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### Details of Filing

Document Lodged: Concise Statement  
File Number: NSD293/2017  
File Title: AUSTRALIAN SECURITIES & INVESTMENTS COMMISSION v  
WESTPAC BANKING CORPORATION ACN 007 457 141  
Registry: NEW SOUTH WALES REGISTRY - FEDERAL COURT OF  
AUSTRALIA



A handwritten signature in blue ink that reads 'Warwick Soden'.

Dated: 1/03/2017 3:04:59 PM AEDT

Registrar

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## CONCISE STATEMENT

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

No.            of 2017

### AUSTRALIAN SECURITIES AND INVESTMENTS COMMISSION

Applicant

### WESTPAC BANKING CORPORATION (ACN 007 457 141)

Respondent

#### A. INTRODUCTION

1. This application raises important questions of construction of the *National Consumer Credit Protection Act 2009* (Cth) (the **Act**).

#### B. IMPORTANT FACTS GIVING RISE TO THE CLAIM

##### *The Home Loans*

2. This application relates to loans made by the respondent (**Westpac**) during the period between 12 December 2011 and March 2015 inclusive (**Relevant Period**) during which:
  - (a) Westpac was an authorised deposit-taking institution as defined in s 5(1) of the *Banking Act 1959* (Cth), and held an Australian Credit Licence granted under s 38 of the Act and was therefore a licensee within the meaning of s 5 of the Act; and
  - (b) Westpac made loans to consumers within the meaning of s 5 of the Act which were secured against residential property for a period of up to 30 years (**Home Loans**); and
  - (c) all of the Home Loans were credit contracts within the meaning of the s 5 of the Act.
3. As regards some Home Loans (defined here as **Interest Only Loans**):
  - (a) there was an initial period during which the Home Loan was to be interest only;
  - (b) the monthly payments by the consumer to Westpac at the expiry of the initial period were to include both interest and a component for the repayment of principal over the period of the loan remaining after the expiry of the initial period (**Residual Monthly Payments**) and were thus higher than monthly payments (comprising principal and interest) would have been if the repayment of principal had occurred throughout the full term of the loan; and

- (c) the total amount of interest that a consumer would pay in respect of an Interest Only Loan, over the life of the loan, was greater than if the consumer made principal and interest repayments throughout the full term of the loan (**Additional Cost of Interest Only Loans**).
4. A number of specific Home Loans, identified as Home Loans A to G as described in Annexure B to the Originating Application filed 1 March 2017, are relied upon. The features of these Home Loans are set out in Schedule 1 to this Concise Statement.

*Automated Home Loan decision-making*

5. During the Relevant Period, in advance of making a Home Loan:
- (a) Westpac required consumers to submit a completed application form, along with relevant supporting documents (such as pay slips or tax returns) and sometimes further information was requested;
  - (b) the information sought in the application form included:
    - (i) monthly income;
    - (ii) monthly expenses (**Declared Living Expenses**); and
    - (iii) liabilities including existing loan commitments and credit card liabilities;
  - (c) Westpac undertook, by an automated system, an assessment of the consumer's ability to comply with the financial obligations under the proposed loan (**Serviceability Assessment**);
  - (d) Westpac applied an automated decision system (**System Rule**) which:
    - (i) automatically approved some Home Loans without any manual assessment and based solely on an automated system; and
    - (ii) referred some Home Loans for manual assessment.
6. The Serviceability Assessment comprised an automated system whereby:
- (a) **first** Westpac calculated a consumer's **Net Monthly Surplus Income** by subtracting from a consumer's monthly income the consumer's outgoings. In determining the figure to use for a consumer's monthly income (**Assessed Net Income**), Westpac did not include all types of declared income and applied discounts to some forms of declared income, such as dividends, overtime, rental income and bonuses. A consumer's outgoings were the monthly repayments calculated by Westpac for the proposed home loan, as well as other loan repayments, credit-card related outgoings, and other commitments such as rent and maintenance. For Interest Only loans, the Serviceability Assessment used a monthly repayment figure that assumed (contrary to the fact) that repayments of principal would be made over the term of the Home Loan (**Full Term Method**), rather than only over the residual term after expiry of the interest only period (**Residual Term Method**). Thus, the Serviceability Assessment did not have regard to the Residual Monthly Payments and instead had regard to a lower figure for monthly repayments than the consumer would have to pay after the expiry of the interest only period. Further, in using the Full Term Method, the Serviceability Assessment took no account of the Additional Costs of Interest Only Loans;

