

NOTICE OF FILING

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Details of Filing

Document Lodged: Concise Statement
File Number: NSD300/2021
File Title: AUSTRALIAN SECURITIES & INVESTMENTS COMMISSION v
WESTPAC BANKING CORPORATION ACN 007 457 141
Registry: NEW SOUTH WALES REGISTRY - FEDERAL COURT OF
AUSTRALIA



Sia Lagos

Dated: 7/04/2021 5:17:27 PM AEST

Registrar

Important Information

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

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



Form NCF1

Concise Statement

No. of 2021

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

IN THE MATTER OF WESTPAC BANKING CORPORATION
ACN: 007 457 141

Australian Securities and Investments Commission

Plaintiff

Westpac Banking Corporation (ACN: 007 457 141)

Defendant

A. NATURE OF THE PROCEEDINGS

1. This claim concerns conduct by the defendant, Westpac Banking Corporation (**Westpac**), whereby it supplied certain insurance to credit customers which they had not requested and had not agreed to acquire. Because in each case the supply of the insurance policies was unsolicited, the customers were not liable to pay premiums but Westpac nonetheless debited the amount of the premiums to the customers' credit accounts.
2. Westpac issued account statements on a regular basis which made statements and itemised the debits for premiums in a way which constituted false, misleading and deceptive representations about the customers' agreement to acquire the insurance and liability to pay the premiums in contravention of s 12DB of the *Australian Securities and Investments Commission Act 2001* (Cth) (**ASIC Act**). The account statements further constituted assertions of a right to payment for the insurance contrary to the prohibition in section 12DM(1) of the ASIC Act.

Filed on behalf of (name & role of party)	Australian Securities and Investments Commission, Plaintiff
Prepared by (name of person/lawyer)	Conrad Gray, Solicitor for the Plaintiff
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B. IMPORTANT FACTS GIVING RISE TO THE CLAIM.

Westpac's supply of CCI and the statements made by Westpac to its customers

3. Westpac is a bank and the holder of an Australian Financial Services Licence No 233714 (**AFSL**). Relevantly, under the terms of the AFSL Westpac was authorised to carry out a financial services business including being authorised to deal in a financial product by:
 - (a) issuing, applying for, acquiring, varying or disposing of, general insurance products and any products issued by a Registered Life Insurance Company that are backed by one or more of its statutory funds; and
 - (b) applying for, acquiring, varying or disposing of, general insurance products and any products issued by a Registered Life Insurance Company that are backed by one or more of its statutory funds on behalf of another person.
4. At all material times Westpac had entered into agreements with customers to provide credit, including by way of credit cards and personal lines of credit known as "Flexi Loans". At times which included the period from 7 April 2015 to 28 July 2015 (**Penalty Period**), Westpac supplied some of these customers with one of several different types of consumer credit insurance (**CCI**). The CCI was underwritten by subsidiaries of Westpac, namely Westpac General Insurance Limited and/or Westpac Life Insurance Services Limited. The different types of CCI were called:
 - (a) Credit Card Repayment Protection; and
 - (b) Flexi - Loan Repayment Protection.
5. Westpac debited the amount of the premiums to the account of each customer to whom it had supplied CCI:
 - (a) in the case of Credit Card Repayment Protection, each month the amount of the premium was calculated on the debit balance of the underlying credit card at the end of the month and charged as a further debit to the credit card account;
 - (b) in the case of Flexi Loan Repayment Protection, each month the amount of the premium was calculated on the debit balance at the end of the month and charged as a further debit to the Flexi Loan account.
6. All the accounts to which Westpac debited amounts for premiums were credit accounts. Therefore the debit of amounts for premiums rendered the customer liable to make future payments to Westpac to repay those amounts.
7. The amount debited varied from customer to customer, depending upon the amount of the customer's debit balance at the end of the month.
8. Westpac periodically issued an account statement which made statements about the CCI:

- (a) for credit card customers:
 - i. the monthly account statement stated “If you have elected to take out Credit Card Repayment Protection the amount of the monthly premium debited to the credit card account is shown in the transaction details. Interest may be payable on the premium; and
 - ii. the account statement listed a monthly debit in the running balance for a transaction described as “Credit Card Repayment Protection” or “Credit insurance premium”; and
- (b) for flexi loan customers:
 - i. the monthly account statement stated words to the effect that if the consumer had elected to take out Flexi Loan Repayment Protection the amount of the monthly premium would be included in the transaction history and it might be subject to interest charges; and
 - ii. the account statement listed a monthly debit in the running balance for a transaction described as either “Flexi Loan Repayment Protection” or “Credit insurance premium”.

