



IN THE SUPREME COURT OF VICTORIA  
AT MELBOURNE  
Commercial Court  
Group Proceedings List

Case: S ECI 2020 03924  
No. S ECI 2020 03924  
Filed on: 24/05/2024 10:57 AM

B E T W E E N

DAIMIN NATHAN

First Plaintiff

TANIA NATHAN

Second Plaintiff

-and-

MACQUARIE LEASING PTY LTD (ACN 002 674 982)

Defendant

**AMENDED DEFENCE**

**(filed pursuant to Rule 36.04(1)(b) of the Supreme Court (General Civil Procedure) Rules 2015)**

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Filed on behalf of:	Defendant	DX:	N/A
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**PRELIMINARY**

The terms defined by the Plaintiff in the Statement of Claim dated 17 February 2022 (**SOC**) have the same meaning in this Defence unless otherwise defined. The Defendant does not admit any factual assertions contained in or implied by the use of those defined terms. Headings are used for convenience only and do not form part of this Defence.

**A. INTRODUCTION**

**A.1 The Group Members**

1. In answer to the allegations in paragraph 1 of the SOC, the Defendant:
  - (a) denies that the Plaintiffs or Group Members have suffered loss or damage arising out of the same, similar or related circumstances by reason of or because of the

alleged conduct of Macquarie Leasing Pty Ltd (ACN 002 674 982) (**Macquarie Leasing**) as pleaded in the SOC;

- (b) denies that the Plaintiffs or the Group Members are entitled to relief against it arising out of the same, similar or related circumstances;
  - (c) in the premises of the Writ, the SOC and this Defence, denies that all of the “common questions of law or fact” set out in the SOC are substantial questions of law or fact common to the claims of the Plaintiffs and Group Members;
  - (d) does not admit that a commission was paid to the accredited third-party motor vehicle dealers with whom it entered into agreements from time to time to facilitate the referral of credit business to it (**Dealers**) in respect of each Car Loan Agreement (as defined in paragraph 6(f)(ii)(B) of this Defence); and
  - (e) otherwise admits the allegations in paragraph 1 of the SOC.
2. The Defendant does not know and therefore cannot admit the allegations in paragraph 2 of the SOC.

#### **A.2 The Defendant**

3. The Defendant admits the allegations in paragraph 3 of the SOC.

### **B. THE CLAIMS OF GROUP MEMBERS**

#### **B.1 Background**

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

##### **B.2.1 Arrangements between Dealers and Macquarie**

4. In answer to the allegations in paragraph 4 of the SOC, the Defendant:
- (a) says that between 1 March 2013 and 31 October 2018, Macquarie Leasing entered into agreements from time to time with Dealers from whom it would receive applications from the Dealers’ customers for approval of a proposed offer for credit to purchase a motor vehicle (**Dealer Agreements**);
  - (b) says further that during the relevant period the agreements which comprised the arrangements between Macquarie Leasing and Dealers were not recorded in a single document but were recorded in various documents, as amended from time to time; and
  - (c) otherwise denies the allegations in paragraph 4 of the SOC.
5. In answer to the allegations in paragraph 5 of the SOC, the Defendant:

- (a) refers to and repeats paragraph 4 of this Defence;
- (b) relies upon the terms of the Dealer Agreements for their full force and effect;
- (c) as to the allegations in sub-paragraph 5(a) of the SOC, says that during the relevant period the terms of the Dealer Agreements provided that the dealership's nominated persons (**Dealer Business Managers**) could access Macquarie Leasing's MacLeasing System (**MacLease**) for the purpose of submitting applications from the Dealers' customers to Macquarie Leasing for consumer loans and for other credit not regulated by the Credit Code, including applications for approval of a proposed offer for credit to purchase a motor vehicle from the Dealer, among other related matters (**Car Loan Application**);
- (d) as to the allegations in sub-paragraph 5(b) of the SOC, says that during the relevant period the terms of the Dealer Agreements required the Dealers and Dealer Business Managers to comply with all of Macquarie Leasing's procedures from time to time in accessing and using MacLease, submitting Car Loan Applications and arranging for signature of relevant documents;
- (e) as to the allegations in sub-paragraph 5(c) of the SOC, says that during the relevant period the terms of the Dealer Agreements provided:
  - (i) that where a Car Loan Application was submitted to Macquarie Leasing, the Dealer and the Dealer Business Manager were to have made reasonable enquiries as to the purpose for which credit was intended to be provided, or the purpose for which the relevant customer would be using the motor vehicle to be purchased; and
  - (ii) from the period from 1 March 2013 to January 2016, that it was the responsibility of both the Dealer and Macquarie Leasing to make appropriate enquiries of the customer to ensure that the loan was not unsuitable for the customer's circumstances, and that depending on the individual's circumstances, Macquarie Leasing may require further evidence of income, property ownership, bank account balances, loan balances and other information as deemed necessary by Macquarie Leasing to make an appropriate decision;
  - (iii) from the period from February 2016 onwards, that the Dealer must make every effort to understand the customer's individual income and expense situation and to ensure this was reflected in the information entered into

MacLease. If the Dealer had any reason to suspect information provided by the customer may not be true and correct or the customer was not being completely frank in the information that they were providing, the Dealer was required to make such further enquiries with the customer as needed in order to satisfy themselves that the information submitted to Macquarie Leasing was true and correct and not misleading;

- (f) says further that during the relevant period, the terms of the Dealer Agreements provided that neither the Dealer nor any nominated person was authorised to make on behalf of Macquarie Leasing any representation in relation to any application for credit; and
  - (g) otherwise denies the allegations in paragraph 5 of the SOC.
6. In answer to the allegations in paragraph 6 of the SOC, the Defendant:
- (a) refers to and repeats paragraphs 4 and 5 of this Defence;
  - (b) says that during the relevant period pursuant to the terms of the Dealer Agreement:
    - (i) the Dealer Business Manager could access MacLease for the purpose of submitting Car Loan Applications to Macquarie Leasing;
    - (ii) the Dealers and Dealer Business Manager were required to comply with all of Macquarie Leasing's procedures from time to time in accessing and using MacLease, submitting Car Loan Applications and arranging for signature of relevant documents;
    - (iii) each Car Loan Application was subject to acceptance by Macquarie Leasing and it had absolute discretion to approve or reject any application and the entry into a finance contract;
  - (c) in answer to the allegations in sub-paragraph 6(a) of the SOC, the Defendant:
    - (i) refers to and repeats paragraph 6(b) of this Defence;
    - (ii) admits the allegations in paragraph 6(a)(i) of the SOC but says further that during the relevant period those procedures were for the purpose of the *Anti-Money Laundering and Counter-Terrorism Financing Act 2006* (Cth) (**AML/CTF Act**);
    - (iii) in relation to the allegations in paragraph 6(a)(ii) of the SOC:

- (A) says that during the relevant period the Dealer Business Manager was required by Macquarie Leasing to:
  - 1. make necessary investigations of customers who wanted to make a Car Loan Application to Macquarie Leasing; and
  - 2. provide the details necessary to complete the Car Loan Application and ensure such details were, to the best of their knowledge, complete and not misleading;
- (B) otherwise denies the allegations in paragraph 6(a)(ii) of the SOC;
- (iv) admits the allegations in paragraph 6(a)(iii) of the SOC;
- (d) as to the allegations in sub-paragraph 6(b) of the SOC, the Defendant:
  - (i) refers to and repeats paragraph 6(b) of this Defence;
  - (ii) admits that during the relevant period Macquarie Leasing requested that the Dealer Business Manager, when submitting a Car Loan Application, ensure that the information listed in sub-paragraph 6(b)(ii) of the SOC was supplied to it by fax or email;
  - (iii) otherwise denies the allegations in paragraph 6(b) of the SOC;
- (e) as to the allegations in sub-paragraph 6(c) of the SOC, the Defendant:
  - (i) refers to and repeats paragraph 6(b) of this Defence;
  - (ii) admits the allegations in sub-paragraph 6(c) of the SOC;
  - (iii) further says that during the relevant period, Macquarie Leasing required that income verification be undertaken for all borrowers, and outlined documents or information that could be obtained by the Dealer Business Manager for that purpose;
- (f) as to the allegations in sub-paragraph 6(d) of the SOC, the Defendant:
  - (i) refers to and repeats paragraph 6(b) of this Defence;
  - (ii) says that during the relevant period once the Dealer Business Manager had received confirmation that a customer's Car Loan Application had been approved by Macquarie Leasing, they were required to prepare the car loan agreement documentation package for the customer which included:
    - (A) the Macquarie Leasing credit guide;

