.

71. To paragraph 71:

- (a) it refers to and repeats paragraph 61 above;
- (b) as to sub-paragraph 71(a), it denies that the plaintiff was at a special disadvantage in dealing with ~~Cars of Melbourne~~ Heartland Holden Penrith in relation to the ~~Crawford~~ O'Brien Loan, and it refers to and repeats sub-paragraph 22(b)(i) above;
- (c) as to sub-paragraph 71(b), it says that:
 - (i) if the plaintiff considered himself unable to obtain a credit facility with another credit provider, then it was not responsible for the plaintiff holding that view;
 - (ii) it denies that the plaintiff would not have been able to obtain a credit facility with another credit provider for the purchase of a motor vehicle;
- (d) as to the allegations in sub-paragraph 71(d), while it was willing to enter into the ~~Crawford~~ O'Brien Loan with the plaintiff on the terms set out in therein (and in conformity with its obligations at general law and under statute), and it was

involved in setting the terms on which it was prepared to agree to provide credit to the plaintiff for his use in purchasing the Holden, the terms entered into were not imposed by it on the plaintiff, involved the plaintiff identifying his preferred loan term, repayment frequency (fortnightly), whether repayments would be made in advance or arrears, and the method for repayment (direct debit), and that the interest payable was capable of negotiation and, if not agreed to by the plaintiff, could be rejected by him;

- (e) as to the allegations in sub-paragraph 71(e), it refers to and repeats sub-paragraph 22(b)(iv) above;
 - (f) it otherwise denies the allegations in paragraph 71.
72. It refers to and repeats paragraph 71 and denies the allegations in paragraph 72.
73. Save that it admits that after it accepted the plaintiff's application to enter into the ~~Crawford~~ O'Brien Loan and the plaintiff became liable to pay interest at the rate and for the term set out in the agreement, and following the novation of the ~~Crawford~~ O'Brien Loan to the second defendant the plaintiff became liable to pay interest at the rate and for the term set out in that agreement, it refers to and repeats paragraph 72 above and denies the allegations in paragraph 73.
74. It refers to and repeats paragraphs 71 to 73 above and denies the allegations in paragraph 74.
75. As to paragraph 75:
- (a) It refers to and repeats paragraphs 8, 52, 56, 61, 64, 65, 68, and 70 above admits that in the circumstances there set out, in relation to the ~~Crawford~~ O'Brien Loan, ~~Cars of Melbourne~~ Heartland Holden Penrith acted on behalf of it as a holder of an Australian credit licence;
 - (b) it otherwise denies the allegations therein.
76. To paragraph 76:
- (a) it refers to and repeats paragraph 75 above;
 - (b) it says that ~~Cars of Melbourne~~ Heartland Holden Penrith was its representative within the meaning of section 5 of the NCCP Act for the limited purpose of

obtaining and providing to it information from the plaintiff in support of the plaintiff's application for a credit facility with it;

(c) it otherwise denies the allegations in paragraph 76.

77. It refers to and repeats paragraph 70 above and denies the allegations in paragraph 77.

78. Save that it says that what conduct the plaintiff could reasonably be expected to rely on is a question of fact and degree in light of all the circumstances, including the personal circumstances of the plaintiff, and that it refers to and repeats paragraph 72 above, it denies the allegations in paragraph 78.

79. It refers to and repeats paragraph 78 above and denies the allegations in paragraph 79.

80. To paragraph 80:

(a) it refers to and repeats paragraphs 77 to 79 above;

(b) it denies that ~~Cars of Melbourne~~ Heartland Holden Penrith engaged in conduct in contravention of section 180A(1) of the NCCP Act or that, if there was such conduct, it was responsible for it within the meaning of sections 74 and 77 of the NCCP Act;

(c) it otherwise denies the allegations in paragraph 80.

81. It denies the allegations in paragraph 81.

82. It denies the allegations in paragraph 82.

83. It denies the allegations in paragraph 83.

83A. It says further that, for the limited purpose of the allegations in paragraphs 83B to 83D below it adopts the plaintiff's allegations as set out in paragraphs 72 to 74, 77 to 79, and 82 of the statement of claim, and says that in the circumstances alleged therein that if (which is denied) the plaintiff is entitled to an order against it under section 180A(2) of the NCCP Act in the terms alleged in sub-paragraphs 83(a) to (g), then the plaintiff is entitled to the same order against Heartland Holden Penrith.

