



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

No. S ECI 2020 03365

Case: S ECI 2020 03365
Filed on: 06/09/2022 07:05 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)

First Defendant

MACQUARIE BANK LIMITED (ACN 008 583 542)

Second Defendant

MACQUARIE LEASING PTY LTD (ACN 002 674 982)

Third Defendant

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

Date of Document:	6 September 2022	Solicitors Code: 420
Filed on behalf of:	Second Defendant	DX: 240 Melbourne
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PRELIMINARIES

- I. The terms defined by the Plaintiff in the Further Amended Statement of Claim (**SOC**) have the same meaning in this Defence, unless otherwise defined or indicated. The Second Defendant does not admit any factual assertions contained in or implied by the use of those defined terms. Headings are used for convenience only and do not form part of the Defence.

A INTRODUCTION

A.1 The Group Members

1. In answer to paragraph 1 of the SOC, the Second Defendant:
- (a) denies that the Plaintiff or the Group Members have suffered loss or damage arising out of the same, similar or related circumstances by reason of or because of the alleged conduct of the Defendants as pleaded in the SOC;
 - (b) denies that the Plaintiff or the Group Members are entitled to relief against the Second Defendant arising out of the same, similar or related circumstances;

- (c) in the premises of the Writ, the SOC and this Defence, denies that all of the “common questions of law or fact” set out in the SOC are substantial questions of law or fact common to the claims of the Plaintiff and Group Members;
 - (d) does not admit that a Flex Commission was paid to the Dealer in respect of each Car Loan;
 - (e) otherwise admits paragraph 1 of the SOC.
2. The Second Defendant does not know and therefore cannot admit paragraph 2 of the SOC.

A.2 The Defendants

3. The Second Defendant admits paragraph 3 of the SOC in relation to the allegations against it, and it otherwise does not know and therefore cannot admit paragraph 3 of the SOC.

B THE CLAIMS OF GROUP MEMBERS

B.1 Background

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

B.2.1 Arrangements between Dealers and ANZ

4. In answer to paragraph 4 of the SOC, the Second Defendant:
- (a) admits that for a period concluding on or about 2 November 2015, ANZ entered into agreements with Dealers to facilitate the provision of Car Loans to individuals (**Dealer Agreements**); and
 - (b) otherwise ~~does not know and therefore cannot admit~~denies paragraph 4 of the SOC.
5. In answer to paragraph 5 of the SOC, the Second Defendant:
- (a) admits that, on or around 8 October 2015, the Second Defendant agreed to acquire part of the Esanda Dealer finance business which included some but not all of the Car Loans (**Esanda Sale**);
 - (b) admits that, on or around 8 October 2015, the Second Defendant agreed to acquire from ANZ the Dealer Agreements with respect to the Car Loans the subject of the Esanda Sale;
 - (c) says that the Esanda Sale was concluded on the basis of good-faith and arm's-length negotiations between the Second Defendant and ANZ;
 - (d) says that it provided valuable consideration for the Esanda Sale;
 - (e) says that, at the time of completion of the Esanda Sale, the Second Defendant had no notice of the mistaken beliefs of the Plaintiff and Group Members alleged in paragraphs 44 and 93 of the SOC; and
 - (f) otherwise denies paragraph 5 of the SOC.
6. In answer to paragraph 6 of the SOC, the Second Defendant:

- (a) says that:
 - (i) on or about 2 November 2015, with respect to Car Loans originated prior to or on 2 November 2015; and
 - (ii) with respect to Car Loans entered into after 2 November 2015, on the date that each Car Loan was, respectively, originated,

(the **Applicable Assignment Date**)

ANZ agreed to sell and assign all of its right, title and interest in the Car Loans the subject of the Esanda Sale to the Second Defendant;

- (b) says that perfection of the Second Defendant's legal title to the Car Loans the subject of the Esanda Sale occurred in around May 2016 (**Perfection Date**); and
- (c) otherwise denies paragraph 6 of the SOC.

7. In answer to paragraph 7 of the SOC, the Second Defendant:

- (a) as to sub-paragraph (a), says that the Dealer Agreements:
 - (i) permitted, but did not oblige, Dealers to submit applications for finance from customers to ANZ; and
 - (ii) recorded an acknowledgement that if Dealers obtained any credit offer, they did so for the convenience of their customers and in the expectation that it would assist the Dealers' businesses;
- (b) as to sub-paragraph 7(b) of the SOC, says that the Dealer Agreements required Dealers:
 - (i) to comply with matters advised by ANZ to Dealers in order to ensure ANZ's customer identification procedures met the requirements of the *Anti-Money Laundering and Counter-Terrorism Financing Act 2006* (Cth);
 - (ii) to warrant that the information provided by customers in credit offers was true and correct insofar as Dealers were aware; and
 - (iii) to warrant that all credit offers were fit to become, upon acceptance by ANZ, enforceable contracts of credit and not adversely affected by any law;
- (c) relies upon the terms of the Dealer Agreements for their full force and effect; and
- (d) otherwise ~~does not know and therefore cannot admit~~denies paragraph 7 of the SOC.