- (B) a loan agreement, which once signed by the customer would constitute an offer from the customer to borrow the credit facility amount from Macquarie Leasing on the terms and conditions set out in a Macquarie Leasing loan schedule and Macquarie Leasing's consumer loan standard conditions (**Car Loan Agreement**);
- (iii) otherwise denies the allegations in paragraph 6(d) of the SOC;
- (g) as to the allegations in sub-paragraph 6(e) of the SOC, the Defendant:
  - (i) refers to and repeats paragraph 6(b) of this Defence;
  - (ii) says that during the relevant period, if the customer wished to proceed with the Car Loan Agreement, the Dealer Business Manager was required to obtain a signed copy of the Macquarie Leasing loan schedule and other documents from the customer;
  - (iii) says that during the relevant period, if the customer wished to proceed with the Car Loan Agreement, the customer was required to agree, and sign and declare, that the information provided by the customer was true, complete and not misleading;
  - (iv) says that during the relevant period, the Car Loan Agreement:
    - (A) disclosed that Macquarie Leasing would pay the Dealer a commission for the introduction of the loan, the amount of which was specified if ascertainable or otherwise noted as unascertainable; and
    - (B) informed the customer that they could withdraw their offer to enter into the credit facility at any time before the offer was accepted by Macquarie Leasing;
  - (v) otherwise denies the allegations in paragraph 6(e) of the SOC;
- (h) as to the allegations in sub-paragraph 6(f) of the SOC, the Defendant:
  - (i) refers to and repeats paragraph 6(b) of this Defence;
  - (ii) says that during the relevant period, the Dealer Business Manager was required to submit to Macquarie Leasing by mail, email or fax a signed and dated full copy of the loan schedule, together with other documents completed or signed by the customer and certain supporting documentation;
  - (iii) otherwise denies the allegations in paragraph 6(f) of the SOC;

- (i) as to the allegations in sub-paragraph 6(g) of the SOC, the Defendant:
    - (i) refers to and repeats paragraph 6(b) of this Defence;
    - (ii) says that during the relevant period if Macquarie Leasing accepted the Car Loan Application, it transferred funds to the Dealer (the amount of which would depend on the terms of the particular Car Loan Agreement);
    - (iii) otherwise denies the allegations in paragraph 6(g) of the SOC;
  - (j) as to the allegations in paragraph 6(h) of the SOC, the Defendant:
    - (i) refers to and repeats paragraph 6(b) of this Defence;
    - (ii) admits that during the relevant period the Dealer would arrange for the motor vehicle the subject of the Car Loan Agreement to be released to the customer;
    - (iii) otherwise does not know and cannot admit the allegations in paragraph 6(h) of the SOC;
  - (k) as to the allegations in paragraph 6(i) of the SOC, the Defendant admits that during the relevant period the Dealer Business Manager typically managed communications between the customer and Macquarie Leasing;
  - (l) otherwise denies the allegations in paragraph 6 of the SOC.
7. In answer to the allegations in paragraph 7 of the SOC, the Defendant:
- (a) says that during the relevant period, Macquarie Leasing was solely responsible for assessing, and deciding whether to approve, Car Loan Applications and for managing and servicing credit facilities advanced by it to customers to purchase motor vehicles; and
  - (b) otherwise denies the allegations in paragraph 7 of the SOC.
8. In answer to the allegations in paragraph 8 of the SOC, the Defendant:
- (a) says that in relation to motor vehicle credit facilities provided by Macquarie Leasing during the relevant period:
    - (i) Macquarie Leasing set a base rate of interest (**Base Rate**) and a maximum rate of interest (**Maximum Rate**);
    - (ii) the Base Rate was set by reference to criteria, including the:
      - (A) term of the Car Loan Agreement;

- (B) price and type of the motor vehicle to be purchased; and
  - (C) Maximum Rate;
- (iii) Macquarie Leasing typically reviewed the Base Rate and Maximum Rate, and notified the Dealers of those rates, on a monthly basis;
  - (iv) customers could negotiate and agree with Dealers a rate of interest to include in their Car Loan Application which was higher than, lower than or equal to the Base Rate but which could not exceed the Maximum Rate (**Facility Rate**) (and was in all cases subject to consideration and approval by Macquarie Leasing);
  - (v) in circumstances where the Facility Rate on a Car Loan Agreement was higher than the Base Rate, a Dealer may have been entitled to receive a proportion of the difference between the Base Rate and the Facility Rate, in accordance with the terms of the applicable Dealer Agreement; and
- (b) otherwise denies the allegations in paragraph 8 of the SOC.
9. In answer to the allegations in paragraph 9 of the SOC, the Defendant:
- (a) says that during the relevant period:
    - (i) customers were able to seek to finance the purchase of their motor vehicle with any available finance method of their choosing, of which credit was one potential option;
    - (ii) in the event a customer elected to seek to finance their motor vehicle purchase using credit, they could seek that credit from any applicable credit provider or through Dealers (although customers were not obliged to seek credit through the Dealers);
    - (iii) information was publicly available to assist customers to access and select motor vehicle finance, including through Dealers, to suit their individual circumstances and preferences;
    - (iv) customers could negotiate and agree to terms to include in their Car Loan Application to Macquarie Leasing based on their individual preferences and circumstances, including the credit facility amount, term (provided the term was not shorter than 12 months or longer than 84 months), repayment schedule and interest rate (each of which was subject to consideration and approval by Macquarie Leasing);



- (v) customers could withdraw their offer to Macquarie Leasing to borrow the loan amount at any time before Macquarie Leasing accepted it, or before the customer had taken possession of the motor vehicle (including where Macquarie Leasing had accepted the credit offer and a progress payment had been made by the customer), and seek credit from other credit providers. In certain circumstances, it was also possible for customers to withdraw their offer after Macquarie Leasing had accepted it and the customer had taken possession of the motor vehicle, and seek credit from other credit providers;
- (b) as to the allegations in sub-paragraph 9(a):
  - (i) refers to and repeats paragraph 8 of this Defence;
  - (ii) says that during the relevant period:
    - (A) the Facility Rate (part of which was set by reference to the Base Rate) was set by reference to criteria including the term of the Car Loan Agreement and the price and type of the motor vehicle to be purchased, each of which could be negotiated and agreed to by customers, and the Maximum Rate (subject to consideration and approval by Macquarie Leasing);
    - (B) customers could negotiate and agree the Facility Rate (subject to consideration and approval by Macquarie Leasing);
    - (C) Dealers were not required to propose, and customers were not required to adopt or include in their Car Loan Application to Macquarie Leasing, an interest rate higher than the Base Rate;
  - (iii) further says that the allegations in sub-paragraph 9(a)(iii) of the SOC are vague and embarrassing and liable to be struck out under rule 23.02(c) of the *Supreme Court (General Civil Procedure) Rules 2015 (Vic) (Civil Procedure Rules)* on the basis that the allegation that the Contract Rate was “significantly higher” than Macquarie Leasing “would have offered the Group Members” “or other consumers” had it been approached otherwise than through a Dealer is vague and not properly particularised, such that Macquarie Leasing is unable to identify the nature and scope of the allegations it must meet; and
  - (iv) otherwise denies the allegations in sub-paragraph 9(a) of the SOC;
- (c) as to the allegations in sub-paragraph 9(b), says that during the relevant period:

- (i) customers could negotiate and agree to the term to include in their Car Loan Application to Macquarie Leasing based on their individual preferences and circumstances (provided the term was not shorter than 12 months or longer than 84 months) (subject to consideration and approval by Macquarie Leasing); and
    - (ii) otherwise denies the allegations in sub-paragraph 9(b) of the SOC;
  - (d) as to the allegations in sub-paragraph 9(c), says that:
    - (i) the purchase of a motor vehicle, and Car Loan Application, were arms-length commercial transactions; and
    - (ii) otherwise denies the allegations in sub-paragraph 9(c) of the SOC;
  - (e) as to the allegations in sub-paragraph 9(f):
    - (i) says that the purchase of a motor vehicle, and Car Loan Application, were arms-length commercial transactions;
    - (ii) says that the Dealers were not acting on behalf of the customer as their agent in relation to the purchase of the motor vehicle or the Car Loan Application, and the Dealer did not owe the customer any duties in respect of their Car Loan Application, and therefore denies that any actual or potential conflict of interest between the Dealers and Group Members could or did arise;
    - (iii) further says that the allegations as pleaded are embarrassing and liable to be struck out under rule 23.02(c) of the Civil Procedure Rules on the basis that no material facts, or legal basis upon which it could be said that a duty to act in the customer's interests and to avoid a conflict of interest arose, are pleaded; and
    - (iv) otherwise denies the allegations in sub-paragraph 9(f) of the SOC;
  - (f) based on the above, denies that the setting of the Facility Rate created unfairness or a risk of unfairness in relation to motor vehicle credit facilities, or was designed to encourage writing above the Base Rate, and otherwise denies the allegations in sub-paragraphs 9(d) and (e) of the SOC;
  - (g) refers to and repeats paragraphs 7 to 8 of this Defence; and
  - (h) otherwise denies the allegations in paragraph 9 of the SOC.
10. In answer to the allegations in paragraph 10 of the SOC, the Defendant:

- (a) refers to and repeats paragraphs 8 to 9 of this Defence;
- (b) in relation to the allegations at sub-paragraph 10(a) of the SOC:
  - (i) says that flex commission arrangements were a common form of commission in the motor vehicle finance industry during the relevant period;
  - (ii) says that during the relevant period Macquarie Leasing:
    - (A) made pre-contractual disclosures as required by law; and
    - (B) disclosed in its Car Loan Agreements:
      - 1. that it paid a commission to Dealers;
      - 2. that the amount of that commission was specified if ascertainable but otherwise noted as unascertainable;
  - (iii) says that ~~from no later than in or around June 2016~~, at all material times during the Relevant Period, Macquarie Leasing required the Dealers to inform customers:
    - (A) that the Dealer and/or its associate (as applicable) was receiving a commission or benefit from Macquarie Leasing for referring the customer to it in relation to providing consumer credit to finance their motor vehicle purchase;
    - (B) the details of the benefits or commissions;
  - (iv) otherwise does not know and therefore cannot admit paragraph 10(a) of the SOC.
- (c) in relation to the allegations at sub-paragraph 10(b) of the SOC:
  - (i) refers to and repeats sub-paragraph 10(b) of this Defence;
  - (ii) says that during the relevant period, Macquarie Leasing required Dealers to complete training on the Credit Code, including on disclosure of commissions; and
  - (iii) otherwise denies the allegations at sub-paragraph 10(b) of the SOC.
- (d) in relation to the allegations at sub-paragraph 10(c) of the SOC:
  - (i) it does not know and cannot admit what a reasonable person in the position of Group Members who are not identified and whose claims are not particularised would have understood or assumed at the time of entering into his or her Car Loan;

- (ii) otherwise denies the allegations at sub-paragraph 10(c) of the SOC.
- (e) in relation to the allegations at sub-paragraphs 10(d) and 10(e) of the SOC:
  - (i) refers to and repeats sub-paragraphs 10(b) and (c) of this Defence;
  - (ii) says that the allegations as pleaded are vague and embarrassing and it does not know and cannot admit whether Group Members who are not identified and whose claims are not particularised:
    - (A) were in a comparatively weaker position to Macquarie Leasing and, or alternatively, the Dealers; or
    - (B) were not treated equally in that comparable Group Members (who are also not identified and whose claims are also not particularised) were not afforded equal Contract Rates;
  - (iii) otherwise denies the allegations at sub-paragraph 10(d) and 10(e) of the SOC;
- (f) otherwise denies the allegations in paragraph 10 of the SOC.

#### **B.2.2 The Dealers provided credit assistance to Group Members**

11. In answer to the allegations in paragraph 11 of the SOC, the Defendant:
  - (a) refers to and repeats paragraphs 1 of this Defence; and
  - (b) otherwise admits the allegations in paragraph 11 of the SOC.
12. In answer to the allegations in paragraph 12 of the SOC, the Defendant:
  - (a) says that Car Loan Agreements which were not wholly or predominately for personal, domestic or household use were not credit contracts within the meaning of section 4 of the Credit Code and section 5 of the NCCPA; and
  - (b) otherwise admits the allegations in paragraph 12 of the SOC.
13. In answer to the allegations in paragraph 13 of the SOC, the Defendant:
  - (a) admits that during the relevant period, Dealers dealt with customers who wanted to make a Car Loan Application to Macquarie Leasing;
  - (b) refers to and repeats paragraphs 6 and 7 of this Defence;
  - (c) otherwise does not know and therefore cannot admit the allegations in paragraph 13 of the SOC.

14. In answer to the allegations in paragraph 14 of the SOC, the Defendant:
- (a) refers to and repeats paragraphs 12 and 13 of this Defence; and
  - (b) otherwise does not know and therefore cannot admit the allegations in paragraph 14 of the SOC.

**B.2.3 The Dealers were intermediaries between Group Members and Macquarie**

15. In answer to the allegations in paragraph 15 of the SOC, the Defendant:
- (a) admits that Dealers carried on business in Australia during part or all of the relevant period; and
  - (b) otherwise does not know and cannot admit the allegations in paragraph 15 of the SOC.
16. In answer to the allegations in paragraph 16 of the SOC, the Defendant
- (a) refers to and repeats paragraph 15 of this Defence;
  - (b) admits that Dealers carried on business during the relevant period in this jurisdiction as defined in section 21(2) of the NCCPA; and
  - (c) otherwise does not know and cannot admit the allegations in paragraph 16 of the SOC.
17. In answer to the allegations in paragraph 17 of the SOC, the Defendant:
- (a) refers to and repeats paragraph 16 of this Defence;
  - (b) admits that during the relevant period, Dealers acted as intermediaries between Macquarie Leasing and customers to:
    - (i) receive and compile information and documentation from a customer as part of their Car Loan Application;
    - (ii) submit Car Loan Applications to Macquarie Leasing using MacLease;
  - (c) otherwise denies the allegations in paragraph 17 of the SOC.
18. In answer to the allegations in paragraph 18 of the SOC, the Defendant:
- (a) refers to and repeats paragraph 17 of this Defence;
  - (b) admits the allegations in paragraph 18 of the SOC insofar as they concern:
    - (i) the activities pleaded at sub-paragraph 17(b) of this Defence; and

- (ii) Car Loan Agreements provided to customers wholly or predominately for personal, domestic or household use; and
- (c) otherwise denies the allegations in paragraph 18 of the SOC.

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

19. In answer to the allegations in paragraph 19 of the SOC, the Defendant:
- (a) refers to and repeats paragraphs 14 and 18 of this Defence;
  - (b) admits the allegations in paragraph 19 of the SOC insofar as they concern the activities pleaded at sub-paragraph 17(b) of this Defence; and
  - (c) otherwise denies the allegations in paragraph 19 of the SOC.

**B.2.5 The Dealers engaged in unfair conduct**

20. In answer to the allegations in paragraph 20, the Defendant:
- (a) as to the allegations in sub-paragraph 20(a):
    - (i) says that whether customers were at a special disadvantage in dealing with Dealers in relation to a credit facility for the purpose of purchasing a motor vehicle is a matter to be assessed having regard to all the relevant individual characteristics, situation and circumstances of each customer and transaction;
    - (ii) says that the determination of whether a customer was at a special disadvantage involves an assessment of the individual characteristics, situation and circumstances relevant to each customer and transaction and does not involve a question common to all Group Members; and
    - (iii) otherwise denies the allegations in sub-paragraph 20(a);
  - (b) as to the allegations in sub-paragraph 20(b):
    - (i) says that it does not know and cannot admit whether Group Members who are not identified and whose claims are not particularised were unable to enter into a credit facility for the purpose of purchasing a motor vehicle with a credit provider other than Macquarie Leasing;
    - (ii) in relation to the allegation that customers considered themselves unable to enter into a credit facility for the purpose of purchasing a motor vehicle with a credit provider other than Macquarie Leasing, says that:

- (A) it does not know and cannot admit the state of mind of customers; and
  - (B) in any event, that matter is subjective and would depend on the individual characteristics, situation and circumstances of each customer;
- (iii) says that the determination of whether a customer was unable, or considered themselves unable, to enter into a credit facility for the purpose of purchasing a motor vehicle with a credit provider other than Macquarie Leasing involves an assessment of the individual characteristics, situation and circumstances relevant to each customer and does not involve a question common to all Group Members;
  - (iv) says that during the relevant period, Macquarie Leasing offered consumer leases through Dealers that were wholly or predominantly for personal, domestic or household use; and
  - (v) otherwise denies the allegations in sub-paragraph 20(b);
- (c) denies the allegations in sub-paragraph 20(c);
  - (d) as to the allegations in sub-paragraph 20(d):
    - (i) refers to and repeats paragraphs 8 and 9 of this Defence;
    - (ii) otherwise denies the allegations in sub-paragraph 20(d);
  - (e) as to the allegations in sub-paragraph 20(e):
    - (i) says that the allegations as pleaded are vague and embarrassing and liable to be struck out under rule 23.02(c) of the Civil Procedure Rules on the basis that the allegation that the “terms” which are alleged to be “less favourable” than the “the terms of a comparable transaction” are not pleaded or properly particularised and Macquarie Leasing is unable to identify the nature and scope of the allegations it must meet;
    - (ii) otherwise denies the allegations in sub-paragraph 20(e);
  - (f) refers to and repeats paragraphs 6, 8, 9 and 10 of this Defence.
21. In answer to the allegations in paragraph 21 of the SOC, the Defendant:
- (a) refers to and repeats paragraph 20 of this Defence;
  - (b) otherwise denies the allegations in paragraph 21 of the SOC.

