

NOTICE OF FILING

This document was lodged electronically in the FEDERAL COURT OF AUSTRALIA (FCA) on 10/11/2020 3:01:20 PM AEDT and has been accepted for filing under the Court's Rules. Details of filing follow and important additional information about these are set out below.

Details of Filing

Document Lodged:	Statement of Claim - Form 17 - Rule 8.06(1)(a)
File Number:	NSD1812/2017
File Title:	GREGORY JOHN LENTHALL & ANOR v WESTPAC BANKING CORPORATION ABN 33 007 457 141 & ANOR
Registry:	NEW SOUTH WALES REGISTRY - FEDERAL COURT OF AUSTRALIA



A handwritten signature in blue ink that reads "Sia Lagos".

Dated: 11/11/2020 4:07:44 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.

The date and time of lodgment also shown above are the date and time that the document was received by the Court. Under the Court's Rules the date of filing of the document is the day it was lodged (if that is a business day for the Registry which accepts it and the document was received by 4.30 pm local time at that Registry) or otherwise the next working day for that Registry.



Form 17

Rule 8.05(1)(a)

~~Fourth~~ Fifth Further Amended Statement of claim

**(Amended pursuant to the order of Lee J made on 21 October 2020 ~~17~~
~~September 2020~~)**

No. 1812 of 2017

Federal Court of Australia

District Registry: New South Wales

Division: General

Gregory John Lenthall

First Applicant

Sharmila Lenthall

Second Applicant and others named in the schedule

Westpac Banking Corporation ABN 33 007 457 141

First Respondent

Westpac Life Insurance Services Limited ABN 31 003 149 157

Second Respondent

A Parties

The Applicants

1. The First, Second, Third and Fourth Applicants (the **Applicants**) bring this proceeding as representative parties for and on behalf of the Group Members pursuant to Part IVA of the *Federal Court of Australia Act 1976* (Cth).

Filed on behalf of (name & role of party)	Gregory John Lenthall, Sharmila Lenthall, Shane Thomas Lye and Kylie Lee Lye Applicants		
Prepared by (name of person/lawyer)	W.A.D. Edwards and Monique Cowden of counsel		
Law firm (if applicable)	Shine Lawyers		
Tel	07 3006 6000	Fax	07 3229 1999
Email	jsaddler@shine.com.au		
Address for service (include state and postcode)	Level 13, 160 Ann Street, Brisbane QLD 4000		

First Respondent

2. The First Respondent (**Westpac**) at all material times was, and is:
 - (a) a company duly incorporated pursuant to the *Corporations Act 2001* (Cth) (**Corporations Act**) and capable of being sued;
 - (b) the holder of an Australian Financial Services Licence (Licence No: 233714) (**Westpac AFSL**);
 - (c) the ultimate holding company of the Second Respondent, Westpac Life Insurance Services Limited (**Westpac Life**);
 - (d) the ultimate holding company of St George Bank, Bank of Melbourne and Bank SA (**Westpac's subsidiary banks**);
 - (e) a trading corporation within the meaning of the *Australian Securities and Investments Commission Act 2001* (Cth) (**ASIC Act**).
3. Pursuant to the Westpac AFSL, Westpac at all material times was, and is, authorised to carry on a business to provide advice about, and dealing in, policies of insurance.

Particulars

Westpac AFSL, 'Authorisation', cl. 1(a)(iv) & (vi) and cl. 1(b)(1)(D) & (F)

4. At all material times Westpac provided advice and dealt in policies of insurance through its own network of financial advisers trading as Westpac Financial Planning or BT Advice or otherwise described as St George Financial Planning, Bank of Melbourne Financial Planning or BankSA Financial Planning (**Westpac Financial Planning**).

Particulars

- (i) Westpac at all material times was responsible for the provision of financial services to customers by its financial advisers whether trading as Westpac Financial Planning or BT Advice or otherwise described as St George Financial Planning, Bank of Melbourne Financial Planning or BankSA Financial Planning.
- (ii) Westpac's financial advisers were at all material times employed by its wholly owned subsidiary, Westpac Financial Consultants Limited (ABN 96 052 952 753).

5. Westpac issued, and continues to issue, financial services guides (**FSG**) that state that its financial advisers are authorised to provide advice on a wide range of financial services, including life insurance.

Particulars

- (i) Westpac Financial Planning FSG issued 1 October 2011, p.8.
- (ii) St George Financial Planning FSG issued 1 October 2011, p.9.
- (iii) Bank of Melbourne Financial Planning FSG issued 1 October 2011, p.6.
- (iv) BankSA Financial Planning FSG issued 1 October 2011, p.9.
- (v) Further particulars will be provided after discovery.

6. At all material times the financial advisers in Westpac Financial Planning were the representatives of and the agents for and on behalf of Westpac in providing financial advice to members of the public.

Particulars

- (i) Westpac Financial Planning FSG issued 1 October 2011, p.3.
- (ii) St George Financial Planning FSG issued 1 October 2011, p.2.
- (iii) Bank of Melbourne Financial Planning FSG issued 1 October 2011, p.1.
- (iv) BankSA Financial Planning FSG issued 1 October 2011, p.2.
- (v) Further particulars will be provided after discovery.

7. In respect of each of the material allegations concerning the financial advisers of Westpac Financial Planning in Parts C, D, F, G and H of this pleading their acts were within the scope of their actual or apparent authority as agents of Westpac.

Particulars

- (i) Westpac Financial Planning FSG issued 1 October 2011, p.8.
- (ii) St George Financial Planning FSG issued 1 October 2011, p.9.
- (iii) Bank of Melbourne Financial Planning FSG issued 1 October 2011, p.6.
- (iv) BankSA Financial Planning FSG issued 1 October 2011, p.9.
- (v) Further particulars will be provided after discovery.

The Second Respondent

8. Westpac Life at all material times was, and is:

- (a) a company duly incorporated pursuant to the Corporations Act and capable of being sued;
- (b) the holder of an Australian Financial Services Licence (Licence No: 233728);
- (c) a wholly owned subsidiary of Westpac;
- (d) registered under s 21 of the *Life Insurance Act 1995* (Cth) (**Life Insurance Act**) to issue life policies within the meaning of that Act;
- (e) carried on a life insurance business within the meaning of the Life Insurance Act.

The Group Members

9. The members of the group to whom this proceeding relates (**Group Members**) are those persons who, on or after 21 February 2011:
- (a) were given advice by Westpac, through its financial advisers in Westpac Financial Planning (including BT Advice, St George Financial Planning, Bank of Melbourne Financial Planning or BankSA Financial Planning), on insurance and the premiums payable on that insurance; and
 - (b) obtained from Westpac Life policies of insurance by reason of that advice.

Particulars

At the time of the filing of the Statement of Claim the Group Members exceeded 7 persons in number.

B Common questions of law and fact

10. [Not used]

C Background

Protection Plans

11. At all material times, Westpac distributed financial products through Westpac Financial Planning known as Westpac Protection Plans, BT Protection Plans and St George Protection Plans (**Protection Plans**).
12. At all material times, the policies of insurance that were distributed as part of the Protection Plans included:

- (a) 'Term Life' and 'Term Life as Superannuation';
- (b) 'Total & Permanent Disablement (TPD)';
- (c) 'Living Insurance (Trauma)'; and
- (d) 'Income Protection' and 'Income Protection Plus'.

(policies of insurance).

