

NOTICE OF FILING

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Details of Filing

Document Lodged: Statement of Claim - Form 17 - Rule 8.06(1)(a)
File Number: VID145/2019
File Title: IAN JOHN TATE & ANOR v WESTPAC BANKING CORPORATION
ACN 007 457 141
Registry: NEW SOUTH WALES REGISTRY - FEDERAL COURT OF AUSTRALIA



Sia Lagos

Dated: 11/02/2020 4:25:47 PM AEDT

Registrar

Important Information

As required by the Court's Rules, this Notice has been inserted as the first page of the document which has been accepted for electronic filing. It is now taken to be part of that document for the purposes of the proceeding in the Court and contains important information for all parties to that proceeding. It must be included in the document served on each of those parties.

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FURTHER AMENDED STATEMENT OF CLAIM



Form 17
Rule 8.05(1)(a)

Further Amended Statement of claim

(Amendments made on 11 February 2020 pursuant to order of Perram J made on 10 February 2020)

No. VID145 of 2019

Federal Court of Australia
District Registry: New South Wales
Division: General

IAN JOHN TATE and another

Applicants

WESTPAC BANKING CORPORATION (ACN 007 457 141)

Respondent

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Filed on behalf of (name & role of party) Ian John Tate and Michelle Mary Tate, Applicants

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A. INTRODUCTORY MATTERS

1. The applicants:
 - (a) are natural persons and capable of suing in their own name;
 - (b) were at all relevant times “consumers” within the meaning of s 5 of the *National Consumer Credit Protection Act 2009* (Cth) (**the Act**).
2. The respondent (**Westpac**) is and was at all times during the Relevant Period (defined below):
 - (a) a company duly incorporated under the laws of Australia and liable to be sued in its corporate name;
 - (b) an authorised deposit-taking institution as defined in s 5(1) of the *Banking Act 1959* (Cth);
 - (c) the holder of an Australian Credit Licence granted under s 38 of the Act;
 - (d) a credit provider within the meaning of s 5 of the Act;
 - (e) in the business of providing credit;
 - (f) engaged in credit activities within the meaning of s 6 of the Act; and
 - (g) a licensee within the meaning of s 5 of the Act.
3. In what follows **Relevant Period** means the period commencing on 1 January 2011 and ending on 17 February 2018.
4. In what follows **Group Members** are natural persons who:
 - (a) entered into a Westpac-branded credit contract with Westpac in the Relevant Period, secured by a mortgage to Westpac of residential property owned solely or jointly by the Group Member, under which Westpac provided credit to the Group Member (**Applicable Credit Contract**):
 - (i) wholly or predominantly for one or more of the following purposes:
 - (A) for personal, domestic or household purposes;

- (B) to purchase, renovate or improve residential property for investment purposes; and/or
 - (C) to refinance credit that had been provided wholly or predominantly to purchase, renovate or improve residential property for investment purposes;
 - (ii) in an amount which did not exceed \$5,000,000 for the purpose of investment in more than a single residence; or
 - (iii) was not secured by a reverse mortgage within the meaning of s 13A of the *National Credit Code (Cth)* (**Code**);
- (b) have suffered or are likely to suffer loss or damage as a result of the pleaded contraventions of the Act ~~by reason of the Group Member's entry into the Applicable Credit Contract~~; and
- (c) were not and are not as at the date of this application any of the following:
- (i) a related party (as defined by s 228 of the *Corporations Act 2001*) of Westpac;
 - (ii) an associated entity (as defined by s 50AAA of the *Corporations Act 2001*) of Westpac;
 - (iii) a director or officer or close associate (as defined by s 9 of the *Corporations Act 2001*) of Westpac; or
 - (iv) a Justice, Registrar, District Registrar or Deputy District Registrar of the High Court of Australia or the Federal Court of Australia.
5. At the time of commencing this proceeding, seven or more Group Members have claims against Westpac.
6. The applicants bring these proceedings on behalf of themselves and the Group Members pursuant to Part IVA of the *Federal Court of Australia Act 1976* (Cth).

B. THE TATES' FINANCIAL SITUATION, REQUIREMENTS AND OBJECTIVES AT THE TIME OF THE DARWIN LOAN CONTRACT

7. In what follows **the Tates** means the first named applicant or the second named applicant or both.
8. In about July 2013 on the advice of Elaine Wood trading under the business name Inspired Lifestyle Solutions (**the Broker**), the Tates became interested in obtaining finance from Westpac for the purposes of funding the acquisition of an investment property being apartment 1110/102 Esplanade, Darwin City, NT (**Darwin apartment**).
9. As at about July 2013, and during the period of 120 days prior to entering the Darwin Loan contract (defined below), the Tates' financial situation, requirements and objectives included the matters pleaded in paragraphs 10 to 21 below.
10. Mrs Tate:
 - (a) was aged about 41, having been born in 1972;
 - (b) had completed school to the age of 16;
 - (c) completed a TAFE course in hairdressing;
 - (d) thereafter worked as a hair-dresser;
 - (e) save for the TAFE course mentioned in subparagraph 10(c) had no tertiary education; and
 - (f) was not in paid employment and was engaged in the full-time care of her three dependent children.
11. Mr Tate:
 - (a) was aged about 48, having been born in 1965;
 - (b) had completed school to about Year 10;
 - (c) had thereafter worked as a labourer;
 - (d) had no tertiary education;
 - (e) was employed on a "fly in fly out" basis as a mobile plant operator, which involved operating large machinery on remote sites;

- (f) had been in paid employment in his then current position for approximately one year; and
 - (g) was the sole bread-winner for the Tate family.
12. The Tates had three dependent children, aged about 8, 5 and 1.
13. The Tates owned in joint names their family home at 18-24 Dianne Court, Jimboomba, Qld (**Dianne Court**), which:
- (a) had a value of approximately \$550,000; and
 - (b) was the subject of a registered mortgage number 712078534 in favour of Westpac which mortgage was also security for the loan for Skyview (defined below).
14. Mr Tate owned an investment property at 11 Skyview Court, Jimboomba, Qld (**Skyview**) which:
- (a) had a value of approximately \$380,000; and
 - (b) was the subject of a registered mortgage number 711507232 in favour of Westpac.
15. The Tates owed Westpac approximately \$410,000 in relation to Skyview, such that the Tates had negative equity in Skyview in the amount of approximately \$30,000.
16. In what follows:
- (a) **Essential expenses** means those of the consumer's monthly Living expenses (defined below) which the consumer regards as essential and which the consumer would or could not forgo in entering into an Applicable Credit Contract;
 - (b) **Living expenses** means household expenditure save for payments in relation to loans, mortgage, rent, board, child maintenance or alimony.
17. The Tates' Living expenses fluctuated depending on their needs but as at about July 2013 were approximately \$9,800 per month.

