

GARLING J

19.6.15



Filed 13 May 2015 2 07 PM



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Form 3A/B  
Rule 6 2

### AMENDED STATEMENT OF CLAIM

#### COURT DETAILS

Court	Supreme Court of NSW
Division	Common Law
List	Common Law General
Registry	Supreme Court Sydney
Case number	2014/00335469

#### FILING DETAILS

Filed for	Plaintiff[s]
Legal representative	David Thomas Newey
Legal representative reference	
Telephone	02 93941144
Your reference	141640

#### ATTACHMENT DETAILS

In accordance with Part 3 of the UCPR, this coversheet confirms that both the Amended Statement of Claim (e-Services), along with any other documents listed below, were filed by the Court

Amended Statement of Claim (S0929135 PDF)

[attach ]

Form 3A (version 4)  
UCPR 6.2

**AMENDED STATEMENT OF CLAIM**

*(filed pursuant to Order of the Court made 24 April 2015)*

**COURT DETAILS**

Court	Supreme Court of New South Wales
Division	Common Law
List	General (Representative Proceedings)
Registry	Sydney
Case number	2014/335469

**TITLE OF PROCEEDINGS**

First Plaintiff	<b>Julian Fewtrell</b>
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Number of Plaintiffs	<b>4</b>
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Defendant	<b>Westpac Banking Corporation</b> <b>ACN 007 457 141</b>
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**FILING DETAILS**

Filed for	<b>Julian Fewtrell, Neil Younger, Ed Box, Darren Whereat, plaintiffs</b>
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Legal representative	David Thomas Newey Gillis Delaney Lawyers Level 40, ANZ Tower 161 Castlereagh Street Sydney NSW 2000 DX 179 SYDNEY Ph: 02 9394 1144 Fax: 02 9394 1100
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Legal representative reference	141640
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Contact name and telephone	Michael Gillis, 02 9394 1188
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**TYPE OF CLAIM**

Contract

**These proceedings are listed for an initial case conference at 9.00 a.m. on the Wednesday after the expiration of 42 days following the filing of this Statement of Claim.**

**RELIEF CLAIMED**

- 1 A Declaration that on its proper construction:
  - a. the expression "*Earnings Per Share for the 2007/08 financial year*" in the "First Retention Incentive Condition" referred to the 2008 "EPS Target", and in particular to the "Revised 2008 EPS Target" (each as defined in the Amended Statement of Claim); and
  - b. the First Retention Incentive Condition was satisfied by no later than 29 October 2008;
- 2 Judgment in the amount of the Retention Incentive;
- 3 Alternatively to 2, damages;
- 4 Interest pursuant to section 101 (2) of the *Civil Procedure Act 2005* from 13 November 2008 on the amount of the Retention Incentive, to date and continuing;
- 5 Costs;
- 6 Interest on costs;
- 7 Such further or other orders as the Court thinks fit.

## PLEADINGS AND PARTICULARS

### I INTRODUCTION

#### ***Plaintiff and Group Members***

1. This proceeding is commenced in the Common Law Division of the Court as a representative proceeding pursuant to Part 10 of the *Civil Procedure Act 2005* (NSW) by the Plaintiffs on their own behalf and on behalf of other persons (***Group Members***):
  - (a) who were employed by St. George Bank Limited (***St George***) or a related body corporate (as defined in the *Corporations Act 2001 (Cth)*)(***Related Body Corporate***) from on or before 18 June 2008 until at least 13 November 2008;
  - (b) who received a letter from the Managing Director of St George dated 18 June 2008 entitled "Additional One Off Incentive for 2007/2008 financial year" (***Fegan Letter***);
  - (c) who have not been paid the incentive referred to in the Fegan Letter;
  - (d) who did not at any time work in what was known as the Institutional & Business Banking Division, and prior to about 1999 the Treasury & Capital Markets Division, of St George (being those persons described in cl 1(c) of the Deed dated 11 May 2011 between *inter alia* Westpac and Gillis Delaney Lawyers (***Deed***)); and
  - (e) whose employment was not terminated by the Defendant (***Westpac***) (being those persons described in cl 1(d) of the Deed, ~~as properly construed~~ in accordance with *Newey v Westpac Banking Corporation* [2011] NSWCA 319); and
  - (f) who have not, as at the date of commencement of these proceedings, commenced proceedings against St George or Westpac in respect of the non-payment of the incentive referred to in the Fegan Letter.
2. As at the date of the commencement of this proceeding, seven or more Group Members have claims against Westpac.