Particulars

- (i) Westpac Protection Plans, Policy Disclosure Statement and Policy Document (**PDS**) dated 15 November 2010, pp.9-53; Supplementary Policy Disclosure Statement and Policy Addendum (**SPDS**) dated 21 February 2011; SPDS dated 22 August 2011.
- (ii) BT Protection Plans, PDS dated 21 February 2011, pp.10-61; SPDS dated 22 August 2011.
- (iii) St George Protection Plans, PDS dated 15 November 2010, pp.6-49; SPDS dated 21 February 2011; SPDS dated 22 August 2011.

13. The policies of insurance could be owned by:

- (a) the insured; or
- (b) the trustee of the insured's superannuation fund.

Particulars

The particulars at paragraph 12 above are repeated.

Policies of insurance

14. At all material times the insurer under the policies of insurance was Westpac Life.

15. At all material times the policies of insurance were obtained through:

- (a) Westpac's financial advisers in Westpac Financial Planning (the **Bank channel**); or
- (b) independent financial advisers (the **IFA channel**).

16. On about 12 November 2010 Westpac Life received actuarial advice (**actuarial advice**) as to a new pricing structure for policies of insurance distributed through:

- (a) the Bank channel; and
- (b) the IFA channel.

Particulars

Actuarial Product Advice for Westpac Life dated 12 November 2010

17. The actuarial advice advised Westpac Life that the premiums payable on the policies of insurance should be as follows:

	Bank channel	IFA channel
Channel Factor	10% premium loading	0%
Premier Advantage Discount	5% discount (Wrap off)	0%
Table Shaving	+75% for lump sum; +50% for income products	+25%

Particulars

Actuarial Product Advice for Westpac Life dated 12 November 2010, par 8.1

18. The actuarial advice also advised Westpac Life that the expected profit margins and return on capital for the new pricing structure for the policies of insurance was as follows:

Channel	Profit Margin as % Premium	Return on Capital (% p. a.)
Bank Standalone	22. 6%	25%
IFA Standalone	14. 0%	13%
Bank on Wrap	24. 7%	28%
IFA on Wrap	17. 2%	18%

Particulars

Actuarial Product Advice for Westpac Life dated 12 November 2010, para 2.2.1

19. On and after 21 February 2011 Westpac Life implemented the new pricing structure set out in paragraph 17 above in relation to the premiums payable on the policies of insurance.

Particulars

Westpac Financial Planning Leadership Team meeting dated 17 January 2011

20. On and after 3 March 2014 Westpac Life introduced the Personal Advice Discount of 5% to premiums payable on the policies of insurance, such discount not being available in conjunction with the Premier Advantage Discount.

Particulars

Memorandum dated 18 December 2013 - Bank Financial Planning Insurance Offer Changes, p 2.

D Westpac's dealings with Applicants and Group Members

21. On or after 21 February 2011:

- (a) the Applicants and each of the Group Members were banking customers of Westpac or one of Westpac's subsidiary banks;

Particulars

- (i) Westpac Account: BSB 734-089, Account 506747 in the name of G and S Lenthall.
 - (ii) Westpac Account: BSB 734-239, Account 674122 in the name of Mr ST and Mrs KL Lye.
 - (iii) Particulars relating to the Group Members will be provided following the initial trial of the common questions and the Applicants' claims.
- (b) Westpac referred the First and Second Applicants, and Westpac or one of Westpac's subsidiary banks referred each of the Group Members, to one of its financial advisers in Westpac Financial Planning for financial advice in relation to their insurance needs.

Particulars (Lenthalls)

- (i) The customer file checklist prepared by Westpac Financial Planning in respect of the First and Second Applicants records that the date of the initial interview was 23 November 2011.
- (ii) Each of the client profile booklets prepared by Westpac Financial Planning in respect of the First and Second Applicants (**client profile booklet**) records that they were referred to Westpac Financial Planning by a Westpac personal banker named Denita Bahtanovic.
- (iii) The client profile booklet records that on or about 23 February 2012 the First and Second Applicants authorised Westpac to provide them with advice on superannuation and insurance.

Particulars (Lyes)

- (iv) Email received at 3.49pm on 13 April 2015 by the Third Applicant from Jessie Chambers, Personal Banker Westpac, to arrange for the Third and Fourth Applicants to meet with James Malhi, Financial Planner, Westpac Financial Planning on 21 April 2015.

- (v) At the meeting on 21 April 2015 with James Malhi, Financial Planner, Westpac Financial Planning, the Third and Fourth Applicants authorised Westpac to provide them with advice on superannuation and insurance.
- (vi) Particulars relating to the Group Members will be provided following the initial trial of the common questions and the Applicants' claims.

22. On or after 21 February 2011, Westpac, by its financial advisers in Westpac Financial Planning, undertook to give the Applicants and each of the Group Members financial advice on their insurance needs, including the premiums payable on that insurance.

Particulars

- (i) Westpac Financial Planning FSG issued 1 October 2011, p.4.
- (ii) St George Financial Planning FSG issued 1 October 2011, pp.3-4.
- (iii) Bank of Melbourne Financial Planning FSG issued 1 October 2011, p.2.
- (iv) BankSA Financial Planning FSG issued 1 October 2011, pp.2-3.
- (v) Sub-particulars (ii) & (iv) to paragraph 21(b) above are repeated
- (vi) Further particulars will be provided after discovery.

23. On or after 21 February 2011, Westpac, by its financial advisers in Westpac Financial Planning, gave personal financial advice to the Applicants and each of the Group Members about what policies of insurance they should obtain and the amount of the premiums that should be paid on those policies.

Particulars (Lenthalls)

- (i) Statement of Advice dated 21 March 2012, prepared for the First and Second Applicants by Christopher Ramsay, Advanced Financial Planner, Westpac, section entitled 'My Advice'.
- (ii) The customer file checklist prepared by Westpac Financial Planning in respect of the First and Second Applicants records that the advice was presented to the Applicants on 4 April 2012.

Particulars (Lyes)

- (iii) Statement of Advice dated 25 May 2015, prepared for the Third Applicant by James Malhi, Financial Planner, Westpac Financial Planning, section entitled 'My Advice'.

- (iv) Statement of Advice dated 30 June 2015, prepared for the Fourth Applicant by James Malhi, Advanced Financial Planner, Westpac Financial Planning, section entitled 'My Advice'.
- (v) Particulars relating to the Group Members will be provided following the initial trial of the common questions and the Applicants' claims.

24. On or after 21 February 2011, the Applicants and each of the Group Members applied to Westpac Life for policies of insurance by reason of the advice referred to in paragraph 23 above.

Particulars (Lenthalls)

- (i) The customer file checklist prepared by Westpac Financial Planning in respect of the First and Second Applicants records that the date the advice was accepted by the Applicants was 4 April 2012.
- (ii) Application Form BT Protection Plans no. BL 983269A dated 12 April 2012:
 - (1) was prepared by Christopher Ramsey, Advanced Financial Planner, Westpac, on behalf of the First and Second Applicants;
 - (2) stated that Christopher Ramsay, Advanced Financial Planner, Westpac, was acting as the financial adviser for the Applicants;
 - (3) stated that the First Applicant was applying for Term Life, Income Protection and Income Linking Plus policies of insurance;
 - (4) stated that the Second Applicant was applying for a Term Life policy of insurance;
 - (5) stated that the identification code for the proposed policies of insurance was "CF 1.045";
 - (6) was submitted to Westpac Life by Christopher Ramsey, Advanced Financial Planner, Westpac, on behalf of the Applicants.

Particulars (Lyes)

- (iii) Application Form BT Protection Plans BL 397760A on behalf of the Third Applicant.
- (iv) Application Form BT Protection Plans BL 233788A on behalf of the Fourth Applicant.

- (v) Particulars relating to the Group Members will be provided following the initial trial of the common questions and the Applicants' claims.