18. The majority of the Tates' Living expenses were Essential expenses, including significant expenses associated with or arising from their three young children's education, well-being, development and nutrition.
19. The Tates maintained in joint names various deposit or loan accounts with Westpac including Westpac Classic Plus account 734-115 75-6222 (**Deposit account**) into which Mr Tate's salary and any rental income from Skyview was paid and from which the Tates withdrew funds to meet expenses, including Essential expenses.
20. The Tates' requirements in relation to any loan to be taken out for the Darwin apartment included obtaining sufficient funds to acquire the Darwin apartment but only if, or to the extent that, their obligations under such loan contract did not limit or impair their capacity to meet their Essential expenses (**Tates' Requirements**).
21. The Tates' objectives in relation to any loan to be taken out for the purposes of the acquisition of the Darwin apartment included (**Tates' Objectives**):
 - (a) building a secure and stable nest egg which would provide them with ongoing income during their retirement and old age; and
 - (b) Mr Tate ceasing physically demanding work by about his mid-fifties, because it was likely that he would not wish or be able to carry out such work after that time.

C. THE DARWIN LOAN CONTRACT

- C1. Westpac's systems, policies and procedures with regard to the Darwin loan contract**
22. During the Relevant Period, Westpac maintained a number of policies and procedures relating to credit contracts between Westpac and consumers, which policies and procedures were gathered in and collectively known as Westpac's Consumer Credit Policy Manual and Westpac's Consumer Credit Procedures Manual (together, **the Manuals**).
23. During the Relevant Period, Westpac operated an automated decision-making system (**Automated Decision System**) as part of its process for determining whether or not to approve loan applications.

24. During the Relevant Period, the Melbourne Institute of Applied Economics and Social Research (**Melbourne Institute**) compiled and published benchmark figures for measuring household expenditure (**HEM Benchmark**).
25. During the Relevant Period, the HEM Benchmark:
- (a) was an analysis which assessed two categories of expenses by taking the median spend (being the 50th percentile) on what the Melbourne Institute designated as 'absolute basic' household expenses plus the 25th percentile spend on what the Melbourne Institute designated as a modest representation of spending on 'discretionary basics' and excluding other expenses which the Melbourne Institute deemed 'non-basic' or 'not included';
 - (b) was prepared on the basis of expenditure data drawn from the Australian community as a whole from the Household Expenditure Survey (**HES**) which comprised data collated by the Australian Bureau of Statistics;
 - (c) was, in the alternative, widely considered to be, a conservative or modest predictor of a consumer's Living expenses;
 - (d) was updated every 6 years to coincide with the HES and also updated each quarter by reference to the Consumer Price Index; and
 - (e) was scaled with reference to categories including 'geographic location of applicant's intended residence', 'marital status', 'number of dependents' and 'income level', of which the key categories were 'marital status', 'number of dependents' and 'income level'.
26. Westpac included in the Manuals a table of figures drawn from the HEM Benchmark.
27. The version of the HEM Benchmark used by Westpac during the Relevant Period (**Simplified HEM Benchmark**):
- (a) was scaled with reference to three categories only, being 'geographical location of the applicant's place of residence', 'marital status' and 'number of dependants'; and
 - (b) was not scaled with reference to 'income level'.

28. The Automated Decision System included during the Relevant Period a rule pursuant to which if the consumer's Living expenses as declared in the consumer's loan application exceeded 70% of the consumer's verified monthly income the Automated Decision System would recommend a "refer" outcome, following which the loan application would be manually assessed by one of Westpac's credit officers (**70% Ratio Rule**).
29. A consumer's Living expenses as declared in the consumer's loan application were not used during the Relevant Period by any rule within the Automated Decision System other than the 70% Ratio Rule.
30. The Automated Decision System included during the Relevant Period a rule which was used to calculate the financial position and capacity of an applicant for a loan to make required payments under a credit contract within the meaning of the Act (**Serviceability Calculation Rule**).

C2. The application for the Darwin loan contract

31. On about 3 July 2013, the Broker submitted a loan application to Westpac pursuant to which the Tates applied for a loan of \$570,000 to enable Mr Tate to acquire the Darwin apartment (**Darwin loan application**).

Particulars

The Darwin loan application comprised a 54 page fax sent by the Broker to the Westpac Broker Processing Unit on 3 July 2013 and an undated Westpac Loan Application form, PF100.

32. Westpac assessed the Darwin loan application through the systems, policies and procedures pleaded in Section C1 above.
33. The Darwin loan application included:
 - (a) a request for the amount of certain of the Tates' Living expenses (described as "Household basic" expenses); and
 - (b) a request for the amount of certain of the Tates' expenses (described as "Other monthly payments") in the following categories:
 - (i) 'Rent/Board';
 - (ii) 'Child Maintenance/Alimony';

- (iii) 'Absolute Basic Expenses – e.g groceries, petrol, utilities, rates, clothing etc';
- (iv) 'Education Expenses';
- (v) 'Childcare fees';
- (vi) 'Insurance – Including car, CTP, building, contents, health, income protection etc';
- (vii) 'Mobile Phone/Internet/Pay TV'; and
- (viii) 'Other – e.g holidays, entertainment, gym membership, cleaning or gardening services etc'.

34. Without the knowledge or consent of the Tates, the Broker:

- (a) inserted the figure of \$3,000 on the Darwin loan application as representing the Tates' "Household basic" expenses; and
- (b) inserted the figures of \$1,500 for each of the Tates (being \$3,000 in total) on the Darwin loan application for the category "Absolute Basic Expenses" and inserted \$0 for each of the other categories described in paragraph 33(b) as representing the Tates' Living expenses.

35. The Darwin loan application made no request for information concerning the Tates' Essential expenses or Living expenses save for the expenses described in the categories pleaded in paragraph 33(b).

36. At no time during the Darwin loan application process did Westpac communicate directly with the Tates about their application.

C3. The Darwin loan contract serviceability assessment

37. On or prior to 3 July 2013 the Broker carried out for and on behalf of Westpac and for the purposes of the Serviceability Calculation Rule a serviceability assessment in relation to the Darwin loan application (**Darwin serviceability assessment**).

38. The Darwin serviceability assessment was carried out by the Broker:

- (a) by reference to and on the basis of the amount of \$3,230 as representing the Tates' Living expenses, being an amount derived from or reflecting the Simplified HEM Benchmark; and
- (b) without reference to the Tates' actual Living expenses or Essential expenses.

39. Westpac did not make inquiries of or seek verification from the Tates about:

- (a) the accuracy of the figures inserted by the Broker in the Darwin loan application as pleaded in paragraph 34; or
- (b) the Tates' Essential expenses at the time of or in relation to the Darwin loan application.

C4. The Darwin Loan

40. On or about 8 August 2013 the Tates accepted Westpac's offer to enter into a loan contract for \$570,000 over a 30 year term (**Darwin Loan**).

D. THE TATES' FINANCIAL SITUATION, REQUIREMENTS AND OBJECTIVES AT THE TIME OF THE MUDGEES LOAN CONTRACT

41. In about March 2014 on the advice of the Broker, the Tates became interested in obtaining finance from Westpac for the purposes of funding the acquisition of, and the construction of a duplex dwelling on, land at 20 Rifle Range Road, Mudgee, NSW (**Mudgee Land**).

42. As at about March 2014, and during the period of 120 days prior to entering the Mudgee Loan contract (defined below), the Tates' financial situation, requirements and objectives were substantially as pleaded in Section B above except that:

- (a) the Tates and their children were approximately 9 months older;
- (b) Mr Tate had been in his current employment for about 21 months;
- (c) while the Tates' monthly Living expenses continued to fluctuate depending on their needs, as at March 2014 their Living expenses were approximately \$8,600, of which the majority were Essential expenses.

