

## NOTICE OF FILING

### Details of Filing

Document Lodged: Statement of Claim - Form 17 - Rule 8.06(1)(a)  
Court of Filing: FEDERAL COURT OF AUSTRALIA (FCA)  
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File Number: VID826/2023  
File Title: DANNYALAN RAYMOND FISHER & ORS v BT FUNDS MANAGEMENT LTD (ACN 002 916 458) IN ITS CAPACITY AS TRUSTEE FOR THE RETIREMENT WRAP, BT SUPER FOR LIFE, BT SUPER AND ASGARD INDEPENDENCE PLAN DIVISION TWO (BTFM) & ORS  
Registry: VICTORIA REGISTRY - FEDERAL COURT OF AUSTRALIA



*Sia Lagos*

Registrar

### Important Information

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 of the filing of the document is determined pursuant to the Court's Rules.



Form 17  
Rule 8.05(1)(a)

## Statement of claim

No. VID 826 of 2023

Federal Court of Australia  
District Registry: Victoria  
Division: General

### **Dannyalan Raymond Fisher**

First Applicant

### **Jonathan Fedson**

Second Applicant

### **Roy Ferguson**

Third Applicant

### **BT Funds Management Ltd (ACN 002 916 458) in its capacity as trustee for BT Retirement Wrap, BT Super for Life, BT Super and Asgard Independence Plan Division Two (BTFM)**

First Respondent

### **TAL Life Insurance Services Limited (WLISL) (ACN 003 149 157)**

Second Respondent

### **Westpac Securities Administration Limited (WSAL) (ACN 000 049 472)**

Third Respondent

## **A Parties**

- 1 The Applicants bring this proceeding as the representative parties for and on behalf of the Group Members pursuant to Part IVA of the *Federal Court of Australia Act 1976* (Cth).
- 2 The members of the group to whom this proceeding relates (**Group Members**) are those persons who were:
  - (a) members of superannuation funds of which the First and Third Respondents were the trustees; and

- (b) holders of superannuation products issued by the First and Third Respondents as trustees that provided insurance cover under a group policy of insurance issued by the Second Respondent in the period 6 October 2017 until 1 April 2023 (the **Relevant Period**); and
- (c) not a Justice of the High Court of Australia or the Federal Court of Australia.

**Particulars**

At the time of the filing of the Statement of Claim the claims of the Group Members exceed 7 in number.

- 3 The First Applicant, Dannyalan Fisher, is and was at all material times a member of the Retirement Wrap superannuation fund and the holder of the superannuation product called BT Super for Life.

**Particulars**

Account no. 109111716

- 4 The Second Applicant, Jonathan Fedson, is and was at all material times until 3 August 2021 a member of the Westpac MasterTrust Superannuation Division superannuation fund and:
- (a) until 19 February 2020, the holder of the superannuation product called BT Business Super; and
  - (b) between 19 February 2020 and 3 August 2021 the holder of the superannuation product called BT Super.

**Particulars**

Member no. 600009065433 of BT Business Super; and  
Member no. 117224568 of BT Super

- 5 The Third Applicant, Roy Ferguson, is and was at all material times until 14 September 2021 a member of the Asgard Independence Plan Division Two superannuation fund and the holder of the superannuation product called Asgard Employee Super Account.

**Particulars**

Account no. 1229086-D2-01

- 6 The First Respondent, BTFM, was at all material times throughout the Relevant Period:
- (a) a company duly incorporated pursuant to the Corporations Act 2001 (Cth) (**Corporations Act**) and capable of being sued;
  - (b) a trading corporation within the meaning of the *Australian Securities and Investments Commission Act 2001* (Cth) (**ASIC Act**);
  - (c) the holder of an Australian Financial Services Licence (licence no: 233724);

- (d) the trustee of a superannuation fund called Retirement Wrap which issued a range of superannuation products that provided group life insurance cover;
- (e) the trustee of a superannuation fund called BT Lifetime Super which issued the superannuation product BT Lifetime Super – Personal Super which provided group life insurance cover;
- (f) the trustee of a superannuation fund called the Asgard Independence Plan Division Two which issues a range of superannuation products that provided group life insurance cover;
- (g) the owner as trustee of various master policies of insurance for the benefit of its members;
- (h) the holder of a registrable superannuation entity (**RSE**) licence (licence no: L0001090);
- (i) a body corporate:
  - (i) carrying on the business of acting as a trustee of superannuation entities and investing money on behalf of the beneficiaries of those superannuation entities; and
  - (ii) holding itself out as having particular knowledge, skill and experience in carrying out such a business;
- (j) a subsidiary of the ultimate holding company, Westpac Banking Corporation (ACN 007 457 141);
- (k) a related body corporate of Westpac Life Insurance Services Limited (ACN 003 149 157) (**WLISL**);
- (l) an RSE licensee (**RSE licensee**) under s 10(1) of the *Superannuation Industry (Supervision) Act 1993* (Cth) (**SIS Act**);
- (m) part of a corporate group for the purpose of *Prudential Standard SPS 250 Insurance in Superannuation* (**SPS 250**); and
- (n) trustee of regulated superannuation funds within s 19(1) of the SIS Act.

7 The Second Respondent, WLISL, was at all material times throughout the Relevant Period:

- (a) the holder of an Australian Financial Services Licence (licence no: 233728);
- (b) a wholly owned subsidiary of Westpac Banking Corporation (ACN 007 457 141);
- (c) registered under s 21 of the *Life Insurance Act 1995* (Cth) (**Life Insurance Act**) to issue life policies within the meaning of that Act; and

(d) carrying on a life insurance business within the meaning of the Life Insurance Act.

8 The Third Respondent, Westpac Securities Administration Limited (ACN 000 049 472) (**WSAL**), was at all material times throughout the Relevant Period:

(a) a company duly incorporated pursuant to the Corporations Act and capable of being sued;

(b) a trading corporation within the meaning of the ASIC Act;

(c) the holder of an Australian Financial Services Licence (licence no: 233731);

(d) the trustee of the superannuation fund called the Westpac MasterTrust Superannuation Division, which issued a range of superannuation products that provided group life insurance cover;

(e) the trustee of the superannuation fund called the Westpac Personal Superannuation Plan which issued a range of superannuation products that provided insurance cover under a group policy of insurance;

(f) the holder of an RSE licence (licence no: L0001083);

(g) a body corporate:

(i) carrying on the business of acting as a trustee of superannuation entities and investing money on behalf of the beneficiaries of those superannuation entities; and

(ii) holding itself out as having particular knowledge, skill and experience in carrying out such a business;

(h) a subsidiary of the ultimate holding company, Westpac Banking Corporation (ACN 007 457 141);

(i) a related body corporate of WLISL;

(j) a RSE licensee under s 10(1) of the SIS Act;

(k) part of a corporate group for the purpose of SPS 250; and

(l) trustee of regulated superannuation funds within s 19(1) of the SIS Act.

## **B Background**

### **B.1 Obligations of BTFM and WSAL under the SIS Act**

9 At all material times the:

(a) Trust Deed for Retirement Wrap;

- (b) Trust Deed for BT Lifetime Super;
- (c) Trust Deed for the ASGARD Independence Plan, until 21 November 2022, and thereafter the Trust Deed for Asgard Independence Plan – Division 2;
- (d) Consolidated Trust Deed, Westpac Personal Superannuation Fund; and
- (e) Trust Deed for the Westpac MasterTrust;

contained the covenants set out in ss 52(2) and 52(7) of the SIS Act.