25. On or after 21 February 2011, the Applicants and each of the Group Members obtained from Westpac Life policies of insurance (**Insurance Policies**) pursuant to the applications referred to in paragraph 24 above.

Particulars (Lenthalls)

- | (i) | Policy No | Product | Insured Person | Commencement Date |
|-----|-----------|---------------------|-------------------|-------------------|
| | YL983269 | Term Life | Gregory Lenthall | 24 April 2012 |
| | CL983270 | Income Protection | Gregory Lenthall | 24 April 2012 |
| | CLF83270 | Income Linking Plus | Gregory Lenthall | 24 April 2012 |
| | YL983271 | Term Life | Sharmila Lenthall | 13 April 2012 |
- (ii) Letter from BT to Second Applicant dated 13 April 2012 and enclosed Policy Schedule.
- (iii) Letter from BT to the First and Second Applicants dated 26 April 2012 and enclosed Policy Schedules.

Particulars (Lyes)

- | | Policy No | Product | Insured Person | Commencement Date |
|--|-----------|-----------------------------|----------------|-------------------|
| | YL397761 | Term Life | Shane Lye | 1 June 2015 |
| | CL397760 | Income Protection Plus | Shane Lye | 1 June 2015 |
| | YLF97761 | Flexible Linking Plus | Shane Lye | 1 June 2015 |
| | LL233789 | Term Life as Superannuation | Kylie Lye | 24 August 2015 |
| | CL233788 | Income Protection Plus | Kylie Lye | 24 August 2015 |
| | YLF33789 | Flexible Linking Plus | Kylie Lye | 24 August 2015 |
- (v) Letter from BT to Third Applicant dated 1 June 2015 and enclosed Policy Schedule.
- (vi) Letter from BT to Fourth Applicant dated 24 August 2015 and enclosed Policy Schedules.
- (vii) Particulars relating to the Group Members will be provided following the initial trial of the common questions and the Applicants' claims.

26. The owners of the Insurance Policies were:

- (a) the insured;

Particulars

- (i)
- | Policy No | Product | Insured Person |
|------------------|------------------------|-----------------------|
| CLF83270 | Income Linking Plus | Gregory Lenthall |
| YL983271 | Term Life | Sharmila Lenthall |
| YLF97761 | Flexible Linking Plus | Shane Lye |
| YL397761 | Term Life | Shane Lye |
| CL397760 | Income Protection Plus | Shane Lye |
| CL233788 | Income Protection Plus | Kylie Lye |
- (ii) Particulars relating to the Group Members will be provided following the initial trial of the common questions and the Applicants' claims.

- (b) the trustee of the insured's superannuation fund.

Particulars

- (i)
- | Policy No | Product | Insured Person |
|------------------|-----------------------------|-----------------------|
| YL983269 | Term Life | Gregory Lenthall |
| CL983270 | Income Protection | Gregory Lenthall |
| YL397761 | Term Life | Shane Lye |
| LL233789 | Term Life as Superannuation | Kylie Lye |
- (ii) Particulars relating to the Group Members will be provided following the initial trial of the common questions and the Applicants' claims.

27. On or after 21 February 2011, Westpac Life charged the policy owner a premium for issuing the Insurance Policies and periodically thereafter continued to charge a premium on those policies.

Particulars

- (i)
- | Policy No | Product | Insured Person | Premium payable |
|------------------|------------------------|-----------------------|------------------------|
| YL983269 | Term Life | Gregory Lenthall | \$223.97 per month |
| CL983270 | Income Protection | Gregory Lenthall | \$226.21 per month |
| CLF83270 | Income Linking Plus | Gregory Lenthall | \$27.82 per month |
| YL983271 | Term Life | Sharmila Lenthall | \$21.93 per month |
| YL397761 | Term Life | Shane Lye | \$131.14 per month |
| YLF97761 | Flexible Linking Plus | Shane Lye | \$56.76 per month |
| CL397760 | Income Protection Plus | Shane Lye | \$151.44 per month |

CL233788	Income Protection Plus	Kylie Lye	\$206.86 per month
YLF33789	Flexible Linking Plus	Kylie Lye	\$30.21 per month
LL233789	Term Life Superannuation	as Kylie Lye	\$219.07 per month

- (ii) Particulars relating to the Group Members will be provided following the initial trial of the common questions and the Applicants' claims.

28. The premiums payable on the Insurance Policies were:

- (a) in the period 21 February 2011 to 2 March 2014, for the First and Second Applicants and Group Members who were not entitled to a Premier Advantage Discount, about 10% higher than the premiums payable on policies of insurance with identical coverage obtained from Westpac Life through the IFA channel.

Particulars

- (i) Actuarial Product Advice for Westpac Life dated 12 November 2010, paras 1, 2.1, 2.2, 4.2 & 8.1;
- (ii) Particulars relating to the Group Members will be provided following the initial trial of the common questions and the Applicants' claims;
- (b) in the period 21 February 2011 to 2 March 2014, for the First and Second Applicants and Group Members who were entitled to a Premier Advantage Discount of 5%, about 4.5% higher than the premiums payable on policies of insurance with identical coverage obtained from Westpac Life through the IFA channel.

Particulars

- (i) Actuarial Product Advice for Westpac Life dated 12 November 2010, paras 1, 2.1, 2.2, 4.2 & 8.1;
- (ii) Particulars relating to the Group Members will be provided following the initial trial of the common questions and the Applicants' claims;
- (c) from 3 March 2014 for the Applicants and Group Members who are entitled to either the Premier Advantage Discount of 5% or the Personal Advice Discount of 5% (but not both), about 4.5% higher premiums payable on policies of insurance with identical coverage obtained from Westpac Life through the IFA channel.

(the differential in each case being referred to as **Excess Premium**)

Particulars

- (i) Memorandum dated 18 December 2013 Bank Financial Planning Insurance

Offer Changes, p 2;

- (ii) Particulars relating to the Group Members will be provided following the initial trial of the common questions and the Applicants' claims.

29. Except in the case of Group Members who would have been subject to a 50% or 75% loading on Insurance Policies, any difference between the policies of insurance obtained through the Bank channel and those obtained through the IFA channel provided no benefit or, alternatively, no substantial benefit, to Group Members.
30. Further, or in the alternative to paragraph 28 above, the premiums payable on the Insurance Policies were higher than the premiums payable on substantially equivalent or better policies of insurance that could be obtained from third party insurers (the differential referred to as the **Alternative Excess Premiums**).

Particulars

- (i) The substantially equivalent or better policies of insurance that could be obtained from third party insurers at a lower premium are set out below

First Applicant, Term Life and TPD

Policy name	Insurer
Life Cover Super and TPD	MLC
Accelerated Protection Life and TPD	TAL
Life and Super TPD	AIA
LifeSolutions Life/TPD cover (Super)	Clearview

Second Applicant, Term Life

Policy name	Insurer
Priority Protection Life Cover Plan Life Cover with Vitality	AIA
On Track Life Cover	MLC
Accelerated Protection (Life Insurance)	TAL
Life Solutions	Clearview
Elevate	AMP
Life Complete	Asteron
OneCare	OnePath
Wealth Protection	Zurich
Comminsure Protection	Comminsure

Third Applicant, Term Life/TPD/Trauma

Policy name	Insurer
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AIA Priority Protection (super) and AIA Crisis Recovery (stand-alone trauma)	AIA
Super & TPD Cover (super) and stand-alone trauma	Clearview
Insurance Life Cover (super) and stand-alone trauma	MLC
Elevate (Life Insurance Superannuation Plan) and trauma	AMP
One Care Life (Life/TPD super) and trauma	One Path
Wealth Protection Life/TPD (super) and trauma	Zurich

Third Applicant, Income Protection

Policy name	Insurer
Life Cover with Vitality	Asteron
On Track Life Cover	MLC
OneCare	OnePath
LifeSolutions	Clearview
Elevate	AMP

Fourth Applicant, Term Life

Policy name	Insurer
Super and TPD and Crisis Recovery (stand-alone trauma)	AIA
Life and TPD and stand-alone trauma	Clearview
Accelerated Protection Life/TPD with Critical Illness Premier	TAL

Fourth Applicant, Income Protection

Policy name	Insurer
Accelerated Protection	TAL
Priority Protection – Vitality	AIA
Clearview LifeSolutions	Clearview

(ii) Particulars of the differences in the premiums payable on the Insurance Policies and the equivalent or better policies of insurance obtained from third party insurers will be provided following expert evidence.