8. In answer to paragraph 8 of the SOC, the Second Defendant:

- (a) refers to and repeats paragraph 7 of this Defence;
- (b) as to sub-paragraphs 8(a) to (d), says that:

- (i) the Dealer Agreements provided that Dealers who wished to submit an application for approval of a proposed credit offer and a customer's credit offer to ANZ were permitted to submit the application for approval of a proposed credit offer and credit offer (**Car Loan Offer**); and
 - (ii) any approval was conditional and subject to final acceptance by ANZ of a credit offer;
 - (c) as to sub-paragraph 8(e), admits that the Dealer Agreements required Dealers to provide customers with documentation that included:
 - (i) the form of an agreement to obtain a Car Loan from ANZ;
 - (ii) a document recording ANZ's loan terms and conditions;
 - (iii) a borrower's declaration as to certain matters; and
 - (iv) an information statement;
 - (d) as to sub-paragraph 8(g), says that if the customer wished to proceed with the Car Loan Offer, the customer signed the Car Loan Offer, and in so doing:
 - (i) acknowledged that ANZ may pay a commission to the Dealer for the introduction of the customer's credit business; and
 - (ii) acknowledged that the customer could withdraw from the offer at any time before ANZ accepted it;
 - (e) otherwise ~~does not know and therefore cannot admit~~denies the allegations in paragraph 8 of the SOC.
9. The Second Defendant does not know and therefore cannot admit the allegations in paragraph 9 of the SOC.
10. In answer to paragraph 10 of the SOC, the Second Defendant:
- (a) says that pursuant to the terms of the Dealer Agreements:
 - (i) the Dealer may be entitled to commission payments or may be required to make facilitation fee payments calculated in accordance with the terms of the agreement;
 - (ii) in respect of commissions payable to a Dealer, total commissions were calculated on a monthly basis in accordance with a formula, taking into account loans written at or above the base rate and loans written under the base rate;
 - (iii) in respect of facilitation fees payable by a Dealer, any facilitation fee payable by the Dealer was calculated on a monthly basis in accordance with a formula, taking into account loans written at or above the base rate and loans written under the base rate; and
 - (b) otherwise ~~does not know and therefore cannot admit~~denies paragraph 10 of the SOC.
11. In answer to paragraph 11 of the SOC, the Second Defendant:

- (a) refers to and repeats paragraphs 7 to 10 of this Defence; and
 - (b) otherwise denies paragraph 11 of the SOC.
12. In answer to paragraph 12 of the SOC, the Second Defendant:
- (a) refers to and repeats paragraphs 10 and 11 of this Defence; and
 - (b) otherwise does not know and therefore cannot admit paragraph 12 of the SOC.

B.2.2 The Dealers provided credit assistance to Group Members

13. The Second Defendant admits the allegations in paragraph 13 of the SOC.
14. In answer to paragraph 14 of the SOC, the Second Defendant:
- (a) says that Car Loans which were not wholly or predominantly for personal, domestic or household purposes were not credit contracts within the meaning of section 4 of the Credit Code and section 5 of the NCCPA; and
 - (b) otherwise admits the allegations in paragraph 14 of the SOC.
15. The Second Defendant refers to and repeats paragraph 7 of this Defence and denies does not know and therefore cannot admit paragraph 15 of the SOC.
16. In answer to paragraph 16 of the SOC, the Second Defendant:
- (a) refers to and repeats paragraph 15 of this Defence; and
 - (b) otherwise denies the allegations in paragraph 16 of the SOC.

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

17. The Second Defendant admits paragraph 17 of the SOC.
18. The Second Defendant admits paragraph 18 of the SOC.
19. In answer to paragraph 19 of the SOC, the Second Defendant:
- (a) admits that during the relevant period, Dealers acted as intermediaries between ANZ and customers in respect of the activities pleaded at sub-paragraph 8(b)(i) of this Defence; and
 - (b) otherwise refers to and repeats paragraphs 7 and 8 of this Defence and denies does not know and therefore cannot admit the allegations in paragraph 19 of the SOC.
20. In answer to paragraph 20 of the SOC, the Second Defendant:
- (a) refers to and repeats paragraph 19 of this Defence;
 - (b) admits the allegations in paragraph 20 of the SOC insofar as they concern:
 - (i) the activities pleaded at sub-paragraph 8(b)(i) of this Defence; and
 - (ii) credit contracts provided to customers wholly or predominantly for personal, domestic or household use; and
 - (c) otherwise denies the allegations in paragraph 20 of the SOC.