**Particulars**

s 52(1) of the SIS Act

**B.2 SIS Act**

10 At all material times, each of BTFM and WSAL covenanted to:

- (a) exercise, in relation to all matters affecting the entity, the same degree of care, skill and diligence as a prudent superannuation trustee would exercise in relation to an entity of which it is trustee and on behalf of the beneficiaries of which it makes investments;

**Particulars**

s 52(2)(b) of the SIS Act

- (b) perform the trustee's duties and exercise the trustee's powers in the best interests of the beneficiaries;

**Particulars**

s 52(2)(c) of the SIS Act

- (c) where there is a conflict between the duties of the trustee to the beneficiaries, or the interests of the beneficiaries, and the duties of the trustee to any other person or the interests of the trustee or an associate of the trustee:
  - (i) to give priority to the duties to and interests of the beneficiaries over the duties to and interests of other persons; and
  - (ii) to ensure that the duties to the beneficiaries are met despite the conflict; and
  - (iii) to ensure that the interests of the beneficiaries are not adversely affected by the conflict; and
  - (iv) to comply with the prudential standards in relation to conflicts.

**Particulars**

s 52(2)(d) of the SIS Act

- (d) formulate, review regularly and give effect to an insurance strategy for the benefit of beneficiaries of the entity that includes provisions addressing each of the following matters:
  - (i) the kinds of insurance that are to be offered to, or acquired for the benefit of, beneficiaries;
  - (ii) the level, or levels, of insurance cover to be offered to, or acquired for the benefit of, beneficiaries;
  - (iii) the basis for the decision to offer or acquire insurance of those kinds, with cover at that level or levels, having regard to the demographic composition of the beneficiaries of the entity;
  - (iv) the method by which the insurer is, or the insurers are, to be determined;

**Particulars**

s 52(7)(a) of the SIS Act

- (e) consider the cost to all beneficiaries of offering or acquiring insurance of a particular kind, or at a particular level;

**Particulars**

s 52(7)(b) of the SIS Act

- (f) only offer or acquire insurance of a particular kind, or at a particular level, if the cost of the insurance does not inappropriately erode the retirement income of beneficiaries.

**Particulars**

s 52(7)(c) of the SIS Act

**B.3 SPS 250**

- 11 During the Relevant Period, each of BTFM and WSAL had imposed on them, as RSE licensees, the condition that they would comply with the prudential standards made by the Australian Prudential Regulation Authority (**APRA**) under s 34C(1) of the SIS Act.

**Particulars**

ss 29E(1)(a) and 10(1) of the SIS Act

- 12 In November 2012, APRA made SPS 250 pursuant to s 34C(1) of the SIS Act, which came into force on 1 July 2013, and was revised with effect from 1 July 2022. SPS 250 required that:

- (a) all RSE licensees must comply with SPS 250 in its entirety, unless otherwise expressly indicated;

**Particulars**

SPS 250 at [3]; and  
from 1 July 2022, SPS 250 at [2].

- (b) where an RSE licensee is part of a corporate group, and the RSE licensee utilises group policies or functions, the Board must approve the use of group policies and functions and must ensure that these policies and functions give appropriate regard to the RSE licensee's business operations and its specific requirements;

**Particulars**

SPS 250 at [7]; and  
from 1 July 2022, SPS 250 at [8].

- (c) an RSE licensee must have in place an insurance management framework to manage making insured benefits available to beneficiaries;

**Particulars**

SPS 250 at [8]; and  
from 1 July 2022, SPS 250 at [9].

- (d) an RSE licensee's insurance management framework is the totality of systems, structures, policies, processes and people to manage making insured benefits available to beneficiaries;

**Particulars**

SPS 250 at [9]; and  
from 1 July 2022, SPS 250 at [10].

- (e) an RSE licensee's insurance management framework must be appropriate to the size, business mix and complexity of the RSE licensee's business operations and to the types of insured benefits made available;

**Particulars**

SPS 250 at [10]; and  
from 1 July 2022, SPS 250 at [11].

- (f) an RSE licensee's insurance management framework must include:
  - (i) the insurance strategy required under s 52(7) of the SIS Act (which must also comply with the requirements of SPS 250);
  - (ii) policies and procedures of the RSE licensee relevant to making insured benefits available to beneficiaries, that cover but are not limited to:
    - (1) the process by which the cost to the RSE licensee of insurance premiums is recovered from the RSE(s);

- (2) the process for monitoring and reviewing the administration of insurance;
- (3) underwriting; and
- (4) claims assessment;
- (iii) clearly defined roles and responsibilities and lines of reporting for the oversight of the insurance management framework;
- (iv) a review process to ensure the insurance management framework remains appropriate and effective; and
- (v) a policy for managing declined applications for insurance, applications resulting in reduced cover or restrictions, terminations of cover and requests for reinstatement;

**Particulars**

SPS 250 at [12]; and  
from 1 July 2022, SPS 250 at [13].

- (g) an RSE licensee's insurance strategy must document:
  - (i) how the RSE licensee has regard to each of the factors in s 52(7) of the SIS Act;
  - (ii) the processes for monitoring, reviewing and renewing the insured benefits made available to beneficiaries; and
  - (iii) the RSE licensee's approach, as outlined in its conflicts management framework, to conflicts that may arise through making available insured benefits to beneficiaries;

**Particulars**

SPS 250 at [17(a)], [17(b)] and [17(d)]

- (h) an RSE licensee must:
  - (i) develop and implement a selection process for choosing an insurer that includes, at a minimum, consideration of the prospective insurer's terms of cover and exclusions, claims philosophy, the reasonableness of the premiums to be charged and the terms of any delegation to any other person of functions associated with making available insured benefits;
  - (ii) undertake a due diligence review of the selected insurer; and
  - (iii) be able to demonstrate to APRA the appropriateness of the selection process and due diligence review and how it is applied;

#### Particulars

SPS 250 at [22]; and  
from 1 July 2022, SPS 250 at [23].

- (i) an RSE licensee must be able to satisfy itself that the engagement of an insurer is conducted at arm's length and is in the best interests of beneficiaries;

#### Particulars

SPS 250 at [23]; and  
from 1 July 2022, SPS 250 at [24].

- (j) an RSE licensee must be able to demonstrate to APRA that the engagement of an insurer is conducted at arm's length and is in the best interests of beneficiaries;

#### Particulars

SPS 250 at [23]; and  
from 1 July 2022, SPS 250 at [24].

- (k) an RSE licensee must ensure that the appropriateness, effectiveness and adequacy of its insurance management framework are subject to a review by operationally independent, appropriately trained and competent persons at least, every three years.

#### Particulars

SPS 250 at [25]; and  
from 1 July 2022, SPS 250 at [30].

### **B.4 BT Financial Group Insurance Management Framework, Insurance Strategy and insurance**

- 13 At all material times the insurance relationships between BTFM and WSAL as trustees (the **Trustees**) and WLISL as insurer were governed by various versions of BT Financial Group's Insurance Management Framework (**IMF**).