(iii) Particulars relating to the Group Members will be provided following the determination of the common questions and Applicants' claims.

31. The owners of the Insurance Policies paid to Westpac Life the premiums including the Excess Premiums and/or Alternative Excess Premiums on the issuing and renewal of the Insurance Policies.

Particulars

The particulars at paragraph 27 above are repeated.

32. On or after 21 February 2011, Westpac did not disclose to the Applicants or any of the Group Members, nor did the Applicants or any of the Group Members know:
- (a) that the premiums payable on the issuing of Insurance Policies included the Excess Premiums or the Alternative Excess Premiums; and
 - (b) that the premiums payable on the renewal of the Insurance Policies would include the Excess Premiums or the Alternative Excess Premiums; and
 - (c) that identical policies of insurance were available to be obtained from Westpac Life through independent financial advisers for a premium that did not include the Excess Premiums; and
 - (d) the nature and amount of the Excess Premiums or the Alternative Excess Premiums; and
 - (e) that substantially equivalent or better policies of insurance were available for a premium that did not include the Alternative Excess Premiums.

E Westpac's responsibility for the conduct of Westpac Financial Planning

33. In acting as pleaded in paragraphs 22, 23 and 32, the financial advisers in Westpac Financial Planning were engaging in conduct that relates to the provision of a financial service within the meaning of s 917A(1)(a) of the Corporations Act.
34. In acting as pleaded in paragraphs 22, 23 and 32, the financial advisers in Westpac Financial Planning were engaging in conduct on which the Applicants and each Group Member could reasonably be expected to rely, in that:
- (a) they would rely upon the advice that they were given, as pleaded in paragraph 23; and
 - (b) they would rely upon the completeness of the advice they would be given, and that no matters of significance had not been disclosed to them (including the matters pleaded in paragraph 32).
35. By reason of the matters pleaded in paragraphs 24 to 25 and 31, the Applicants and each Group Members in fact relied in good faith upon the conduct of financial advisers in Westpac Financial Planning, as pleaded in paragraphs 22, 23 and 32 above.
36. By reason of the matters pleaded in paragraphs 33 to 35:
- (a) Division 6 of Part 7.6 of the Corporations Act applies to the conduct of the financial

advisers in Westpac Financial Planning, as pleaded in paragraphs 22, 23 and 32; and

- (b) in circumstances where Westpac at all material times held the Westpac AFSL, Westpac is responsible for their conduct, by reason of s 917B and 917E of the Corporations Act.

F Fiduciary obligations

37. By reason of the matters pleaded in paragraph 22 above, on or after 21 February 2011 Westpac owed to the Applicants and each Group Member a fiduciary duty to:

- (a) avoid the real or substantial possibility of conflicts between the interests of the Applicants and Group Members, on the one hand, and its own interests and the interests of Westpac Life, on the other;
- (b) not to improperly use its position to gain an advantage for itself and/or Westpac Life.

Particulars

- (i) Westpac held out its financial advisers in Westpac Financial Planning as having expertise in providing financial advice on insurance and the premiums payable on that insurance;
- (ii) Westpac, through its financial advisers in Westpac Financial Planning, was able to control the flow of relevant information to the Applicants and each of the Group Members in relation to insurance and the premiums payable on that insurance;
- (iii) The Applicants and each of the Group Members were dependent upon the financial advice given to them by Westpac, through its financial advisers in Westpac Financial Planning, in deciding what policies of insurance they should obtain and the amount of the premiums that should be paid on those policies;
- (iv) Particulars relating to the Group Members will be provided following the initial trial of the common questions and the Applicants' claims.

G Breach of fiduciary obligations

38. On or after 21 February 2011, there was an actual conflict between the interests of the Applicants and each of the Group Members, on the one hand, and Westpac's own interests and the interests of Westpac Life on the other.

Particulars

- (i) It was in the interests of the Applicants and each of the Group Members to obtain policies of insurance with the most economical (or lowest) premiums that could

reasonably be obtained.

- (ii) It was in Westpac's own interest to advise the Applicants and each of the Group Members to obtain from Westpac Life policies of insurance with the highest premiums that could be charged, and that the Applicants and each of the Group Members should obtain such policies for those premiums.
- (iii) It was in Westpac Life's interests for the Applicants and each of the Group Members to obtain from Westpac Life policies of insurance with the highest premiums that could be charged.

39. On or after 21 February 2011, Westpac breached its fiduciary duties owed to the Applicants and each of the Group Members by:

- (a) failing to avoid the conflict referred to in paragraph 38 above; and/or

Particulars

Westpac preferred its own interests to the interests of the Applicants and each of the Group Members by advising them to obtain from Westpac Life Insurance Policies that included payments of the Excess Premiums or Alternative Excess Premiums.

- (b) improperly using its position to gain a benefit for itself and/or Westpac Life.

Particulars

- (i) The benefit to Westpac was the receipt of the Excess Premiums or Alternative Excess Premiums by its wholly owned subsidiary, Westpac Life, which thereby enhanced the value of its shareholding in Westpac Life or increased distributions to it by way of dividends or otherwise of the profits of that company.
- (ii) The benefit to Westpac Life was the receipt of the Excess Premiums or Alternative Excess Premiums to itself.

40. By reason of the matters pleaded in paragraphs 11 to 39 above, Westpac is liable to account for and pay to the Applicants and each of the Group Members all benefits, profits and gains made or derived by Westpac from the receipt and use by Westpac Life of the Excess Premiums or Alternative Excess Premiums.

Particulars

The particulars (i) & (ii) to paragraph 39 (b) above are repeated.

41. Further or in the alternative, the Applicants and each of the Group Members suffered loss or damage by reason of the breaches of fiduciary duty by Westpac as pleaded in paragraphs 37 and 39 above.

Particulars

- (i) The First Applicant lost the benefit he would otherwise have received under his BT

Foundation Portfolio PSP Superannuation Fund had the Excess Premiums or the Alternative Excess Premiums on the issuing and renewal of the Term Life Policy No YL983269 and Income Protection Policy No CL983270 not been paid to Westpac Life out of his Superannuation Fund.

- (ii) The First Applicant paid to Westpac Life the Excess Premiums or the Alternative Excess Premiums on the issuing and renewal of the Income Linking Plus Policy No CLF83270.
- (iii) The Second Applicant paid to Westpac Life the Excess Premiums or the Alternative Excess Premiums on the issuing and renewal of the Term Life Policy No YL98371.
- (iv) The Third Applicant lost the benefit he would have otherwise received under his BT Foundation Portfolio SuperWrap PSP Superannuation Fund had the Excess Premiums or Alternative Excess Premiums on the issuing and renewal of the Term Life Policy No YL397761 not been paid to Westpac Life out of his Superannuation Policy.
- (v) The Third Applicant paid to Westpac Life the Excess Premiums or the Alternative Excess Premiums on the issuing and renewal of the Term Life Flexible Linking Plus Policy No YLF97761 and Income Protection Plus Policy No CL397760.
- (vi) The Fourth Applicant lost the benefit she would otherwise have received under her Westpac MasterTrust Superannuation Division Superannuation Fund paid to Westpac Life the Excess Premiums or Alternative Excess Premiums on the issuing and renewal of the Income Protection Plus Policy No CL233788 and Flexible Linking Plus Policy No YLF33789 not been paid to Westpac Life out of his Superannuation Fund.
- (vii) The Fourth Applicant paid to Westpac Life the Excess Premiums or the Alternative Excess Premiums on the issuing and renewal of the Term Life Policy No LL233789
- (viii) Particulars relating to the Group Members will be provided following the initial trial of the common questions and the Applicants' claims.