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

21. In answer to paragraph 21 of the SOC, the Second Defendant:
- (a) refers to and repeats paragraphs 16 and 20 of this Defence;
 - (b) admits the allegations in paragraph 21 of the SOC insofar as they concern credit contracts provided to customers wholly or predominantly for personal, domestic or household use; and
 - (c) otherwise denies the allegations in paragraph 21 of the SOC.

B.2.5 The Dealers engaged in unfair conduct

22. The Second Defendant does not know and therefore cannot admit the allegations in paragraph 22 of the SOC.
23. In answer to paragraph 23 of the SOC, the Second Defendant:
- (a) refers to and repeats paragraph 22 of this Defence; and
 - (b) otherwise denies the allegations in paragraph 23 of the SOC.

B.2.6 Consequences of the Dealers’ unfair conduct

24. In answer to paragraph 24, the Second Defendant:
- (a) admits that Group Members became liable to pay interest charges under Car Loans to ANZ from inception of the Car Loan and to the Second Defendant from around the Perfection Date;
 - (b) refers to and repeats paragraphs 22 and 23 of this Defence; and
 - (c) otherwise does not know and therefore cannot admit the allegations in paragraph 24 of the SOC.
25. In answer to paragraph 25 of the SOC, the Second Defendant:
- (a) refers to and repeats paragraphs 22 to 24 of this Defence; and
 - (b) denies the allegations in paragraph 25 of the SOC.

B.3 Claim against ANZ under the NCCPA for the Dealers’ Unfair Conduct

26. In answer to paragraph 26 of the SOC, the Second Defendant:
- (a) admits that, during the relevant period, Dealers were persons acting on behalf of ANZ as a holder of an Australian credit licence for certain limited purposes; and
 - (b) otherwise denies the allegations in paragraph 26 of the SOC.
27. In answer to paragraph 27 of the SOC, the Second Defendant:
- (a) refers to and repeats paragraphs 8, 16, 20 and 26 of this Defence;
 - (b) admits that, during the relevant period, each Dealer was a representative of ANZ within the meaning of section 5 of the NCCPA for certain limited purposes; and

- (c) otherwise denies the allegations in paragraph 27 of the SOC.
- 28. In answer to paragraph 28 of the SOC, the Second Defendant:
 - (a) refers to and repeats paragraphs 16, 20, 21, 23, 26 and 27 of this Defence; and
 - (b) otherwise denies the allegations in paragraph 28 of the SOC.
- 29. In answer to paragraph 29 of the SOC, the Second Defendant:
 - (a) refers to and repeats paragraphs 11, 12, 21 and 23 of this Defence; and
 - (b) otherwise denies the allegations in paragraph 29 of the SOC.
- 30. In answer to paragraph 30 of the SOC, the Second Defendant:
 - (a) says it does not know and therefore cannot admit the state of mind or motivations of Group Members at the time of entering into Car Loans;
 - (b) says that individuals enter into Car Loans for subjective reasons which depend on their individual characteristics, situation and circumstances;
 - (c) refers to and repeats paragraphs 11, 12, 21 and 23 of this Defence; and
 - (d) otherwise denies the allegations in paragraph 30 of the SOC.
- 31. In answer to paragraph 31 of the SOC, the Second Defendant:
 - (a) refers to and repeats paragraphs 28 to 30 of this Defence; and
 - (b) otherwise denies the allegations in paragraph 31 of the SOC.
- 32. The Second Defendant denies paragraph 32 of the SOC.
- 33. The Second Defendant denies paragraph 33 of the SOC.
- 34. The Second Defendant denies paragraph 34 of the SOC.
- B.4 Claim against ANZ for misleading and deceptive conduct**
- 35. In answer to paragraph 35 of the SOC, the Second Defendant:
 - (a) refers to and repeats paragraph 12 of this Defence; and
 - (b) otherwise denies the allegations in paragraph 35 of the SOC.
- 36. The Second Defendant does not know and therefore cannot admit the allegations in paragraph 36 of the SOC.
- 37. The Second Defendant denies paragraph 37 of the SOC.
- 38. The Second Defendant does not admit paragraph 38 of the SOC.
- 39. The Second Defendant does not admit paragraph 39 of the SOC.
- 40. In answer to paragraph 40 of the SOC, the Second Defendant:
 - (a) admits that Group Members became liable to pay interest charges under Car Loans to ANZ from inception of the Car Loan and to the Second Defendant from around the Perfection Date; and

- (b) otherwise does not know and therefore cannot admit paragraph 40 of the SOC.