### **St George**

3. St George or a Related Body Corporate was at all material times:
  - (a) a company duly incorporated pursuant to the *Corporations Act 2001* (Cth) (***Corporations Act***);
  - (b) the employer of the Plaintiffs;
  - (c) the employer of each of the Group Members.
  
6. At all material times Paul Fegan (***Fegan***) was the Managing Director and Chief Executive Officer of St George, and an authorised servant or agent of St George.
  
- 6A. At all material times Fegan was an authorised servant or agent of each Related Body Corporate.
  
7. At all material times, the financial year for St George commenced on 1 October and ended on 30 September of the following year (***Financial Year***).
  
- 8A. At all material times, St George was the holding company (as defined in the *Corporations Act 2001* (Cth)) of:
  - fa] Asgard Wealth Solutions Limited ACN 009 143 597; and
  - fb] Advanced Leasing Limited ACN 063 369 488.
  
8. At all material times prior to 17 November 2008, St George was:
  - (a) a corporation included in the official list of the financial market operated by Australian Securities Exchange (***ASX***) and whose securities are ED securities for the purposes of section 111AE of the Corporations Act;
  - (b) a listed disclosing entity within the meaning of section 111 AL(1) of the Corporations Act;
  - (c) subject to and bound by the Listing Rules of the ASX (***Listing Rules***); and
  - (d) obliged by s 674(2) of the Corporations Act and the Listing Rules to ensure that any disclosure made by it to the ASX was truthful.

**Westpac**

9. Westpac is:
- (a) a company duly incorporated pursuant to the Corporations Act; and
  - (b) able to sue and be sued in and by its corporate name and style.
10. On 1 March 2010, Westpac became the successor in law of St George in respect of all the assets and liabilities of St George:
- (a) pursuant to s 22 of the *Financial Sector (Business Transfer & Group Restructure) Act 1999* (Cth) and a Certificate of Transfer issued by the Australian Prudential Regulation Authority under section 18 of that Act; and
  - (b) orders made by the Federal Court of Australia under s 413(1)(c) of the Corporations Act (*Westpac Banking Corporation (ACN 007 457 141), in the matter of St George Bank Limited (ACN 055 513 070)* [2010] FCA 148).

**II ST GEORGE'S EPS TARGET**

11. By reason of the matters pleaded in paragraph 8, and Listing Rule 4.3A, St George was obliged to file with the ASX each year, not later than two months after the end of the Financial Year, a Preliminary Final Report (Appendix 4E) which disclosed, *inter alia*, St George's earnings per security (**EPS**) for the Financial Year.
12. At all material times in the 2008 Financial Year, by reason of the matters pleaded in paragraph 8 and Listing Rule 3.1, St George from time to time disclosed to the ASX and/or to the public an EPS growth target for the Financial Year (being expressed in percentage terms as a percentage increase of the EPS reported by St George for the previous Financial Year in accordance with paragraph 11) (**EPS Target**).

Particulars

*News Release dated 31 October 2007, pages 3, 5.*

*News Release dated 31 March 2008, page 4.*

*2008 Interim Results presentation released to ASX on 6 May 2008, pages 4 (slide 7), 32 (slide 63).*

*News Release dated 12 August 2008.*

*2008 Final Results released to ASX on 29 October 2008, Slides 5, 13.*

13. In or about 31 October 2007, St George announced to the ASX and/or the public an EPS Target for the 2008 Financial Year of 10 per cent (***the Original 2008 EPS Target***).

Particulars

*News Release dated 31 October 2007, pages 3, 5.*

14. On or about 6 May 2008, St George announced to the ASX and/or the public that it had revised its EPS Target for the 2008 Financial Year to a range of 8 to 10 per cent (***the Revised 2008 EPS Target***).

Particulars

*Appendix 4D Profit Announcement released 6 May 2008.*

15. At no time following 6 May 2008 and up to 18 June 2008 did St George announce to the ASX and/or the public any variation to the Revised 2008 EPS Target.