E. THE MUDGEE LOAN CONTRACT

E1. The application for the Mudgee loan contract

43. In about March or April 2014 the Broker submitted a loan application to Westpac pursuant to which the Tates applied for a loan of \$619,000 to enable Mr Tate to acquire, and to construct a dwelling on, the Mudgee Land (**Mudgee loan application**).
44. Westpac assessed the Mudgee loan application through the systems, policies and procedures pleaded in Section C1 above.
45. The Mudgee loan application included a request for the amounts for the Tates' expenses (described as "Other monthly payments") in the following categories:
- (a) 'Rent/Board';
 - (b) 'Child Maintenance/Alimony';
 - (c) 'Absolute Basic Expenses – e.g groceries, petrol, utilities, rates, clothing etc';
 - (d) 'Education Expenses';
 - (e) 'Childcare fees';
 - (f) 'Insurance – Including car, CTP, building, contents, health, income protection etc';
 - (g) 'Mobile Phone/Internet/Pay TV'; and
 - (h) 'Other – e.g holidays, entertainment, gym membership, cleaning or gardening services etc'.
46. Without the knowledge or consent of the Tates, the Broker inserted the figures of \$1,500 for each of the Tates (being \$3,000 in total) on the Mudgee loan application for the category "Absolute Basic Expenses" and inserted \$0 for each of the categories described in paragraph 45.
47. The Mudgee loan application made no request for information concerning the Tates' Essential expenses or the Tates' Living expenses save for the expenses described in the categories pleaded in paragraph 45.

48. At no time during the Mudgee loan application process did Westpac communicate directly with the Tates about their application.

E2. The Mudgee loan contract serviceability assessment

49. On a date presently unknown to the Tates, the Broker carried out for and on behalf of Westpac and for the purposes of the Serviceability Calculation Rule, a serviceability assessment in relation to the Mudgee loan application (**Mudgee serviceability assessment**).

50. The Mudgee serviceability assessment was carried out:

- (a) by reference to and on the basis of the amount of \$3,276 as representing the Tates' Living expenses, being an amount derived from or reflecting the Simplified HEM Benchmark;
- (b) without reference to the Tates' actual Living expenses or Essential expenses.

51. Westpac did not make inquiries of or seek verification from the Tates about:

- (a) the accuracy of the figures inserted by the Broker in the Mudgee loan application as pleaded in paragraph 46; or
- (b) the Tates' Essential expenses at the time of or in relation to the Mudgee loan application.

E3. The Mudgee Loan

52. On 14 April 2014 the Tates accepted Westpac's offer to enter into a loan for \$619,000 over a 30 year term (**Mudgee Loan**).

F. WESTPAC'S CONTRAVENTIONS OF THE ACT

53. In what follows:

- (a) **Tate Loans** means either the Darwin Loan or the Mudgee Loan or both;
- (b) **Tate Loan Applications** means the Darwin loan application or the Mudgee loan application or both.

54. The Tate Loans were Applicable Credit Contracts.

F1. Westpac failed to make reasonable inquiries

F1.1 Essential expenses

55. Pursuant to ss 128(d) and 130(1)(b) of the Act, Westpac was required to make reasonable inquiries about the consumer's financial situation.
56. Westpac failed to make any or, alternatively, reasonable inquiries about the Tates' financial situation prior to entering into the Tate Loans.

Particulars of reasonable inquiries re financial situation

Further particulars of the reasonable inquiries which Westpac could or should have undertaken may be given after discovery and expert evidence, however such inquiries would have included one or more of:

- (1) *asking the Tates in writing by including in any loan application form or similar document questions about:*
 - (A) *the amount of the Tates' Essential expenses;*
 - (B) *the amount the Tates reasonably had available to service the Tate Loans taking into account their existing or contemplated commitments and their financial situation as a whole; and, or alternatively*
 - (C) *how much longer Mr Tate could expect or wish to carry out physically demanding work and, in the event (as was the case) that it was likely that Mr Tate would cease to carry out such work prior to the expiry of the terms of the Tate Loans, how the Tates could possibly service the Tate Loans;*
- (2) *asking the Tates directly in a face to face or telephone interview questions about and designed to elicit the information in (1)(A) to (C) above;*
- (3) *making inquiries about expenses other than those requested in or by the Tate Loan Applications, which were confined to specific and limited categories including, "Household basic expenses" and the categories pleaded in paragraph 45; and, or alternatively*
- (4) *after examining the account statements for the Deposit account or other relevant account statements or records for at least the three months prior, inquiries about any discrepancy between the expenses shown on those account statements and the expenses disclosed in the Tate Loan Applications; and*
- (5) *given the circumstances pleaded, including the matters pleaded in Section F1.4 below, ensuring that the above inquiries were asked of the Tates directly, not through the Broker.*

F1.2 Objectives

57. Pursuant to ss 128(d) and 130(1)(a) of the Act, Westpac was required to make reasonable inquiries about the consumer's objectives.
58. By reason of its said statutory obligation, Westpac was required to make reasonable inquiries about the Tates' Objectives.
59. Westpac failed to make any or, alternatively, reasonable inquiries about the Tates' Objectives prior to entering into the Tate Loans.

Particulars of reasonable inquiries re objectives

Further particulars of the reasonable inquiries which Westpac could or should have undertaken may be given after discovery and expert evidence, however given the matters pleaded above, including that the Tate Loans had 30 year terms and the fact that Mr Tate was the sole breadwinner, such inquiries would have included one or more of:

- (1) *asking in writing by including in any loan application form or similar document questions about:*
 - (A) *the Tates' objectives in relation to the Tate Loans;*
 - (B) *how long Mr Tate could expect or wish to carry out physically demanding work;*
 - (C) *if (as was the case) Mr Tate was intending to cease, or would be unable to continue, physically demanding work well prior to the expiry of the 30 year term of the Tate Loans, how the Tates could possibly service the Tate Loans;*
- (2) *asking the Tates directly in a face to face or telephone interview questions about and designed to elicit the information in (1)(A) to (C) above; and, or alternatively*
- (3) *making inquiries about significant changes to the Tates' financial situation, including expected changes beyond those which might occur in the next 3 years as requested in the Tate Loan Applications; and*
- (4) *given the circumstances pleaded, including the matters pleaded in Section F1.4 below, ensuring that the above inquiries were asked of the Tates directly, not through the Broker.*

F1.3 Requirements

60. Pursuant to ss 128(d) and 130(1)(a) of the Act, Westpac was required to make reasonable inquiries about the consumer's requirements.
61. By reason of its said statutory obligation, Westpac was required to make reasonable inquiries about the Tates' Requirements.
62. Westpac failed to make any or, alternatively, reasonable inquiries about the Tates' Requirements prior to entering into the Tate Loans.