41. In answer to paragraph 41 of the SOC, the Second Defendant:

- (a) refers to and repeats paragraph 40 of this Defence; and
- (b) otherwise denies the allegations in paragraph 41 of the SOC.

B.5 Claim against the Defendants for money had and received and unjust enrichment

42. The Second Defendant does not know and therefore cannot admit the allegations in paragraph 42 of the SOC.

43. In answer to paragraph 43 of the SOC, the Second Defendant:

- (a) does not know and therefore cannot admit the allegations as to the state of mind of Group Members; and
- (b) otherwise denies the allegations in paragraph 43 of the SOC.

44. In answer to paragraph 44 of the SOC, the Second Defendant:

- (a) admits that Group Members became liable to pay interest charges under Car Loans to ANZ from inception of the Car Loan and to the Second Defendant from around the Perfection Date;
- (b) says that Group Members were under a legal obligation to pay those interest charges and ANZ and the Second Defendant respectively were legally entitled to payment of such moneys; and
- (c) otherwise does not know and therefore cannot admit paragraph 44 of the SOC.

45. In answer to paragraph 45 of the SOC, the Second Defendant:

- (a) says that each of the alleged mistaken beliefs pleaded in paragraph 44 of the SOC is not a mistake which would entitle the relevant Group Member to rescind their Car Loan or otherwise to be relieved of their obligation to perform their Car Loan, including the obligation to pay interest charges; and
- (b) otherwise denies the allegations in paragraph 45 of the SOC.

46. In answer to paragraph 46 of the SOC, the Second Defendant:

- (a) refers to and repeats paragraphs 44 and 45 of this Defence; and
- (b) otherwise denies the allegations in paragraph 46 of the SOC.

47. The Second Defendant does not know and therefore cannot admit paragraph 47 of the SOC.

48. In answer to paragraph 48 of the SOC, the Second Defendant:

- (a) denies the paragraph; and
- (b) says further that it is a bona fide purchaser of the Car Loans for value, without notice of the mistaken beliefs of the Group Members alleged in

paragraph 44 of the SOC, and that any entitlement a Group Member may have had against ANZ to rescind their Car Loan is not available against the Second Defendant following the Applicable Assignment Date of the relevant Car Loan.

49. In answer to paragraph 49 of the SOC, the Second Defendant:

- (a) repeats paragraphs 42 to 48 above;
- (b) says that:
 - (i) interest charges paid by Group Members under Car Loans were and continue to be paid pursuant to valid loan contracts;
 - (ii) in consideration for payment of those interest charges, ANZ (and, following the Perfection Date, the Second Defendant) extended and continues to extend credit to Group Members under the Car Loans;
 - (iii) unless a Car Loan is rescinded or declared void, interest charges paid pursuant to the Car Loan are not payments made under a mistake of fact or law entitling a Group Member to restitution of such payments; and
- (c) otherwise denies paragraph 49 of the SOC.

50. In answer to paragraph 50 of the SOC, the Second Defendant:

- (a) repeats paragraph 49 above; and
- (b) otherwise denies paragraph 50 of the SOC.

C PLAINTIFF'S CLAIM AGAINST THE FIRST DEFENDANT

C.1 The Plaintiff

51. In answer to paragraph 51 of the SOC, the Second Defendant:

- (a) admits that the Plaintiff is, and was at all material times, a natural person; and
- (b) otherwise does not know and therefore cannot admit paragraph 51 of the SOC.

52. In answer to paragraph 52 of the SOC, the Second Defendant:

- (a) as to sub-paragraph 52(a) of the SOC:
 - (i) says that it does not know and therefore cannot admit when the Plaintiff entered into discussions with ~~Cars of Melbourne~~ Heartland Holden Penrith;
 - (ii) otherwise admits the allegations in sub-paragraph 52(a) of the SOC; and
- (b) as to sub-paragraph 52(b) of the SOC, says that the purchase price of the Holden was ~~\$26,620,990~~, not ~~\$26,420,690~~, but otherwise admits the allegations in this sub- paragraph; and

(e) ~~admits the allegations in sub-paragraph 52(e).~~

53. The Second Defendant admits paragraph 53 of the SOC.

54. In answer to paragraph 54 of the SOC, the Second Defendant:

(a) says that the ANZ Car Loan was equitably assigned to the Second Defendant on or around 2 November 2015 pursuant to the Esanda Sale; and

(b) otherwise denies the allegations in paragraph 54 of the SOC.