### III CONTRACTUAL TERMS

***Employment Contract***

16. On a date before 18 June 2008, the Plaintiffs and each of the Group Members entered into an agreement whereby the Plaintiffs and each of the Group Members, respectively, was employed by St George or a Related Body Corporate (***the Employment Contract***).

Particulars

*In respect of each of the Group Members, particulars of the date of the Employment Contract will be provided following discovery.*

*Express terms*

17. Insofar as the terms of the Employment Contract were express, they were partly in writing, such writing including:
- (a) a document entitled Service Agreement, or Letter of Offer, or Employment

Agreement;

- (b) a Fegan Letter; and
- (c) correspondence between St-George their employer and the Plaintiffs and each Group Member in or about November of each year of employment in relation to remuneration.

Particulars

*In respect of the each of the Group Members, particulars of the documents will be provided following discovery.*

18. By reason of the Fegan Letter, the Employment Contract of the Plaintiffs (and each Group Member respectively) contained an express term (***the Retention Incentive Term***) to the effect that the Plaintiffs (and each Group Member respectively) would be paid on 13 November 2008 an additional cash incentive payment (***the Retention Incentive***), provided that:
- (a) St George met its "*Earnings per Share Target for the 2007/08 financial year*" (***First Retention Incentive Condition***),
  - (b) the Plaintiffs (or each Group member respectively) remained in the employ of St George or a Related Body Corporate as at 13 November 2008 (***Second Retention Incentive Condition***), and
  - (c) the Plaintiff's performance (or each Group Member's performance respectively) continued to be satisfactory (***Third Retention Incentive Condition***).

Particulars

*The Retention Incentive Term is in writing and is set out in the Fegan Letter.*

*In respect of the First Plaintiff, the amount of the Retention Incentive is \$50,000.00.*

*In respect of the Second Plaintiff, the amount of the Retention Incentive is \$69,000.00.*

*In respect of the Third Plaintiff, the amount of the Retention Incentive is \$38,000.00.*

*In respect of the Fourth Plaintiff, the amount of the Retention Incentive is \$37,000.00.*



*In respect of the Group Members, particulars of the Retention Incentive will be provided following the initial trial of the Plaintiff's claim.*

18A Further, and in the alternative to 18 above, by reason of the Fegan Letter, there was brought into existence a contract collateral to the Employment Contract between any Plaintiff (and Group Member) not employed by St George and St George, containing an express term to the effect of the Retention Incentive Term.

Particulars

The collateral contract was brought into existence by an offer (**the Offer**) by St George in the Fegan Letter to the effect that the Plaintiffs (and each Group Member respectively) would be paid on 13 November 2008 the Retention Incentive by St George provided that:

- (a) St George met its "Earnings per Share Target for the 2007/08 financial year";
- (b) the Plaintiffs (or each Group member respectively) remained in the employ of their employer (being a Related Body Corporate as at 13 November 2008: and
- (c) the Plaintiff's performance (or each Group Member's performance respectively) continued to be satisfactory.

The Offer was accepted by each relevant plaintiff (and Group Member) by refraining from exercising his or her right to seek alternative employment and/or otherwise terminate the Employment Contract until at least 13 November 2008.

- 19. By reason of the matters pleaded in paragraphs 12 to 15, as at the date of the Fegan Letter, St George's EPS Target for the 2008 Financial Year was the Revised 2008 EPS Target.
- 20. On its proper construction, the expression "*Earnings per Share Target for the 2007/08 financial year*" in the First Retention Incentive Condition referred to the **EPS** Target, namely the Revised 2008 EPS Target.
- 21. By reason of the matters pleaded in paragraphs 18 to 20 above, the Plaintiffs (and

each Group Member) was entitled to be paid on 13 November 2008 a Retention Incentive, provided that:

- (a) St George met the Revised 2008 EPS Target in the 2008 Financial Year, so as to fulfil the First Retention Incentive Condition;
- (b) the Plaintiffs (and each Group Member) remained in the employ of St George or a Related Body Corporate, as at 13 November 2008, so as to satisfy the Second Retention Incentive Condition; and
- (c) the Plaintiffs' performance (and each Group Member's performance) continued to be satisfactory, so as to satisfy the Third Retention Incentive Condition.