42. By reason of the matters pleaded in paragraphs 11 to 39 and 41 above, Westpac is liable to pay equitable compensation to the Applicants and each of the Group Members for such loss or damage.

H Mistake

43. Further or in the alternative, by reason of the matters pleaded in paragraph 32 above, on or after 21 February 2011 the Applicants and Group Members paid to Westpac Life the premiums charged by Westpac Life (including the Excess Premiums) under a mistaken belief that they could not obtain the policies of insurance issued to them by Westpac Life without paying premiums in those sums.
44. The belief referred to in paragraph 43 was mistaken in fact, in that, by reason of the matters

pleaded in paragraphs 28 and 29, the Applicants and Group Members could have obtained the policies of insurance issued to them by Westpac Life by paying premiums which did not include the Excess Premiums.

45. Further or in the alternative, by reason of the matters pleaded in paragraph 32 above, on or after 21 February 2011 the Applicants and Group Members paid to Westpac Life the premiums charged by Westpac Life (including the Alternative Excess Premiums) under a mistaken belief that they could not obtain substantially equivalent or better policies of insurance than the policies of insurance issued to them by Westpac Life without paying premiums in those sums.
46. The belief referred to in paragraph 45 was mistaken in fact, in that, by reason of the matters pleaded in paragraphs 30, the Applicants and Group Members could have obtained substantially equivalent or better policies of insurance than the policies of insurance issued to them by Westpac Life by paying premiums which did not include the Alternative Excess Premiums.
47. Further, or in the alternative, by reason of the matters pleaded in paragraph 32 above, on or after 21 February 2011 the Applicants and Group Members paid to Westpac Life the premiums charged by Westpac Life (including the Excess Premiums and/or the Alternative Excess Premiums) under a mistaken belief that Westpac (through Westpac Life) and/or Westpac Life were lawfully entitled to demand payment of, and/or retain, the premiums they in fact demanded payment of.
48. The belief referred to in paragraph 47 was mistaken in fact and/or in law, in that, by reason of the matters pleaded in paragraphs 37 to 39, Westpac (through Westpac Life) and/or Westpac Life were not lawfully entitled to demand payment of, and/or retain, the premiums they in fact demanded payment of, to the extent they included the Excess Premiums and/or the Alternative Excess Premiums.
49. The Applicants and Group Members paid:
 - (a) the Excess Premiums by reason of the mistakes alleged in paragraphs 43 and 44 and/or 47 and 48;
 - (b) alternatively, the Alternative Excess Premiums by reason of the mistakes alleged in paragraphs 45 and 46 and/or 47 and 48.
50. By reason of the matters pleaded in paragraphs 49(a) and/or (b), Westpac and Westpac Life have been unjustly enriched by the receipt by Westpac Life of the Excess Premiums and/or Alternative Excess Premiums, at the expense of the Applicants and Group Members,

and it would be unconscionable for Westpac and Westpac Life to retain the Excess Premiums and/or Alternative Excess Premiums (and/or the benefits received by them by receipt by Westpac Life of the Excess Premiums and/or the Alternative Excess Premiums).

51. By reason of the matters pleaded in paragraphs 43 to 50, the Excess Premiums and/or the Alternative Excess Premiums are monies had and received by Westpac and Westpac Life to the use of the Applicants and Group Members, and Westpac and Westpac Life are obliged to repay those sums to the Applicants and Group Members.

I Knowing receipt by Westpac Life

52. Further or in the alternative, the Applicants and Group Members repeat the matters pleaded in paragraphs 11 to 39 above.

53. At the time of receipt of the Excess Premiums, Westpac Life knew:

- (a) the material facts giving rise to the existence of the fiduciary duty owed by Westpac to the Applicants and each of the Group Members as pleaded in paragraph 37 above; and

Particulars

- (i) The particulars at paragraph 24(ii), (iii) and (iv) above are repeated.
 - (ii) Westpac Life's knowledge of the matters particularised at paragraph 37 above is to be inferred from its receipt of the Application Form.
 - (iii) Further particulars will be provided after discovery.
 - (iv) Particulars relating to the Group Members will be provided following the initial trial of the common questions and the Applicants' claims.
- (b) the material facts giving rise to the breaches of the fiduciary duty by Westpac as pleaded in paragraphs 38 and 39 above.

Particulars

- (i) The particulars at paragraph 28 above and the matters pleaded in paragraph 29 above are repeated.
- (ii) Westpac Life's knowledge of the matters particularised at paragraph 38 above is to be inferred from it calculating and charging the premiums particularised at paragraph 28 above.
- (iii) Westpac Life's knowledge of the matters particularised at paragraph 39(a) & (b) above is to be inferred from it calculating and charging the premiums particularised at paragraph 28 above.
- (iv) Further particulars will be provided after discovery.
- (v) Particulars relating to the Group Members will be provided following the initial trial

of the common questions and the Applicants' claims.

54. Alternatively to paragraph 53 above, Westpac Life knew of the circumstances that would have indicated to an honest and reasonable person:

- (a) the material facts referred to in paragraph 53(a) above; and

Particulars

The particulars at sub-paragraph 53(a) above are repeated.

- (b) the material facts referred to in paragraph 53(b) above.

Particulars

The particulars at sub- paragraph 53(b) above are repeated.

55. On or after 21 February 2011 Westpac Life received the Excess Premiums.

Particulars

The particulars at paragraph 27 above are repeated.

56. By reason of the matters pleaded in paragraphs 52 to 55 above, Westpac Life is liable to account for and pay to the Applicants and each of the Group Members:

- (a) the Excess Premiums;
- (b) all benefits, profits and gains made or derived by Westpac Life from its receipt and use of the Excess Premiums

57. Further or in the alternative, the Applicants and each of the Group Members suffered loss or damage by reason of Westpac Life knowingly receiving the Excess Premiums in breach of the fiduciary duty by Westpac as pleaded in paragraphs 38 and 39 above:

Particulars

The particulars at paragraph 41 above are repeated.

58. By reason of the matters pleaded in paragraphs 52 to 55 and 57 above, Westpac Life is liable to pay equitable compensation to the Applicants and each of the Group Members for such loss or damage.

J Future of Financial Advice

59. Further or in the alternative, each of the material allegations concerning Westpac and the financial advisers in Westpac Financial Planning in Part J of this pleading are made for the period on or after 1 July 2013.
60. The Third and Fourth Applicants and each of the Group Members repeat the matters pleaded in paragraphs 11 to 32 above.

61. Each of the policies of insurance was a financial product within the meaning of s764A(1) of the Corporations Act.
62. The financial advice referred to in paragraph 23 above was financial product advice within the meaning of s766B(1) of the Corporations Act in that the advice contained recommendations that:
 - (a) were intended to influence the Third and Fourth Applicants and each of the Group Members in making a decision in relation to the Insurance Policies; or
 - (b) could reasonably be regarded as being intended to have such an influence.