### **B.2.6 Consequences of the Dealers' unfair conduct**

22. In answer to the allegations in paragraph 22 of the SOC, the Defendant:
- (a) admits that during the relevant period, customers became liable to pay interest at the rate and for the term set out in the Car Loan Agreement upon Macquarie Leasing accepting the customer's offer to borrow the credit facility amount from Macquarie Leasing;
  - (b) refers to and repeats paragraphs 20 and 21 of this Defence; and
  - (c) otherwise denies the allegations in paragraph 22 of the SOC.
23. In answer to the allegations in paragraph 23 of the SOC, the Defendant:
- (a) refers to and repeats paragraphs 20 to 22 of this Defence; and
  - (b) denies the allegations in paragraph 23 of the SOC.

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

24. In answer to the allegations in paragraph 24 of the SOC, the Defendant:
- (a) admits that, during the relevant period, Dealers were persons acting on behalf of Macquarie Leasing as a holder of an Australian credit licence for the limited purpose of verifying the customer's original identification and financial documents for the purpose of the AML/CTF Act; and
  - (b) otherwise denies the allegations in paragraph 24 of the SOC.
25. In answer to the allegations in paragraph 25 of the SOC, the Defendant:
- (a) refers to and repeats paragraphs 6, 14, 18 and 24 of this Defence;
  - (b) admits that, during the relevant period and in accordance with the terms of the Dealer Agreements, each Dealer was a representative of Macquarie Leasing for the limited purpose referred to in paragraph 24(a) of this Defence; and
  - (c) otherwise denies the allegations in paragraph 25 of the SOC.
26. In answer to the allegations in paragraph 26 of the SOC, the Defendant:
- (a) refers to and repeats paragraphs 14, 18, 19, 21, 24 and 25 of this Defence; and
  - (b) otherwise denies the allegations in paragraph 26 of the SOC.
27. In answer to the allegations in paragraph 27 of the SOC, the Defendant:
- (a) refers to and repeats paragraphs 9, 10, 19 and 21 of this Defence; and



- (b) otherwise denies the allegations in paragraph 27 of the SOC.
28. In answer to the allegations in paragraph 28 of the SOC, the Defendant:
- (a) says that it does not know and therefore cannot admit the state of mind or motives of customers;
- (b) says that individuals enter into Car Loan Agreements for subjective reasons which depend on their individual characteristics, situation and circumstances;
- (c) refers to and repeats paragraphs 9, 10, 19 and 21 of this Defence; and
- (d) otherwise denies the allegations in paragraph 28 of the SOC.
29. In answer to the allegations in paragraph 29 of the SOC, the Defendant:
- (a) refers to and repeats paragraphs 26 to 28 of this Defence; and
- (b) otherwise denies the allegations in paragraph 29 of the SOC.
30. The Defendant denies the allegations in paragraph 30 of the SOC.
31. The Defendant denies the allegations in paragraph 31 of the SOC.
32. In answer to the allegations at paragraph 32 of the SOC, ~~The~~the Defendant:
- (a) denies the allegations in paragraph 32 of the SOC; and
- ~~(a)~~(b) says further that, -with respect to claims under section 180A of the NCCPA by Group Members, in relation to Car Loan Agreements entered into prior to 14 October 2014, those claims are statute barred, by reason of sub-section 180A(5) of the NCCPA.

#### **B.4 Claim against Macquarie for misleading or deceptive conduct**

33. In answer to the allegations in paragraph 33 of the SOC, the Defendant:
- (a) refers to and repeats paragraph 10 of this Defence; and
- (b) otherwise denies the allegations in paragraph 33 of the SOC.
34. In answer to the allegations in paragraph 33 of the SOC, the Defendant:
- (a) refers to and repeats paragraph 10 of this Defence; and
- (b) otherwise denies the allegations in paragraph 34 of the SOC.
35. The Defendant denies the allegations in paragraph 35 of the SOC.
36. The Defendant denies the allegations in paragraph 36 of the SOC.

37. In answer to the allegations in paragraph 37 of the SOC, the Defendant:
- (a) refers to and repeats paragraphs 33 to 36 of this Defence; and
  - (b) otherwise denies the allegations in paragraph 37 of the SOC.
38. In answer to the allegations in paragraph 38 of the SOC, the Defendant:
- (a) admits that during the relevant period, customers became liable to pay interest at the rate and for the term set out in the Car Loan Agreement upon Macquarie Leasing accepting the customer's offer to borrow the credit facility amount from Macquarie Leasing;
  - (b) refers to and repeats paragraphs 33 to 37 of this Defence; and
  - (c) otherwise denies the allegations in paragraph 38.
39. In answer to the allegations in paragraph 39 of the SOC, the Defendant:
- (a) refers to and repeats paragraph 38 of this Defence;
  - (b) denies the allegations in paragraph 39 of the SOC;
  - (c) says further that, with respect to claims under section 1041H of the Corporations Act or section 12GF of the ASIC Act by Group Members (**Misleading or Deceptive Conduct Claims**), in relation to Car Loan Agreements entered into prior to 14 October 2014, those claims are statute barred, by reason of sub-sections 1041I(2) and 1317K of the Corporations Act and sub-section 12GF(2) of the ASIC Act;
  - (d) says further that, for the purpose of this Defence only, if the Court finds that the Group Members are entitled to an order against the Defendant under section 1041I of the Corporations Act or section 12GF of the ASIC Act and the Defendant is liable to the Group Members in respect of any loss or damages suffered by them by reason of those alleged contraventions (which is denied), then:
    - (i) the Group Members are responsible in part or wholly for that same loss or damage, to the extent that the loss resulted partly or wholly from the Group Members' failure to take reasonable care to avoid such loss;
    - (ii) the Group Members are entitled to the same order against the relevant Dealer;
    - (iii) the Misleading or Deceptive Conduct Claims are "apportionable claims" within the meaning of sub-sections 1041L(1) and (4) of the Corporations Act and sub-sections 12GP(1) and (4) of the ASIC Act;

- (iv) the Dealers are “concurrent wrongdoers” within the meaning of sub-section 1041L(3) of the Corporations Act and sub-section 12GP(3) of the ASIC Act;
- (v) by that reason, its liability (if any) to the Group Members is limited to an amount reflecting the proportion of the damage or loss claimed that the Court considers is just having regard to the extent of its responsibility for that damage or loss in accordance with:
  - (A) section 1041N and sub-sections [1041I\(1B\)](#), 1041L(1), (3) and (4) of the Corporations Act; and
  - (B) section 12GR and sub-sections [12GF\(1B\)](#), 12GP(1), (3) and (4) of the ASIC Act.
- (e) says further that if it appears to the Court that Macquarie Leasing has or may have any liability to the Group Members by reason of any contravention of section 1041H of the Corporations Act (which is denied), then Macquarie ought to be relieved from that liability pursuant to section 1317S (as applied by section 1041I(4)) on the basis that:
  - (i) Macquarie acted honestly; and
  - (ii) having regard to all the circumstances of the case, Macquarie ought fairly to be excused from the contraventions.

#### **B.5 Claim against Macquarie for money had and received and unjust enrichment**

- 40. In answer to the allegations in paragraph 40 of the SOC, the Defendant:
  - (a) refers to and repeats paragraphs 8, 9, 10, 21, 32 and 37 of this Defence;
  - (b) says that it does not know and cannot admit what matters were known to Group Members who are not identified and whose claims are not particularised;
  - (c) denies that it was obliged to inform the Plaintiffs and/or Group Members of any of the matters alleged in paragraph 40; and
  - (d) otherwise denies the allegations in paragraph 40 of the SOC.
- 41. In answer to the allegations in paragraph 41 of the SOC, the Defendant:
  - (a) refers to and repeats paragraphs 10(b)(iii) and 40 of this Defence;
  - (b) says that it does not know and cannot admit what matters were known to Group Members who are not identified and whose claims are not particularised or whether

such matters would have been relevant to the decision of the Group Members to proceed with an offer to enter into the Car Loan Agreement;

- (c) denies that each of the matters alleged was material information that would have been relevant to the decision of the Group Members about whether to proceed with an offer to enter into the Car Loan Agreement; further or in the alternative
- (d) whether each of the matters alleged was material information relevant to the decision of the Group Members about whether to proceed with an offer to enter into the Car Loan Agreement is subjective and would depend on the individual characteristics, situation and circumstances of each Group Member; and
- (e) otherwise denies the allegations in paragraph 41 of the SOC.

