

# Westpac Banking Corporation - Submissions on Rubric 3-12 Case Study

Royal Commission into Misconduct in the  
Banking, Superannuation and Financial  
Services Industry

8 June 2018

## **INTRODUCTION**

- 1 These submissions set out the findings that Westpac Banking Corporation (**Westpac**) submits should be made by the Commission on the matters identified in Counsel Assisting's closing submissions in relation to the Westpac case study addressed as part of the Commission's consideration of guarantees from third parties in the context of small business lending.<sup>1</sup>
- 2 The case study concerns the guarantee provided in 2010 by Carolyn Flanagan to Westpac to support a loan to a company (**Borrower**) for a Poolwerx franchise for three marketing areas to be operated by Ms Flanagan's daughter (**Daughter**) and her partner (**Daughter's Partner**). Westpac accepts that there were issues in its dealings with Ms Flanagan, and that it should have acted more quickly in relation to her hardship request. Westpac also acknowledges that the enforcement of guarantees can have serious potential consequences for the guarantor, and that Ms Flanagan has been seriously impacted by her provision of a guarantee in relation to her daughter's loan. The risk of these issues is taken into account in Westpac's policies in relation to accepting guarantees from family members. In the case of Ms Flanagan, Westpac does not, however, consider that it was inappropriate (or unconscionable) to accept and rely on a guarantee from Ms Flanagan.
- 3 These submissions are structured as follows:
  - a. Part A summarises Westpac's position in respect of the issues raised in this case study;
  - b. Part B addresses Counsel Assisting's proposed findings about Westpac's conduct in respect of Ms Flanagan; and
  - c. the Annexure sets out the factual findings that Westpac submits the Commission should make with respect to this case study.
- 4 The general questions raised by Counsel Assisting in relation to guarantees from third parties are dealt with separately in Westpac's general submissions.

### **A. SUMMARY OF WESTPAC'S POSITION**

- 5 In summary, Westpac submits that it was appropriate in all of the circumstances to accept and rely upon the guarantee from Ms Flanagan.
- 6 From the time her Daughter first asked her to be a guarantor, Ms Flanagan clearly understood the effect of a guarantee and the consequence for her if the Borrower defaulted. While Ms Flanagan had significant physical health problems in and before 2010, which worsened thereafter, there was no evidence or indication that those physical difficulties affected her ability to make a fully informed decision as to whether she should support her daughter and give the guarantee (supported by the mortgage).
- 7 Westpac recognised the importance of Ms Flanagan understanding the purport and effect of the transaction she was entering into and, to that end, receiving independent legal advice. Consistent with its policies and practices, Westpac made it a condition of accepting the guarantee that Ms Flanagan obtain such advice. Ms Flanagan gave evidence to the Commission that the guarantee

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<sup>1</sup> Commencing at Transcript 1 June 2018 (Counsel Assisting), T3037:40.

was read out to her when she came into the branch on 8 December 2010. The guarantee contained a warning on its cover page about its effect. Ms Flanagan received independent legal advice on or around 10 December 2010 from a solicitor with (at the time) 25 years' experience (**Solicitor**) before signing the guarantee and mortgage in the Solicitor's presence.

- 8 In those circumstances, it was appropriate for Westpac to accept a guarantee from Ms Flanagan. Because of the guarantee, Westpac agreed to make the loan, thereby enabling Ms Flanagan to help her Daughter to obtain a loan which would not otherwise have been possible. Ms Flanagan wanted to help her Daughter in this way. On the basis that Ms Flanagan understood the nature of the arrangement and its potential effect, which she plainly did, Ms Flanagan was entitled to use her home as security to help her Daughter. As there was no evidence or suggestion that Ms Flanagan did not have the mental capacity to understand her actions, and having taken appropriate steps to ensure Ms Flanagan understood the effect of, and received independent advice about, the guarantee, it was not for Westpac to prevent Ms Flanagan doing what she wanted to do.
- 9 As explained below, the professional rules governing solicitors who provided guarantors with advice in NSW at the time (rule 45 of the *Revised Professional Conduct and Practice Rules 1995 (Solicitors' Rules)*)<sup>2</sup> made clear what advice a solicitor should provide. The form of the declaration given by Ms Flanagan, and relied upon by Westpac, was in the form required by Rule 45. There is no basis to conclude that the fact that the 'form of acknowledgement' was completed by the business banker meant that the Solicitor did not give the advice that he was required to give to fulfil his professional obligations. Nevertheless, Westpac accepts that it would not have been appropriate for the business banker who assisted with the loan to "pre-fill" parts of the documents, if that is what occurred. It was and is not Westpac's policy to allow the pre-filling of documents by its employees in this way. However, this did not, as Counsel Assisting submitted, "compromise... the process"<sup>3</sup> for the provision of independent legal advice to Ms Flanagan.
- 10 Westpac recognises that it should have acted faster to address Ms Flanagan's request for, in effect, a 'life interest' when she made her complaint to the Financial Ombudsman Service (**FOS**) in 2014. Westpac was focussed on addressing the substance of the complaint and the FOS process itself, rather than determining what the appropriate outcome was for Ms Flanagan in the circumstances.
- 11 The provision of guarantees by family members facilitates small business lending. As Bryson J said in *Burt v ANZ Banking Group Ltd*:<sup>4</sup>