#### IV ACCRUAL OF THE RETENTION INCENTIVE

##### ***First Retention Incentive Condition satisfied***

22. On 29 October 2008, in accordance with its obligation as pleaded in paragraph 11 above, St George disclosed to the ASX its EPS for the 2008 Financial Year, being 237c per share (***the Actual 2008 EPS***).

##### Particulars

*2008 Final Results presentation released to ASX on 29 October 2008, Slide 5.*

*Appendix 4E Profit Announcement released 29 October 2008 page 11.*

23. The Actual 2008 EPS was 8.3% higher than the EPS which St George had announced for the previous Financial Year.

##### Particulars

*2008 Final Results presentation released to ASX on 29 October 2008, Slide 5*

*Appendix 4E Profit Announcement released 29 October 2008 page 12.*

24. The Actual 2008 EPS was within the range which comprised the Revised 2008 EPS Target.
25. Further, on 29 October 2008, St George announced to the ASX and to the public that

St George had achieved the Revised 2008 EPS Target.

Particulars

*2008 Final Results presentation released to ASX on 29 October 2008, Slide 13.*

26. By reason of the matters pleaded in paragraphs 22 to 25, the First Retention Incentive Condition was satisfied on or about 29 October 2008.

***Alternatively, Defendant estopped from denying the Revised 2008 EPS Target satisfies the First Retention Incentive Condition***

27. Further, or alternatively, to paragraphs 22 to 26:
- (a) at no time after 18 June 2008 did St George announce to the ASX and/or the public and/or disclose to the Plaintiffs and Group Members any variation to the Revised 2008 EPS Target;
  - (b) on or about 12 August 2008, St George announced to the ASX and/or the public that it was "*on track to meet its EPS growth target of 8-10% in 2008*".

Particulars

*News Release dated 12 August 2008, Page 1.*

- (c) on or about 12 August 2008, Fegan sent an email to the Plaintiffs and each Group Member which stated that "*We are on track to meet our Earnings Per Share (EPS) target of 8-10% in 2008, which is very positive.*"

Particulars

*Email from Fegan to the Plaintiff and each Group Member dated 12 August 2008.*

28. By reason of the matters pleaded in paragraph 27, at all times between 18 June 2008 and 13 November 2008 St George:
- (a) represented to the Plaintiffs and Group Members that the Revised 2008 EPS Target was the "*Earnings per Share Target for the 2007/08 financial year*" for the purposes of the First Retention Incentive Condition (***EPS Representation***)]and/or
  - (b) conducted its affairs with the Plaintiffs and Group Members on the basis that the Revised 2008 EPS Target was the "*Earnings per Share Target for the 2007/08 financial year*" for the purposes of the First Retention Incentive

Condition (**EPS Conduct**).

Particulars

*The EPS Representation was partly express and partly implied. To the extent it was express, paragraph 27(b)-(c) are repeated. To the extent it was implied, paragraph 27(a) is repeated in combination with the absence of any correction or qualification to the express statements pleaded in paragraph 27(b)-(c), in circumstances where St George was subject to the obligations pleaded in paragraph 8(c)-(d).*

*The EPS Conduct comprised the matters pleaded in paragraph 27, together with the failure by St George to disclose to the Plaintiffs and Group Members in the course of their employment that the "Earnings per Share Target -for the 2007/08 financial year"for the purposes of the First Retention Incentive Condition was anything other than the -Revised 2008 EPS Target.*

29. The Plaintiffs and Group Members:

- (a) relied upon the EPS Representation; and/or
- (b) conducted affairs with St George on the basis of the EPS Conduct.

Particulars

*The Plaintiffs remained in employment with St George or a Related Body Corporate until 13 November 2008 and did not inquire of St George whether the "Earnings per Share Target for the 2007/08 financial year" was anything other than the Revised 2008 EPS Target.*

*Particulars of reliance by Group Members will be provided following the initial trial of the Plaintiffs' claims.*

30. By reason of the matters pleaded in paragraphs 27 to 29, the Defendant is estopped from denying that the Revised 2008 EPS Target was the "Earnings per Share Target for the 2007/08 financial year" for the purposes of the First Retention Incentive Condition.

