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Details of Filing

Document Lodged:	Statement of Claim - Form 17 - Rule 8.06(1)(a)
File Number:	NSD1222/2014
File Title:	Sydney Forex Pty Ltd ACN 111 743 750 v Westpac Banking Corporation ACN 007 457 141
Registry:	NEW SOUTH WALES REGISTRY - FEDERAL COURT OF AUSTRALIA



A handwritten signature in blue ink, reading "Warwick Soden".

Dated: 4/12/2014 2:38:06 PM AEDT

Registrar

Important Information

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

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Amended Statement of claim

No. NSD1222 of 2014

Federal Court of Australia

District Registry: New South Wales

Division: General

Sydney Forex Pty Ltd (ACN 111 743 750)

Applicant

Westpac Banking Corporation (ACN 007 457 141)

Respondent

For the purposes of this Statement of Claim, the Applicant adopts (where the context permits) the abbreviations and defined terms used in its amended application under Part IVA of the Federal Court of Australia Act 1976 (Cth) filed in these proceedings on 21 November 2014.

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A. THE PARTIES

1. The Applicant at all material times:
 - a. was and is and is a company registered pursuant to the *Corporations Act 2001* (Cth) (**Corporations Act**);
 - b. had and has its registered office in the state of New South Wales;
 - c. was and is a customer of the Respondent (**Westpac**).
2. Westpac is and was at all material times a corporation which:
 - a. is capable of being sued;
 - b. carries on and carried on, as its principal business, the business of banking, throughout Australia;
 - c. was and is a supplier of financial services within the meaning of the *Australian Securities and Investments Commission Act 2001* (Cth) (**ASIC Act**);
 - d. has adopted the *Revised Code of Banking Practice 2013* which commenced on 1 February 2014 (**Code**), and had adopted the *Modified Code of Banking Practice 2004* which was in force from 1 June 2004 (**Old Code**) until the Code commenced.

B. THE REMITTANCE INDUSTRY

1. **The Applicant and Group Members**
3. The Applicant and Group Members each operate a business providing remittance services, being services for the transfer of money between persons in Australia and persons in countries or territories other than Australia (**Remittance Services**).
4. The Applicant and Group Members are not authorised deposit taking institutions, banks, building societies or credit unions (**Financiers**).
5. Pursuant to the *Anti-Money Laundering and Counter-Terrorism Financing Act 2006* (Cth) (**AML/CTF Act**):
 - a. a person who is not a Financier who accepts instructions from customers for the transfer of money in order to provide Remittance Services is a person who is providing a registrable designated remittance service within the meaning of the AML/CTF Act (s 6, Table 1, Items 31-32, and s 10);

- b. a person must not:
 - i. provide a registrable remittance network service if the person is not a registered remittance network provider (s 74(1));
 - ii. provide a registrable designated remittance service (if the person provides the service other than as part of a remittance network operated by a registered remittance network provider) if the person is not a registered independent remittance dealer (s 74(1A));
 - iii. provide a registrable designated remittance service (as part of a remittance network operated by a registered remittance network provider) if the person is not a registered remittance affiliate of the registered remittance network provider (s 74(1B));
- c. by reason of subparagraph (a) and (b), a person who is not a Financier must not provide Remittance Services without being registered on the Remittance Sector Register (**Register**) maintained by the Chief Executive Officer of the Australian Transaction Reports and Analysis Centre (**AUSTRAC**) (ss 75, 75C).

Particulars

Pursuant to s 6 of the AML/CTF Act (Table, Item 32), a person who in the capacity of a non-financier carrying on a business of giving effect to remittance arrangements, making money or property available, or arranging for it to be made available, to an ultimate transferee entity as a result of a transfer under a designated remittance arrangement (as defined in s 10) is providing a registrable designated remittance service.

- 6. The Applicant and Group Members are:
 - a. by reason of the matters pleaded in paragraphs 3 to 5, persons who are required to be registered on the Register in order lawfully to provide Remittance Services; and
 - b. persons who are registered on the Register (**Registered Remitters**).
- 7. In order to provide Remittance Services, Registered Remitters need access to:
 - a. banking facilities with an Australian Financier; and
 - b. foreign exchange facilities provided by an Australian Financier.