Customers who did not consent

- 9. Leading up to and during the Penalty Period, Westpac supplied CCI to many customers who had not requested CCI and who had not agreed to acquire CCI. The total number of affected customers is unknown to ASIC. These proceedings are brought in respect of approximately 384 customers who have been identified by ASIC (**Affected Customers**).
- 10. Because the Affected Customers had not requested the CCI and had not agreed to acquire it, the Affected Customers were not liable to make any payment for the CCI, both by reason of section 12DMA(a) of the ASIC Act and as a matter of contract law. Westpac nonetheless debited amounts for premiums as described above during the Penalty Period.
- 11. The supply of the CCI and the debiting of amounts for premiums in those circumstances was a failure by Westpac to do all things necessary to ensure that the financial services covered by its AFSL were provided efficiently, honestly and fairly.
- 12. Further, by issuing to each of the Affected Customers account statements during the Penalty Period as referred to above and making the statements set out therein, Westpac:
 - (a) asserted to each such customer a right to payment for the CCI; and
 - (b) represented to each such customer that the customer had agreed to acquire the CCI, the customer was liable to pay for the CCI and that Westpac had a right to debit amounts for the premium.

C. RELIEF SOUGHT FROM THE COURT

13. ASIC seeks the declarations, pecuniary penalties, adverse publicity orders and costs as set out in the Originating Process.

D. PRIMARY GROUNDS FOR THE RELIEF SOUGHT

14. Each of the CCI policies (Credit Card Repayment Protection and Flexi-Loan Repayment Protection) was a financial product within the meaning of section 12BAA(7)(d) and/or (e) and section 12BAA(9) of the ASIC Act.
15. By distributing CCI policies to its credit customers and debiting amounts for premiums to their accounts, and arranging for the insurers to issue the CCI, Westpac dealt in a financial product and therefore provided a financial service within the meaning of sections 12BAB(1)(b), 12BAB(7) and 12BAB(8) of the ASIC Act. That financial service was covered by Westpac's AFSL.
16. By reason of the matters referred to in paragraphs 9 to 11 above, each time Westpac supplied a CCI without the customer's agreement Westpac failed to do all things necessary to ensure that the financial services covered by its AFSL were provided efficiently, honestly and fairly and thereby contravened section 912A(1)(a) of the *Corporations Act 2001* (Cth) (**Corporations Act**).
17. Further, because the CCI was supplied to each Affected Customer without a request, the CCI was an unsolicited financial product and/or Westpac's supply of it was an unsolicited financial service within the terms of section 12BA of the ASIC Act. Section 12DMA(a) operated to relieve the customer of any liability he or she otherwise had to pay for the CCI. Further, Westpac was prohibited from asserting a right to payment for the CCI by section 12DM(1). By making the statements referred to in paragraph 8 above, Westpac did assert such a right within the meaning of section 12BEA(1)(a) and/or section 12BEA(1)(e) and therefore contravened section 12DM(1) each time it did so.
18. Further, for the purposes of section 12DB(1) of the ASIC Act, the issue of the account statements to customers was conduct:
 - (a) in trade or commerce; and
 - (b) in connection with the supply or possible supply of financial services.
19. The statements referred to in each of the subparagraphs 8(a) and (b) above either alone or taken together, constituted representations:
 - (a) that the customer had agreed to acquire a CCI policy, which were representations that the customer had agreed to acquire services within the terms of section 12DB(1)(b);
 - (b) that the customer was liable to pay for the CCI and that Westpac had a right to debit amounts for premiums, which were representations with respect to the price for services within the terms of section 12DB(1)(g); and

- (c) that Westpac had a right to debit the amount for the CCI premium, which were representations concerning the existence of a right within the terms of section 12DB(1)(i).
20. All these representations were false or misleading having regard to the matters referred to in paragraphs 9 and 10 above. Therefore, Westpac contravened section 12DB(1) each time it issued an account statement to a customer who had not requested the CCI.
21. Finally, the issuance of the account statements to customers who had not requested the CCI were failures by Westpac to comply with the financial services law (which includes sections 12DM and 12DB) in contravention of section 912A(1)(c) of the Corporations Act.

E. ALLEGED HARM

22. The total number of Affected Customers to whom unsolicited CCI was supplied and to whose accounts amounts for premiums were unlawfully debited was 384.
23. The total amount of wrongfully deducted amounts for premiums is unknown.
24. Each of the Affected Customers was issued at least one of the account statements the subject of the contraventions under sections 12DM, 12DA and 912A(1)(c).
25. Each of the Affected Customers noticed the debit or debits of amounts for CCI premiums and complained to Westpac. Some noticed soon after they took out the relevant credit facility and some did not notice for some time. There have been refunds of at least some of the wrongly deducted amounts.
26. Each customer was exposed to the risk of having to make payments unlawfully debited by Westpac on an ongoing basis. It was a real risk given that each payment was relatively small and liable not to be noticed. The customers were liable to pay interest on any unpaid amounts that were added to the overall amount owing. Further, the premium was payment for a product (the CCI) which was supplied as an incidental part of the main transaction between the customer and Westpac (the credit card or the flexi loan). Each customer did not have use of the amount of the wrongly deducted amounts for the period between when the amounts were wrongly deducted and when any refund was made by Westpac.
27. Further, each customer had cast upon him or her the burden of complaining to Westpac and taking steps to end the unlawful debits to the customer's account over which Westpac had control.
28. On a broader level, Westpac's conduct undermined confidence in the financial system.

Date: 7 April 2021

Certificate of lawyer

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

Date: 7 April 2021

A handwritten signature in cursive script, appearing to read 'Conrad Gray', positioned above a horizontal line.

Signed by Conrad Gray

Lawyer for the Applicant