Particulars

*The estoppel is an estoppel by representation and/or by convention.*

**Second Retention Incentive Condition satisfied**

31. The Plaintiffs and each Group Member remained employed by St George or a Related Body Corporate on 13 November 2008.

32. By reason of the matters pleaded in paragraph 31, the Second Retention Incentive Condition was satisfied by the Plaintiffs and each Group Member.

***Third Retention Incentive Condition satisfied***

33. The Plaintiffs' and each Group Member's performance continued to be satisfactory between 18 June 2008 and 13 November 2008.

Particulars

*The Plaintiffs rely upon the absence of any statement by St George or a Related Body Corporate to them that their performance was not satisfactory.*

*In respect of the Group Members, particulars will be provided following the initial trial of the Plaintiffs' claims.*

34. By reason of the matters pleaded in paragraph 33, the Third Retention Incentive Condition was satisfied by the Plaintiffs and each Group Member.

**V ENTITLEMENT TO BE PAID AND NON-PAYMENT OF THE RETENTION INCENTIVE**

35. By reason of the matters pleaded in:

- (a) paragraphs 26 and/or 30;
- (b) paragraph 32; and
- (c) paragraph 34,

the Plaintiffs and each Group Member was entitled to be paid the Retention Incentive on 13 November 2008 pursuant to the Retention Incentive Term and/or the Collateral Contract.

36. St George has, at all times on and from 13 November 2008, failed and/or neglected and/or refused to pay the Retention Incentive to the Plaintiffs and Group Members.

37. By reason of the matters pleaded in paragraphs 35 to 36 above, on and from 13 November 2008 St George has breached the Retention Incentive Term and/or the Collateral Contract (**Retention Incentive Term Breach**).

38. As a result of the Retention Incentive Term Breach, the Plaintiffs and each Group Member has suffered loss and damage.

Particulars

*The First Plaintiff's loss and damage is the amount of the Retention Incentive, together with interest, as follows:*

<i>Retention Incentive</i>	<i>\$50,000.00</i>
<i>Interest to date</i>	<i>\$24,179.54</i>
<i>Total</i>	<i>\$74,179.54</i>

*The Second Plaintiff's loss and damage is the amount of the Retention Incentive, together with interest, as follows:*

<i>Retention Incentive</i>	<i>\$69,000.00</i>
<i>Interest to date</i>	<i>\$33,367.77</i>
<i>Total</i>	<i>\$102,367.77</i>

*The Third Plaintiff's loss and damage is the amount of the Retention Incentive, together with interest, as follows:*

<i>Retention Incentive</i>	<i>\$38,000.00</i>
<i>Interest to date</i>	<i>\$18,376.45</i>
<i>Total</i>	<i>\$56,376.45</i>

*The Fourth Plaintiff's loss and damage is the amount of the Retention Incentive, together with interest, as follows:*

<i>Retention Incentive</i>	<i>\$37,000.00</i>
<i>Interest to date</i>	<i>\$17,892.86</i>
<i>Total</i>	<i>\$54,892.86</i>

*Full particulars of the loss and damage suffered by Group Members will be provided following the initial trial of the Plaintiffs' claims, but will be of the same character.*

39. Further, and in the alternative, by virtue of the matters pleaded in paragraph 37 above, St George became indebted, on and from 13 November 2008, to the Plaintiffs and each Group Member in the amount of the Retention Incentive (***the Debt***).

Particulars

*The Debt in respect of each of the Plaintiffs is the amount of the Retention Incentive, together with interest, as set out in the Particulars to paragraph 38.*

*Full particulars of the Debt owing to each Group Member will be provided following the initial trial of the Plaintiffs' claims, but will be of the same character.*

40. By reason of the matters pleaded in paragraphs 10 and 35 to 39, Westpac has, on and from 1 March 2010:
- (a) become liable to pay the Retention Incentive in accordance with the Retention Incentive Term;
  - (b) by reason of its non-payment of the Retention Incentive to the Plaintiffs and Group Members, been in breach of the Retention Incentive Term;
  - (c) become liable for the Retention Incentive Term Breach by St George; and/or
  - (b) been liable for the Debt.