Particulars

Without banking facilities Registered Remitters cannot accept funds from customers to remit to the intended transferee.

Without foreign exchange facilities, Registered Remitters cannot convert Australian dollars (or other currencies) received from customers into the currency which is legal tender in the country other than Australia in which the intended transferee is to receive the funds.

II. Westpac

8. Westpac provides Remittance Services to both retail and wholesale customers.
9. Westpac is not required to be registered on the Register because it is a Financier, and so is not a "non-financier" within the meaning of the AML/CTF Act.

III. Competition

10. By reason of the matters pleaded in paragraphs 3 and 8, Westpac is in competition with Registered Remitters (including the Applicant and Group Members) for the market of persons in Australia wishing to transfer money to persons in countries other than Australia.
11. As at 21 November 2014 Westpac was aware, and it was the fact, that:
 - a. Westpac provided:
 - i. banking facilities; and/or
 - ii. foreign exchange facilities,
 to a significant proportion of Registered Remitters.

Particulars

The Registered Remitters to whom Westpac provided banking facilities and/or foreign exchange facilities include the Applicant and Group Members. The Applicant with its present state of knowledge is not able to specify precisely the percentage of Registered Remitters who have Westpac facilities, but relies upon:

- <http://www.smh.com.au/nsw/money-remitter-restrictions-poor-and-disadvantaged-to-be-hardest-hit-20141115-11n1cu.html>
- <http://www.smh.com.au/business/westpac-moves-first-on-terrorist-accounts-20141118-11p3cz.html>

- b. Westpac had very limited competition from other banks in providing banking facilities and/or foreign exchange facilities to Registered Remitters (including the Applicant and Group Members) and if Westpac ceased to provide banking facilities and/or foreign exchange facilities to Registered Remitters (including the Applicant and Group Members), remittance business would be "shut down".

Particulars

Subparagraph (a) is repeated. The applicant relies upon the statements made by Ms Gail Kelly (CEO of Westpac) after Westpac's full year results on 3 November 2014, as reported in

<http://www.smh.com.au/business/westpac-moves-first-on-terrorist-accounts-20141118-11p3cz.html>

12. By reason of the matters pleaded in paragraphs 7 and 10 to 11, Westpac is in a position of dominance compared to Registered Remitters in relation to the ability of Registered Remitters to provide Remittance Services.

C. THE CONTRACTUAL FRAMEWORK

I. Introduction

13. The Applicant and Group Members:

- a. hold and operate banking facilities with Westpac (**Accounts**);

Particulars

The Applicants' Accounts are, and were at the material times subject to nonmaterial differences in account descriptions:

b. Westpac "Business One Low" – Account Number 032065 277533;

c. Westpac "Business One High" – Account Number 032070 292949;

d. Westpac "USD Currency Account" – Account Number 034702 228515.

The date upon which the Applicant opened each of the Accounts will be provided following discovery.

Particulars of the Accounts of Group Members will be given following the initial trial of the Applicant's claim.

- b. have access to a facility, known as the XYLO Foreign Exchange Platform (**XYLO**) offered by Westpac for the processing of foreign exchange transactions for a specific amount of one currency for another at an agreed exchange rate on an agreed date between bank accounts in Australia and internationally;

Particulars

The Applicant completed and submitted to Westpac a XYLO Application Form on 18 November 2011, agreed to the XYLO Supplementary Terms on 21 November 2011, and was thereafter granted access to XYLO.

Particulars of Group Members' applications to use XYLO will be given following the initial trial of the Applicant's claim.

14. The Applicant and some or all Group Members are small business customers of Westpac within the meaning of the Code, in that they have less than 20 full-time employees.

Particulars

The identity of any Group Member who have less than 20 full-time or equivalent employees is presently unknown to the Applicant, and the Applicant requires an opportunity to make further inquiries following the giving of notices to Group Members.