C.2 The contravening conduct under the NCCPA of the ~~Cars of Melbourne~~ Heartland Holden Penrith

C.2.1 Arrangements between ~~Cars of Melbourne~~ Heartland Holden Penrith and ANZ

55. The Second Defendant admits the allegations in paragraph 55 of the SOC.

56. In answer to paragraph 56 of the SOC, the Second Defendant:

(a) as to sub-paragraph 56(a), says that the ~~Cars of Melbourne~~ Heartland Holden Penrith Dealer Agreement:

(i) permitted, but did not oblige, ~~Cars of Melbourne~~ Heartland Holden Penrith to submit applications for finance from customers to ANZ;

(ii) recorded an acknowledgement that if ~~Cars of Melbourne~~ Heartland Holden Penrith obtained any credit offer, it did so for the convenience of its customers and in the expectation that it would assist ~~Cars of Melbourne's~~ Heartland Holden Penrith's business;

(b) as to sub-paragraph 56(b) of the SOC, says that the ~~Cars of Melbourne~~ Heartland Holden Penrith Dealer Agreement required ~~Cars of Melbourne~~ Heartland Holden Penrith:

(i) to comply with matters advised by ANZ to ~~Cars of Melbourne~~ Heartland Holden Penrith in order to ensure ANZ's customer identification procedures met the requirements of the *Anti-Money Laundering and Counter-Terrorism Financing Act 2006* (Cth);

(ii) to warrant that the information provided by customers in credit offers was true and correct insofar as ~~Cars of Melbourne~~ Heartland Holden Penrith was aware;

(iii) to warrant that all credit offers were fit to become, upon acceptance by ANZ, enforceable contracts of credit and not adversely affected by any law;

(c) relies upon the terms of the ~~Cars of Melbourne~~ Heartland Holden Penrith Dealer Agreement for their full force and effect; and

(d) ~~otherwise does not know and therefore cannot admit~~ denies the allegations in paragraph 56 of the SOC.

57. In answer to paragraph 57 of the SOC, the Second Defendant:

(a) refers to and repeats paragraph 8 of this Defence;

- (b) relies upon the terms of the ~~Cars of Melbourne~~ Heartland Holden Penrith Dealer Agreement for their full force and effect; and
 - (c) otherwise denies paragraph 57 of the SOC.
58. The Second Defendant does not know and therefore cannot admit the allegations in paragraph 58 of the SOC.
59. In answer to paragraph 59 of the SOC, the Second Defendant:
- (a) refers to and repeats paragraph 10 of this Defence;
 - (b) relies upon the terms of the ~~Cars of Melbourne~~ Heartland Holden Penrith Dealer Agreement for their full force and effect; and
 - (c) otherwise denies ~~does not know and therefore cannot admit~~ paragraph 59.
60. In answer to paragraph 60 of the SOC, the Second Defendant:
- (a) refers to and repeats paragraphs 56 to 59 of this Defence; and
 - (b) otherwise denies paragraph 60 of the SOC.
61. In answer to paragraph 61 of the SOC, the Second Defendant:
- (a) refers to and repeats paragraphs 59 and 60 of this Defence; and
 - (b) otherwise does not know and therefore cannot admit paragraph 61 of the SOC.

C.2.2 ~~Cars of Melbourne~~ Heartland Holden Penrith provided credit assistance to Mr Crawford O'Brien

62. The Second Defendant admits the allegations in paragraph 62 of the SOC.
63. In answer to paragraph 63 of the SOC, the Second Defendant:
- (a) says that to the extent that the ANZ Car 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 and section 5 of the NCCPA; and
 - (b) otherwise admits the allegations in paragraph 63 of the SOC.
64. The Second Defendant refers to and repeats paragraph 56 of the SOC and denies ~~does not know and therefore cannot admit~~ paragraph 64 of the SOC.
65. In answer to paragraph 65 of the SOC, the Second Defendant:
- (a) refers to and repeats paragraph 64 of this Defence; and
 - (b) otherwise denies the allegations in paragraph 65 of the SOC.

C.2.3 ~~Cars of Melbourne~~ Heartland Holden Penrith was an intermediary between Mr Crawford O'Brien and ANZ

66. The Second Defendant admits paragraph 66 of the SOC.
67. The Second Defendant admits paragraph 67 of the SOC.

68. In answer to paragraph 68 of the SOC, the Second Defendant:

- (a) admits that ~~Cars of Melbourne~~ Heartland Holden Penrith acted as intermediary between ANZ and the Plaintiff in respect of the activities pleaded at sub-paragraph 8(b)(i) of this Defence for the purposes of securing a provision of credit for Mr ~~Crawford~~ O'Brien under the ANZ Car Loan with ANZ; and
- (b) otherwise refers to and repeats paragraphs 56 and 57 and does not know and therefore cannot admitdenies the allegations in paragraph 68 of the SOC.