- (b) **second**, Westpac calculated a consumer's **Required Minimum Monthly Surplus**. This was an allowance for monthly living expenses plus a "buffer" to allow for future interest rate rises. The Required Minimum Monthly Surplus was derived from a Household Expenditure Measure Benchmark (**HEM Benchmark**) compiled by reference to expenditure data from the 2009/2010 ABS Household Expenditure Survey and scaled for geographic location of the applicant and number of dependents, marital status, but not scaled for income. It was not derived from Declared Living Expenses.
  - (c) **third**, Westpac subtracted the consumer's Required Minimum Monthly Surplus from the consumer's Net Monthly Surplus Income to determine a **Final Net Monthly Surplus** or **Final Net Monthly Shortfall**.
7. During the Relevant Period, the System Rule enabled the automatic approval of a Home Loan without manual assessment provided that certain criteria were met, including that the assessed Final Net Monthly Shortfall (if any) was not more than \$400 per month as calculated by the Serviceability Assessment.

*The individual home loans which are the subject of this application*

8. Each of Home Loans A to G was approved automatically pursuant to the System Rule in circumstances where:
- (a) the Serviceability Assessment generated a Final Net Monthly Shortfall (as set out at Schedule 2);
  - (b) the consumers' Declared Living Expenses were higher than the HEM Benchmark Figure used by Westpac in the Serviceability Assessment (as set out in Schedule 3); and
  - (c) if the Serviceability Assessment had been conducted using the consumers' Declared Living Expenses instead of the HEM benchmark figure, the Final Net Monthly Shortfall would have exceeded \$400 (as set out in Schedule 3).
9. Home Loans A to E were Interest Only Loans. As regards each of these loans, if the Serviceability Assessment had been conducted using the Residual Term Method rather than the Full Term Method (using the Declared Living Expenses), the Final Net Monthly Shortfall would have exceeded \$400 (as set out in Schedule 4).
10. Alternatively, if the Serviceability Assessment in relation to Home Loans A to E had been conducted using the Full Term Method but in doing so included the Additional Cost of Interest Only Loans (and used Declared Living Expenses), the Final Net Monthly Shortfall would have exceeded \$400 (as set out in Schedule 5).

### **C. SUMMARY OF RELIEF SOUGHT FROM THE COURT**

11. The relief sought is set out in the accompanying application, summarised as follows:
- (a) declarations;
  - (b) pecuniary penalties;
  - (c) such further orders as the Court considers appropriate.

#### **D. PRIMARY LEGAL GROUNDS FOR THE RELIEF SOUGHT**

12. Under s 5 of the Act each of the Home Loans was a credit contract and each of the persons to whom the Home Loans were made was a consumer.