Particulars

The particulars of paragraph 23(iii) and (iv) above are repeated

63. The financial product advice was personal advice within the meaning of s766B(3) of the Corporations Act in that it was given to the Third and Fourth Applicants and each of the Group Members in circumstances where:
 - (a) the financial advisers in Westpac Financial Planning had considered one or more of the objectives, financial situation or needs of the Third or Fourth Applicants and each of the Group Members, or
 - (b) a reasonable person might expect that the financial advisers of Westpac Financial Planning to have considered one or more of the objectives, financial situation or needs of the Third or Fourth Applicants and each of the Group Members

Particulars

The particulars of paragraph 23(iii) and (iv) above are repeated

64. By providing the financial product advice to the Third and Fourth Applicants and each of the Group Members, the financial advisers in Westpac Financial Planning were providing a financial service within the meaning of s766A (1) of the Corporations Act.
65. By providing the financial service referred to in paragraph 64 above, the Third and Fourth Applicants and each of the Group Members were retail clients within the meaning of s761G (1) of the Corporations Act.
66. Each of the financial advisers in Westpac Financial Planning was a representative of Westpac and therefore a provider within the meaning of s961(2) of the Corporations Act.

Particulars

The particulars of paragraph 2(b) above are repeated

67. By reason of the matters pleaded in paragraphs 59 to 66 above, each of the financial advisers in Westpac Financial Planning was under an obligation to:

- (a) act in the best interests of the Third and Fourth Applicants and each of the Group Members;

Particulars

s 961B(1) of the Corporations Act

- (b) give priority to the interests of the Third and Fourth Applicants and each of the Group Members in circumstances where the financial adviser knew, or reasonably ought to have known, of the conflict between the interests of the Third and Fourth Applicants and each of the Group Members and the interests of Westpac, Westpac Life or the financial adviser.

Particulars

s 961J(1) of the Corporations Act

68. Each of the financial advisers in Westpac Financial Planning knew, or reasonably ought to have known, of the conflict between the interests of the Third and Fourth Applicants and Group Members and the interests of Westpac, Westpac Life or the financial adviser.

Particulars

- (i) The particulars to paragraph 38 are repeated.
- (ii) It was in the interests of the financial advisers to advise the Third and Fourth Applicants and Group Members obtain policies of insurance that resulted in the financial advisors receiving the highest commissions.
- (iii) The actual or constructive knowledge of James Malhi of the conflict between the interests of the Third and Fourth Applicants and Group Members and the interests of Westpac, Westpac Life or the financial adviser is to be inferred from the Statement of Advice dated 25 May 2015 prepared for Shane Lye at page 25 and the Statement of Advice dated 30 June 2015 prepared for Kylie Lye at page 22.

69. The financial advisers in Westpac Financial Planning failed to act in the best interests of the Third and Fourth Applicants and each of the Group Members by:

- (a) giving personal advice to the Third and Fourth Applicants and each of the Group Members that they should obtain the Insurance Policies from Westpac Life at premiums which included the Excess Premiums or the Alternative Excess Premiums;

Particulars

The particulars at paragraph 23(iii) and (iv), 27, 28 and 30 are repeated.

- (b) failing to use research reports produced by external research report providers to identify policies of insurance that might achieve or meet the objectives or needs of the Third and Fourth Applicants and each of the Group Members;
- (c) failing to benchmark the policies of insurance issued by Westpac Life against the market for similar policies of insurance to establish their competitiveness on key criteria such as coverage and premium;
- (d) failing to investigate, consider or assess the suitability of policies of insurance issued by third parties other than Westpac Life to meet the objectives, financial situation and needs of the Third and Fourth Applicants and each of the Group Members;

Particulars

- (i) The particulars to paragraphs 30, 69(g) and (j) are repeated.
- (ii) Westpac Financial Planning FSG issued 1 October 2011, p.8.
- (iii) Westpac Financial Planning FSG issued 1 October 2014, p.4.
- (iv) St George Financial Planning FSG issued 1 October 2011, p.9.
- (v) Bank of Melbourne Financial Planning FSG issued 1 October 2011, p. 7.
- (vi) BankSA Financial Planning FSG issued 1 October 2011, p 10.
- (vii) BT Financial Group Media Release dated 1 November 2017.
- (e) not recommending policies of insurance issued by providers other than Westpac Life, where those policies offered substantially equivalent or better coverage for a lower premium;

Particulars

- (i) The particulars to paragraph 30 are repeated.
- (ii) The particulars to sub-paragraph 69(d) are repeated.
- (f) failing to disclose to the Third and Fourth Applicants and each of the Group Members that:
 - (i) the premiums payable on the issuing of the Insurance Policies included the Excess Premiums or the Alternative Excess Premiums;

Particulars

The particulars to paragraphs 28 and 30 are repeated.

- (ii) the premiums payable on the renewal of the Insurance Policies included the Excess Premiums or the Alternative Excess Premiums;

Particulars

The particulars to paragraphs 28 and 30 are repeated.

- (iii) identical policies of insurance were available to be obtained from Westpac Life through independent party financial advisers for premiums that did not include the Excess Premiums;

Particulars

The particulars to paragraph 28 are repeated.

- (iv) substantially equivalent, or better, policies of insurance were available to be obtained from third parties for premiums that did not include the Alternative Excess Premiums;

Particulars

The particulars to paragraph 30 are repeated.

- (v) they had not investigated or considered whether policies of insurance other than those issued by Westpac Life were suitable to the objectives, financial situation and needs of the Third and Fourth Applicants and each of the Group Members;
 - (vi) the nature and amount of the Excess Premiums or the Alternative Excess Premiums.
- (g) complying with the requirement of Westpac not to provide advice, unless they had obtained one-off approval from Westpac, on policies of insurance issued by third parties other than Westpac Life that did not include the Alternative Excess Premiums;

Particulars

- (i) WBC Approved Product List Policy, paras 4.1-4.4
 - (ii) Up until about March 2018 the only insurance products listed on the Approved Product List were issued by Westpac Life
 - (iii) Memorandum to Management for Approval dated 7 June 2013-Personal Insurance Sector Review 2013 and Confirmation of Approved Products List, p 17
 - (iv) BT Financial Group – Guide to APL and Off-APL process and tools dated 5 July 2013
 - (v) B T Financial Group Media Release dated 1 November 2017.
- (h) In the alternative to (g), failing to obtain one-off approval from Westpac to advise in relation to life insurance products that did not include the Alternative Excess Premiums;

- (i) failing to review adequate information to enable them to determine whether the Approved Product List had been properly constructed;

Particulars

BT Financial Group – Research and Approved Products List Construction Process, pp 2 -12.

- (j) relying on an Approved Product List which had not been properly constructed in that:
 - (i) most of the factors used by Westpac to assess the life insurance products available on the market were:
 - (A) irrelevant to whether a life insurance product was in the best interests of the client;
 - (B) not appropriately weighted;
 - (C) assessed at a global level, rather than by reference to the individual needs, financial circumstances or objectives of the individual client;
 - (ii) there was an arbitrary cut-off point whereby only one insurer was included in the Approved Product List, namely, Westpac Life;
 - (iii) 4 out of 11 insurers were given the lowest score of "1" because they did not provide information to Westpac in the time specified by Westpac's research team; and/or

Particulars

- (A) Memorandum to Management for Approval dated 7 June 2013- Personal Insurance Sector Review 2013 and Confirmation of Approved Products List pp 2-15.
- (B) KPMG – Insurance Product Provider Review – BT Advice dated 7 November 2013 pp10, 13, 15, 17-19.