15. The Applicant and Group Members, to Westpac's knowledge, maintain Accounts for the purpose of providing Remittance Services, and (from the inception of XYLO, using XYLO to provide those Remittance Services).

II. XYLO

16. XYLO is a financial product within the meaning of section 12BAA of the ASIC Act;
17. Westpac's supply of XYLO comprises a financial service within the meaning of section 12BAB of the ASIC Act (**XYLO Services**).
18. Westpac gave or otherwise communicated or made available to the Applicant and the Group Members one or more of:
 - a. XYLO Product Disclosure Statement dated 9 December 2011;
 - b. XYLO Product Disclosure Statement dated 9 December 2012 incorporating XYLO Supplementary Product Disclosure Dated 1 March 2012;
 - c. XYLO Product Disclosure Statement dated 30 June 2014;
 (paragraphs 18.a, 18.b and 18.c collectively, the **XYLO PDS**).

Particulars

The precise dates upon which each of the versions of the XYLO PDS were given or otherwise communicated or made available to the Applicant is currently unknown and will be provided after discovery.

The dates upon which the XYLO PDS was given to Group Members will be given following the initial trial of the Applicant's claim.

19. In order to use XYLO Services, the Applicant and Group Members were required to:
 - a. complete and submit to Westpac a XYLO customer application form (**XYLO Application Form**);
 - b. agree to a supplementary terms agreement (**XYLO Supplementary Terms**); and
 - c. agree to the terms of use applicable from time to time to the website by which XYLO was accessed (**XYLO Terms of Use**).

20. The XYLO PDS, XYLO Application Form, XYLO Supplementary Terms and XYLO Terms of Use, contained the express written terms of the contracts being contracts:

- a. between Westpac on the one hand, and the Applicant or each Group Member on the other hand;
- b. pursuant to which Westpac agreed to supply XYLO to the Applicant and Group Members,

(XYLO Contracts).

21. The XYLO Contract contained, *inter alia*, the following express written terms:

- a. the Code, alternatively the Old Code, applied to XYLO and the supply of XYLO to the Applicant and Group Members;

Particulars

Page 19 of XYLO Product Disclosure Statement dated 9 December 2011; page 22 of XYLO Product Disclosure Statement dated 30 June 2014.

- b. Westpac would apply:
 - i. a fee to the Applicant or Group Member per international payment processed using XYLO;
 - ii. a margin rate to any exchange transaction;
 - iii. various other fees and charges for particular uses of XYLO;

Particulars

Page 12 of XYLO Product Disclosure Statement dated 9 December 2011; page 12 of XYLO Product Disclosure Statement dated 30 June 2014.

- c. Westpac may unilaterally, at its discretion, vary the terms of the XYLO Contract;

Particulars

Page 17 of XYLO Product Disclosure Statement dated 9 December 2011; page 18 of XYLO Product Disclosure Statement dated 30 June 2014.

- d. Westpac may, at its discretion, terminate any or all foreign exchange transactions outstanding for the Applicant or Group Members on XYLO if:
 - i. funds debited from the bank account from which payment is made are not cleared funds and/or are dishonoured;
 - ii. the Applicant or Group Member fails to pay applicable fees when due;
 - iii. the Applicant or Group Member is involved, or suspected to be involved, in money laundering or terrorism financing;

- iv. the Applicant or Group Member materially breach a term of the XYLO Contracts;
- v. the Applicant or Group Member is involved, or suspect to be involved, in any fraudulent activity or misuse of XYLO;
- vi. the Applicant or Group Member becomes insolvent or bankrupt;
- vii. Westpac considers it reasonably necessary to protect its legitimate business interests;

Particulars

Page 15 of XYLO Product Disclosure Statement dated 9 December 2011; page 15 of XYLO Product Disclosure Statement dated 30 June 2014.

- e. the terms of the XYLO Contract were to be governed and construed in accordance with the law of New South Wales;

Particulars

Page 17 of XYLO Product Disclosure Statement dated 9 December 2011; page 18 of XYLO Product Disclosure Statement dated 30 June 2014.