83B. In further answer to the claims made by the plaintiff for relief under section 180A(2) of the NCCP Act, it says that:

(a) the claims include a claim for economic loss made in an action for damages arising from a failure to take reasonable care (the **O'Brien NCCP Act Claim**);

- (b) the O'Brien NCCP Act Claim is an apportionable claim within the meaning of section 34(1) of the NSW Act;
- (c) if any alleged act or omission of it caused the alleged loss or damage that is the subject of the O'Brien NCCP Act Claim (which is denied) then, on the grounds referred to in paragraph 83A above, Heartland Holden Penrith is a concurrent wrongdoer in relation to the O'Brien NCCP Act Claim within the meaning of section 34(2) of the NSW Act.

83C. In the premises, if, which is denied, it is liable to the plaintiff in respect of the O'Brien NCCP Act Claim, then Heartland Holden Penrith is a person who is one of two or more persons whose acts or omissions caused, independently of each other or jointly, the damage as aforesaid.

83D. In the premises, if, which is denied, it is liable to the plaintiff in respect of the O'Brien NCCP Act Claim, then, pursuant to section 35 of the NSW Act, such liability is limited to an amount reflecting that proportion or percentage of the loss and damage the subject of the O'Brien NCCP Act Claim that the Court considers just having regard to the extent of its responsibility (if any) for that loss and damage, and judgment must not be given against it for more than that amount.

84. To paragraph 84:

- (a) it refers to and repeats paragraphs 59, 60 and 61 above;
- (b) it says that if, which is not admitted, the plaintiff held the expectation alleged, the expectation was not reasonably held or, alternatively, not one which it was required to satisfy or correct;
- (c) it denies the allegations in paragraph 84.

85. It refers to and repeats paragraph 84 and denies the allegations in paragraph 85.

86. It refers to and repeats paragraph 85 and denies the allegations in paragraph 86.

87. To paragraph 87:

- (a) it denies that the provision of credit by it to the plaintiff involved conduct in relation to financial services within the meaning of sub-sections 1041H(1) and 1041H(2) of the Corporations Act;

- (b) it does not admit that when it entered into the ~~Crawford~~ O'Brien Loan with the plaintiff, the entry into that agreement involved conduct in trade or commerce in relation to financial services within the meaning of section 12DA(1) of the ASIC Act, but it denies that it engaged in any conduct in contravention of the ASIC Act;
 - (c) it otherwise denies the allegations in paragraph 87.
88. It refers to and repeats paragraphs 85 to 87 above and denies the allegations in paragraph 88.
89. To paragraph 89:
- (a) It admits that after it accepted the plaintiff's application to enter into the ~~Crawford~~ O'Brien Loan the plaintiff became liable to pay interest at the rate and for the term set out in the agreement;
 - (b) it refers to and repeats paragraphs 72 and 88 above;
 - (c) it denies the allegations in paragraph 89.
90. It refers to and repeats paragraph 89 above and denies the allegations in paragraph 90.
- 90A. It says further that, for the limited purpose of the allegations in paragraphs 90B to 90G below, it adopts the plaintiff's allegations in paragraphs 57, 59, 60 and 61 of the statement of claim, and says that in the circumstances alleged therein that if (which is denied) the plaintiff is entitled to an order against it under section 1041I of the Corporations Act or section 12GF of the ASIC Act, then the plaintiff is entitled to the same order against ~~Cars of Melbourne~~ Heartland Holden Penrith.
- 90B. In further answer to the claims made by the plaintiff for relief under section 1041I of the Corporations Act for a contravention by it of section 1041H of the Corporations Act, it says that:
- (a) the claims include a claim for economic loss made in an action for damages arising from alleged contraventions of section 1041H of the Corporations Act (which contraventions are denied) (the ~~Crawford~~ O'Brien Corporations Act Claim);