- (k) failing to properly assess or be satisfied that Westpac's Approved Product List was constructed in a manner that was likely to result in the selection of a life insurance product that would meet the needs and achieve the objectives of their client.

70. The financial advisers in Westpac Financial Planning failed to give priority to the interests of Third and Fourth Applicants and each of the Group Members in circumstances where there was a conflict between those interests and the interests of Westpac, Westpac Life or the financial adviser by:

- (a) giving personal advice to the Third and Fourth Applicants and each of the Group Members that they should obtain from Westpac Life the Insurance Policies at premiums which included the Excess Premiums or the Alternative Excess Premiums;

Particulars

The matters and particulars at paragraph 23(ii) and (iii), 27, 28 and 30 above are repeated.

- (b) failing to avoid the conflicts of interest referred to in paragraphs 38 and 68 above;

Particulars

The particulars at paragraphs 38 above and 68(ii) are repeated.

- (c) improperly using his position to gain a benefit for Westpac, Westpac Life or/or the financial adviser;

Particulars

The particulars at paragraph 68(ii) are repeated.

- (d) failing to disclose to the Third and Fourth Applicants and each of the Group Members that:
 - (i) the premiums payable on the issuing of the Insurance Policies included the Excess Premiums or the Alternative Excess Premiums;
 - (ii) the premiums payable on the renewal of the Insurance Policies included the Excess Premiums or the Alternative Excess Premiums;
 - (iii) identical policies of insurance were available to be obtained through independent party financial advisers for premiums that did not include the Excess Premiums;
 - (iv) substantially equivalent, or better, policies of insurance were available to be obtained from third parties for premiums that did not include the Alternative Excess Premiums;
 - (v) they had not investigated or considered whether policies of insurance other than those issued by Westpac Life were suitable to the objectives, financial situation and needs of the Third and Fourth Applicants and each of the Group Members;
 - (vi) the nature and amount of the Excess Premiums or the Alternative Excess Premiums;

71. By reason of the matters referred to in paragraphs 59 to 66, 67(a), and 69, the financial advisers of Westpac Financial Planning contravened s 961B(1) of the Corporations Act.

72. By reason of the matters referred to paragraphs 59 to 66, 67(b), 68 and 70, the financial advisers in Westpac Financial Planning contravened s 961J(1) of the Corporations Act.
73. Further or in the alternative, the Third and Fourth Applicants and each of the Group Members repeat the matters pleaded in paragraphs 59 to 72.
74. By reason of the matters pleaded in paragraphs 2(b) and 3 to 6, Westpac was under an obligation to take reasonable steps to ensure the financial advisers in Westpac Financial Planning complied with s 961B and s 961J of the Corporations Act.

Particulars

s 961L of the Corporations Act.

75. Westpac imposed a requirement on the financial advisers of Westpac Financial Planning to only advise Group Members in relation to Westpac Life insurance products unless they had obtained one-off approval from Westpac.

Particulars

- (i) WBC Approved Product List Policy, paras 4.1-4.4;
 - (ii) Up until about March 2018, the only insurance products listed on the Approved Product List were issued by Westpac Life;
 - (iii) Memorandum to Management for Approval dated 7 June 2013-Personal Insurance Sector Review 2013 and Confirmation of Approved Products List, p 17 ;
 - (iv) BT Financial Group – Guide to APL and Off-APL process and tools dated 5 July 2013
 - (v) B T Financial Group Media Release dated 1 November 2017.
76. The Approved Product List had not been constructed in a way which made it suitable for the purpose of giving advice in the best interests of the Third and Fourth Applicants and each of the Group Members, in that:
- (a) most of the factors used by Westpac to assess the life insurance products available on the market were:
 - (i) irrelevant to whether a life insurance product was in the best interests of the client;
 - (ii) not appropriately weighted;
 - (iii) assessed at a global level, rather than by reference to the individual needs, financial circumstances or objectives of the individual client;

- (b) there was an arbitrary cut-off point whereby only one insurer was included in the Approved Product List, namely, Westpac Life;
- (c) 4 out of 11 insurers were given the lowest score of "1" because they did not provide information to Westpac in the time specified by Westpac's research team.

Particulars

- (i) Memorandum to Management for Approval dated 7 June 2013- Personal Insurance Sector Review 2013 and Confirmation of Approved Products List pp 2-15.
- (ii) KPMG – Insurance Product Provider Review – BT Advice dated 7 November 2013 pp10, 13, 15, 17-19.

- 76A. Westpac did not take any steps to require or remind financial advisers in Westpac Financial Planning to disclose to the Third and Fourth Applicants and each of the Group Members the matters pleaded in sub-paragraph 69(f).
77. By reason of the matters referred to paragraphs 69 and 73 to 76 and/or 76A, Westpac did not take reasonable steps to ensure that the financial advisers in Westpac Financial Planning complied with s 961B(1) and/or s 961J(1) of the Corporations Act and thereby contravened s 961L of the Corporations Act.
78. The Third and Fourth Applicants and each of the Group Members repeat the matters pleaded in paragraphs 2 and 6 above.
79. By reason of the matters pleaded in paragraphs 71 and 72, Westpac was the responsible licensee for any contraventions of Part 7.7A of the Corporations Act by the financial advisers of Westpac Financial Planning, as they were each representatives of Westpac.

Particulars

s 961P of the Corporations Act.

80. The Third and Fourth Applicants and each of the Group Members suffered loss or damage as a result of the contraventions pleaded in paragraphs 71, 72 and 77 above.

Particulars

- (i) The particulars at paragraph 41 above are repeated.
- (ii) Further particulars of the profit of Westpac and the profit of the financial advisers resulting from the contraventions will be provided following discovery.

81. By reason of the matters pleaded in paragraphs 59 to 80 above, Westpac is liable to compensate the Third and Fourth Applicants and each of the Group Members for that loss or damage (including by reference to the profit obtained by Westpac and the financial advisers).

Particulars

s 961M(2)(b) and (4) of the Corporations Act.

K Unconscionable Conduct

82. Further or in the alternative, the Applicants and each of the Group Members repeat the matters pleaded in paragraphs 11 to 32 above.
83. In respect of each of the material allegations concerning the financial advisers of Westpac Financial Planning in Part K of this pleading:
- (a) their acts were within the scope of their actual or apparent authority as agents for Westpac;
 - (b) their conduct is deemed to be the conduct of Westpac; and/or
 - (c) Westpac was responsible for their conduct by reason of Division 6 of Part 7.6 of the Corporations Act;

Particulars

- (i) s12GH(2) of the ASIC Act.
 - (ii) Paragraphs 33 to 36 are repeated
84. At all material times, the policies of insurance were financial products within the meaning of s12BAA(7) of the ASIC Act.
85. The financial advice referred to in paragraph 23 above was financial product advice within the meaning of s12BAB(5) of the ASIC Act in that it contained recommendations that:
- (a) were intended to influence the Applicants and each of the Group Members in making a decision in relation to the Insurance Policies;
 - (b) could reasonably be regarded as being intended to have such an influence.

Particulars

The particulars at paragraph 23 above are repeated.

86. Alternatively, if the financial advice referred to in paragraph 23 above was not financial product advice within the meaning of s 12BAB(5) of the ASIC Act, by reason that it was

contained in a document prepared in accordance with the requirements of Chapter 7 of the Corporations Act so as to be excluded by s 12BAB(5)(c), then by:

- (a) arranging for the Applicant and Group Members to apply for the Insurance Policies, financial advisers in Westpac Financial Planning (for whose conduct Westpac is responsible as pleaded in paragraphs 33 to 36 above) was dealing in financial products within the meaning of s 12BAB(8) of the ASIC Act;
- (b) issuing the Insurance Policies to the Applicants and each of the Group Members, Westpac Life was dealing in financial products within the meaning of s 12BAB(7) of the ASIC Act.