- 22. The XYLO Contracts contained an express, alternatively an implied term, that Westpac would not withdraw the XYLO Services without reasonable notice (**XYLO Notice Term**).

Particulars

To the extent the term is express, it is incorporated by reason of the matters pleaded in paragraphs 26 to 30 below, by reason of, in particular, the XYLO Access Term.

To the extent the term is implied in fact in order to give business efficacy to the contract. Alternatively, the term is implied as a matter of custom and usage.

- 23. By reason of the matters pleaded in paragraph 21.a, it was an express term of the XYLO Contracts that Westpac would, in connexion with the XYLO Contracts act fairly and reasonably towards the Applicant and Group Members in a consistent and ethical manner (**XYLO Code Term**).

Particulars

Code, cl 3.2, Old Code cl 2.2

III. Accounts

- 24. The Accounts are financial products within the meaning of section 12BAA of the ASIC Act.

25. Westpac's supply of the Accounts comprises a financial service within the meaning of section 12BAB of the ASIC Act (**Account Services**).
26. Westpac gave or otherwise communicated or made available to the Applicant and the Group Members the terms of conditions of the Account Services in documents entitled:
- a. Deposit Accounts for Business Customers Terms and Conditions; and
 - b. Foreign Currency Account Terms and Conditions
- (collectively, the **Account Contracts**).

Particulars

The currently available versions of the "Deposit Accounts for Business Customers Terms and Conditions" and "Foreign Currency Account Terms and Conditions" documents are dated 4 and 17 November 2014 respectively. The precise dates of, and upon which each was provided, of each earlier versions of the terms and conditions were given or otherwise communicated or made available to the Applicant is currently unknown and will be provided after discovery.

Particulars of the documents comprising the Account Contracts of Group Members will be provided following the initial trial of the Applicant's claim.

27. The Account Contracts contained, *inter alia*, an express written term that the Code, alternatively the Old Code, applied to the Accounts and the supply of the Account Services to the Applicant and Group Members.

Particulars

Clause 38 of the Deposit Accounts for Business Customers Terms and Conditions; page 8 of the Foreign Currency Account Terms and Conditions. Further particulars may be provided following discovery.

28. The Account Contracts contained, *inter alia*, an express written term, alternatively an implied term that Westpac would not close the Accounts without giving reasonable notice (being notice that is reasonable in all the relevant circumstances) (**Account Notice Term**).

Particulars

Cl 33.1 of the Code, alternatively cl 31(b) of the Old Code, is relied upon, which is incorporated into the Account Contracts by reason of the matters pleaded in paragraph 27 (which is repeated).

The term is implied in fact in order to give business efficacy to the contract. Alternatively, the term is implied as a matter of custom and usage.

29. By reason of the matters pleaded in paragraph 27, it was an express term of the XYLO Contracts that Westpac would, in connexion with the XYLO Contracts, act fairly and

reasonably towards the Applicant and Group Members in a consistent and ethical manner (**Accounts Code Term**).

Particulars

Code, cl 3.2, Old Code cl 2.2

30. The Account Contracts contained an implied term that the XYLO Services would be provided in conjunction with the Account Services (**XYLO Access Term**).

Particulars

The XYLO Access Term was implied in order to give business efficacy to the Account Contracts and the XYLO Contracts, by reason of the matter pleaded in paragraph

D. THE CLOSURE NOTIFICATION

31. By letters dated in or around late September or October 2008 (being on various dates not all of which are known to the Applicant), Westpac notified the Applicant and Group Members that it intended to close the Accounts (**Closure Notification**).

Particulars

The letter to the Applicant was dated 22 September 2014, and received on 25 September 2014. Particulars of the letters sent to Group Members will be provided after the initial trial of the Applicant's claim.