42. In answer to the allegations in paragraph 42 of the SOC, the Defendant:

- (a) refers to and repeats paragraph 40 and 41 of this Defence;
- (b) admits that during the relevant period, customers became liable to pay interest at the rate and for the term set out in the Car Loan Agreement upon Macquarie Leasing accepting the customer's offer to borrow the credit facility amount from Macquarie Leasing;
- (c) says that during the relevant period, customers had a legal obligation to pay those interest charges and Macquarie Leasing was legally entitled to payment of such moneys;
- (d) says that the matters alleged in paragraphs 40 to 47 of the SOC:
  - (i) do not relate to fundamental terms of the Car Loan; and
  - (ii) do not make out a cause of action against Macquarie Leasing in the form of unilateral mistake;
- (e) otherwise denies the allegations in paragraph 42 of the SOC.

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

- (a) refers to and repeats paragraph 42 of this Defence;
- (b) says that each of the alleged mistaken beliefs pleaded in paragraph 43 of the SOC is not a mistake which would entitle the relevant Group Member to rescind their Car Loan Agreement or otherwise to be relieved of their obligation to perform their Car Loan Agreement, including the obligation to pay interest charges; and

- (c) otherwise denies the allegations in paragraph 43 of the SOC.
44. In answer to the allegations in paragraph 44 of the SOC, the Defendant:
- (a) refers to and repeats paragraph 42 and 43 of this Defence; and
- (b) otherwise denies the allegations in paragraph 44 of the SOC.
45. The Defendant denies the allegations in paragraph 45 of the SOC.
46. In answer to the allegations in paragraph 46 of the SOC, the Defendant:
- (a) denies the allegations in paragraph 46 of the SOC;
- (b) says further that, with respect to claims of unilateral mistake by the Group Members (**Unilateral Mistake Claims**), in relation to any Car Loan entered into prior to 14 October 2014 in Victoria, New South Wales, Western Australia, Queensland, South Australia, Tasmania or the Australian Capital Territory, those claims are statute barred, by reason of, respectively:
- (i) section 5(1) of the *Limitation of Actions Act 1958 (Vic)*;
- (ii) section 14(1) of the *Limitation Act 1969 (NSW)*;
- (iii) section 13(1) of the *Limitation Act 2005 (WA)*;
- (iv) section 10(1) of the *Limitation of Actions Act 1974 (Qld)*;
- (v) section 35(a) of the *Limitation of Actions Act 1936 (SA)*;
- (vi) section 4(1) of the *Limitation Act 1974 (Tas)*; and
- (vii) section 11(1) of the *Limitation Action 1985 (ACT)*;
- (c) says that it is entitled to rely upon the equitable doctrine of laches due to the Group Members' delay in bringing their respective claims.
47. In answer to the allegations in paragraph 47 of the SOC, the Defendant:
- (a) refers to and repeats paragraphs 40 to 46 of this Defence;
- (b) says that:
- (i) Macquarie Leasing, acting on good faith, relied to its detriment on the agreement by Group Members to pay interest charges pursuant to the Car Loan Agreements (**Interest Charges**) and the payment of those Interest Charges by financing the purchase of the motor vehicle, incurring

expenditure and/or other disadvantageous consequences that it would not have otherwise incurred;

- (ii) in reliance upon the agreement by Group Members to pay Interest Charges and payment of those Interest Charges, Macquarie Leasing:
  - (A) financed the purchase of the motor vehicle;
  - (B) bore the cost associated with the maintenance of that finance;
  - (C) bore the risk associated with the provision of that finance including that a Group Member may cease to make repayments and the underlying assets would be insufficient to cover the balance of the loan; and
  - (D) complied with the prudential standards relating to lending imposed by the Australian Prudential Regulation Authority (**APRA**);
- (iii) by reason of the change of position pleaded in sub-paragraph 47(b)(i) of this Defence, it would be inequitable in all the circumstances to require it to repay the Interest Charges in whole or in part;
- (iv) Macquarie Leasing gave good consideration to any Group Member from whom it received the payment of Interest Charges pursuant to the terms of Group Members' respective Car Loan Agreements;
- (v) by reason of the provision of good consideration pleaded in sub-paragraph 47(b)(iv) of this Defence, it is not obliged to repay to Group Members the Interest Charges received by it in whole or in part;
- (vi) the receipt and use of the motor vehicles purchased using monies advanced pursuant to the Car Loan Agreements constitute unequivocal words or conduct by which Group Members have elected to take the benefit of the Car Loan Agreements;
- (vii) Group Members are not entitled to the repayment of Interest Charges paid in respect of the Car Loan Agreements in whole or in part;
- (viii) Group Members have received a benefit from the Car Loan Agreements, to the extent that the amount advanced under the Car Loan Agreements was applied:
  - (A) to repay an amount owing by a Group Member under another credit contract;

- (B) to finance premiums for comprehensive motor insurance of any “add-on” insurance products;
  - (C) to pay for accessories or extras in relation to the automobile purchased; and
  - (D) to obtain a valuable asset, being the motor vehicle purchased;
- (ix) in the premises of the benefit received, set out in sub-paragraph 47(b)(viii) of this Defence, Group Members would be unjustly enriched at its expense if it were required to repay the Interest Charges received by it and Group Members are not entitled to the remedies or relief sought;
- (c) says that further or in the alternative, Group Members are not entitled to the remedies or relief sought unless they account for such benefit;
- (d) says that there is no maintainable claim in monies had and received by Group Members whose Car Loan Agreements have been fully performed; and
- (e) otherwise denies the allegations in paragraph 47 of the SOC.
48. In answer to the allegations in paragraph 48 of the SOC, the Defendant:
- (a) refers to and repeats paragraphs 46 and 47 of this Defence; and
  - (b) otherwise denies the allegations in paragraph 48 of the SOC.

## **C. FIRST AND SECOND PLAINTIFFS’ CLAIM AGAINST MACQUARIE**

### **C.1 The First and Second Plaintiffs**

49. In answer to the allegations in paragraph 49 of the SOC, the Defendant:
- (a) admits that the First and Second Plaintiffs are, and were at all material times, natural persons; and
  - (b) otherwise does not know and therefore cannot admit the allegations in paragraph 49 of the SOC.
50. In answer to the allegations in paragraph 50 of the SOC, the Defendant:
- (a) as to the allegations in subparagraph 50(a) of the SOC:
    - (i) says that it does not know and therefore cannot admit when the Plaintiffs entered into discussions with Booran Motors; and
    - (ii) otherwise admits the allegations in sub-paragraph 50(a);

- (b) admits the allegations in sub-paragraph 50(b); and
- (c) as to the allegations in subparagraph 50(c) of the SOC, says that it does not know and therefore cannot admit whether a \$50 deposit was paid to Booran Motors for the acquisition of the Kia.

51. The Defendant admits the allegations in paragraph 51 of the SOC.

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

### **C.2.1 Arrangements between Booran Motors and Macquarie**

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

- (a) admits that on or around 26 September 2012, Mr George Stoikos of Booran Dandenong Pty Ltd (**Booran Motors**) (together, **Booran Motors Business Manager**) signed the Macquarie Leasing Business Manager Registration Form;
- (b) says that during the relevant period, the agreements which comprised the arrangements between Macquarie Leasing and Booran Motors were not recorded in a single document but were recorded in various documents including the document referred to at paragraph 52(a) of this Defence, as amended from time to time (**Booran Motors Dealer Agreement**); and
- (c) otherwise denies the allegations in paragraph 52 of the SOC.