69. In answer to paragraph 69 of the SOC, the Second Defendant:

- (a) refers to and repeats paragraph 68 of this Defence;
- (b) admits the allegations in paragraph 69 of the SOC insofar as they concern:
 - (i) the activities pleaded at sub-paragraph 8(b)(i) of this Defence; and
 - (ii) credit contracts provided to customers wholly or predominantly for personal, domestic or household use; and
- (c) otherwise denies the allegations in paragraph 69 of the SOC.

C.2.4 ~~Cars of Melbourne~~ Heartland Holden Penrith provided a "credit service" to Mr ~~Crawford~~ O'Brien

70. In answer to paragraph 70 of the SOC, the Second Defendant:

- (a) refers to and repeats paragraphs 65 and 69 of this Defence;
- (b) admits the allegations in paragraph 70 of the SOC insofar as the ANZ Car Loan was obtained by the Plaintiff wholly or predominantly for personal, domestic or household use; and
- (c) otherwise denies the allegations in paragraph 70 of the SOC.

C.2.5 ~~Cars of Melbourne~~ Heartland Holden Penrith engaged in unfair conduct

71. The Second Defendant does not know and therefore cannot admit the allegations in paragraph 71 of the SOC.

72. In answer to paragraph 72 of the SOC, the Second Defendant:

- (a) refers to and repeats paragraph 71 of this Defence; and
- (b) otherwise denies the allegations in paragraph 72 of the SOC.

C.2.6 ~~Consequences of Cars of Melbourne's~~ Heartland Holden Penrith's unfair conduct

73. In answer to paragraph 73 of the SOC, the Second Defendant:

- (a) admits that the Plaintiff became liable to pay interest charges under the ANZ Car Loan to ANZ from inception of the ANZ Car Loan and to the Second Defendant from around the Perfection Date;
- (b) refers to and repeats paragraphs 71 and 72 of this Defence; and

- (c) otherwise does not know and therefore cannot admit the allegations in paragraph 73 of the SOC.

74. In answer to paragraph 74 of the SOC, the Second Defendant:

- (a) refers to and repeats paragraphs 71 to 73 of this Defence; and
- (b) denies the allegations in paragraph 74 of the SOC.

C.3 Claim against ANZ under the NCCPA for ~~Cars of Melbourne's~~ Heartland Holden Penrith's unfair conduct

75. In answer to paragraph 75 of the SOC, the Second Defendant:

- (a) Admits that, during the relevant period, ~~Cars of Melbourne~~ Heartland Holden Penrith was a person acting on behalf of ANZ as a holder of an Australian credit licence for certain limited purposes; and
- (b) otherwise denies the allegations in paragraph 75 of the SOC.

76. In answer to paragraph 76 of the SOC, the Second Defendant:

- (a) refers to and repeats paragraphs 8, 65, 69 and 75 of this Defence;
- (b) admits that, during the relevant period, ~~Cars of Melbourne~~ Heartland Holden Penrith was a representative of ANZ within the meaning of section 5 of the NCCPA for certain limited purposes; and
- (c) otherwise denies the allegations in paragraph 76 of the SOC.

77. In answer to paragraph 77 of the SOC, the Second Defendant:

- (a) refers to and repeats paragraphs 65, 69, 70, 72, 75 and 76 of this Defence; and
- (b) otherwise denies the allegations in paragraph 77 of the SOC.

78. In answer to paragraph 78 of the SOC, the Second Defendant:

- (a) refers to and repeats paragraphs 60, 61, 70 and 72 of this Defence; and
- (b) otherwise denies the allegations in paragraph 78 of the SOC.

79. In answer to paragraph 79 of the SOC, the Second Defendant:

- (a) says it does not know and therefore cannot admit the state of mind or motivations of the Plaintiff at the time of entering into the ANZ Car Loan;
- (b) refers to and repeats paragraphs 60, 61, 70 and 72 of this Defence; and
- (c) otherwise denies the allegations in paragraph 79 of the SOC.

80. In answer to paragraph 80 of the SOC, the Second Defendant:

- (a) refers to and repeats paragraphs 77 to 79 of this Defence; and
- (b) otherwise denies the allegations in paragraph 80 of the SOC.

81. The Second Defendant denies paragraph 81 of the SOC.

82. The Second Defendant denies paragraph 82 of the SOC.

83. The Second Defendant denies paragraph 83 of the SOC.

C.4 Claim against ANZ for misleading and deceptive conduct

84. In answer to paragraph 84 of the SOC, the Second Defendant:

- (a) refers to and repeats paragraph 61 of this Defence; and
- (b) otherwise denies the allegations in paragraph 84 of the SOC.