#### Particulars

The best particulars the Applicants are able to provide at this stage are:

- i. IMF Version 1 dated 24 June 2015;
- ii. IMF Version 4 dated 14 June 2017;
- iii. Further particulars may be provided following discovery and expert evidence.

- 14 The IMF:

- (a) identifies that the document applies to and has been considered and approved by, inter alia, the boards of the Trustees;

#### **Particulars**

The best particulars the Applicants are able to provide at this stage are:

- i. IMF Version 1 dated 24 June 2015 at page 2;
  - ii. IMF Version 4 dated 14 June 2017 at page 2;
  - iii. Further particulars may be provided following discovery and expert evidence.
- (b) was developed in purported compliance with SPS 250;
- (c) detailed the insurance offered by BT Financial Group entities (including WLISL) to members of each of the BT Financial Group funds;
- (d) described the systems, structures, policies, processes and people used by the trustee to manage the offering of insured benefits and the acquiring of insurance in relation to those benefits;
- (e) set out the insurance strategy;
- (f) indicated that the overarching principles in determining insurance benefit designs for the products that offer insurance are “affordability”, “adequacy”, “flexibility”, and “simplicity”, and include putting member’s interests at the forefront of all insurance decisions;

#### **Particulars**

The best particulars the Applicants are able to provide at this stage are:

- i. IMF Version 1 dated 24 June 2015 at [1.2] and [4.2];
  - ii. IMF Version 4 dated 14 June 2017 at [1.2] and [4.3];
  - iii. Further particulars may be provided following discovery and expert evidence.
- (g) set out the activities to be undertaken by the Trustees for monitoring, due diligence and approval of the insurance provider;

#### **Particulars**

The best particulars the Applicants are able to provide at this stage are:

- i. IMF Version 1 dated 24 June 2015 at [5.1], [5.2], [6.2] and [7];

- ii. IMF Version 4 dated 14 June 2017 at [5.1], [5.2], [6.2] and [7];
  - iii. Further particulars may be provided following discovery and expert evidence.
- (h) acknowledged that the trustee was required to ensure that it had acted at arm's length with the Insurer and in the best interests of members;

#### **Particulars**

The best particulars the Applicants are able to provide at this stage are:

- i. IMF Version 1 dated 24 June 2015 at [1.1], [5.2.4] and [7.1];
  - ii. IMF Version 4 dated 14 June 2017 at [1.1], [5.2.4] and [7.1];
  - iii. Further particulars may be provided following discovery and expert evidence.
- (i) indicated that the trustee was responsible for engaging operationally independent, appropriately trained and competent people (either external or internal) to conduct a comprehensive review of the IMF every three years;

#### **Particulars**

The best particulars the Applicants are able to provide at this stage are:

- i. IMF Version 1 dated 24 June 2015 at page 2;
  - ii. IMF Version 4 dated 14 June 2017 at page 2;
- (i) Further particulars may be provided following discovery and expert evidence.
- (j) indicated that the engagement and renewal of the insurer would be conducted at arm's length and in the best interests of beneficiaries, seeking to partner with an insurer that, at a minimum, possesses: proven claims and underwriting processes, strong financial ratings, competitive insurance offerings, an established Australian market presence and strong ethical standards;

#### **Particulars**

The best particulars the Applicants are able to provide at this stage are:

- i. IMF Version 1 dated 24 June 2015 at [5.1] and [5.2.4];

- ii. IMF Version 4 dated 14 June 2017 at [5.1] and [5.2.4];
  - iii. Further particulars may be provided following discovery and expert evidence.
- (k) indicated that renewal of the existing insurer, without a tender, would require trustee satisfaction that: the insurer is meeting its designated service standards, policy conditions and benefits offered to members remain competitive, premiums quoted are reasonable and reappointment will be in the best interests of the members;

**Particulars**

The best particulars the Applicants are able to provide at this stage are:

- i. IMF Version 1 dated 24 June 2015 at [5.2.2];
  - ii. IMF Version 4 dated 14 June 2017 at [5.2.2];
  - iii. Further particulars may be provided following discovery and expert evidence.
- (l) indicated that premiums deducted from members' accounts to pay for insurance cover had the potential to reduce retirement income.

**Particulars**

The best particulars the Applicants are able to provide at this stage are:

- i. IMF Version 1 dated 24 June 2015 at [4.2.1];
  - ii. IMF Version 4 dated 14 June 2017 at [4.3.1];
  - iii. Further particulars may be provided following discovery and expert evidence.

**C WLISL and the tender**

**WLISL's group insurance business**

- 15 Since at least January 2013, WLISL life insurance products were sold through several sales channels, including by selling group insurance products to trustees of superannuation funds.

**Particulars**

The best particulars the Applicants are able to provide at this stage are:

- i. Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry, Witness Statement of Susan Wendy Houghton – Ex. 6.16 at pages 3 to 4, paragraph [14];
- ii. Further particulars may be provided following discovery and expert evidence.

16 As at 1 January 2013, WLISL issued a number of group insurance policies to related bodies corporate within the Westpac group, including BTFM.

**Particulars**

The best particulars the Applicants are able to provide at this stage are:

- i. Houghton – Ex. 6.16 at page 8, paragraph [28];
- ii. Further particulars may be provided following discovery and expert evidence.

17 In the period from 1 January 2013 to 30 June 2017, WLISL did not issue any new group insurance policies.

**Particulars**

The best particulars the Applicants are able to provide at this stage are:

- i. Houghton – Ex. 6.16 at page 8 paragraph, [28];
- ii. Further particulars may be provided following discovery and expert evidence

**D Conduct of BTFM and WSAL**

18 At all material times, each of BTFM and WSAL offered the following types of group insurance cover to the Applicants and Group Members:

- (a) death only cover (**life insurance**);
  - (b) death and Total and Permanent Disablement (**TPD**) cover; and
  - (c) income protection (**IP**) (also known as “Salary Continuance Insurance” or “SCI”).
- (the “**group insurance cover**”).

**Particulars**

The best particulars the Applicants are able to provide at this stage are:

- iii. BT Super for Life PDS dated 1 July 2015;
- iv. BT Super for Life PDS dated 1 July 2016;
- v. BT Super for Life Additional Information Booklet dated 1 July 2016;
- vi. BT Super for Life PDS dated 1 July 2017;
- vii. BT Super for Life Additional Information Booklet dated 1 July 2017;
- viii. BT Super for Life Additional Information Booklet dated 30 September 2017;
- ix. BT Super for Life PDS dated 10 December 2018;
- x. BT Super for Life Additional Information Booklet dated 10 December 2018;
- xi. BT Super for Life PDS dated 1 July 2019;
- xii. BT Super for Life Additional Information Booklet dated 1 July 2019;
- xiii. BT Super for Life Additional Information Booklet dated 1 November 2019;
- xiv. BT Super for Life Additional Information Booklet dated 20 April 2020;
- xv. BT Super for Life PDS dated 20 May 2020;
- xvi. BT Super for Life Additional Information Booklet dated 20 May 2020;
- xvii. BT Super for Life PDS dated 1 October 2020;
- xviii. BT Super for Life Additional Information Booklet dated 1 October 2020;
- xix. BT Super for Life PDS dated 1 August 2021;
- xx. BT Lifetime Super – Employer Plan PDS dated 1 July 2015;
- xxi. BT Lifetime Super – Employer Plan Additional Information Booklet Part 3 Insurance dated 1 July 2015;
- xxii. BT Lifetime Super – Employer Plan PDS dated 1 July 2016;
- xxiii. BT Lifetime Super – Employer Plan Additional Information Booklet Part 3 Insurance dated 1 July 2016;
- xxiv. BT Lifetime Super – Employer Plan PDS dated 17 February 2017;
- xxv. BT Lifetime Super – Employer Plan Additional Information Booklet Part 3 Insurance dated 17 February 2017;
- xxvi. BT Lifetime Super – Employer Plan PDS dated 1 July 2017;