- (b) the ~~Crawford~~ O'Brien Corporations Act Claims is an apportionable claim within the meaning of sub-sections 1041L(1) and (4) of the Corporations Act, to which Part 7.10, Division 2A of that Act applies;
 - (c) if any alleged act or omission of it caused any of the alleged loss or damage that is the subject of the ~~Crawford~~ O'Brien Corporations Act Claim (which is denied), then, on the grounds referred to in paragraph 90A above, ~~Cars of Melbourne~~ Heartland Holden Penrith is a concurrent wrongdoer in relation to the ~~Crawford~~ O'Brien Corporations Act Claim within the meaning of sub-section 1041L(3) of the Corporations Act.
- 90C. In the premises, if, which is denied, it is liable to the plaintiff in respect of the ~~Crawford~~ O'Brien Corporations Act Claim, then ~~Cars of Melbourne~~ Heartland Holden Penrith is a person who is one of two or more persons whose acts or omissions caused, independently of each other or jointly, the damage and/or loss as aforesaid.
- 90D. In the premises, if, which is denied, it is liable to the plaintiff in respect of the ~~Crawford~~ O'Brien Corporations Act Claim then, pursuant to section 1041N of the Corporations Act, such liability is limited to an amount reflecting that proportion of the loss and damage the subject of the ~~Crawford~~ O'Brien Corporations Act Claims that the Court considers just having regard to the extent of its responsibility (if any) for that loss and damage, and judgment must not be given against it for more than that amount.
- 90E. In further answer to the claims made by the plaintiff for relief under section 12GF of the ASIC Act for a contravention by it of section 12DA(1) of the ASIC Act, it says that:
- (a) the claims include a claim for economic loss made in an action for damages arising from alleged contraventions of section 12DA of the ASIC Act (which contraventions are denied) (the ~~Crawford~~ O'Brien ASIC Act Claim);
 - (b) the ~~Crawford~~ O'Brien ASIC Act Claim is an apportionable claim within the meaning of sub-sections 12GP(1) and (4) of the ASIC Act;
 - (c) if any alleged act or omission of it caused any of the alleged loss or damage that is the subject of the ASIC Act (which is denied), then, on the grounds referred to in paragraph 90A above, ~~Cars of Melbourne~~ Heartland Holden Penrith is a concurrent wrongdoer in relation to the ~~Crawford~~ O'Brien ASIC Act Claim within the meaning of sub-section 12GP(3) of the ASIC Act.

- 90F. In the premises, if, which is denied, it is liable to the plaintiff in respect of the ~~Crawford~~ O'Brien ASIC Act Claim, then ~~Cars of Melbourne Heartland Holden Penrith~~ is a person who is one of two or more persons whose acts or omissions caused, independently of each other or jointly, the damage and/or loss as aforesaid.
- 90G. In the premises, if, which is denied, it is liable to the plaintiff in respect of the ~~Crawford~~ O'Brien ASIC Act Claim, then, pursuant to section 12GR of the ASIC Act, such liability is limited to an amount reflecting that proportion of the loss and damage the subject of the ASIC Act Claim that the Court considers just having regard to the extent of its responsibility (if any) for that loss and damage, and judgment must not be given against it for more than that amount.
91. To paragraph 91:
- (a) it refers to and repeats paragraphs 61 and 84 above;
 - (b) it says that:
 - (i) it was not obliged to inform the plaintiff of any of the matters alleged in paragraph 91;
 - (ii) the facts alleged in sub-paragraph 91(d) are not facts which it or ~~Cars of Melbourne Heartland Holden Penrith~~ could inform the plaintiff of, as each of the matters alleged are legal conclusions drawn from facts;
 - (c) it denies the allegations in paragraph 91.
92. To paragraph 92:
- (a) it refers to and repeats paragraph 91 above;
 - (b) it does not admit whether the plaintiff did not know one or more of the matters alleged in paragraph 91 of the statement of claim;
 - (c) it otherwise denies the allegations in paragraph 91.
93. To paragraph 93:
- (a) it refers to and repeats paragraphs 91 and 92 above;
 - (b) it says that the rate of interest applicable to the ~~Crawford~~ O'Brien Loan at the time of entry into that agreement was ~~14.9507~~ 12.3800%;
 - (c) it otherwise denies the allegations in paragraph 93.

94. To paragraph 94:

- (a) it refers to and repeats paragraphs 10, 11, 60, 83 and 93 above;
- (b) it says that:
 - (i) insofar as the plaintiff held a belief alleged in paragraphs 93(d) to (i) of the statement of claim, that belief was not induced by it;
 - (ii) it says that the matters alleged in paragraph 93 do not involve any mistake or misunderstanding as to any term, or any fundamental term, of the contract;
- (c) it denies the allegations in paragraph 94.