*Giving a guarantee to a bank to support credit extended to a close relative is a common transaction in the enjoyment of economic liberty, and many people would be greatly disadvantaged if they were not left in their liberty to employ the credit flowing from owning property for the benefit of themselves or of others.*
- 12 The position of guarantors has been the subject of considerable case law, and the existing general and statutory law provides appropriate protections for family members who assist their

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<sup>2</sup> Currently, rule 11 of the *Legal Practice (Solicitors) Rules 2015*.

<sup>3</sup> Transcript 1 June 2018 (Hodge QC), T3038:10.

<sup>4</sup> (1994) ATPR (Digest) 46-123 at 53,597.

relatives by providing guarantees. Pursuant to Westpac's policies, it will only take a guarantee from a third party if they have received independent legal advice and provided written evidence of this (unless they are a 'Category A' guarantor<sup>5</sup> or decline receipt of such advice and a Credit Officer waives this requirement).<sup>6</sup> This is the most important step in ensuring that guarantors are fully informed of the risks of providing a guarantee, and is required by Westpac's policies and practices. This ensures that potential guarantors have the information they need to make their own decision as to whether they should become a guarantor, fully aware of their potential liability from doing so. Westpac submits that it is not necessary to legislate or otherwise prescribe any additional steps.<sup>7</sup>

## **B. PROPOSED FINDINGS IN RELATION TO THE FLANAGAN CASE STUDY**

13 Counsel Assisting identified the following findings as potentially open on the case study:

- a. no reasonable person could have been satisfied that Ms Flanagan had any meaningful direct or indirect interest in the business;<sup>8</sup>
- b. Westpac may have contravened s 12CB of the *Australian Securities and Investments Commission Act 2001 (Cth) (ASIC Act)* by accepting and relying upon a guarantee from Ms Flanagan, or may have (otherwise) engaged in unconscionable conduct;<sup>9</sup> and
- c. Westpac engaged in conduct falling below community standards and expectations in:
  - i. accepting and relying on the guarantee;<sup>10</sup>
  - ii. not responding to Ms Flanagan's request for a 'life interest' in a timely and reasonable way;<sup>11</sup> and
  - iii. its continued insistence that its behaviour in taking the guarantee was acceptable.<sup>12</sup>

14 Westpac's response to these proposed findings is addressed in turn below.

### **B1. Ms Flanagan's direct or indirect interest in the business**

Whether a reasonable person could have been satisfied that Ms Flanagan had any meaningful direct or indirect interest in the business.<sup>13</sup>

15 On the evidence available, Ms Flanagan had a clear and tangible interest in the business which was the subject of the loan.

16 On 21 October 2010, and before drawdown of the loan, Ms Flanagan was issued one of two shares in the Borrower. From that time, Ms Flanagan was a 50% shareholder.<sup>14</sup> Accordingly, while there could be no certainty of dividends or profits from the business as a going concern or

<sup>5</sup> As explained in Ex 3.10 Witness Statement of Welsh [WBC.900.001.0475] (**Welsh Statement**): [57]-[58].

<sup>6</sup> Welsh Statement: [59].

<sup>7</sup> This issue is further addressed in Westpac's general submissions on the topic of guarantees.

<sup>88</sup> Transcript 1 June 2018 (Hodge QC), T3039:5.

<sup>9</sup> Transcript 1 June 2018 (Hodge QC), T3039:7-10.

<sup>10</sup> Transcript 1 June 2018 (Hodge QC), T3039:23-24.

<sup>11</sup> Transcript 1 June 2018 (Hodge QC), T3039:25-27.

<sup>12</sup> Transcript 1 June 2018 (Hodge QC), T3039:28-29.

<sup>13</sup> Transcript 1 June 2018 (Hodge QC), T3039:2-5.

<sup>14</sup> Ex 3.10.12 AW4-12 [WBC.107.005.0241] (Company Extract dated 17 April 2018).

on sale, Ms Flanagan was nevertheless entitled to participate in such dividends or profits as existed. Moreover, if the business was ever sold, Ms Flanagan would have been entitled to 50% of the proceeds of that sale. The fact that it was a \$1 share, as is commonly the case in small business companies, tells nothing of its value in terms of potential profit or equity in the business.