##### *Contraventions of s 128 – the Home Loans*

13. Under s 128(c) and (d) of the Act, properly construed, Westpac was not permitted to enter into a Home Loan without:
  - (a) making an assessment in accordance with s 129 of whether the Home Loan would be unsuitable for the consumer if entered into; and
  - (b) making inquiries in accordance with s 130(1) including making reasonable inquiries about the consumer's financial situation and taking reasonable steps to verify the consumer's financial situation.
14. On the proper construction of the Act, the assessment under s 128(c) was required to be conducted by reference to information obtained as the result of inquiries under s 130(1), including the consumer's Declared Living Expenses.
15. As regards each of Home Loans A to G Westpac contravened s 128 because the Serviceability Assessment and System Rule assessed the suitability of the Home Loan, and enabled the automated approval of each of the Home Loans, by reference to HEM Benchmark Figures as to expenses but without regard to the Declared Living Expenses.
16. As regards all Home Loans entered into by Westpac which were not referred for manual assessment during the Relevant Period Westpac contravened s 128 for the reasons set out in paragraph 15 above.
17. Further, as regards each of Home Loans A to G Westpac contravened s 128 because:
  - (a) as set out at Schedule 3 the Declared Living Expenses were greater than the HEM Benchmark Figures used in the Serviceability Assessment; and
  - (b) further or in the alternative, had Westpac conducted its Serviceability Assessment by reference to Declared Living Expenses rather than HEM Benchmark Figures the Final Net Monthly Shortfall would have been in excess of \$400 as set out in Schedule 3.
18. Further, as regards each of Home Loans A to E (each Interest Only Loans) Westpac contravened s 128 of the Act because:
  - (a) it did not have regard to the amount of the Residual Monthly Payments in conducting the Serviceability Assessment. Westpac thus did not assess whether the Home Loan would be unsuitable for the consumer including having regard to repayments required after the expiry of the interest only period of the Home Loan; and
  - (b) further or in the alternative, if the Serviceability Assessment had had regard to the Residual Monthly Payments the Final Net Monthly Shortfall would have been in excess of \$400 as set out in Schedule 4.
19. In the alternative to paragraph 18, as regards each of Home Loans A to E (each Interest Only Loans) Westpac contravened s 128 of the Act because:

- (a) in using the Full Term Method when it conducted the Serviceability Assessment for each of Home Loans A to E, it did not have regard to the amount of the Additional Costs of Interest Only Loans. Westpac thus did not assess whether the Home Loans would be unsuitable for the consumer including having regard to those additional costs; and
- (b) further or in the alternative, if the Serviceability Assessment had had regard to the Additional Costs of Interest Only Loans the Final Net Monthly Shortfall would have been in excess of \$400 as set out in Schedule 5.

*Failures to comply with and contraventions of ss 131 and 133*

- 20. Under section 131(1) of the Act Westpac was required to assess as unsuitable a Home Loan that would be unsuitable for the consumer under s 131(2), including where at the time of assessment it was likely that the consumer would be unable to comply with the consumer's financial obligations under the Home Loan or could only comply with substantial hardship. Under s 131(4), for the purpose of determining whether a Home Loan would be unsuitable, Westpac could only take into account information about the consumer's financial situation which it had reason to believe was true or would have had reason to believe was true if it had made the inquiries or verification under s 130.
- 21. Under section 133(1) of the Act Westpac was prohibited from entering into a Home Loan with a consumer if the Home Loan would be unsuitable for the consumer under s 133(2) which was in relevantly similar terms as regards assessment of unsuitability as s 131(2).
- 22. Thus, assessment of unsuitability for the purposes of ss 131(1) and 133(1) had to have regard to the Declared Living Expenses and could not have regard solely to the HEM Benchmark Figures as to expenses.
- 23. As regards each of Home Loans A to G Westpac failed to comply with each of ss 131 and 133 because the Serviceability Assessment and System Rule assessed the suitability, and enabled the automated approval, of each of the Home Loans by reference to HEM Benchmark Figures as to expenses but without regard to the Declared Living Expenses.
- 24. As regards all Home Loans which were not referred for manual assessment entered into by Westpac during the Relevant Period Westpac failed to comply with ss 131 and 133 for the reasons set out in paragraph 23 above.
- 25. Further, each of Home Loans A to G was unsuitable for the consumer(s) who entered it, and accordingly Westpac contravened each of ss 131(1) and 133(1) because:
  - (a) if Westpac's Serviceability Assessment had been conducted using the consumer's monthly Declared Living Expenses instead of the HEM Benchmark Figure, the Final Net Monthly Shortfall for each loan would have been in excess of \$400 as set out in Schedule 3; and
  - (b) further or in the alternative as regards Home Loans A to E (each Interest Only Loans):
    - (i) Westpac's Serviceability Assessment, if it had been calculated using the Residual Term Method rather than the Full Term Method, would have

assessed a Final Net Monthly Shortfall for each loan of greater than \$400 as set out in Schedule 4;

- (ii) alternatively, Westpac's Serviceability Assessment, if it had been calculated using the Full Term Method but taking account of the Additional Cost of Interest Only Loans), would have assessed a Final Net Monthly Shortfall for each loan of greater than \$400, as set out in Schedule 5.