Particulars of reasonable inquiries re requirements

Further particulars of the reasonable inquiries which Westpac could or should have undertaken may be given after discovery and expert evidence, however given the matters pleaded above, including that the Tates had three dependent children, such inquiries would have included one or more of:

- (1) *asking in writing by including in any loan application form or similar document questions about:*
 - (A) *whether or to what extent the Tates were prepared to forgo any of their Living expenses in order to service the Tate Loans;*
 - (B) *whether the Tates were prepared to forgo their Essential expenses;*
 - (C) *whether the Tates were prepared to proceed with the Tate Loans if that meant cutting back on their spending on their children's education, well-being, development and nutrition;*
- (2) *asking the Tates directly in a face to face or telephone interview questions directed to and designed to elicit the information in (1)(A) to (C) above; and, or alternatively*
- (3) *ensuring that any loan application form was not restricted to asking about changes that might occur in the next three years, thereby excluding any inquiry about, or the provision of information concerning, the information in (1)(A) to (C) above; and*
- (4) *given the circumstances pleaded, including the matters pleaded in Section F1.4 below, ensuring that the above inquiries were asked of the Tates directly, not through the Broker.*

F1.4 Anomalies in the Tate Loan Applications

63. By reason of its statutory obligation pleaded in paragraphs 55, 57 and, or alternatively, 60, Westpac was required to make reasonable inquiries to clarify, correct or complete information in the Tate Loan Applications that was, or appeared on its face to be, anomalous, inaccurate or incomplete.
64. As pleaded in paragraphs 34 and 46 above, the Tate Loan Applications included a figure of \$3,000 for the Tates' Living expenses, being an amount less than the amount derived from or reflecting the Simplified HEM Benchmark.
65. It was on its face unlikely that a family in the Tates' financial situation was spending less on Living expenses than the amount derived from or reflecting the Simplified HEM Benchmark.
66. Further, at the time the Tate Loans were entered and, or alternatively, during the Relevant Period:
 - (a) approximately 80% of the Applicable Credit Contracts entered into by Westpac that were conditionally approved by the Automated Decision System and not referred for manual assessment by a Westpac credit officer were entered into in circumstances in which the Living expenses as declared in the consumer's loan application were less than the amount derived from or reflecting the Simplified HEM Benchmark; and
 - (b) it was unlikely that 80% of the successful applicants to Westpac for Applicable Credit Contracts were spending less on Living expenses than the amount derived from or reflecting the Simplified HEM Benchmark.
67. Given the matters pleaded in paragraph 66, during the Relevant Period Westpac knew or ought reasonably to have known that it was systemically processing applications for Applicable Credit Contracts in which the Living expenses as declared in the consumer's loan application were incorrect and did not accurately reflect the consumer's Living expenses or Essential expenses.
68. By reason of the matters pleaded in paragraphs 64 to 67, Westpac knew or ought reasonably to have known that the figures which had been inserted by the Broker in the Tate Loan Applications as pleaded in paragraph 64 were incorrect and did not accurately reflect the Tates' Living expenses or their Essential expenses.

69. The Tate Loan Applications disclosed or purported to disclose that the Tates were spending:
- (a) "\$0" on expenses other than "Absolute Basic expenses" (as defined in the Tate Loan Applications), including "\$0" on expenses for education, childcare, mobile phone, internet and holidays; and
 - (b) "\$0" on insurance including car, comprehensive third party, building, contents, health and income protection insurance.
70. It was on its face unlikely that a family:
- (a) with three dependent children had no expenses for education, childcare, mobile phones, internet and holidays; and, or alternatively
 - (b) in the circumstances of the Tates as disclosed in the Tate Loan Applications had no expenses for insurance.
71. Westpac failed to make any inquiries to clarify, correct or complete the information in the Tate Loan Applications pleaded in paragraphs 64 and 69, despite such information being, or appearing on its face to be, anomalous, inaccurate or incomplete.
72. By reason of the matters pleaded in paragraphs 56, 59, 62 and 71 Westpac contravened ss 128(d) and 130(1)(a) and (b) of the Act in relation to the Tate Loans.
- F2. Westpac failed to take reasonable steps to verify the Tates' financial situation**
73. Pursuant to ss 128(d) and s 130(1)(c) of the Act Westpac was required to take reasonable steps to verify the consumer's financial situation.
74. By reason of the statutory obligation pleaded in paragraph 73, Westpac was required to take reasonable steps to verify the Tates' Living expenses, or alternatively, Essential expenses.
75. Westpac took no or, alternatively, no reasonable steps to verify the Tates' Living expenses, or alternatively, Essential expenses.

Particulars of reasonable steps to verify

Further particulars of the reasonable steps which Westpac could or should have taken to verify the Tates' financial situation may be given after discovery and expert evidence, however such reasonable steps would have included:

- (1) *examining the statements of the Deposit account for at least three months prior to the Tate Loans to check for any expenses that had not been disclosed on the Tate Loan Applications;*
- (2) *obtaining from the Tates, the Broker or elsewhere other financial records (including credit card statements) to examine such records to check for any expenses that had not been disclosed on the Tate Loan Applications; and*
- (3) *taking reasonable steps subsequent to carrying out the said examinations and checks, including (if or to the extent that information was identified through such examinations and checks that conflicted with information in the Tate Loan Applications) checking or clarifying any conflicting information with the Tates and amending or updating the Tate Loan Applications accordingly; and, or alternatively*
- (4) *verifying information collected by the Broker in relation to or for the purposes of the Tate Loan Applications as accurate and complete.*

76. By reason of the matters pleaded in paragraph 75, Westpac contravened ss 128(d) and 130(1)(c) of the Act.

F3. Westpac contravened ss ~~131(1)~~, 131(4), ~~133(1)~~ and 133(4) by taking into account the Simplified HEM Benchmark

77. Pursuant to s 128(c) of the Act, Westpac was required prior to entering the Tate Loans to make an assessment that, among other things, was in accordance with s 129 of the Act.

78. Pursuant to s 129 of the Act, Westpac was required to make an assessment of the Tate Loans that:

- (a) specified the period the assessment covered; and
- (b) assessed whether the Tate Loans would be unsuitable for the Tates if the Tate Loans were entered.

79. Pursuant to s 131(1) of the Act, Westpac was required to assess the Tate Loans as unsuitable if they were unsuitable within the meaning of s 131(2) of the Act.

80. For the purposes of Westpac determining under subsection 131(2) of the Act whether the Tate Loans would at the time of the assessment be unsuitable, only information about the Tates' financial situation, requirements or objectives was to be taken into account.

81. Further, pursuant to s 133(1) of the Act Westpac was prohibited from entering into the Tate Loans if they were unsuitable for the Tates pursuant to s 133(2) of the Act.
82. For the purposes of Westpac determining under subsection 133(2) of the Act whether the Tate Loans would at the time of the assessment be unsuitable, only information about the Tates' financial situation, requirements or objectives was to be taken into account.
83. In determining whether the Tate Loans were unsuitable for the Tates for the purposes of ss 131(2) and 133(2) of the Act Westpac took into account information derived from or reflecting the Simplified HEM Benchmark.
84. The information derived from or reflecting the Simplified HEM Benchmark was not information about the Tates' financial situation, requirements or objectives.
85. By taking into account information derived from or reflecting the Simplified HEM Benchmark in determining whether the Tate Loans were unsuitable for the Tates, Westpac contravened s 131(4)(a) and, or alternatively, s 133(4)(a) of the Act.
86. Further, pursuant to s 131(4)(b) and s 133(4)(b) of the Act, for the purposes of determining under subsection 131(2) or subsection 133(2) of the Act whether the Tate Loans would be unsuitable, Westpac was required to take into account only information that Westpac:
 - (a) had reason to believe was true; or
 - (b) would have had reason to believe was true if it had made the inquiries or verification under s 130 of the Act.
87. To the extent that Westpac took into account in assessing unsuitability, the information pleaded in paragraphs 64 and 69, Westpac contravened s 131(4)(b) and, or alternatively, s 133(4)(b) of the Act because by reason of the matters pleaded in paragraphs 65 to 67 and 70 , Westpac had no reason to believe that such information was true and would not have had reason to believe such information was true if it had made the required inquiries or verification.
88. Westpac's obligation pursuant to s 128(c) and s 129 of the Act to carry out an assessment was an obligation to carry out an assessment in a manner that complied with the credit legislation.