- xxvii. BT Lifetime Super – Employer Plan Additional Information Booklet Part 3 Insurance dated 1 July 2017;
- xxviii. BT Lifetime Super – Employer Plan Additional Information Booklet Part 3 Insurance dated 30 September 2017;
- xxix. BT Super PDS dated 1 November 2019;
- xxx. BT Super PDS dated 1 April 2019;
- xxxi. BT Super PDS dated 20 May 2020;
- xxxii. BT Super PDS dated 1 October 2020;
- xxxiii. BT Lifetime – Personal Super PDS dated 1 July 2014;
- xxxiv. Asgard Employee Super Account Product Disclosure Statement Part 1A dated 1/7/2014;
- xxxv. Asgard Employee Super Account SPDS dated 2/2/2015;
- xxxvi. Asgard Employee Super Account SPDS dated 1/5/2015;
- xxxvii. Asgard Employee Super Account PDS dated 1/7/2015;
- xxxviii. Asgard Employee Super Account Additional Information Booklet Part 3 – Insurance dated 1/7/2015;
- xxxix. Asgard Employee Super Account Product Disclosure Statement dated 27/7/2015;
- xl. Asgard Employee Super Account SPDS dated 22/4/2017;
- xli. Asgard Employee Super Account Additional Information Booklet Part 3 – Insurance dated 1/7/2017;
- xlii. Asgard Employee Super Account Product Disclosure Statement dated 1/7/2017;
- xliii. Asgard Employee Super Account SPDS dated 30/9/2017;
- xliv. Asgard Employee Super Account Additional Information Booklet Part 3 – Insurance dated 30/9/2017;
- xlv. Asgard Employee Super Account Additional Information Booklet Part 3 – Insurance dated 17/12/2018;
- xlvi. Asgard Employee Super Account Product Disclosure Statement dated 17/12/2018;
- xlvii. Asgard Employee Super Account Additional Information Booklet Part 3 – Insurance dated 1/9/2019;

- xlvi. Asgard Employee Super Account Product Disclosure Statement dated 1/9/2019;
- xlvii. Asgard Employee Super Account Product Disclosure Statement dated 1/9/2019;
- xlviii. Asgard Employee Super Account Product Disclosure Statement dated 1/9/2019;
- xlix. Asgard Employee Super Account Additional Information Booklet Part 3 – Insurance dated 1/4/2020;
- l. Asgard Employee Super Account Product Disclosure Statement dated 1/4/2020;
- li. Asgard Employee Super Account Additional Information Booklet Part 3 – Insurance dated 20/5/2020;
- lii. Asgard Employee Super Account Product Disclosure Statement dated 20/5/2020;
- liii. Asgard Employee Super Account Additional Information Booklet Part 3 – Insurance dated 1/10/2020;
- liv. Asgard Employee Super Account Product Disclosure Statement dated 1/10/2020;
- lv. BT Super for Life – Westpac Group Plan Additional Information Booklet No. 1 dated 1/7/2015;
- lvi. BT Super for Life – Westpac Group Plan (PDS) dated 1/7/2015;
- lvii. BT Super for Life – Westpac Group Plan Additional Information Booklet No. 1 dated 1/7/2016;
- lviii. BT Super for Life – Westpac Group Plan (PDS) dated 1/7/2016;
- lix. BT Super for Life – Westpac Group Plan Additional Information Booklet No.1 dated 30/9/2017;
- lx. BT Super for Life – Westpac Group Plan (PDS) dated 30/9/2017;
- lxi. BT Super for Life – Westpac Group Plan Additional Information Booklet No.1 dated 17/12/2018;
- lxii. BT Super for Life – Westpac Group Plan (PDS) dated 17/12/2018;
- lxiii. Changes to the cost of insurance in super – BT Super for Life – Westpac Group Plan Significant Event Notice dated 30/5/2019;
- lxiv. BT Super for Life - Westpac Group Plan Additional Information Booklet No.1 dated 1/7/2019;
- lxv. BT Super for Life - Westpac Group Plan (PDS) dated 1/7/2019;
- lxvi. BT Super for Life - Westpac Group Plan Additional Information Booklet No.1 dated 1/11/2019;
- lxvii. BT Super for Life - Westpac Group Plan Additional Information Booklet No.1 dated 20/5/2020;

- Ixviii. BT Super for Life - Westpac Group Plan (PDS) dated 20/5/2020;
- Ixix. BT Super for Life - Westpac Group Plan Additional Information Booklet No.1 dated 1/8/2021;
- Ixx. BT Super for Life - Westpac Group Plan (PDS) dated 1/8/2021;
- Ixxi. BT Super for Life - Westpac Group Plan (PDS) dated 1/2/2022;
- Ixxii. BT Super for Life - Westpac Group Plan (PDS) dated 30/9/2022;
- Ixxiii. BT Business Super Additional Information Booklet Part 3 – Insurance, dated 1/07/2015;
- Ixxiv. BT Business Super Product Disclosure Statement, dated 1/07/2015;
- Ixxv. BT Business Super Additional Information Booklet Part 3 – Insurance, dated 1/07/2016;
- Ixxvi. BT Business Super Product Disclosure Statement, dated 1/07/2016;
- Ixxvii. BT Business Super Additional Information Booklet Part 3 – Insurance, dated 1/07/2017;
- Ixxviii. BT Business Super Product Disclosure Statement, dated 1/07/2017;
- Ixxix. BT Business Super Additional Information Booklet Part 3 – Insurance, dated 30/9/2017;
- Ixxx. BT Business Super Product Disclosure Statement, dated 30/9/2017;
- Ixxxi. Further particulars may be provided following discovery and expert evidence.

19 During at least part of the Relevant Period, for the purpose of providing the group insurance cover, BTFM obtained from WLISL or renewed with WLISL policies of group insurance for the members of the following funds:

- (a) Retirement Wrap, which included, amongst others, the following superannuation products:
  - (i) Generic MySuper;
  - (ii) Westpac Group Plan MySuper;
  - (iii) BT Super for Life;
  - (iv) BT Lifetime Super – Employer Plan;
  - (v) BT Retirement Selection; and
  - (vi) BT Super;

### **Particulars**

The best particulars the Applicants are able to provide at this stage are:

- i. Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry, Witness Statement of Melinda Suzanne Howes – Ex. 6.211 (Rubrics 6-32, 6-33 and 6-34) at Schedule A;
  - ii. Product Update for BT Super and BT Super for Life dated 1 July 2020;
  - iii. Further particulars may be provided following discovery and expert evidence.
- (b) BT Lifetime Super which included the superannuation product BT Lifetime Super – Personal Super;

### **Particulars**

The best particulars the Applicants are able to provide at this stage are:

- i. Howes – Ex. 6.211 (Rubrics 6-32, 6-33 and 6-34) at Schedule A;
  - ii. Further particulars may be provided following discovery and expert evidence.
- (c) Asgard Independence Plan Division Two, which included, amongst others, the following superannuation products:
- (i) Asgard Employee Superannuation Account MySuper;
  - (ii) Asgard Employee Superannuation Account;
  - (iii) eWrap Super Account
  - (iv) eWrap Pension Account
  - (v) Elements Super Account
  - (vi) Elements Pension Account
  - (vii) Infinity eWrap Super Account
  - (viii) Infinity eWrap Pension Account
  - (ix) ASGARD Superannuation Account
  - (x) Advance Retirement Suite Super

- (xi) Beacon Superannuation Plan

**Particulars**

The best particulars the Applicants are able to provide at this stage are:

- i. Howes at Schedule A;
- ii. Further particulars may be provided following discovery and expert evidence.