Date: 1 March 2017



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Signed by Conrad Gray

Lawyer for the Applicant

**AUSTRALIAN SECURITIES AND INVESTMENTS COMMISSION**

Applicant

**WESTPAC BANKING CORPORATION (ACN 007 457 141)**

Respondent

**Schedule 1 to the Concise Statement**

Features of Home Loans A to G

Loan	Loan Amount (\$)	Interest Only period of loan – In years	Total loan period In years	Likely Secured over principal place of residence (Y/N)	Date loan accepted-contract entered	Interest rate (%)
A	1,170,000	10 (1,170,000)	30	Y	17/7/14	4.98
B	1,250,000	15 (1,250,000)	30	Y	11/7/14	4.68
C	800,000	5 (700,000)	30	Y	14/7/14	4.93
		N/A (100,000)				
D	315,000	3 (150,000)	20	Y	24/6/14	4.98
		5 (165,000)				
E	542,104	15 (150,000)	30	Y	11/7/14	4.98
		N/A (392,104)				
F	750,000	N/A (750,000)	30	Y	4/5/14	4.98
G	409,000	N/A (409,000)	30	Y	13/8/14	5.08



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**Schedule 2 to the Concise Statement**

Final Net Monthly Shortfall

Using Westpac's Serviceability Assessment

<b>Loan</b>	<b>Final Net Monthly Shortfall (\$)</b>
A	178.07
B	225.20
C	329.28
D	234.20
E	315.46
F	279.86
G	397.40

**AUSTRALIAN SECURITIES AND INVESTMENTS COMMISSION**

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**Schedule 3 to the Concise Statement**

Final Net Monthly Shortfall

using Declared Living Expenses instead of HEM Benchmark

<b>Loan</b>	<b>Consumer's Declared Expenses</b>	<b>HEM benchmark figure used by Westpac</b>	<b>Amount by which Declared Expenses Exceeds HEM Benchmark</b>	<b>Final Net Monthly Shortfall (\$)</b>
A	4,000.00	3,050.00	950.00	1,128.07
B	4,000.00	3,050.00	950.00	1,175.20
C	3,800.00	2,650.00	1,150.00	1,479.28
D	3,226.97	2,664.00	562.97	797.17
E	3,811.00	2,146.00	1,665.00	1,980.46
F	5,490.00	2,170.00	3,320.00	3,599.86
G	2,861.00	2,650.00	211.00	608.40

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**AUSTRALIAN SECURITIES AND INVESTMENTS COMMISSION**

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**Schedule 4 to the Concise Statement**

Final Net Monthly Short fall for Interest Only Loans  
using Residual Term Method<sup>1</sup>

<b>Loan</b>	<b>Final Net Monthly Shortfall (\$) using Residual Term Method</b>
A	2,570.07
B	4,385.20
C	1,863.28
D	1,116.17
E	2,362.46

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<sup>1</sup> Final Net Monthly Shortfall figures are calculated using Declared Living Expenses for living expenses.

**AUSTRALIAN SECURITIES AND INVESTMENTS COMMISSION**

Applicant

**WESTPAC BANKING CORPORATION (ACN 007 457 141)**

Respondent

**Schedule 5 to the Concise Statement**

Final Net Monthly Short-fall

using Full Term Method, but taking account of additional cost of Interest Only loans<sup>2</sup>

<b>Loan</b>	<b>Total Additional cost of Interest Only loan (\$)</b>	<b>Monthly increase due to Additional cost of Interest Only loan (\$)</b>	<b>Final Net Monthly Shortfall (\$)</b>
A	176,768	491.02	1,619.09
B	291,042	808.45	1,983.65
C	49,609	137.80	1,617.08
D	22,602	94.17	891.34
E	36,059	100.16	2,080.62

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<sup>2</sup> Final Net Monthly Shortfall figures are calculated using Declared Living Expenses for living expenses.