89. By reason of the matters pleaded in paragraphs 73 to 88, Westpac failed to carry out an assessment in relation to the Tate Loans ~~in a fair way or, alternatively,~~ in a manner that complied with the credit legislation such that Westpac contravened ~~s 47(1)(a), s 47(1)(d),~~ s 128(c) and, or alternatively, s 129 of the Act.

F4. The Tate Loans were unsuitable

90. In what follows **the Assessments** means either the Darwin serviceability assessment or the Mudgee serviceability assessment or both.

91. At the time of the Assessments:

- (a) Mr Tate was and would continue to be the sole breadwinner for the Tate family;
- (b) Mr Tate was aged in his late 40's and did not wish, and would in any event not be able, to continue to carry out physically demanding work for the whole or even a significant part of the 30 year terms of the Tate Loans;
- (c) Mr Tate had no other qualifications for the purposes of finding alternative employment that was not physically demanding work;
- (d) Mr Tate would be looking to retire from the workforce well before the expiry of the term of the Tate Loans;
- (e) Even if Mr Tate had found some alternative employment before the expiry of the Tate Loans, it was highly unlikely that the remuneration from such employment would be sufficient to enable him to meet the Tates' obligations under the Tate Loans;
- (f) even if Mrs Tate resumed full time or, more likely, part-time paid employment at some point in the future it was highly unlikely that her remuneration from such employment would be sufficient to enable her to meet the Tates' obligations under the Tate Loans;
- (g) the Tates would be responsible for the care, maintenance and support of their three children for many years;
- (h) the Tate Loans would in approximately five years from the date of the Tate Loans convert from interest only to principal and interest such that the repayments would increase;

- (i) by reason of and subsequent to the Tate Loans, the Tates would have among other things:
 - (i) legal title to, but no or negative equity in, three investment properties being Skyview, the Darwin apartment and the Mudgee Land;
 - (ii) a debt or debts to Westpac of some \$1.6 million in total;
 - (iii) no prospect of obtaining any equity in the Darwin apartment or the Mudgee Land for at least five years (despite Mr Tate being already in his late 40's); and, or alternatively
 - (iv) no or no reasonable prospect of earning a net return on any of the said investment properties for many years and, or alternatively, until after Mr Tate was no longer able or did not wish to carry out physically demanding work; and
 - (j) by reason of the Tates' Essential expenses they would not be able to service the Tate Loans.
92. By reason of the matters pleaded in paragraph 91 above, it was likely at the time of the Assessments:
- (a) that the Tates would not be able to comply with their obligations under the Tate Loans, or not without substantial hardship within the meaning of s 131(2)(a) of the Act; and
 - (b) if the Tate Loans were entered into, the Tate Loans would not meet either of the Tates' Requirements or the Tates' Objectives or both within the meaning of s 131(2)(b) of the Act.
93. By reason of the matters pleaded in paragraph 92, Westpac contravened s 131 of the Act by failing to assess that the Tate Loans would be unsuitable for the Tates.
94. By entering into the Tate Loans, Mrs Tate gave as security her interest in Dianne Court while having or obtaining no interest in the Darwin apartment, the Mudgee Land or Skyview.
95. By reason of the matters pleaded in paragraphs 91 and 94 above, it was likely at the time of entering into the Tate Loans that:

- (a) the Tates would not be able to comply with their obligations under the Tate Loans, or not without substantial hardship within the meaning of s 133(2)(a) of the Act; and
- (b) the Tate Loans did not meet either of the Tates' Requirements or the Tates' Objectives or both within the meaning of s 133(2)(b) of the Act.

96. By reason of the matters pleaded in paragraph 95 above, Westpac contravened s 133 of the Act by entering into the Tate Loans that were unsuitable for the Tates.

G. ~~STATUTORY DUTY~~

97. Pursuant to ~~s 47 of the Act, Westpac was obliged during the Relevant Period:~~

- ~~(a) to do all things necessary to ensure that the credit activities authorised by Westpac's licence were engaged in efficiently, honestly and fairly (s 47(1)(a)); and~~
- ~~(b) to comply with the credit legislation (which included obligations under the Act) (s 47(1)(d)).~~

98. ~~Westpac's potential and existing clients including the Tates were persons the Act sought to protect.~~

99. ~~Westpac owed the obligations pleaded in paragraph 97 to the Tates.~~

100. ~~By reason of the matters pleaded above in paragraphs 56, 59, 62, 71, 93 and 96 Westpac failed to:~~

- ~~(a) ensure that the credit activities authorised by Westpac's licence were engaged in efficiently and fairly; and or alternatively~~
- ~~(b) comply with the credit legislation.~~

101. ~~By reason of the matters pleaded in paragraph 100, Westpac contravened s 47(1)(a) and (d) of the Act and, thereby, its obligations to the Tates during the Relevant Period.~~

H. CAUSATION

102. The contraventions of the Act pleaded in Section F ~~and, or alternatively, the breaches of statutory duty pleaded in Section G~~ were a cause of the Tates' loss pleaded in Section I below.

103. In the alternative, if the Tates are required to plead a counterfactual as an element of their cause of action for the purposes of this claim (which is denied), then the Tates plead further as follows.

104. If Westpac had not contravened the Act ~~or its statutory duty~~ but rather had:

(a) made the reasonable inquiries about the Tates' financial situation pleaded in Section F1.1;

(b) made the reasonable inquiries to clarify, correct or complete information in the Tate Loan Applications that was, or appeared on its face to be, anomalous, inaccurate or incomplete as pleaded in Section F1.4; and

(c) taken reasonable steps to verify the Tates' financial situation as pleaded in Section F2,

then Westpac would or could have ensured that true, accurate and complete information concerning the Tates' Living expenses was included in the Tate Loan Applications.

105. If such true, accurate and complete information concerning the Tates' financial situation had been included in the Tate Loan Applications:

(a) the Tate Loan Applications would have failed the 70% Ratio Rule or the Serviceability Calculation Rule or both;

(b) Westpac's credit officer responsible for manual assessment of the Tate Loan Applications, or a reasonable person in the position of that credit officer, would not have approved the Tate Loans; and, further or alternatively

(c) Westpac would have assessed the Tate Loans as unsuitable and not proceeded with them.