32. The Closure Notification received by the Applicant stated that:
- a. unless the Applicant voluntarily closed the Accounts first, the Accounts would be closed on 22 October 2014 and the Account Services would no longer be provided to the Applicant beyond that date, being a period of approximately 30 days from the date of the Closure Notification (**Notice Period**); and
 - b. XYLO Services would not be provided after 22 October 2014.
33. Westpac subsequently agreed to extend the Notice Period the subject of the Closure Notification to on or about 24 November 2014 (**Extended Notice Period**), being a further period of approximately 30 days in the case of the Applicant.
- 33A. After issuing the Closure Notifications, Westpac represented to Registered Remitters who sought additional time before an Account closure, or for the Account to remain open (and/or the public in a way likely to be brought to the attention of such Registered Remitters) that:

- (a) Westpac was working closely with government and regulators to see if there was a solution to be found to enable Remittance Services to continue to be provided by Registered Remitters;
- (b) the solution to which Westpac was working with government and regulators was a solution which involved Westpac continuing to provide the Accounts to Registered Remitters;
- (c) Westpac would consider any request for additional time, or non-closure of the Accounts; and/or
- (d) in considering a request for additional time or non-closure of the Accounts, Westpac would *bona fide* consider such a request on the individual merits of the relevant Registered Remitter making the request such that it was a possibility that following such consideration Westpac would not close the Accounts of an individual Registered Remitter.

(Consideration Representations).

Particulars

The representations were partly express and partly implied.

- The representation in (a) was express and made by Ms Gail Kelly (CEO of Westpac) shortly after announcing Westpac's full year results on 3 November 2014, and reported in the media on 18 November 2014 (<http://www.smh.com.au/business/westpac-moves-first-on-terrorist-accounts-20141118-11p3cz.html>).
- The representation in (b) was implied, and is to be implied from the representation in (a), as there would be no other point in Westpac "working with" government towards that solution.
- The representation in (c) was express and made by Mr Grech as part of his "invariable practice" in response to any request for an extension of time for the closing of accounts or a request that accounts remain open, referred to in the Affidavit of Joseph Grech sworn 27 November 2014 at [64] and [66]
- The representation in (d) was implied, and is to be implied from the representation in (c) and/or the combination of the representations in (a), (b) and (c).

Each of the representations were made with respect to a future matter within the meaning of s 12BB of the ASIC Act, and the Applicant relies on s 12BB(2) of the ASIC Act.

E. NO REASONABLE NOTICE

34. The Applicant and Group Members received the Account Services and XYLO Services in circumstances where:

- a. the matters pleaded in paragraphs 10 to 12 exist;
- b. having regard to the matters pleaded in paragraphs 10 to 12, Westpac was or ought to have been aware, and it was the fact that:
 - i. it was unlikely that Registered Remitters (including the Applicant and Group Members) would be able prior to the expiry of the Notice Period to arrange alternative banking facilities and/or foreign exchange facilities through which they could conduct Remittance Services;
 - ii. if Registered Remitters (including the Applicant and Group Members) were not, prior to the expiry of the Notice Period, able to arrange alternative banking facilities and/or foreign exchange facilities through which they could conduct Remittance Services, there was a material risk or likelihood that Registered Independent Remitters would be unable to continue to trade, and would suffer adverse financial consequences;
- c. having regard to the matters pleaded in paragraphs 10 to 12, Westpac was or ought to have been aware, and it was the fact that:
 - i. it would, or would be likely to, take Registered Remitters (including the Applicant and Group Members) a substantial period of time in excess of the Notice Period (and the Extended Notice Period) to arrange alternative banking facilities and/or foreign exchange facilities through which they could conduct Remittance Services (**Required Period**);
 - ii. Registered Remitters (including the Applicant and Group Members) would need the Required Period in order to seek to avoid the material risk or likelihood that they would cease to trade and suffer adverse financial consequences;
- d. there was a material risk or likelihood that the Registered Remitters (including the Applicant and Group Members) would be unable to arrange alternative banking facilities and/or foreign exchange facilities through which they could conduct Remittance Services at all, such that it was very difficult or impossible to obtain identical or equivalent financial services from another Financier;
- e. by reason of the matters pleaded in subparagraphs (a) to (d), Westpac stood to benefit from closing the Closure Notification by substantially reducing the level of competition to which it is subject in providing Remittance Services, if the effect of so doing was that Registered Remitters would be unable to continue to trade;
- f. Westpac was or ought to have been aware, and it was the fact, that the shortness of the Notice Period (and Extended Notice Period) was not reasonably necessary for the protection of the legitimate interests of Westpac;

(each an **Unreasonable Notice Circumstance**).