(together, the **BTFM Funds**).

- 20 During at least part of the Relevant Period, for the purpose of providing the group insurance cover, WSAL obtained from WLISL or renewed with WLISL policies of group insurance for the members of the following:

- (a) Westpac MasterTrust Superannuation Division, which included, amongst others, the following superannuation products:
  - (i) BT Business Super MySuper, from 1 January 2018 to 19 February 2020;
  - (ii) BT Business Super, from 1 January 2018 to 19 February 2020; and
  - (iii) Westpac Lifetime Superannuation Service, for the entire period;

**Particulars**

The best particulars the Applicants are able to provide at this stage are:

- i. Howes at Schedule C;
- ii. Further particulars may be provided following discovery and expert evidence.

- (b) BT Superannuation Savings Fund (now terminated), which included the superannuation product, BT Superannuation Savings Fund, until 24 July 2018;

**Particulars**

The best particulars the Applicants are able to provide at this stage are:

- i. Howes at Schedule C;
- ii. Further particulars may be provided following discovery and expert evidence.

- (c) Westpac Personal Superannuation Plan, which included, amongst others, the following superannuation products:

- (i) Westpac Personal Superannuation Bond;

- (ii) Westpac Personal Super Investment Plan; and
- (iii) Westpac Personal Superannuation Plan (1987/1990 and 1978/1990 Staff Version).

#### **Particulars**

The best particulars the Applicants are able to provide at this stage are:

- i. Howes at Schedule C;
- ii. Further particulars may be provided following discovery and expert evidence.

(together, the **WSAL Funds**)

#### **D.1 BTFM and WSAL – group insurance contracts**

- 21 Prior to 1 January 2016, group insurance policies for superannuation funds of which BTFM or WSAL was the trustee were provided by either:
- (a) AIA Australia Limited (ACN 004 837 861) (**AIA**); or
  - (b) WLISL.
- 22 The group insurance policies referred to in paragraph 21 were due to expire in February 2017, which was later extended to 31 December 2017.

#### **Particulars**

The best particulars the Applicants are able to provide at this stage are:

- i. Howes at [44];
- ii. Further particulars may be provided following discovery and expert evidence.

- 23 In 2016, a tender process was conducted by, inter alia, the Trustees for their group insurance policies.
- 24 The Request for Proposal (**RFP**) was designed by the Trustees in conjunction with Rice Warner Actuaries and the Westpac Group Commercial Services team.
- 25 The tender included the development of weighted criteria for the selection of the insurer, which included:
- (a) price;
  - (b) product terms;
  - (c) service model; and
  - (d) “contract and commercial” matters.

### Particulars

The best particulars the Applicants are able to provide at this stage are:

- i. Howes at [45](e)(i);
- ii. Further particulars may be provided following discovery and expert evidence.

- 26 The tender also included consideration of non-weighted criteria for the selection of the insurer.

### Particulars

The best particulars the Applicants are able to provide at this stage are:

- i. Howes at [45](e)(ii);
- ii. Further particulars may be provided following discovery and expert evidence.

- 27 The following insurers participated in the tender process:

- (a) WLISL;
- (b) Zurich Insurance Group Limited (**Zurich**); and
- (c) AIA.

- 28 As part of that tender:

- (a) AIA and WLISL responded to the proposal with a willingness to support the full scope of products in respect of which the RFP was issued;
- (b) Zurich was unwilling to support the full scope of products subject to tender and so was not part of the final consideration;
- (c) WLISL and AIA both offered 'competitive pricing';
- (d) AIA scored higher on the weighted criteria;
- (e) Management recommended to the boards of BTFM and WSAL that WLISL be appointed; and
- (f) At the conclusion of the tender, the Boards of each of BTFM and WSAL resolved on 21 November 2016, to approve WLISL as the insurer (the **Tender Decision**).

### Particulars (to [23] – [28] above)

The best particulars the Applicants are able to provide at this stage are:

- i. Howes at [44]-[60];
- ii. Further particulars may be provided following discovery and expert evidence.

29 The selection of WLISL as the insurer occurred in circumstances where:

- (a) it was a related party of the trustee;
- (b) a third party, AIA, had scored higher on weighted criteria for the selection;
- (c) criteria which were capable of being weighted were considered as non-weighted criteria; and
- (d) ultimately, non-weighted criteria were determinative in the selection of the insurer.

**Particulars**

The best particulars the Applicants are able to provide at this stage are:

- i. Howes at [45](e);
- ii. Further particulars may be provided following discovery and expert evidence.

30 On 20 March 2017, the Trustees entered into an Insurance Services Deed with WLISL, with effect from 1 January 2018.

**Particulars**

The best particulars the Applicants are able to provide at this stage are:

- i. Howes at [45];
- ii. Further particulars may be provided following discovery and expert evidence.

31 On 1 January 2018, WLISL issued a number of life insurance policies to related bodies corporate within the Westpac group, including:

- (a) Up to 10 master policies to BTFM and WSAL; and
- (b) 4 group life policies to two external superannuation funds that use BTFM as their fund administrator (which were included in the RFP)

(collectively, the **Group Insurance Contracts**).

**Particulars**

The best particulars the Applicants are able to provide at this stage are:

- i. Houghton – Ex. 6.16 at pages 8 to 9, paragraph [29];
- ii. Further particulars may be provided following discovery and expert evidence.

32 As a consequence of WLISL being selected as the insurer and the implementation of that decision by BTFM, WLISL and WSAL:

- (a) the premium rates payable by members of the BTFM Funds and WSAL Funds materially increased when compared to the premium rates payable by holders who had previously received insurance through an AIA group insurance policy;
- (b) the Trustees agreed to pay premium rates that were higher than the best premium rates that could have been obtained for members; and
- (c) the Trustees agreed to pay premium rates to WLISL that were higher than the premiums that could have been obtained from third-party insurers.

#### **Particulars**

The best particulars the Applicants are able to provide at this stage are:

- i. Howes at [45](e);
- ii. Further particulars may be provided following discovery and expert evidence.

33 On and from the implementation of the decision in paragraph 32 above, the Trustees:

- (a) made further decisions to maintain WLISL as the insurer for at least some of the relevant products and funds through to the end of the Relevant Period;
- (b) agreed to pay premium rates to WLISL that were higher than the premiums that:
  - (i) were the best premium rates that could have been obtained for members;
  - (ii) alternatively, could have been obtained from third-party insurers; and
- (c) did not take the steps that a reasonable trustee would have taken to ensure that the premium rates being charged to members were the best rates that could be obtained from members in all of the circumstances.