## **VI COMMON QUESTIONS OF LAW OR FACT**

41. The questions of law or fact common to the claims of the Plaintiffs and the Group Members in this proceeding are:
- (a) Did the Employment Contract of the Plaintiffs and each Group Member include the Retention Incentive Term?
  - MI** Did the Collateral Contract include a term to the effect of the Retention Incentive Term?
  - (b) What is the proper construction of the words "*Earnings per Share Target for the 2007/08 financial year*" for the purposes of the First Retention Incentive Condition (in the Retention Incentive Term)?
  - (c) Did St George meet the Revised 2008 EPS Target in the 2008 Financial Year?

- (d) Is Westpac liable to meet any established obligation(s) of St George or a Related Body Corporate to pay the Retention Incentive?

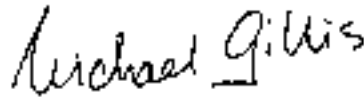


**SIGNATURE OF LEGAL REPRESENTATIVE**

I certify under section 347 of the Legal Profession Act 2004 that there are reasonable grounds for believing on the basis of provable facts and a reasonably arguable view of the law that the claim for damages in these proceedings has reasonable prospects of success.

I have advised the plaintiff(s) that court fees may be payable during these proceedings. These fees may include a hearing allocation fee.

Signature



Capacity

Solicitor for the plaintiffs, by his partner M. J. Gillis

Date of signature

~~13-November-2014~~ 13 May 2015

## NOTICE TO DEFENDANT

You will be in default if you do not file a defence within 28 days of being served with this statement of claim. The court may enter judgment against you without any further notice to you. The judgment may be for the relief claimed in the statement of claim and for the plaintiffs costs of bringing these proceedings. The court may provide third parties with details of any default judgment entered against you.

## HOW TO RESPOND

**Please read this statement of claim very carefully. If you have any trouble understanding it or require assistance on how to respond to the claim you should get legal advice as soon as possible.**

You can respond in one of the following ways:

1. **If you intend to dispute the claim**, by filing a defence and/or making a cross-claim.
2. **If money is claimed, and you believe you owe the money claimed**, by:
  - paying the plaintiff all of the money and interest claimed. If you file a notice of payment under UCPR 6.17 further proceedings against you will be stayed unless the court otherwise orders;
  - filing an acknowledgement of the claim; or
  - applying to the court for further time to pay the claim.
3. **If money is claimed, and you believe you owe part of the money claimed**, by:
  - paying the plaintiff that part of the money that is claimed; or
  - filing a defence in relation to the part that you do not believe is owed.

You can get further information about what you need to do to respond to the claim from:

- the court registry for limited procedural information;
- a legal practitioner; or
- LawAccess NSW on 1300 888 529 or at .

Court forms are available on the UCPR website at [www.ucpr.nsw.gov.au](#) or at any NSW court registry.

## REGISTRY ADDRESS

Street address	Supreme Court, Queens Square, Level 5, 184 Phillip Street, Sydney NSW 2000
Postal address	PO Box 3, Sydney NSW 2001
Telephone	02 9230 8111

**FURTHER DETAILS ABOUT PLAINTIFFS****First Plaintiff**

Name Julian Fewtrell  
 Address 11 Pindari Avenue  
 St Ives NSW 2075

**Second Plaintiff**

Name Neil Younger  
 Address 13 Yiremba Place  
 Forestville NSW 2075

**Third Plaintiff**

Name Ed Box  
 Address 7 Creek Street  
 Forest Lodge NSW 2037

**Fourth Plaintiff**

Name Darren Whereat  
 Address 31 Bilberry Avenue  
 Bilgola Plateau NSW 2107

**Legal representative for plaintiffs**

Name David Thomas Newey  
 Practising certificate number 9399  
 Firm Gillis Delaney Lawyers  
 Contact solicitor Michael Gillis  
 Address Level 40  
 161 Castlereagh Street  
 SYDNEY NSW 2000  
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 Electronic service address N/A  
 {DEC\S0923832:1}

**DETAILS ABOUT DEFENDANT**

**Defendant**

Name	Westpac Banking Corporation
Address	275 Kent Street Sydney NSW 2000 Australia