53. In answer to the allegations in paragraph 53 of the SOC, the Defendant:

- (a) refers to and repeats paragraph 52 of the SOC;
- (b) relies upon the terms of the Booran Motors Dealer Agreement for their full force and effect;
- (c) as to the allegations in sub-paragraph 53(a) of the SOC, says that during the relevant period, the terms of the Booran Motors Dealer Agreement provided that the Booran Motors Business Manager was nominated and authorised to access MacLease for the purpose of submitting applications to Macquarie Leasing for consumer loans or personal leases and for other credit not regulated by the Credit Code, including Car Loan Applications;
- (d) as to the allegations in sub-paragraph 53(b) of the SOC, says that during the relevant period, the terms of the Booran Motors Dealer Agreement required Booran Motors and the Booran Motors Business Manager to comply with all of Macquarie Leasing's procedures from time to time in accessing and using MacLease,



submitting Car Loan Applications and arranging for signature of relevant documents;

- (e) as to the allegations in sub-paragraph 53(c) of the SOC, says that during the relevant period the terms of the Booran Motors Dealer Agreement provided that:
    - (i) where a Car Loan Application was submitted to Macquarie Leasing, Booran Motors and the Booran Motors Business Manager were to have made reasonable enquiries as to the purpose for which credit was intended to be provided or the purpose for which the customer would be using the motor vehicle to be purchased; and
    - (ii) it was the responsibility of both Booran Motors and Macquarie Leasing to make appropriate enquiries of the customer to ensure that the loan was not unsuitable for the customer's circumstances, and that depending on the individual circumstances, Macquarie Leasing may require further evidence of income, property ownership, bank account balances, loan balances and other information as deemed necessary to make an appropriate decision;
  - (f) says further that, during the relevant period the terms of the Booran Motors Dealer Agreement provided that neither Booran Motors nor any Booran Motors Business Manager was authorised to make on behalf of Macquarie Leasing any representation in relation to any application for credit; and
  - (g) otherwise denies the allegations in paragraph 53.
54. The Defendant refers to and repeats paragraph 6 of this Defence and otherwise denies the allegations in paragraph 54 of the SOC.
55. The Defendant refers to and repeats paragraph 7 of this Defence and otherwise denies the allegations in paragraph 55 of the SOC.
56. In answer to the allegations in paragraph 56 of the SOC, the Defendant:
- (a) refers to and repeats paragraph 8 of this Defence;
  - (b) admits that paragraph 8 of this Defence applied to Booran Motors and the Car Loan Agreement between the Plaintiffs and Macquarie Leasing dated 16 October 2014 (**Plaintiffs' Car Loan Agreement**); and
  - (c) otherwise denies the allegations in paragraph 56 of the SOC.
57. In answer to the allegations in paragraph 57 of the SOC, the Defendant:

- (a) refers to and repeats paragraphs 9 and 53 to 56 of this Defence;
- (b) says that:
  - (i) the Plaintiffs were able to seek to finance the purchase of their motor vehicle with any available finance method of their choosing, of which credit was one potential option;
  - (ii) having elected to seek to finance their motor vehicle purchase using credit, the Plaintiffs could have sought that credit from any applicable credit provider or through any other Dealer (although the Plaintiffs were not obliged to seek credit through a Dealer, including Booran Motors);
  - (iii) information was publicly available to assist the Plaintiffs to access and select motor vehicle finance, including through Booran Motors, to suit their individual circumstances and preferences;
  - (iv) the Plaintiffs were able to negotiate and agree to terms to include in their Car Loan Application to Macquarie Leasing based on their individual preferences and circumstances, including the credit facility amount, term (provided the term was not shorter than 12 months or longer than 84 months), repayment schedule and interest rate (each of which was subject to consideration and approval by Macquarie Leasing);
  - (v) the Plaintiffs were able to withdraw their offer to Macquarie Leasing to borrow the loan amount at any time before Macquarie Leasing accepted it, or before the Plaintiffs had taken possession of the motor vehicle (including where Macquarie Leasing had accepted the credit offer and a progress payment had been made by the customer), and seek credit from other credit providers. In certain circumstances, it was also possible for the Plaintiffs to withdraw their credit offer after Macquarie Leasing had accepted it and the Plaintiffs had taken possession of the motor vehicle, and seek credit from other credit providers;
- (c) as to the allegations in sub-paragraph 57(a):
  - (i) refers to and repeats paragraph 8 of this Defence;
  - (ii) admits that the Facility Rate for the Plaintiffs' Car Loan Agreement was 12.75% per annum;
  - (iii) says that:

- (A) the Facility Rate (part of which was set by reference to the Base Rate) was set by reference to criteria including the terms of the Plaintiffs' Car Loan Agreement and the price and type of the motor vehicle to be purchased by the Plaintiffs, each of which could be negotiated and agreed to by the Plaintiffs, and the Maximum Rate;
  - (B) the Plaintiffs were able to negotiate and agree the Facility Rate with Booran Motors;
  - (C) Booran Motors was not required to propose, and the Plaintiffs were not required to adopt or include in their Car Loan Application to Macquarie Leasing, an interest rate higher than the Base Rate;
- (iv) further says that the allegations in sub-paragraph 57(a)(iii) of the SOC are vague and embarrassing and liable to be struck out under rule 23.02(c) of the Civil Procedure Rules on the basis that the allegation that the Contract Rate was "significantly higher" than Macquarie Leasing "would have offered Mr & Mrs Nathan" had they been approached otherwise than through Booran Motors is vague and not properly particularised, such that Macquarie Leasing is unable to identify the nature and scope of the allegations it must meet; and
- (v) otherwise denies the allegations in sub-paragraph 57(a) of the SOC;
- (d) as to the allegations in sub-paragraph 57(b), says that:
- (i) the Plaintiffs were able to negotiate and agree to the term to include in their Car Loan Application to Macquarie Leasing based on their individual preferences and circumstances (provided the term was not shorter than 12 months or longer than 84 months) (subject to consideration and approval by Macquarie Leasing); and
  - (ii) otherwise denies the allegations in sub-paragraph 57(b) of the SOC;
- (e) as to the allegations in sub-paragraph 57(c), says that:
- (i) the purchase of the Plaintiffs' motor vehicle, and the Plaintiffs' Car Loan Application, were arms-length commercial transactions; and
  - (ii) otherwise denies the allegations in sub-paragraph 57(c) of the SOC;
- (f) as to the allegations in sub-paragraph 57(f):
- (i) refers to and repeats paragraph 57(e)(i) of this Defence;

- (ii) says that Booran Motors were not acting on behalf of the Plaintiffs as their agent in relation to the purchase of the motor vehicle or their Car Loan Application, and Booran Motors did not owe the Plaintiffs any duties in respect of the Plaintiffs' Car Loan Application, and therefore denies that any actual or potential conflict of interest between Booran Motors and the Plaintiffs could or did arise;
- (iii) further says that the allegations as pleaded are embarrassing and liable to be struck out under rule 23.02(c) of the Civil Procedure Rules on the basis that no material facts, or legal basis upon which it could be said that a duty to act in the Plaintiffs' interests and to avoid a conflict of interest arose, are pleaded; and
- (iv) otherwise denies the allegations in sub-paragraph 57(f) of the SOC;
- (g) based on the above, denies that the setting of the Facility Rate created unfairness or a risk of unfairness in relation to the Plaintiffs' Car Loan Agreement, or was designed to encourage writing above the Base Rate, and otherwise denies the allegations in sub-paragraphs 57(d) and 57(e) of the SOC; and
- (h) refers to and repeats paragraphs 55 to 56 of this Defence; and
- (i) otherwise denies the allegations in paragraph 57 of the SOC.

58. In answer to the allegations in paragraph 58 of the SOC, the Defendant:

- (a) refers to and repeats paragraphs 56 and 57 of this Defence;
- (b) in relation to the allegations at sub-paragraph 58(a) of the SOC:
  - (i) says that flex commission arrangements were a common form of commission in the motor vehicle finance industry during the relevant period;
  - (ii) says that Macquarie Leasing:
    - (A) made pre-contractual disclosures as required by law; and
    - (B) disclosed in the Plaintiffs' Car Loan Agreement:
      1. that it paid a commission to Dealers;
      2. that the amount of that commission was unascertainable;
  - (iii) otherwise does not know and therefore cannot admit the allegations at sub-paragraph 58(a) of the SOC.
- (c) in relation to the allegations at sub-paragraph 58(b) of the SOC:

- (i) refers to and repeats sub-paragraph 10(b) of this Defence;
  - (ii) says that during the relevant period, Macquarie Leasing required Booran Motors to complete training on the Credit Code, including on disclosure of commissions; and
  - (iii) otherwise denies the allegations at sub-paragraph 58(b) of the SOC.
- (d) in relation to the allegations at sub-paragraph 58(c) of the SOC:
- (i) says that it does not know and cannot admit what a reasonable person in the position of the Plaintiffs would have understood or assumed at the time of entering into the Plaintiffs' Car Loan Agreement;
  - (ii) otherwise denies the allegations at sub-paragraph 10(c) of the SOC.
- (e) in relation to the allegations at sub-paragraphs 58(d) and 58(e) of the SOC:
- (i) refers to and repeats sub-paragraphs 10(b) and 10(c) of this Defence;
  - (ii) says that the allegations as pleaded are vague and embarrassing and it does not know and cannot admit whether the Plaintiffs:
    - (A) were in a comparatively weaker position to Macquarie Leasing and, or alternatively, Booran Motors; or
    - (B) were not treated equally in that comparable Group Members (who are not identified and whose claims are also not particularised) were not afforded equal Contract Rates;
  - (iii) otherwise denies the allegations at sub-paragraphs 58(d) and 58(e) of the SOC;
- (f) otherwise denies the allegations in paragraph 58 of the SOC.