(these decisions, together with the Tender Decision, are the **Group Insurance Decisions**)

34 On 1 July 2020, WLISL was replaced by AIA as provider of group insurance to BTFM:

- (a) as trustee of Retirement Wrap for the superannuation products BT Lifetime Super and BT Super for Life; and

- (b) as trustee of the Asgard Independence Plan Division Two for the superannuation products Asgard Employee Super Account and Asgard Personal Protection Package.

**Particulars**

The best particulars the Applicants are able to provide at this stage are:

- i. BTFM Annual Report for the year ended 30 September 2020, page 3;
- ii. Further particulars may be provided following discovery and expert evidence.

35 On and from 1 July 2020, AIA issued group insurance to BTFM:

- (a) as trustee of BT Retirement Wrap for the superannuation products BT Lifetime Super and BT Super for Life; and
- (b) as trustee of the Asgard Independence Plan Division Two for the superannuation products Asgard Employee Super Account and Asgard Personal Protection Package.

**D.2 Asgard**

36 At all material times, for the purpose of providing the **Asgard Personal Protection Plans**, BTFM obtained from WLISL or renewed with WLISL policies of group insurance for the members of the following:

- (a) Asgard Independence Plan Division Two, which included, amongst others, the following superannuation products, for the period from 1 January 2018:
  - (i) Asgard Employee Superannuation Account;
  - (ii) Asgard Employee Superannuation Account MySuper;
  - (iii) eWrap Super/Pension Account;
  - (iv) Elements Super/Pension Account; and
  - (v) Infinity eWrap Super/Pension Account; and ASGARD Superannuation Account; and

**Particulars**

The best particulars the Applicants are able to provide at this stage are:

- i. Howes at Schedule A;
- ii. Further particulars may be provided following discovery and expert evidence.

- (b) Advance Retirement Suite, which included the superannuation product Advance Retirement Suite Super, from 1 January 2018.

#### **Particulars**

The best particulars the Applicants are able to provide at this stage are:

- i. Howes at Schedule A;
  - ii. Further particulars may be provided following discovery and expert evidence.
- 37 At all relevant times, BTFM and WSAL were parties to an Administration Agreement and a Custody Agreement.
- 38 Under the Administration Agreement, BTFM appointed Asgard to perform certain services in relation to the "BTFM Products", which were defined to include the Asgard products.
- 39 Under the Custody Agreement, BTFM appointed Asgard as the custodian of the assets of the "Funds", which were defined to include the Asgard products.
- 40 During the Relevant Period and until 22 November 2022, Trust Deed for Asgard Independence Plan provided that:
- (a) BTFM may arrange for the insurance or re-insurance of the life of a [member] or arrange for insurance or re-insurance against the disability of a [member] with such Life Insurance Company [or] insurance company ... selected by the trustee.
  - (b) BTFM may effect such further or other insurances as it or they may deem necessary or prudent; and
  - (c) Premiums payable on any such insurances effected by the trustee are to be met from the relevant [member's account].

#### **Particulars**

Trust Deed for Asgard Independence Plan as at 26 August 2021 cl 11.2(d);

- (d) the trustee may effect insurance policies in its own name by a separate insurance policy or as part of the insurance provided in respect of a number of [members] under a group or master policy issued to the trustee and the terms of an insurance policy in respect of a [member] shall bind the [member] and any person who is or becomes entitled to a Benefit in respect of the [member].

#### **Particulars**

Trust Deed for Asgard Independence Plan as at 26 August  
2021 cl 12.13.1;

- 41 From 22 November 2022 the Trust Deed for the ASGARD Independence Plan Division Two provided:
- (a) The Trustee may take out and maintain one or more Life Policies to provide Insured benefit on such terms and conditions as the trustee determines to provide Insured Benefits in respect of Members who hold an interest in a Plan in the event of a Member's death, terminal illness, total and permanent disablement or temporary incapacity.
  - (b) The Trustee may pay the premiums and costs of any Insured Benefits under a Life Policy maintained in respect of a Member from the Member's Account as the Trustee determines.
  - (c) If the Member's Account Balance is insufficient to meet the premiums and costs of any Insured Benefits or Life Policy attributable to that Member or, if the member's Account Balance is less than a minimum balance determined by the trustee, the trustee will not pay such premiums and costs from the Plan in respect of the Member.

**Particulars**

Trust Deed for Asgard Independence Plan – Division 2  
dated 22 November 2022 cll 13.1 and 13.6;

- 42 BTFM entered into group life insurance policies WLISL in respect of members of the Asgard Independence Plan Division Two
- 43 The master policies included policies numbered:
- (a) MP 8128 (or MP 8395) and MP 9962 (or MP 8404), which applied to members who held the Asgard Employee Superannuation Account (**AESA**) AESA product (the **AESA master policies**); and
  - (b) MP 9958, MP 9959 and MP 9961, which applied to members who applied for insurance branded as the Asgard Personal Protection Plan product (the **APPP master policies**).
- (together, the **master policies**).
- 44 The members of the Asgard Independence Plan Division Two who held the AESA product could apply for insurance cover under the APPP master policies.
- 45 At all relevant times:
- (a) under each master policy, the insurer provided life protection cover, total and permanent disablement cover, and (in the case of the APPP master policies) salary continuance cover in respect of members of the Asgard Independence Plan Division Two who were covered under the policy;

- (b) under each master policy, premiums were payable by BTFM to the insurer in respect of members of the Asgard Independence Plan Division Two who were covered under the policy at the rates set out in the schedules to the policy; and
  - (c) BTFM was permitted to charge members of the Asgard Independence Plan Division Two a monthly administration fee for each type of insurance cover held under the policy.
- 46 During the Relevant Period, Asgard also included a further charge of up to 25% on top of the premium amounts to reflect the payment of a commission to financial advisers.
- 47 Under the AESA master policy numbered MP 9962 (or MP 8404), members who commenced holding their AESA product prior to 22 October 2013 may have been required to pay that adviser commission of up to 25% (the **AESA Adviser Commission**).

#### **Particulars**

The best particulars the Applicants are able to provide at this stage are:

- i. Group Life (Death and Total and Permanent Disablement) Insurance Policy No. MP 8128 date of issue 26 September 2017 at pages 32 to 40;
  - i. Asgard Employee Super Account Additional Information Booklet Part 3 – Insurance date of issue 1 September 2019 at pages 23 to 32;
  - ii. Further particulars may be provided following discovery and expert evidence.
- 48 Under the APPP master policies, members of the Asgard Independence Plan Division Two may have been required to pay that adviser commission of up to 25% (the **APPP Adviser Commission**).

#### **Particulars**

The best particulars the Applicants are able to provide at this stage are:

- i. Group Life (Life Protection, Total and Permanent Disablement, Salary Continuance) Policy Document No. MP 58, MP 9959 and MP 9961 date of issue 23 March 2011 at pages 34 to 45;
  - ii. Further particulars may be provided following discovery and expert evidence.
- 49 During the Relevant Period, Asgard offered insurance to the Third Applicant and at least some of the Group Members who were members of the Asgard Independence

Plan at premium rates that were greater than the rates offered under the relevant master policy (the **Asgard Enhanced Premium**).