85. The Second Defendant does not know and therefore cannot admit the allegations in paragraph 85 of the SOC.

86. The Second Defendant denies the allegations in paragraph 86 of the SOC.

87. The Second Defendant does not admit paragraph 87 of the SOC.

88. The Second Defendant does not admit paragraph 88 of the SOC.

89. In answer to paragraph 89 of the SOC, the Second Defendant:

- (a) admits that the Plaintiff became liable to pay interest charges under the ANZ Car Loan to ANZ from inception of the ANZ Car Loan and to the Second Defendant from around the Perfection Date; and
- (b) otherwise does not know and cannot admit paragraph 89 of the SOC.

90. In answer to paragraph 90 of the SOC, the Second Defendant:

- (a) refers to and repeats paragraph 89 of this Defence; and
- (b) otherwise denies the allegations in paragraph 90 of the SOC.

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

91. The Second Defendant does not know and therefore cannot admit the allegations in paragraph 91 of the SOC.

92. In answer to paragraph 92 of the SOC, the Second Defendant:

- (a) does not know and therefore cannot admit the allegations as to the state of mind of the Plaintiff; and
- (b) otherwise denies the allegations in paragraph 92 of the SOC.

93. In answer to paragraph 93 of the SOC, the Second Defendant:

- (a) admits that the Plaintiff became liable to pay interest charges under the ANZ Car Loan to ANZ from inception of the ANZ Car Loan and to the Second Defendant from around the Perfection Date;
- (b) says that the Plaintiff was under a legal obligation to pay those interest charges and ANZ and the Second Defendant respectively were legally entitled to payment of such moneys; and
- (c) otherwise does not know and therefore cannot admit the allegations in paragraph 93 of the SOC.

94. In answer to paragraph 94 of the SOC, the Second Defendant:
- (a) says that each of the alleged mistaken beliefs pleaded in paragraph 93 of the SOC is not a mistake which would have entitled the Plaintiff to rescind the ANZ Car Loan or otherwise to have been relieved of his obligation to perform the ANZ Car Loan, including the obligation to pay interest charges; and
 - (b) otherwise denies the allegations in paragraph 94 of the SOC.
95. In answer to paragraph 95 of the SOC, the Second Defendant:
- (a) refers to and repeats paragraphs 93 and 94 of this Defence; and
 - (b) otherwise denies the allegations in paragraph 95 of the SOC.
96. The Second Defendant does not know and therefore cannot admit paragraph 96 of the SOC.
97. In answer to paragraph 97 of the SOC, the Second Defendant:
- (a) denies the paragraph; and
 - (b) says further that it is a bona fide purchaser of the ANZ Car Loan for value, without notice of the mistaken beliefs of the Plaintiff alleged in paragraph 93 of the SOC, and that any entitlement the Plaintiff may have had against ANZ to rescind the ANZ Car Loan is not available against the Second Defendant following the Applicable Assignment Date of the ANZ Car Loan.
98. In answer to paragraph 98 of the SOC, the Second Defendant:
- (a) repeats paragraphs 91 to 95 above;
 - (b) says that:
 - (i) interest charges paid by the Plaintiff under the ANZ Car Loan were paid pursuant to a valid loan contract;
 - (ii) in consideration for payment of those interest charges, ANZ (and, upon the Perfection Date, the Second Defendant) extended credit to the Plaintiff under the ANZ Car Loan;
 - (iii) unless the ANZ Car Loan is rescinded or declared void, interest charges paid pursuant to the ANZ Car Loan are not payments made under a mistake of fact or law entitling the Plaintiff to restitution of such payments; and
 - (c) otherwise denies paragraph 98 of the SOC.
99. In answer to paragraph 99 of the SOC, the Second Defendant:
- (a) repeats paragraph 98 above; and
 - (b) otherwise denies paragraph 99 of the SOC.
100. In answer to paragraphs 100 to 125, the Second Defendant does not admit that the questions in paragraphs 100 to 125 amount to or involve common issues of fact or law or that, to the extent that any such questions are common, that they are common to the Plaintiff and any Group Members.