87. By reason of the matters pleaded in paragraphs 84 and 85 above and/or 86 above, on or after 21 February 2011 Westpac and Westpac Life supplied to the Applicants and each of the Group Members financial services within the meaning of s12BAB(1) of the ASIC Act.

88. Further, or alternatively to paragraphs 84 to 87, the conduct of financial advisers of Westpac Financial Planning in:

- (a) giving the financial advice referred to in paragraph 23 above; and/or
- (b) arranging for the Applicant and Group Members to apply for the Insurance Policies,

was in trade or commerce in connexion with the supply or possible supply of services to the Applicants and Group Members, within the meaning of the Australian Consumer Law (as applicable pursuant to s 16 of the *Fair Trading Act 1989* (Qld), s 7 of the *Fair Trading (Australian Consumer Law) Act 1992* (ACT), s 28 of the *Fair Trading Act 1987* (NSW), s 12 of the *Australian Consumer Law and Fair Trading Act 2012* (Vic), s 6 of the *Australian Consumer Law (Tasmania) Act 2010* (Tas), s 19 of the *Fair Trading Act 2010* (WA), s 14 of the *Fair Trading Act 1987* (SA); and/or s 27 of the *Consumer Affairs and Fair Trading Act* (NT).

89. On or after 21 February 2011, the Applicants and each of the Group Members were placed in a position of special disadvantage with Westpac in relation to obtaining insurance.

Particulars

- (i) The particulars at paragraph 37 above are repeated.
- (ii) Particulars relating to the Group Members will be provided following the initial trial of the common questions and the Applicants' claims.

90. On or after 21 February 2011, Westpac, by its financial advisers in Westpac Financial

Planning, unfairly took advantage of the position of special disadvantage in which the Applicants and each of the Group Members had been placed by:

- (a) giving financial advice to the Applicants and each of the Group Members that they should obtain the Insurance Policies at premiums which included the Excess Premiums;

Particulars

The particulars at paragraph 23 above are repeated.

- (b) failing to disclose to the Applicants and each of the Group Members that:
 - (i) the premiums payable on the issuing of the Insurance Policies included the Excess Premiums;
 - (ii) the premiums payable on the renewal of the Insurance Policies included the Excess Premiums;
 - (iii) identical policies of insurance were available to be obtained through independent party financial advisers for premiums that did not include the Excess Premiums;
 - (iv) the nature and amount of the Excess Premiums;
- (c) failing to avoid the conflict of interest referred to in paragraph 38 above;

Particulars

The particulars at paragraph 39(a) above are repeated.

- (d) improperly using its position to gain or benefit for itself and/or Westpac Life;

Particulars

The particulars at paragraph 39(b) above are repeated.

- (e) improperly using its position to cause a corresponding detriment to the Applicants and each of the Group Members.

Particulars

The particulars at paragraph 41 above are repeated.

- (f) failing to disclose to the Applicants and each of the Group Members the conflict referred to in paragraph 38 above or obtain their fully informed consent for Westpac and/or Westpac Life to receive the benefit of the Excess Premiums.

91. By reason of the matters referred to in paragraphs 82 to 90 above, on or after 21 February 2011, Westpac, in trade or commerce, and in connection with the supply of such financial

services to the Applicants and each of the Group Members, engaged in conduct that was, in all the circumstances, unconscionable in contravention of:

- (a) s12CC(1) of the ASIC Act, in respect of conduct on or after 21 February 2011 and prior to 1 January 2012;
- (b) s12CB(1) of the ASIC Act in respect of conduct on or after 1 January 2012; and/or
- (c) s 21 of the Australian Consumer Law.

92. The Applicants and each of the Group Members suffered loss or damage by the conduct of Westpac that contravened s 12CB(1) and/or s 12CC(1) of the ASIC Act and/or s 21 of the Australian Consumer Law.

Particulars

The particulars at paragraph 41 above are repeated.

L ↓ Involvement by Westpac Life in contraventions by Westpac

93. Further or in the alternative, the Applicants and each of the Group Members repeat the matters pleaded in paragraphs 11 to 36 above.

94. On or after 21 February 2011, Westpac Life knew:

- (a) the material facts giving rise to the position of special disadvantage into which the Applicants and each of the Group Members had been placed with Westpac in relation to obtaining insurance as pleaded in paragraph 89 above;

Particulars

The particulars at paragraph 53(a) above are repeated.

- (b) the material facts giving rise to Westpac unfairly taking advantage of that position of special disadvantage as pleaded in paragraph 90 above;

Particulars

The particulars at paragraph 53(b) above are repeated.

95. On or after 21 February 2011, Westpac Life:

- (a) received and approved the applications for insurance from the Applicants and the Group Members;

Particulars

- (i) The particulars at paragraphs 24(ii), (iii) and (iv) and 25 above are repeated.

- (ii) Particulars relating to the Group Members will be provided following the initial trial of the Applicants' claims.

- (b) calculated and charged the owners of the Insurance Policies the Excess Premiums;

Particulars

- (i) The particulars at paragraphs 27 and 28 above are repeated.
- (ii) Particulars relating to the Group Members will be provided following the initial trial of the Applicants' claims.

- (c) became the insurer of the Insurance Policies;

Particulars

- (i) The particulars at sub-paragraph 25(i) above are repeated.
- (ii) Particulars relating to the Group Members will be provided following the initial trial of the Applicants' claims.

- (d) received the Excess Premiums.

Particulars

- (i) The particulars at sub-paragraph 31 above are repeated.
- (ii) Particulars relating to the Group Members will be provided following the initial trial of the Applicants' claims.

- 96. By reason of the matters pleaded in paragraph 95 above, Westpac Life participated in Westpac's contraventions of s 12CB(1) and s 12CC(1) of the ASIC Act and/or s 21 of the Australian Consumer Law as pleaded in paragraph 91 above.
- 97. By reason of the matters pleaded in paragraphs 93 to 96 above, Westpac Life was knowingly concerned in, within the meaning of s 79 of the *Corporations Act*, and thus involved in, within the meaning of s12GF(1) and s12GM(1) of the ASIC Act and/or ss 236 and 237 of the Australian Consumer Law, in Westpac's contraventions of s12CB(1) and s12CC(1) of the ASIC Act and/or s 21 of the Australian Consumer Law as pleaded in paragraph 46 91 above.
- 98. The Applicants and each of the Group Members suffered loss or damage by the conduct of Westpac that contravened s12CB(1) and s12CC(1) of the ASIC Act and/or s 21 of the Australian Consumer Law as pleaded in paragraph 91 above.

Particulars

The particulars at paragraph 41 above are repeated.

M Relief claimed

99. The Applicants claim for themselves and on behalf of each of the Group Members the relief set out in the accompanying Second Further Amended Originating Application.

Date: 5 November 2020 ~~17 September 2020~~



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Signed by Janice Mary Saddler Lawyer for the Applicants

This fifth ~~fourth~~ further amended pleading was prepared by Monique Cowden of counsel and settled by W A D Edwards of counsel.

Certificate of lawyer

I, Janice Mary Saddler, certify to the Court that, in relation to the ~~fourth~~ fifth further amended 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: 5 November 2020 ~~17 September 2020~~



.....
Signed by Janice Mary Saddler Lawyer for the Applicants

Schedule

No. 1812 of 2017

Federal Court of Australia

District Registry: New South Wales

Division: General

Applicants

Third Applicant: Shane Thomas Lye

Fourth Applicant: Kylie Lee Lye

Date: 5 November 2020 ~~17 September 2020~~