### **Particulars**

The best particulars the Applicants are able to provide at this stage are:

- i. Group Life (Death and Total and Permanent Disablement) Insurance Policy No. MP 8128 date of issue 26 September 2017 at page 25;
- ii. Asgard Employee Super Account Additional Information Booklet Part 3 – Insurance date of issue 1 September 2019 at pages 23 to 24;
- iii. Further particulars may be provided following discovery and expert evidence.

50 It was not in the interests of the Third Applicant and those Group Members who were members of the Asgard Independence Plan Division Two to pay insurance premiums on terms that included any or each of the AESA Adviser Commission, APPP Adviser Commission and the Asgard Enhanced Premium (together, the **Asgard Markup**).

### **E Premiums for insurance cover**

51 By engaging in the contraventions referred to in Part F below, the amounts deducted by BTFM and WSAL from the superannuation accounts of the Applicants and Group Members were higher than the amounts that would have been deducted if BTFM and WSAL had complied with the covenants set out in s 52(2)(b), (c) and (d) and s 52(7)(a), (b) and (c) of the SIS Act (the difference being the **Overcharge**).

52 The premiums paid by, or on behalf of, the Applicants and Group Members included the Overcharge on the issuing and renewal of the group insurance policies by BTFM or WSAL, as the case may be, with WLISL.

### **F Contraventions**

53 The Trustees charged at least the following fees relating to the group insurance cover, each of which was a percentage of the total premiums paid,

- (a) in relation to BT Business Super:
  - (i) 25.5% administration fee for standard cover;
  - (ii) up to 25.5% administration fee for tailored cover; and
  - (iii) up to 25.5% administration fee for SCI;
- (b) in relation to BT Lifetime Super – Employer Plan:
  - (i) up to 27% administration fee for standard cover;

- (ii) up to 20.5% administration fee for tailored cover; and
- (iii) up to 16.5% administration fee for SCI;
- (c) in relation to BT Super:
  - (i) up to 15% administration fee for standard cover;
  - (ii) up to 15% administration fee for tailored cover; and
  - (iii) up to 10% administration fee for SCI;
- (d) the AESA Adviser Commission;
- (e) the APPP Adviser Commission;
- (f) the Asgard Enhanced Premium.

### **Particulars**

The best particulars the Applicants are able to provide at this stage are:

- i. Asgard Employee Super Account Additional Information Booklet Part 3 – Insurance dated 30/9/2017;
- ii. Asgard Employee Super Account Additional Information Booklet Part 3 – Insurance dated 17/12/2018;
- iii. Asgard Employee Super Account Additional Information Booklet Part 3 – Insurance dated 1/9/2019;
- iv. Asgard Employee Super Account Additional Information Booklet Part 3 – Insurance dated 1/4/2020;
- v. Asgard Employee Super Account Additional Information Booklet Part 3 – Insurance dated 20/5/2020;
- vi. Asgard Employee Super Account Additional Information Booklet Part 3 – Insurance dated 1/10/2020;
- vii. BT Business Super Additional Information Booklet Part 3 – Insurance, dated 30/9/2017;
- viii. BT Lifetime Super – Employer Plan Additional Information Booklet Part 3 – Insurance dated 30/9/2017;
- ix. BT Super Employee Insurance Guide dated 01/4/2020;
- x. BT Super Employee Insurance Guide dated 20/05/2020;

- xi. BT Super Employee Insurance Guide dated 01/10/2020;
- xii. BT Super Employee Insurance Guide dated 01/03/2022;
- xiii. Further particulars may be provided following discovery and expert evidence.

54 In the premises of paragraph 53, it was in the financial interest of the Trustees to obtain group insurance policies at a higher premium rate.

55 At all material times there was, and is, a conflict between BTFM and WSAL's duties to, and the interests of, the Applicants and the Group Members on the one hand and the interests of BTFM, WSAL and WLISL on the other in relation to the premiums being charged on insurance obtained from WLISL for members of the BTFM and WSAL funds.

(the **Conflict**)

#### **Particulars**

- i. Paragraphs 43 and 54 above are repeated.
- ii. It was and is BTFM's and WSAL's duty to take all reasonable steps to seek, and it was and is in the best financial interests of the Applicants and each of the Group Members to obtain, the most suitable insurance and at premiums which were fair and the most economical (or lowest) that could reasonably be obtained;
- iii. It was and is in BTFM's and WSAL's own interest to obtain from WLISL insurance with higher premiums;
- iv. It was and is in the financial interests of WLISL to maximise its profits through charging the Applicants and each of the Group Members a higher premium than could otherwise be charged for issuing insurance to them.

56 At the time of making and implementing each of the Group Insurance Decisions, BTFM and WSAL knew of the Conflict.

#### **Particulars**

The best particulars the Applicants are able to provide at this stage are:

- i. Howes at [45](d);
- ii. Further particulars may be provided following discovery and expert evidence.

- 57 Alternatively to paragraph 56 above, at the time of making and implementing each of the Group Insurance Decisions, BTFM and WSAL ought to have known of the Conflict.
- 58 In deciding to obtain the group insurance policies from WLISL, each of BTFM and WSAL contravened the covenants in:
- (a) s 52(7)(a) of the SIS Act to give effect to an insurance strategy for the benefit of the members of their respective funds;

### **Particulars**

- i. A prudent superannuation trustee in the position of BTFM and WSAL as trustees would have identified the following considerations as relevant:
- a. the existence of the Conflict;
  - b. the past claims experience, the likely future claims experience, the policy terms and conditions, the rate structures (based upon age, gender and occupation) and prevailing insurance market conditions for the funds;
  - c. the amount to be charged for premiums which would be fair and the most economical (lowest) reasonably available for the members of the funds;
- ii. A prudent superannuation trustee in the position of BTFM and WSAL as trustees would have:
- d. obtained premiums which were fair and the most economical (lowest) reasonably available for the members of the superannuation funds of which BTFM and WSAL were trustees;
  - e. performed the trustee's duties and exercise the trustee's powers in the best interests of the members of their superannuation funds.
- iii. A prudent superannuation trustee in the position of BTFM and WSAL as trustees would not have:
- a. obtained cover from WLISL;
  - b. charged any members a commission on the premiums paid for group life cover; or
  - c. (in the case of members of the Asgard funds) applied a markup to the premiums offered by the insurer under the master policies.

- (b) s 52(7)(b) of the SIS Act to consider the cost to all beneficiaries of offering or acquiring insurance of a particular kind, or at a particular level;

**Particulars**

The particulars to (a) are repeated

- (c) s 52(7)(c) of the SIS Act to only offer or acquire insurance of a particular kind, or at a particular level, if the cost of the insurance does not inappropriately erode the retirement income of the members of the superannuation funds of which BTFM and WSAL were the trustees.

**Particulars**

The particulars to (a) are repeated

59 In making and implementing each of the Group Insurance Decisions,

- (a) BTFM and WSAL contravened, and continues to contravene, the covenant in s 52(2)(b) of the SIS Act to exercise the degree of care, skill and diligence that a prudent superannuation trustee would have exercised if they were the trustee of the superannuation funds of which BTFM and WSAL were the trustees.