106. Further, or in the alternative, if Westpac had not contravened the Act ~~or its statutory duty~~ by:

- (a) failing to make the reasonable inquiries about the Tates' Objectives and Tates' Requirements as pleaded in Sections F1.2 and F1.3;
- (b) taking into account information concerning the Simplified HEM Benchmark as pleaded in Section F3; and
- (c) failing to assess the Tate Loans as unsuitable as pleaded in Section F4,

the Tate Loans would have been assessed as unsuitable and neither Westpac nor the Tates would have entered into the Tate Loans.

107. Further, or in the alternative, if Westpac had not contravened the Act ~~or its statutory duty~~ as pleaded in this Section H above then through the process of responding to and engaging with Westpac's reasonable inquiries and verification the Tates would have become aware that:

- (a) they could not enter the Tate Loans without being forced to forgo some or all of their Essential expenses; or
- (b) they would not be able to comply with their obligations under the Tate Loans or not without substantial hardship; or
- (c) the Tate Loans did or would not meet the Tates' Requirements and, or alternatively, the Tates' Objectives, and

the Tates would have declined to proceed with or enter into the Tate Loans.

I. ~~LOSS, COMPENSATORY AND EXEMPLARY DAMAGES~~

I1. The Tates' loss

108. Prior to entering into the Tate Loans the Tates had equity in real property in an amount of approximately \$520,000, being the approximate value of Dianne Court less the approximate amount of negative equity in Skyview.

109. Subsequent to entering into the Tate Loans, the Tates sold the following properties:

- (a) Dianne Court on or about 8 June 2017 for \$740,000;
- (b) a subdivided part of the Mudgee Land known as 18 Rifle Range Road, Mudgee on or about 13 April 2018 for \$325,500;

- (c) a subdivided part of the Mudgee Land known as 20 Rifle Range Road, Mudgee on or about 20 June 2018 for \$324,000;
- (d) Skyview on or about 19 December 2018 for \$400,000; and
- (e) the Darwin apartment on or about 26 April 2019 for \$280,000.

110. As at the date of the filing of ~~this~~the Amended Statement of Claim, the Tates had incurred approximately the following costs and obtained approximately the following benefits by entering into the Tate Loans and purchasing the Darwin apartment and the Mudgee Property:

Darwin loan

Costs	\$	Benefits	\$
<i>Property purchase price</i>	\$540,000	<i>Sale price</i>	\$281,052
<i>Property purchase costs</i>	\$27,255	<i>Rents received</i>	\$210,918
<i>Interest paid on loan as at 21 May 2019</i>	\$161,306		
<i>Rental and maintenance expenses</i>	\$158,339		
<i>Sale expenses</i>	\$12,617		

Mudgee loan

Costs	\$	Benefits	\$
<i>Land purchase + development cost</i>	\$610,911	<i>Sale price</i>	\$649,500
<i>Property purchase costs</i>	\$11,573	<i>Rents received</i>	\$53,900
<i>Interest paid on loan</i>	\$80,879	<i>New home grant</i>	\$5,000
<i>Rental and maintenance expenses</i>	\$54,491		
<i>Sale expenses</i>	\$20,689		

Taxation benefit due to Darwin and Mudgee Credit Contracts

\$43,601

- 111. The total costs of the Tate Loans set out above were: \$1,678,060.
- 112. The total benefits of the Tate Loans set out above were: \$1,243,970.
- 113. The Tates have suffered loss being or including:
 - (a) the costs of the Tate Loans as pleaded in paragraph 111 less the total benefits of the Tate Loans as pleaded in paragraph 112, being a loss of approximately \$434,090; and, or alternatively

- (b) a deterioration in the Tates' net equity position in real property as pleaded in paragraph 108, in that as at 18 October 2019, the Tates had net equity in real property in an amount of approximately \$232,806.44.

Particulars

- (1) *The amount of net equity in real property as at 18 October 2019 is comprised of an approximate value of real property owned by the Tates of \$530,000 less the balance of the Darwin loan of \$297,193.56.*
- (2) *Further particulars of the Tates' loss will be provided after the service of evidence including expert evidence.*

114. Further, the Tates continue to suffer loss, including that they continue to make repayments on the balance of the Darwin loan.

Particulars

Further particulars of the Tates' continuing loss will be provided closer to the hearing.

115. The Tates would not have incurred the losses described in paragraphs 113 and 114 if they had not entered into the Tate Loans.

I2. Compensatory damages and other relief

116. The Tates are entitled to compensatory damages pursuant to ss 177, 178 and, or alternatively, 179 of the Act ~~and, or alternatively, at law.~~

117. Further, the Tates are entitled to an order pursuant to ss 177, 178 and, or alternatively, 179 of the Act ~~and, or alternatively, at law~~ that:

- (a) Westpac is not entitled to enforce the Darwin Loan against the Tates;
- (b) Westpac is not entitled to any further performance of the Darwin Loan; and, or in the alternative
- (c) in respect of the Darwin Loan, the Tates are or were not indebted to Westpac under the Darwin Loan.

13. Exemplary damages

118. Westpac knew or ought to have known at all times during the Relevant Period that in determining whether an Applicable Credit Contract would be unsuitable under the Act Westpac could only take into account:

~~(a) the consumer's financial situation, requirements or objectives (s 131(4)(a) and/or s 133(4)(a)); and~~

~~(b) the information that Westpac had reason to believe was true or would have had reason to believe was true if it had made the inquiries and verifications under the Act (s 131(4)(b) and/or s 133(4)(b)).~~

Particulars

~~(1) In 2009, the Westpac Group established a Major Regulatory Change Program concerning the implementation of four areas of regulatory reform including the Act and had a team responsible for managing the implementation of the requirements of the Act (the **Responsible Lending Project**).~~

~~(2) The Responsible Lending Project focussed on the new requirements under the Act across all channels, brands and relevant products within the Westpac Group including:~~

~~(A) the concept of making reasonable inquiries about a consumer's financial situation including requirements and objectives;~~

~~(B) the concept of taking reasonable steps to verify a consumer's financial situation;~~

~~(C) the concept of making an assessment about whether the proposed credit contract is "not unsuitable" for the consumer.~~

~~(3) Westpac's knowledge can be inferred from the following:~~

~~(A) Explanatory Memorandum, National Consumer Credit Protection Bill 2009~~

~~(B) ASIC Consultation Paper 115: Responsible Lending, 2 September 2009~~

~~(C) Letter dated 30 October 2009 to ASIC regarding ASIC Consultation Paper 115~~

~~(D) ASIC, Regulatory Guide 209 – Credit Licensing: Responsible Lending Conduct, 26 February 2010~~

- ~~(E) File note of meeting held on 12 October 2010 between ASIC and Westpac~~
- ~~(F) Slide Pack entitled "NCCP & Responsible Lending Project Status", ASIC discussion, 12 October 2010~~
- ~~(G) File note of meeting held on 30 November 2010 between ASIC and Westpac~~
- ~~(H) Slide Pack entitled "Credit Licensing: Responsible lending conduct" dated 30 November 2010~~
- ~~(I) Memorandum dated 5 July 2010 from Susie Peacock, Head of Secured Risk P&O to David Malcolm, General Manager P&O Risk entitled "Recommended Credit Policy Changes (secured) – Responsible Lending"~~
- ~~(J) ASIC, Report 262, Review of credit assistance providers' responsible lending conduct, focusing on 'low doc' home loans, November 2011~~
- ~~(K) ASIC Consumer credit regulatory update 2014, A speech by Peter Kell, Deputy Chairman, 14 May 2014~~
- ~~(L) ASIC, Report 410, Review of 'low doc' home lending following the introduction of the responsible lending obligations, September 2014~~
- ~~(M) ASIC, Regulatory Guide 209 – Credit Licensing: responsible lending conduct, November 2014~~
- ~~(N) Australian Prudential Regulation Authority, APG 223 – Residential Mortgage Lending, 5 November 2014~~