35. By reason of all or any of the matters pleaded in paragraph 34, the Notice Period (and the Extended Notice Period) was not reasonable, or reasonable in all the circumstances, within the meaning of:

- a. the XYLO Notice Term;
- b. the Account Notice Term; and/or
- c. cl 33.1 of the Code (alternatively cl 33(b) of the Old Code),

for the Applicant and all Group Members.

36. Further to paragraph 35, Westpac purported to impose the Notice Period (and Extended Notice Period) for the Applicant and some Group Members in circumstances where:

- a. the relative bargaining position of Westpac was dominant as compared to the position of the Registered Remitters (including the Applicant and some Group Members), whose businesses were entirely reliant upon the Account Services and the XYLO Services;
- b. Westpac stipulated the Notice Period unilaterally, and without any attempt to inquire or negotiate with the Applicant and/or some Group Members what a reasonable notice period would be;

ba. Westpac selected the Notice Period arbitrarily, so as to be uniform for all Registered Remitters, and without any inquiry into, or consideration of, the individual circumstances of each Registered Remitter;

Particulars of (ba)

The Applicant refers to the Affidavit of Joseph Grech sworn 27 November 2014 at [43], and the Affidavit of Carolyn Babette Hanson sworn 27 November 2014 at [47]. The decision to fix the Notice Period was fixed at a time in June 2013 well prior to the decision being taken to exit all Registered Remitters, and so was not made with reference to the relevant circumstances prevailing as at late September 2014.

- c. Westpac failed to disclose, or disclose immediately, to the Applicant and some Group Members, the criterion or criteria by which (or reason or reasons for which their Accounts were to be closed and their XYLO Services ceased, and afford the Registered Remitters any, or any adequate opportunity to address any curable matters which might alter Westpac's decision to close the Accounts;
- d. the terms of the Closure Notification were apt to cause the Applicant and some Group Members to believe (and the Applicant did in fact believe) that in the event that they did not "voluntarily" close the Accounts (even though they did not want to),

then Westpac would carry through with its threat to close the Accounts, this amounting to a form of undue pressure or unfair tactics on the part of Westpac;

- e. the Applicant and some Group Members have complied and continue to comply with the terms of the XYLO Contracts and in particular did not act in such a way to give rise to a contractual right for Westpac to exercise the express term pleaded at 21.d of this statement of claim,

(each a **Further Unreasonable Notice Circumstance**).

Particulars

The identity of all Group Members to whom each of the Further Unreasonable Notice Circumstances apply is presently unknown to the Applicant, and the Applicant requires an opportunity to make further inquiries following the giving of notices to Group Members.

- 37. By reason of all or any of the matters pleaded in paragraphs 34 and/or 36, the Notice Period (and the Extended Notice Period) was not reasonable, or reasonable in all the circumstances of the Applicant and some Group Members, within the meaning of:
 - a. the XYLO Notice Term;
 - b. the Account Notice Term; and/or
 - c. cl 33.1 of the Code (alternatively cl 33(b) of the Old Code).

Particulars

The identity of all Group Members to whom each of the Further Unreasonable Notice Circumstances apply is presently unknown to the Applicant, and the Applicant requires an opportunity to make further inquiries following the giving of notices to Group Members.

F. LIABILITY

I. Breach of Contract

- 38. By reason of the matters pleaded in paragraphs 34 to 35, by issuing the Closure Notification and/or failing to withdraw the Closure Notification, Westpac breached:
 - a. the XYLO Notice Term;
 - b. the Account Notice Term; and
 - c. XYLO Access Term;
 for the Applicant and all Group Members (collectively, **Notice Term Breaches**).