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

59. The Defendant admits the allegations in paragraph 59 of the SOC.

60. In answer to the allegations in paragraph 60 of the SOC, the Defendant:

- (a) says that to the extent that the Plaintiffs' Car Loan Agreement was not wholly or predominately for personal, domestic or household purposes it was not a credit contract within the meaning of section 4 of the Credit Code and section 5 of the NCCPA; and
- (b) otherwise admits the allegations in paragraph 60 of the SOC.

61. In answer to the allegations in paragraph 61 of the SOC, the Defendant:
- (a) admits that during the relevant period, Booran Motors dealt with the Plaintiffs who wanted to make a Car Loan Application to Macquarie Leasing;
  - (b) otherwise does not know and therefore cannot admit the allegations in paragraph 61 of the SOC.
62. In answer to the allegations in paragraph 62 of the SOC, the Defendant:
- (a) refers to and repeats paragraphs 60 and 61 of this Defence;
  - (b) otherwise does not know and therefore cannot admit the allegations in paragraph 62 of the SOC.

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

63. In answer to the allegations in paragraph 63 of the SOC, the Defendant:
- (a) admits that Booran Motors carried on business in Australia during part or all of the relevant period; and
  - (b) otherwise does not know and cannot admit the allegations in paragraph 63 of the SOC.
64. In answer to the allegations in paragraph 64 of the SOC, the Defendant
- (a) refers to and repeats paragraph 63 of this Defence;
  - (b) admits that Booran Motors carried on business during the relevant period in this jurisdiction as defined in section 21 of the NCCPA; and
  - (c) otherwise does not know and cannot admit the allegations in paragraph 64 of the SOC.
65. In answer to the allegations in paragraph 65 of the SOC, the Defendant
- (a) refers to and repeats paragraph 64 of this Defence;
  - (b) admits that during the relevant period, Booran Motors acted as an intermediary between Macquarie Leasing and the Plaintiffs to:
    - (i) receive and compile information and documentation as part of the Plaintiffs' Car Loan Application; and
    - (ii) submit the Plaintiffs' Car Loan Application to Macquarie Leasing using MacLease;

(c) otherwise denies the allegations in paragraph 65 of the SOC.

66. In answer to the allegations in paragraph 66 of the SOC, the Defendant

(a) refers to and repeats paragraph 65 of this Defence;

(b) admits the allegations in paragraph 66 of the SOC insofar as:

(i) they concern the activities pleaded at sub-paragraph 65(b) of this Defence;  
and

(ii) the Plaintiffs' Car Loan Agreement was wholly or predominately for personal, household or domestic use; and

(c) otherwise denies the allegations in paragraph 66 of the SOC.

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

67. In answer to the allegations in paragraph 67 of the SOC, the Defendant:

(a) refers to and repeats paragraphs 62 and 66 of this Defence;

(b) admits the allegations in paragraph 67 of the SOC insofar as:

(i) they concern the activities pleaded at sub-paragraph 65(b) of this Defence;  
and

(ii) the Plaintiffs' Car Loan Agreement was wholly or predominately for personal, domestic or household use; and

(c) otherwise denies the allegations in paragraph 67 of the SOC.

**C.2.5 Booran Motors engaged in unfair conduct**

68. In answer to the allegations in paragraph 68, the Defendant:

(a) denies the allegations in sub-paragraph 68(a);

(b) as to the allegations in sub-paragraph 68(b):

(i) denies the Plaintiffs were unable to enter into a Car Loan for the purpose of purchasing a motor vehicle with a credit provider other than Macquarie Leasing;

(ii) otherwise does not know and cannot admit the allegations in sub-paragraph 68(b);

(c) denies the allegations in sub-paragraph 68(c);

- (d) as to the allegations in sub-paragraph 68(d):
  - (i) refers to and repeats paragraphs 56 and 57 of this Defence;
  - (ii) otherwise denies the allegations in sub-paragraph 68(d);
- (e) as to the allegations in sub-paragraph 68(e):
  - (i) says that the allegations as pleaded are vague and embarrassing and liable to be struck out under rule 23.02(c) of the Civil Procedure Rules on the basis that the allegation that the “terms” which are alleged to be “less favourable” than the “the terms of a comparable transaction” are not pleaded or properly particularised and it is unable to identify the nature and scope of the allegations it must meet;
  - (ii) otherwise denies the allegations in sub-paragraph 68(e);
- (f) otherwise refers to and repeats paragraphs 54, 56, 57 and 58 of this Defence, and denies the allegations in paragraph 68 of the SOC.

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

- (a) refers to and repeats paragraph 68 of this Defence;
- (b) otherwise denies the allegations in paragraph 69 of the SOC.

#### **C.2.6 Consequences of Booran Motors’s unfair conduct**

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

- (a) admits that the Plaintiffs became liable on 16 October 2016 to pay interest in accordance with the Plaintiffs’ Car Loan Agreement;
- (b) refers to and repeats paragraph 69 of this Defence; and
- (c) otherwise denies the allegations in paragraph 70 of the SOC.

71. In answer to the allegations in paragraph 71 of the SOC, the Defendant:

- (a) refers to and repeats paragraphs 68 to 70 of this Defence;
- (b) otherwise denies the allegations in paragraph 71 of the SOC.

#### **C.3 Claim against Macquarie under the NCCPA for Booran Motors’s Unfair Conduct**

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

- (a) admits that, during the relevant period, Booran Motors was a person acting on behalf of Macquarie Leasing as a holder of an Australian credit licence for the



limited purpose of verifying the Plaintiffs' original identification and financial documents for the purpose of the AML/CTF Act;

- (b) otherwise denies the allegations in paragraph 72 of the SOC.
73. In answer to the allegations in paragraph 73 of the SOC, the Defendant:
- (a) refers to and repeats paragraph 54, 62, 66 and 72 of this Defence;
  - (b) admits that, during the relevant period and in accordance with the terms of the Booran Motors Dealer Agreement, Booran Motors was a representative of Macquarie Leasing for the limited purpose pleaded in paragraph 72(a) of this Defence; and
  - (c) otherwise denies the allegations in paragraph 73 of the SOC.
74. In answer to the allegations in paragraph 74 of the SOC, the Defendant:
- (a) refers to and repeats paragraph 62, 66, 67, 69, 72 and 73 of this Defence; and
  - (b) otherwise denies the allegations in paragraph 74 of the SOC.
75. In answer to the allegations in paragraph 75 of the SOC, the Defendant:
- (a) refers to and repeats paragraphs 57, 58, 67 and 69 of this Defence; and
  - (b) otherwise denies the allegations in paragraph 75 of the SOC.
76. In answer to the allegations in paragraph 76 of the SOC, the Defendant:
- (a) says that it does not know and therefore cannot admit the state of mind or motivations of the Plaintiffs;
  - (b) says that the Plaintiffs entered into the Plaintiffs' Car Loan Agreement for subjective reasons which depended on their individual characteristics, situation and circumstances;
  - (c) refers to and repeats paragraphs 57, 58, 67 and 69 of this Defence; and
  - (d) otherwise denies the allegations in paragraph 76 of the SOC.
77. In answer to the allegations in paragraph 77 of the SOC, the Defendant:
- (a) refers to and repeats paragraphs 74 to 76 of this Defence; and
  - (b) otherwise denies the allegations in paragraph 77 of the SOC.
78. The Defendant denies the allegations in paragraph 78 of the SOC.

79. The Defendant denies the allegations in paragraph 79 of the SOC.

80. The Defendant denies the allegations in paragraph 80 of the SOC.

**C.4 Claim against Macquarie for misleading or deceptive conduct**

81. In answer to the allegations in paragraph 81 of the SOC, the Defendant:

- (a) refers to and repeats paragraph 58 of this Defence; and
- (b) otherwise denies the allegations in paragraph 81 of the SOC.

82. In answer to the allegations in paragraph 82 of the SOC, the Defendant:

- (a) refers to and repeats paragraphs 58 and 81 of this Defence; and
- (b) otherwise denies the allegations in paragraph 82 of the SOC.

83. The Defendant denies the allegations in paragraph 83 of the SOC.

84. The Defendant denies the allegations in paragraph 84 of the SOC.

85. In answer to the allegations in paragraph 85 of the SOC, the Defendant:

- (a) refers to and repeats paragraphs 81 to 84 of this Defence; and
- (b) otherwise denies the allegations in paragraph 85 of the SOC.

86. In answer to the allegations in paragraph 86 of the SOC, the Defendant:

- (a) admits that the Plaintiffs became liable on 16 October 2016 to pay interest in accordance with the Plaintiffs' Car Loan Agreement;
- (b) refers to and repeats paragraphs 69 to 85 of this Defence; and
- (c) otherwise denies the allegations in paragraph 86.