RELIEF

101. In answer to Plaintiff and Group Members' claim for relief against the Second Defendant, the Second Defendant:

- (a) says that it, acting in good faith, relied to its detriment on the agreement by Group Members and the Plaintiff to pay interest charges referable to the Car Loans (**Interest Charges**) and the payment of those Interest Charges by (following the Perfection Date) financing the purchase of the car, incurring expenditure and/or other disadvantageous consequences that it would not have otherwise incurred;

Particulars

- A. in reliance upon the agreement by Group Members and the Plaintiff to pay Interest Charges and payment of those Interest Charges, the Second Defendant:
 - a. financed the purchase of the car;
 - b. bore the cost associated with the maintenance of that finance;
 - c. bore the risk associated with the provision of that finance including that a Group Member or the Plaintiff may cease to make repayments and the underlying assets would be insufficient to cover the balance of the loan; and
 - d. complied with the prudential standards relating to lending imposed by APRA;
- (b) says that by reason of the change of position pleaded in sub-paragraph 101(a) of this Defence, it would be inequitable in all the circumstances to require the Second Defendant to repay the Interest Charges in whole or in part;
- (c) says that it gave good consideration to any Group Member and the Plaintiff from whom it received the payment of Interest Charges pursuant to terms of Group Members' and the Plaintiff's respective Car Loans;

Particulars

- A. the particulars to paragraph 101(a) of this Defence are repeated;
- B. Group Members and the Plaintiff received cars and other benefits, including insurances and improvements to the cars, and the use/enjoyment of the cars;
- (d) says that by reason of the provision of good consideration pleaded in sub-paragraph 101(c) of this Defence, the Second Defendant is not obliged to repay to Group Members or the Plaintiff the Interest Charges received by it in whole or in part;
- (e) says that the receipt and use of the cars purchased with the Car Loans constitute unequivocal words or conduct by which Group Members and the Plaintiff have elected to take the benefit of the Car Loans;
- (f) says that Group Members and the Plaintiff are not entitled to the repayment of Interest Charges paid in respect of those Car Loans in whole or in part;

- (g) says that Group Members and the Plaintiff have received a benefit from the Car Loans, to the extent that the amount advanced under the Car Loans:
 - (i) to repay an amount owing by a Group Member or the Plaintiff under another credit contract;
 - (ii) to finance premiums for comprehensive motor insurance of any “add-on” insurance products;
 - (iii) to pay for accessories or extras in relation to the automobile purchased; and
 - (iv) to obtain a valuable asset, being the automobile purchased;
- (h) says that in the premises of the benefit received, set out in sub-paragraph 101(g) of this Defence, Group Members and the Plaintiff would be unjustly enriched at the Second Defendant’s expense if the Second Defendant were required to repay the Interest Charges received by it and Group Members and the Plaintiff are not entitled to the remedies or relief sought;
- (i) says that further or in the alternative, Group Members and the Plaintiff are not entitled to the remedies or relief sought unless they account for such benefit;
- (j) says that with respect to claims of unilateral mistake by Group Members in relation to any Car Loan entered into prior to 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, respectively:
 - (i) section 5(1) of the *Limitation of Actions Act 1958* (Vic);
 - (ii) section 14(1) of the *Limitation Act 1969* (NSW);
 - (iii) section 13(1) of the *Limitation Act 2005* (WA);
 - (iv) section 10(1) of the *Limitation of Actions Act 1974* (Qld);
 - (v) section 35(a) of the *Limitation of Actions Act 1936* (SA);
 - (vi) section 4(1) of the *Limitation Act 1974* (Tas); and
 - (vii) section 11(1) of the *Limitation Action 1985* (ACT);
- (k) says that with respect to claims of unilateral mistake by Group Members in relation to any Car Loan entered into in the Northern Territory, such claims are statute barred, by reason of section 12(1) of the *Limitation Act 1981* (NT);
- (l) says that it is entitled to rely upon the equitable doctrine of laches due to the Group Members’ and the Plaintiff’s delay in bringing their respective claims;
- (m) says that there is no maintainable claim in moneys had and received by Group Members whose Car Loans have been fully performed;
- (n) says that there is no maintainable claim in moneys had and received by the Plaintiff as the ANZ Car Loan has been fully performed;
- (o) refers to and repeats paragraph 5 of this Defence; and

(p) says that:

- (i) in completing the Esanda Sale, it was a good faith purchaser of Car Loans from ANZ without notice of the mistaken beliefs of the Plaintiff and Group Members alleged in paragraphs 44 and 93 of the SOC;
- (ii) the Second Defendant has not been unjustly enriched as a result of receiving interest and other payments under the Car Loans;
- (iii) it is not unconscionable for the Second Defendant to retain payments received by it under the Car Loans; and
- (iv) the payments that the Second Defendant has received under the Car Loans do not amount to moneys had and received to the use of the Plaintiff or Group Members.

J WILLIAMS

J ENTWISLE

Dated: 21 December 2020 6 September 2022

Gilbert + Tobin

~~Solicitors for the Second Defendant~~

Michael Rush

Melanie Szydzik

Elizabeth Brumby



Herbert Smith Freehills

Solicitors for the second defendant