95. It refers to and repeats paragraphs 93 and 94 above and denies the allegations in paragraph 95.

96. It denies the allegations in paragraph 96.

97. To paragraph 97:

- (a) it denies the allegations in paragraph 97;
- (b) it says that if the plaintiff is entitled to relief of the kind sought in paragraph 97 of the statement of claim (which is denied) such relief should:
 - (i) in the discretion of the Court, be refused having regard to all the circumstances including that:
 - (A) it cannot be restored to the position in which it was before the entry into the ~~Crawford~~ O'Brien Loan;
 - (B) the plaintiff affirmed the terms of the ~~Crawford~~ O'Brien Loan;
 - (C) the first defendant is entitled to rely upon the equitable doctrine of laches due to the plaintiff's delay;
 - (ii) be on terms, requiring the plaintiff to restore to it, and/or to the second defendant as the case may be, the value of the benefit received by the plaintiff from his use of the credit provided under the Crawford Loan.

98. To paragraph 98:

- (a) it refers to and repeats paragraphs 91 to 97 above;

(b) it says that:

- (i) interest paid by the plaintiff was pursuant to a valid contract;
- (ii) the ~~Crawford~~ O'Brien Loan has been fully performed and no claim is available to the plaintiff in money had and received in those circumstances;
- (iii) it (and the second defendant) gave good consideration for the interest paid by the plaintiff, and the plaintiff is not entitled to repayment of any interest paid by him;
- (iv) it changed its position, on the faith of the receipt of the application for a credit facility, and the acknowledgements, declarations and promises of the plaintiff set out therein, by entering into the ~~Crawford~~ O'Brien Loan to provide the plaintiff with credit to finance the purchase of the Holden and:
 - (A) transferring money to ~~Cars of Melbourne~~ Heartland Holden Penrith in respect of the plaintiff's purchase of the motor vehicle;
 - (B) assuming and carrying the risk associated with any failure by the plaintiff to repay principal and interest owing in respect of the credit facility provided to him;
 - (C) incurred capital and provisioning costs in connection with the credit facilities provided to the plaintiff;
 - (D) entered into, and then completed, the agreement with the first defendant referred in paragraph 5 above;

and the claims of the plaintiff should, accordingly, be refused entirely or reduced by the extent of the detriment suffered by it;

(c) it otherwise denies the allegations in paragraph 98.

99. It refers to and repeats paragraph 98 and denies the allegations in paragraph 99.

99A. It says further that, for the limited purpose of the allegations in paragraphs 99B to 99D below it adopts the plaintiff's allegations as set out in paragraphs 72, 91 to 95 of the statement of claim, and says that in the circumstances alleged therein that if (which is denied) the plaintiff is entitled to an order against it in the terms alleged at paragraphs

97 to 99, then the plaintiff is entitled to the same order against Heartland Holden Penrith.

99B. In further answer to the claims made by the plaintiff for relief in the terms alleged at paragraphs 97 to 99, it says that:

- (a) the claims include a claim for economic loss made in an action for damages arising from a failure to take reasonable care (the **O'Brien Mistake Claim**);
- (b) the O'Brien Mistake Claim is an apportionable claim within the meaning of section 34(1) of the NSW Act;
- (c) if any alleged act or omission of it caused any of the alleged loss or damage that is the subject of the O'Brien Mistake Claim (which is denied) then, on the grounds referred to in paragraph 99A above, Heartland Holden Penrith is a concurrent wrongdoer in relation to the O'Brien Mistake Claim within the meaning of section 34(2) of the NSW Act.

99C. In the premises, if, which is denied, it is liable to the plaintiff in respect of the O'Brien Mistake Claim, then, for the purposes of the NSW Act, Heartland Holden Penrith is a person who is one of two or more persons whose acts or omissions caused, independently of each other or jointly, the damage as aforesaid.

99D. In the premises, if, which is denied, it is liable to the plaintiff in respect of the O'Brien Mistake Claim, then, pursuant to section 35 of the NSW Act, such liability is limited to an amount reflecting that proportion or percentage of the loss and damage the subject of the O'Brien Mistake Claim that the Court considers just, having regard to the extent of its responsibility (if any) for the loss and damage, and judgment must not be given against it for more than that amount.

100-125. It does not admit that the questions in paragraph 100 to 125 involve common issues of fact or law or that, insofar as those questions are common, that they are common to both the plaintiff and group members.

Dated: ~~24 December 2020~~ 6 September 2022

Michael Rush

Melanie Szydzik

Elizabeth Brumby

A handwritten signature in blue ink, reading "Herbert Smith Freehills", written over a dotted line.

Herbert Smith Freehills

Solicitors for the first defendant

SCHEDULE OF PARTIES

~~STEELE LEE CRAWFORD~~ DANIEL CHRISTIAN O'BRIEN

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~~