87. In answer to the allegations in paragraph 87 of the SOC, the Defendant:

- (a) refers to and repeats paragraph 86 of this Defence;
- (b) denies the allegations in paragraph 87 of the SOC;
- (c) says further that, for the purpose of this Defence only, if the Court finds that the Plaintiffs are entitled to an order against the Defendant under section 1041I of the Corporations Act or section 12GF of the ASIC Act and the Defendant is liable to the Plaintiffs in respect of any loss or damages suffered by them by reason of those alleged contraventions (which is denied), then:

- (i) the Plaintiffs are responsible in part or wholly for that same loss or damage, to the extent that the loss resulted partly or wholly from the Plaintiffs' failure to take reasonable care to avoid such loss;
- (ii) the Plaintiffs are entitled to the same order against Booran Motors;
- (iii) the Plaintiffs' Misleading or Deceptive Conduct Claims are "apportionable claims" within the meaning of sub-sections 1041L(1) and (4) of the Corporations Act and sub-sections 12GP(1) and (4) of the ASIC Act;
- (iv) Booran Motors are "concurrent wrongdoers" within the meaning of sub-section 1041L(3) of the Corporations Act and sub-section 12GP(3) of the ASIC Act;
- (v) by that reason, its liability (if any) to the Plaintiffs is limited to an amount reflecting the proportion of the damage or loss claimed that the Court considers is just having regard to the extent of its responsibility for that damage or loss in accordance with:
  - (A) section 1041N and sub-sections 1041L(1), (3) and (4) of the Corporations Act; and
  - (B) section 12GR and sub-sections 12GP(1), (3) and (4) of the ASIC Act.

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

88. In answer to the allegations in paragraph 88 of the SOC, the Defendant:

- (a) refers to and repeats paragraphs 56, 57, 58, 68, 80 and 85 of this Defence;
- (b) says that it does not know and cannot admit what matters were known to the Plaintiffs;
- (c) denies that it was obliged to inform the Plaintiffs of any of the matters alleged in paragraph 88; and
- (d) otherwise denies the allegations in paragraph 88 of the SOC.

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

- (a) refers to and repeats paragraph 88 of this Defence;
- (b) says that it does not know and cannot admit what matters were known to the Plaintiffs or whether such matters would have been relevant to the decision of the Plaintiffs to proceed with an offer to enter into the Plaintiffs' Car Loan Agreement;

- (c) denies that each of the matters alleged was material information that would have been relevant to the decision of the Plaintiffs whether to proceed with an offer to enter into the Plaintiffs' Car Loan Agreement; further or in the alternative and
  - (d) otherwise denies the allegations in paragraph 89 of the SOC.
90. In answer to the allegations in paragraph 90 of the SOC, the Defendant:
- (a) refers to and repeats paragraph 40 and 41 of this Defence;
  - (b) admits that the Plaintiffs became liable on 16 October 2016 to pay interest at the rate and for the term set out in the Plaintiffs' Car Loan Agreement;
  - (c) says that the Plaintiffs had a legal obligation to pay those interest charges and Macquarie Leasing was legally entitled to payment of such moneys;
  - (d) says that the matters alleged in paragraphs 90 to 95 of the SOC:
    - (i) do not relate to fundamental terms of the Plaintiffs' Car Loan Agreement; and
    - (ii) do not make out a cause of action against Macquarie Leasing in the form of unilateral mistake; and
  - (e) otherwise denies the allegations in paragraph 90 of the SOC.
91. In answer to the allegations in paragraph 91 of the SOC, the Defendant:
- (a) refers to and repeats paragraph 90 of this Defence;
  - (b) says that each of the alleged mistaken beliefs pleaded in paragraph 90 of the SOC is not a mistake which would have entitled the Plaintiffs to rescind the Plaintiffs' Car Loan Agreement or otherwise to have been relieved of their obligation to perform the Plaintiffs' Car Loan Agreement, including the obligation to pay interest charges; and
  - (c) otherwise denies the allegations in paragraph 91 of the SOC.
92. In answer to the allegations in paragraph 92 of the SOC, the Defendant:
- (a) refers to and repeats paragraphs 90 and 91 of this Defence; and
  - (b) otherwise denies the allegations in paragraph 92 of the SOC.
93. The Defendant denies the allegations in paragraph 93 of the SOC.
94. In answer to the allegations in paragraph 94 of the SOC, the Defendant:
- (a) denies the allegations in paragraph 94 of the SOC;

- (b) says that it is entitled to rely upon the equitable doctrine of laches due to the Plaintiffs' delay in bringing their claim.

95. In answer to the allegations in paragraph 95 of the SOC, the Defendant:

- (a) refers to and repeats paragraphs 88 to 94 of this Defence;
- (b) otherwise denies the allegations in paragraph 95 of the SOC;
- (c) says that:
  - (i) Macquarie Leasing, acting on good faith, relied to its detriment on the agreement by the Plaintiffs to pay interest charges pursuant to the Plaintiffs' Car Loan Agreement (**Plaintiffs Interest Charges**) and the payment of those Plaintiffs Interest Charges by financing the purchase of the motor vehicle, incurring expenditure and/or other disadvantageous consequences that it would not have otherwise incurred;
  - (ii) in reliance upon the agreement by the Plaintiffs to pay the Plaintiffs Interest Charges and payment of those Plaintiffs Interest Charges, Macquarie Leasing:
    - (A) financed the purchase of the motor vehicle;
    - (B) bore the cost associated with the maintenance of that finance;
    - (C) bore the risk associated with the provision of that finance including that the Plaintiffs may cease to make repayments and the underlying assets would be insufficient to cover the balance of the loan; and
    - (D) complied with the prudential standards relating to lending imposed by APRA;
  - (iii) by reason of the change of position pleaded in sub-paragraph 95(b)(i) of this Defence, it would be inequitable in all the circumstances to require it to repay the Plaintiffs Interest Charges in whole or in part;
  - (iv) Macquarie Leasing gave good consideration to the Plaintiffs from whom it received the payment of the Plaintiffs Interest Charges pursuant to the terms of Plaintiffs' Car Loan Agreement;
  - (v) by reason of the provision of good consideration pleaded in sub-paragraph 95(b)(iv) of this Defence, it is not obliged to repay to the Plaintiffs the Plaintiffs Interest Charges received by it in whole or in part;

- (vi) the receipt and use of the motor vehicles purchased using monies advanced pursuant to the Plaintiffs' Car Loan Agreement constitute unequivocal words or conduct by which the Plaintiffs have elected to take the benefit of the Plaintiffs' Car Loan Agreement;
- (vii) the Plaintiffs are not entitled to the repayment of the Plaintiffs Interest Charges paid in respect of the Plaintiffs' Car Loan Agreement in whole or in part;
- (viii) the Plaintiffs have received a benefit from the Plaintiffs' Car Loan Agreement, to the extent that the amount advanced under the Plaintiffs' Car Loan Agreement was applied:
  - (A) to repay an amount owing by the Plaintiffs under another credit contract;
  - (B) to finance premiums for comprehensive motor insurance of any "add-on" insurance products;
  - (C) to pay for accessories or extras in relation to the automobile purchased; and
  - (D) to obtain a valuable asset, being the motor vehicle purchased;
- (ix) in the premises of the benefit received, set out in sub-paragraph 95(b)(viii) of this Defence, the Plaintiffs would be unjustly enriched at its expense if it were required to repay the Plaintiffs Interest Charges received by it and the Plaintiffs are not entitled to the remedies or relief sought;
- (d) says that further or in the alternative, the Plaintiffs are not entitled to the remedies or relief sought unless they account for such benefit;
- (e) says that there is no maintainable claim in monies had and received by the Plaintiffs whose Plaintiffs' Car Loan Agreement has been fully performed; and
- (f) otherwise denies the allegations in paragraph 95 of the SOC.

96. In answer to the allegations in paragraph 96 of the SOC, the Defendant:

97. repeats paragraphs 94 and 95 of this Defence;

98. otherwise denies the allegations in paragraph 96 of the SOC.

**D. COMMON QUESTIONS OF LAW OR FACT**

**D.1 The contravening conduct under the NCCPA**

99. In answer to the allegations in paragraphs 97 to 122 of the SOC, the Defendant does not admit that the questions in paragraphs 97 to 122 amount to or involve common issues of fact or law or that, to the extent that any such questions are common, that they are common to the Plaintiffs and any Group Members.

**J WILLIAMS**

**J ENTWISLE**

**S Gerber**

Dated: 24 May 2024 ~~14 April 2022~~

*Gilbert + Tobin*

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**Gilbert + Tobin**  
Solicitors for the Defendant