39. Alternatively, by reason of the matters pleaded in paragraphs 34 to 35, by issuing the Closure Notification and/or failing to withdraw the Closure Notification, Westpac breached:

- a. the XYLO Notice Term;
- b. the Account Notice Term; and
- c. XYLO Access Term;

for the Applicant and some Group Members (collectively, **Alternative Notice Term Breaches**).

IA Misleading or deceptive conduct

39A. At the time that each of the Consideration Representations were made:

- a. Westpac had taken the decision no later than mid to late September 2014 to terminate or “exit” the Accounts of all Registered Remitters at an “executive level”;
- b. Westpac did not intend to consider any request that the Accounts remain open, or alternatively consider any such request on its individual merits, such that it was a possibility that following such consideration Westpac would not close the Accounts;
- c. there were no reasonable grounds for Westpac to make the Consideration Representations.

(True Consideration Position).

Particulars

Affidavit of Joseph Grech sworn 27 November 2014 at [39], [55].

39B. By reason of the True Consideration Position, each of the Consideration Representations were misleading or deceptive, or likely to mislead or deceive.

39C. By reason of the matters pleaded in paragraph 39B, in making the Consideration Representations, Westpac contravened s 12DA of the ASIC Act (**Misleading Contraventions**).

39D. The Applicant and some Group Members relied on the Consideration Representations by:

- a. continuing to seek to negotiate an outcome with Westpac, and/or await the outcome of the consideration which they believed Westpac was giving to their requests for additional time and/or withdrawal of the Closure Notification; and

- b. not taking steps to further progress, attempts to obtain banking facilities and/or foreign exchange facilities from an alternative Financier to enable them to continue to provide Remittance Services informed by the knowledge that there was no possibility that Westpac would not close the Accounts.

Particulars

The identity of all Group Members who relied on the Misleading Contraventions is presently unknown to the Applicant, and the Applicant requires an opportunity to make further inquiries following the giving of notices to Group Members.

II. Unconscionable Conduct

40. By reason of:

- a. the Unreasonable Notice Circumstances, or any of them; and/or
- b. the Notice Term Breaches;

by issuing the Closure Notification and/or failing to withdraw the Closure Notification issued to the Applicant and all Group Members, Westpac engaged in conduct in trade or commerce which was unconscionable in all the circumstances.

41. Alternatively, by reason of:

- a. the Unreasonable Notice Circumstances, or any of them;
- b. the Notice Term Breaches;
- c. the Further Unreasonable Notice Circumstances, or any of them; and/or
- d. the Alternative Notice Term Breaches; and/or
- e. the Consideration Representations and the True Consideration Position.

by issuing the Closure Notification and/or failing to withdraw the Closure Notification issued to the Applicant and some Group Members, Westpac engaged in conduct in trade or commerce which was unconscionable in all the circumstances.

Particulars

The identity of all Group Members to whom each of the Further Unreasonable Notice Circumstances apply is presently unknown to the Applicant, and the Applicant requires an opportunity to make further inquiries following the giving of notices to Group Members.

42. By reason of the matters pleaded in paragraph 0:
- a. by issuing the Closure Notification and/or failing to withdraw the Closure Notification issued to the Applicant and all Group Members, Westpac has contravened; and/or
 - b. to the extent Westpac intends to continue to rely on the Closure Notification, and to continue to fail to withdraw the Closure Notification issued to the Applicant and all Group Members, Westpac is proposing to contravene,
- section 12CB of the ASIC Act (**Statutory Contraventions**).
43. Alternatively, by reason of the matters pleaded in paragraph 41:
- a. by issuing the Closure Notification and/or failing to withdraw the Closure Notification issued to the Applicant and some Group Members, Westpac has contravened; and/or
 - b. to the extent Westpac intends to continue to rely on the Closure Notification, and to continue to fail to withdraw the Closure Notification issued to the Applicant and some Group Members, Westpac is proposing to contravene,
- section 12CB of the ASIC Act (**Alternative Statutory Contraventions**).