~~(4) Further particulars will be provided following discovery.~~

119. ~~Westpac knew or ought to have known that compliance with s 131(4)(a) and, or alternatively, s 133(4)(a) of the Act required Westpac to consider the consumer's actual financial situation, requirements or objectives.~~

Particulars

~~(1) The Tates repeat the particulars in paragraph 118.~~

~~(2) Further particulars will be provided following discovery.~~

120. ~~At all times during the Relevant Period Westpac knew or ought to have known that information derived from the Simplified HEM Benchmark was not information "about the consumer's financial situation, requirements or objectives" within the meaning of s 131(4)(a) and, or alternatively, s 133(4)(a) of the Act yet Westpac nevertheless took~~

~~the said information derived from the Simplified HEM Benchmark into account in determining whether Applicable Credit Contracts would be unsuitable.~~

Particulars

~~(1) — The applicants repeat the particulars in paragraph 118.~~

~~(2) — Further particulars will be provided following discovery.~~

- ~~121. Westpac developed and maintained during the Relevant Period systems, policies, procedures or practices such that information derived from the Simplified HEM Benchmark was used in determining unsuitability rather than information about the consumer's actual financial situation, requirements or objectives.~~
- ~~122. Further, Westpac developed and maintained during the Relevant Period systems, policies, procedures or practices which involved Westpac engaging, or caused Westpac to engage, in the contraventions of the Act pleaded in Sections F and J, and, or alternatively, the breaches of statutory duty pleaded in Sections G and J.~~
- ~~123. Westpac continued to enter into, and to enforce, Applicable Credit Contracts during the Relevant Period, despite the matters pleaded in paragraphs 118 to 122 above and despite the fact that Westpac had acted contrary to the Act and knew or should have known that it had so acted.~~
- ~~124. Westpac engaged in the conduct pleaded above in this Section I3 not in furtherance of the statutory purposes of Part 3.2 of the Act but, rather, in its own financial interests and to earn profit.~~
- ~~125. By reason of the matters pleaded in paragraphs 118, 119, 120, 121, 122, 123 and, or alternatively, 124, Westpac contravened the Act and, or alternatively, its statutory duty to the Tates, with contumelious or wanton disregard for the interests of the Tates and is liable for exemplary damages in addition to compensatory damages.~~

J. GROUP MEMBER CLAIMS

J1. Westpac applied the Manuals to Group Members

- ~~126. In the Relevant Period, Group Members were “consumers” within the meaning of s 5 of the Act in their dealings with Westpac in connection with a Group Member's Applicable Credit Contract.~~

127. From time to time in the Relevant Period, Group Members applied for credit under Applicable Credit Contracts (**Group Member Applications**).
128. Westpac applied the systems, policies and procedures pleaded in Section C1 above in determining the Group Member Applications.
- J2. Westpac failed to make reasonable inquiries about the requirements or objectives and the financial situation of Group Members**
129. Under s 128(d) of the Act, Westpac was not permitted to enter an Applicable Credit Contract with a consumer unless it had, within 120 days before entering the credit contract, among other things, made the inquiries and verification required by s 130 of the Act.
130. Under s 130(1) of the Act, for the purposes of s 128(d), Westpac was obliged, among other things, to:
- (a) make reasonable inquiries about a consumer's requirements and objectives in relation to the proposed Applicable Credit Contract as required by s 130(1)(a) of the Act;
 - (b) make reasonable inquiries about a consumer's financial situation as required by s 130(1)(b) of the Act; and
 - (c) take reasonable steps to verify the consumer's financial situation as required by s 130(1)(c) of the Act.
131. By reason of its statutory obligation pleaded in paragraph 130 Westpac was required to make reasonable inquiries about or for the purposes of ascertaining the amount of the Group Member's Essential expenses.
132. In the Relevant Period Westpac contravened s 128(d) and s 130(1)(a) and (b) of the Act in connection with each Group Member's Applicable Credit Contract because it did not, in the 120 days before entering the Applicable Credit Contract make any, and or alternatively, reasonable inquiries about the Group Member's Essential expenses.
133. In the Relevant Period, Westpac failed to make any, or alternatively, reasonable inquiries about Group Members' objectives and, or alternatively, requirements.
134. By reason of its statutory obligation under s 128(d) and s 130(1), Westpac was required to make reasonable inquiries to clarify, correct or complete information in the Group

Member Applications that was, or appeared on its face to be, anomalous, inaccurate or incomplete.

135. In relation to Group Members who made Group Member Applications which included information to the effect that the Group Member's Living expenses as declared in the consumer's loan application were less than the amount derived from the Simplified HEM Benchmark, Westpac failed to make any inquiries to clarify, correct or complete such information, despite such information being, or appearing on its face to be, anomalous, inaccurate or incomplete.

J3. Westpac failed to take reasonable steps to verify the financial situation of Group Members

136. A Group Member's financial situation within the meaning of s 130(1)(b) and 130(1)(c) of the Act during the 120 days before the Group Member entered an Applicable Credit Contract included the Group Member's Living expenses, or alternatively, Essential expenses.
137. In the Relevant Period, Westpac contravened s 128(d) and s 130(1)(c) of the Act in connection with each Group Member's Applicable Credit Contract because it did not, in the 120 days before entering the Applicable Credit Contract, take any, or alternatively, reasonable steps to verify the Group Member's Living expenses, or alternatively, Essential expenses.

J4. Westpac failed to carry out compliant assessments of the suitability of Applicable Credit Contracts for Group Members

138. In the Relevant Period pursuant to s 128(c) and s 129 of the Act, Westpac was required to make an assessment of each Group Member Application that specified the period the assessment covered and assessed whether the Applicable Credit Contract would be unsuitable for the Group Member if the Applicable Credit Contract were entered.
139. Pursuant to s 131(4) and, or alternatively, s 133(4) of the Act, in determining whether the Applicable Credit Contract was unsuitable for the Group Member, Westpac was required to take into account only:
- (a) information about the Group Member's financial situation, requirements or objectives (**Prescribed Information**); and
 - (b) Prescribed Information that Westpac:

- (i) had reason to believe was true; or
 - (ii) would have had reason to believe was true if it had made the inquiries or verification under s 130 of the Act.
- 140. In the period 1 January 2011 to March 2015, in accordance with the Manuals, Westpac assessed the Group Member's ability to comply with his or her obligations under the proposed Applicable Credit Contract by taking into account the Simplified HEM Benchmark rather than his or her Living expenses or Essential expenses (**Pre-March 2015 Serviceability Assessment**).
- 141. For Group Members who entered Applicable Credit Contracts following an assessment pursuant to the Pre-March 2015 Serviceability Assessment:
 - (a) the amount derived from the Simplified HEM Benchmark was not information about the Group Member's financial situation, requirements or objectives, for the purposes of s 131(4)(a) or s 133(4)(a) of the Act;
 - (b) Westpac had no reason to believe that the amount derived from the Simplified HEM Benchmark was a true reflection of the Group Member's Living expenses or Essential expenses, for the purposes of s131(4)(b)(i) or s 133(4)(b)(i) of the Act; and or alternatively
 - (c) if it had undertaken the inquiries and verification required by s 130(1) of the Act, Westpac would have had no reason to believe that the amount derived from the Simplified HEM Benchmark was a true reflection of the Group Member's Living expenses or Essential expenses, for the purposes of s 131(4)(b)(ii) or s 133(4)(b)(ii) of the Act.
- 142. In the period from March 2015 to 17 February 2018, Westpac assessed the Group Member's ability to comply with his or her obligations under the proposed Applicable Credit Contract on the assumption that his or her Living expenses were the greater of the amount derived from the Simplified HEM Benchmark or his or her Living expenses as declared in the Group Member Application rather than his or her actual Living expenses or Essential expenses (**Post-March 2015 Serviceability Assessment**).
- 143. For those Group Members who were assessed pursuant to the Post-March 2015 Serviceability Assessment and whose Living expenses as declared in the Group

Member Application were less than the amount derived from the Simplified HEM Benchmark:

- (a) the amount derived from the Simplified HEM Benchmark was not information about the Group Member's financial situation, requirements or objectives, for the purposes of s 131(4)(a) or s 133(4)(a) of the Act;
- (b) Westpac had no reason to believe that the amount derived from the Simplified HEM Benchmark was a true reflection of the Group Member's Living expenses or Essential expenses, for the purposes of s131(4)(b)(i) or s 133(4)(b)(i) of the Act; and or alternatively
- (c) if it had undertaken the inquiries and verification required by s 130(1) of the Act, Westpac would have had no reason to believe that the amount derived from the Simplified HEM Benchmark was a true reflection of the Group Member's Living expenses or Essential expenses, for the purposes of s 131(4)(b)(ii) or s 133(4)(b)(ii) of the Act.

144. To the extent that Westpac took into account, in assessing unsuitability, the information pleaded in paragraphs 140 to 143 Westpac contravened s 131(4) and s 133(4) of the Act.

145. ~~By reason of s 47(1)(d) of the Act, Westpac's obligation to carry out an assessment was an obligation to carry out an assessment in a fair way and, or alternatively, efficient way, and, or alternatively, in a manner that complied with the credit legislation.~~

146. By reason of the matters pleaded in paragraphs 140 to 143 Westpac failed to carry out an assessment in relation to Applicable Credit Contracts ~~in a fair way, and or alternatively, in an efficient way, and, or alternatively,~~ in a manner that complied with the credit legislation such that Westpac contravened ~~s 47(1)(a), s 47(1)(d),~~ s 128(c) and, or alternatively, s 129 of the Act.

J5. ~~Westpac failed to assess Applicable Credit Contracts as unsuitable for Group Members and entered unsuitable Applicable Credit Contracts~~

147. ~~Further, and alternatively, in the Relevant Period:~~

- ~~(a) under s 131 of the Act, Westpac was required to assess that an Applicable Credit Contract would be unsuitable for a Group Member if, at the time of the assessment, it was likely that the Group Member would be unable to comply~~

~~with the Group Member's financial obligations under the Applicable Credit Contract or could only comply with substantial hardship; and~~

~~(b) under s 133 of the Act, Westpac was prohibited from entering an Applicable Credit Contract with a Group Member if the Applicable Credit Contract was unsuitable for the Group Member because, at the time of entry into the Applicable Credit Contract, it was likely that the Group Member would be unable to comply with the Group Member's financial obligations under the Applicable Credit Contract or could only comply with substantial hardship.~~

~~148. In the Relevant Period, in respect of each Group Member who at the time of the assessment would have been likely to have been unable to comply with his or her financial obligations under the Applicable Credit Contract or would only have been able to comply with substantial hardship, Westpac contravened s 131 of the Act by failing to assess the Applicable Credit Contract as unsuitable for the Group Member.~~

~~149. In the Relevant Period, in respect of each Group Member who at the time of the assessment would have been likely to have been unable to comply with his or her financial obligations under the Applicable Credit Contract or would only have been able to comply with substantial hardship, Westpac contravened s 133 of the Act by entering an Applicable Credit Contract that was unsuitable for the Group Member.~~

J6. ~~Westpac breached its statutory duty to Group Members~~

~~150. The applicants repeat the matters in paragraphs 97 to 98.~~

~~151. By reason of the matters pleaded in Section J4 and Section J5 Westpac contravened s 47(1)(a) and (d) of the Act during the Relevant Period.~~

J7. ~~Group Members claim relief~~

~~152. Group Members have suffered loss or damage or are likely to suffer loss or damage as a result of entering into an Applicable Credit Contract in circumstances where Westpac contravened or breached:~~

~~(a) ss 128(d) and 130(1)(a) and (b) of the Act by failing to make reasonable inquiries about the Group Member's financial situation, requirements or objectives and as pleaded in Section J2;~~

~~(b) ss 128(d) and 130(1)(c) of the Act by failing to verify the Group Member's Living expenses or, alternatively, Essential expenses as pleaded in Section J3; and~~

- (c) ss 128(c) and 129 of the Act by failing to carry out an assessment of suitability that complied with the Act as pleaded in Section J4;
 - (d) ~~s 131 of the Act by failing to assess that the Applicable Credit Contract would be unsuitable for the Group Member as pleaded in Section J5; and~~
 - (e) ~~s 133 of the Act by entering an Applicable Credit Contract with a Group Member which was unsuitable for the Group Member as pleaded in Section J5; and, or in the alternative~~
 - (f) ~~its statutory duty as pleaded in Section J6.~~
153. Group Members claim compensatory damages and, or alternatively, other appropriate relief pursuant to ss 177, 178 and or alternatively 179 of the Act ~~and or alternatively at law.~~
154. ~~Group Members claim exemplary damages by reason of the matters pleaded in Section I3.~~
155. The relevant material facts and particulars of individual Group Member claims will be provided after opt-out and the trial of common issues.

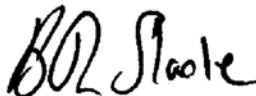
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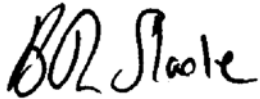
Signed by Signed by Ben Slade,
Maurice Blackburn Pty Ltd
Lawyer for the applicants

This pleading was prepared by Jeremy Stoljar SC, Paul Batley and Bernice Ng.

Certificate of lawyer

I Ben Slade certify to the Court that, in relation to the statement of claim filed on behalf of the applicants, the factual and legal material available to me at present provides a proper basis for each allegation in the pleading.

Date: ~~18 October 2019~~ 11 February 2020

A handwritten signature in black ink that reads "Ben Slade". The signature is written in a cursive, slightly slanted style.

Signed by Ben Slade,
Maurice Blackburn Pty Ltd
Lawyer for the applicants