**Particulars**

The particulars to paragraph 58(a) are repeated

- (b) BTFM and WSAL contravened, and continues to contravene, the covenant in s 52(2)(c) of the SIS Act to perform their duties and exercise their powers in the best interests of the Applicants and Group Members.

**Particulars**

The particulars to paragraph 58(a) are repeated

- (c) BTFM and WSAL contravened, and continues to contravene, the covenant in s 52(2)(d) of the SIS Act to:
- (i) give priority to its duties to, and the interests of, the Applicants and the Group Members over its interests and the interests of WLISL.
  - (ii) ensure that its duties to the Applicants and the Group Members were met despite the Conflict;
  - (iii) ensure that the interests of the Applicants and the Group Members were not adversely affected by the Conflict.

60 By reason of the matters in sub-paragraphs 59(a) to (c) above and in circumstances where the financial interests of the Applicants and each of the Group Members were adversely affected in a significant way by the Conflict, a prudent superannuation trustee in the position of trustee of the funds would not have made the Group Insurance Decisions.

61 The contraventions by BTFM and WSAL of the covenants in ss 52(2)(b), 52(2)(c), 52(2)(d) and 52(7)(a), (b) and (c) of the SIS Act also constituted:

- (a) contraventions by them of s 55(1) of the SIS Act (prior to 6 April 2019); and
- (b) contraventions by them of s 54B(1) of the SIS Act (after 6 April 2019).

## **G Fiduciary obligations**

62 By reason of their status as trustees each of BTFM and WSAL owed the members of their respective funds a fiduciary duty to:

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

63 Each of BTFM and WSAL breached its fiduciary duties owed to the Applicants and each of the Group Members by:

- (a) failing to avoid the Conflict; and/or
- (b) improperly using its position to gain a benefit for itself and/or WLISL.

64 Each of BTFM and WSAL are liable to account for and pay to the Applicants and each of the Group Members all benefits, profits and gains made or derived by them from the receipt and use of the Overcharge.

65 Further or in the alternative, the Applicants and each of the Group Members are entitled to equitable compensation reason of the breaches of fiduciary duty by BTFM and WSAL

### **Particulars**

- i. The above contraventions caused a reduction in the amount which the Applicants and the Group Members have received from the funds.
- ii. The above contraventions have caused, and continue to cause, a reduction in the amount which the Applicants and the Group Members can expect to receive from the funds.
- iii. The above contraventions have caused an erosion of the retirement income of the Applicants and the Group Members.

**H Claim against Westpac Life (WLISL)**

66 WLISL was involved in the making and implementation of each of the Group Insurance Decisions.

**Particulars**

The best particulars the Applicants are able to provide at this stage are:

- i. WLISL knew the corporate structure of the Westpac Group.
- ii. WLISL set the premium rates that were payable under the Group Insurance Contracts.
- iii. Prior to setting the premium rates, WLISL obtained actuarial advice about the expected costs and expected profits of the Group Insurance Contracts.
- iv. In the premises of (i) to (iii) WLISL knew about the existence of the Conflict and the profit that it stood to make as a related party of the trustee.
- v. Further particulars will be provided after discovery.

67 By reason of the matters pleaded in paragraph 66 above, WLISL was involved within the meaning of section 55(3) of the SIS Act in the contraventions in paragraphs 53 to 58 above.

68 By reason of the matters pleaded in paragraphs 66 to 67 above, WLISL is liable to compensate the Applicants and each of the Group Members for the loss or damage pleaded in paragraph 65 above.

**Particulars**

s 55(3) of the SIS Act

69 Further or in the alternative, by reason of the matters pleaded in paragraphs 66 to 67 above, WLISL is liable to pay equitable compensation to the Applicants and each of the Group Members.

70 Further or in the alternative, by reason of the matters pleaded in paragraphs 66 to 67 above, WLISL is liable to account for and pay to the Applicants and each of the group members:

- (a) the Overcharge; and
- (b) all benefits, profits and gains made or derived by WLISL from the Group Insurance Contracts.

## H.1 Knowing receipt

71 At the time of receipt of the Overcharge WLISL knew:

- (a) the material facts giving rise to the existence of the fiduciary duty owed by BTFM and WSAL; and

### Particulars

The best particulars the Applicants are able to provide at this stage are:

- i. The particulars to paragraph 66 are repeated;
  - ii. WLISL knew that BTFM and WSAL were trustees;
  - iii. Further particulars may be provided following discovery and expert evidence.
- (b) the material facts giving rise to the breaches of the fiduciary duty by BTFM and WSAL as pleaded in paragraphs 53 to 60 above.

### Particulars

The best particulars the Applicants are able to provide at this stage are:

- i. The particulars to paragraph 64 are repeated.
  - ii. Further particulars may be provided following discovery and expert evidence.
- 72 In the alternative to paragraph 71 above, WLISL knew of the circumstances that would have indicated to an honest and reasonable person:

- (a) the material facts referred to in sub-paragraph 71(a) above;

### Particulars

The particulars at sub-paragraph 71(a) above are repeated.

- (b) the material facts referred to in sub-paragraph 71(b) above;

### Particulars

The particulars at sub-paragraph 71(b) above are repeated.

73 WLISL received the Overcharge during the Relevant Period.

74 By reason of the matters pleaded in paragraphs 71 to 73 above, WLISL is liable to pay equitable compensation to the Applicants and each of the Group Members.

75 Further or in the alternative, by reason of the matters pleaded in paragraphs 69 to 71 above, WLISL is liable to account for and pay to the Applicants and each of the Group Members:

- (a) the Overcharge;
- (b) all benefits, profits and gains made or derived by WLISL from the Group Insurance Contracts.

**I Loss or Damage (statutory claims)**

76 Had BTFM and WSAL complied with some or all of the covenants in ss 52(2)(b), 52(2)(c), 52(2)(d) and 52(7)(a), 52(7)(b) and 52(7)(c) of the SIS Act in making and implementing each of the Group Insurance Decisions, BTFM and WSAL would not have:

- (a) continued to obtain from WLISL group insurance at premiums which included the Overcharge;
- (b) continued to charge the members of the funds premiums which included the Overcharge; and
- (c) continued to deduct from the accounts of the members of the funds premiums which included the Overcharge.

77 The Applicants and each of the Group Members suffered loss or damage as a result of the some or all of contraventions pleaded in Part F above.

**Particulars**

- i. The above contraventions caused a reduction in the amount which the Applicants and the Group Members have received from the funds.
- ii. The above contraventions have caused, and continue to cause, a reduction in the amount which the Applicants and the Group Members can expect to receive from the funds.
- iii. The above contraventions have caused an erosion of the retirement income of the Applicants and the Group Members.
- iv. By reason of the matters pleaded in paragraphs 76 to 77 above, each of BTFM and WSAL is liable to compensate the Applicants and each of the Group Members for that loss or damage.

**J Relief Claimed**

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

Date: 19 January 2024



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Signed by Craig Allsopp  
Lawyer for the Applicant

This pleading was prepared by Eliza Forsyth and Thomas Bagley and settled by Nicholas Owens SC

**Certificate of lawyer**

I Craig Allsopp 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: 19 January 2024



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Signed by Craig Allsopp  
Lawyer for the Applicant