Particulars

The identity of all Group Members to whom each of the Further Unreasonable Notice Circumstances apply is presently unknown to the Applicant, and the Applicant requires an opportunity to make further inquiries following the giving of notices to Group Members.

III. Breach of the Code

44. By reason of:
- a. the Unreasonable Notice Circumstances, or any of them; ~~and/or~~
 - b. the conduct which constitutes the Notice Term Breaches, or any of them; and/or
 - c. the conduct which constitutes the Statutory Contraventions, or any of them
- by issuing the Closure Notification and/or failing to withdraw the Closure Notification issued to the Applicant and all Group Members, Westpac did not act fairly and reasonably towards the Applicant and all Group Members in a consistent and ethical manner.
45. Alternatively, by reason of:

- a. the Unreasonable Notice Circumstances and/or the Further Unreasonable Notice Circumstances, or any of them; and
- b. the conduct which constitutes the Alternative Notice Term Breaches, or any of them; and/or
- c. the conduct which constitutes the Alternative Statutory Contraventions, or any of them; and/or
- d. the conduct which constitutes the Misleading Contraventions, or any of them.

by issuing the Closure Notification and/or failing to withdraw the Closure Notification issued to the Applicant and some Group Members, Westpac did not act fairly and reasonably towards the Applicant and all Group Members in a consistent and ethical manner.

46. By reason of the matters pleaded in paragraph 44, Westpac has breached:
- a. the XYLO Code Term; and
 - b. the Accounts Code Term,
- in respect of the Applicant and All Group Members (**Code Term Breaches**)
47. Alternatively, by reason of the matters pleaded in paragraph 45, Westpac has breached:
- a. the XYLO Code Term; and
 - b. the Accounts Code Term,
- in respect of the Applicant and some Group Members (**Alternative Code Term Breaches**).

Particulars

The identity of all Group Members to whom each of the Further Unreasonable Notice Circumstances apply is presently unknown to the Applicant, and the Applicant requires an opportunity to make further inquiries following the giving of notices to Group Members.

G. ANTICIPATED LOSS OR DAMAGE

48. By reason of the Notice Term Breaches and/or the Code Term Breaches, the Applicant and Group Members are presently entitled nominal damages.
49. Alternatively, by reason of the Alternative Notice Term Breaches and/or the Alternative Code Term Breaches, the Applicant and some Group Members are presently entitled nominal damages.

Particulars

The identity of all Group Members to whom each of the Further Unreasonable Notice Circumstances apply is presently unknown to the Applicant, and the Applicant requires an opportunity to make further inquiries following the giving of notices to Group Members.

50. In the event that Westpac, closes the Accounts and terminates the Account Services and XYLO Services, in reliance on, or by or as a result of:

- a. the Notice Term Breaches;
- b. the Alternative Notice Term Breaches;
- c. the Misleading Contraventions;
- d. the Statutory Contraventions;
- e. the Alternative Statutory Contraventions;
- f. the Code Term Breaches;
- g. the Alternative Code Term Breaches,

the Applicant and Group Members will suffer more than nominal loss or damage.

Particulars

The loss or damage that the Applicant will suffer is:

- *Loss of income and profit from the business of Sydney Forex ceasing to be able to provide Remittance Services to all, alternatively a substantial proportion of, its customers;*
- *loss of goodwill, and devaluation of the business owned by Sydney Forex by reason of it being unable to Remittance Services to all, alternatively a substantial proportion of, its customers.*

The loss or damage that the Group Members will suffer is of the same kind as that which will be suffered by the Applicant, but particulars will be given following the initial trial of the Applicant's claim.

Date: 28 November 2014


 Signed by Richard Louis Mitry
 Lawyer for the Applicant

This pleading was prepared by A.H. Edwards and W.A.D. Edwards of counsel.

Certificate of lawyer

I Richard Louis Mitry 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: 28 November 2014

A handwritten signature in black ink, consisting of a large, stylized 'A' followed by a horizontal stroke and a loop.

Signed by Richard Louis Mitry
Lawyer for the Applicant