- 17 There is no legal requirement that a guarantor must have a “*meaningful direct or indirect interest in the business*”.<sup>15</sup> The requirement for a ‘benefit’ is an element of Westpac’s policy and applied only in relation to certain guarantors – that is, persons other than directors / shareholders, spouses or (for consumer loans only) parents.<sup>16</sup>

## **B2. Whether accepting the guarantee was unconscionable conduct**

Whether Westpac contravened s 12CB of the ASIC Act or engaged in unconscionable conduct by accepting and relying upon a guarantee from Ms Flanagan.<sup>17</sup>

### *Relevant principles*

- 18 For the reasons set out below, Westpac submits that it did not engage in unconscionable conduct under s 12CB of the ASIC Act, as referenced by Counsel Assisting,<sup>18</sup> or s 12CC as it then was, or otherwise.
- 19 A different version of the ASIC Act was in force in 2010 (**2010 ASIC Act**),<sup>19</sup> being the relevant period for this case study. At that time, s 12CC of the 2010 ASIC Act was the provision relevant to unconscionable conduct in business transactions (as opposed to the current s 12CB).<sup>20</sup>
- 20 Section 12CC(1) of the 2010 ASIC Act provided that a person must not, in trade or commerce, in connection with the supply or possible supply to, or acquisition or possible acquisition from, a person (other than a listed public company) of financial services engage in conduct that is, in all the circumstances, unconscionable.
- 21 Regard must not be had to any circumstances which were not reasonably foreseeable at the time of the alleged contravention: s 12CC(5)(a). Subsections (2) and (3) identified certain matters that the Court may have regard to for the purpose of considering whether s 12CC(1) has been contravened, which included the relative strengths of the bargaining positions of the parties, whether conditions were imposed which were not reasonably necessary, whether the person was able to understand the documents and whether the parties acted in good faith.
- 22 In considering whether s 12CC(1) and other statutory norms of conduct with respect to unconscionability are contravened, the Court’s task is to evaluate the facts by reference to a normative standard of conscience, this being a standard permeated with accepted and acceptable community values as to proper business practices and the content of which values are illuminated

<sup>15</sup> See e.g. the comments made by Pembroke J in *Williams v Commonwealth Bank of Australia* [2013] NSWSC 335 discussed at paragraph [40] below.

<sup>16</sup> Ex 3.10 Witness Statement of Welsh [WBC.900.001.0475]: [52]-[53]; Ex 3.10 AW4-5 [WBC.410.001.0215].

<sup>17</sup> Transcript 1 June 2018 (Hodge QC), T3039:7-10.

<sup>18</sup> Transcript 1 June 2018 (Hodge QC), T3039:7-10. Transcript, 1 June 2018, T3039:7.

<sup>19</sup> Taking into account amendments up to Act No. 103 of 2010.

<sup>20</sup> However, the meanings and effect of the former s 12CC and current s 12CB are relevantly the same.

by the requirements of the relevant statute.<sup>21</sup> An element of hardship or unfairness in the terms of a transaction or in the manner of its performance is insufficient, in itself, to interfere with a contract on grounds of unconscionability.<sup>22</sup> One of the community values against which conduct is to be measured is “*faithfulness or fidelity to a bargain freely and fairly made [which] should be seen as a central aspect of legal policy and commercial law*”.<sup>23</sup>

23 At general law, equitable principles enable a court to set aside a transaction where one person, by reason of some condition or circumstance, is placed at a special disadvantage vis-à-vis another and unfair or unconscientious advantage is then taken of the opportunity thereby created.<sup>24</sup> The special disadvantage or disability must be one which seriously affects the ability of the person to make a judgement as to his or her own best interests.<sup>25</sup>

### *Application in this case study*

24 The supply of the guarantee and mortgage by Westpac to Ms Flanagan was the issuing of a financial product and thus constituted the supply and acquisition of financial services, which occurred in trade or commerce.<sup>26</sup> Accordingly, the only relevant question under the statute is whether Westpac’s conduct was “*in all the circumstances, unconscionable*”. The relevant question at general law is whether Ms Flanagan was under a special disadvantage of which Westpac took unconscientious advantage.

25 One of the difficulties in assessing that question is that the Commission has only received evidence from Ms Flanagan, whose memory of 2010 is very poor.<sup>27</sup> The Commission has not received evidence from other relevant persons, including the Solicitor who advised Ms Flanagan, her Daughter, her Daughter’s Partner, and the business banker who met Ms Flanagan (who is no longer an employee of Westpac).

26 Notwithstanding the limits of the evidence available to the Commission, it is nevertheless clear that Westpac did not engage in unconscionable conduct, and that Ms Flanagan was neither under a special disadvantage nor unconscientiously taken advantage of by Westpac, for at least three reasons.

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<sup>21</sup> *Australian Competition and Consumer Commission v Lux Distributors Pty Ltd* [2013] FCAFC 90 at [23] per Allsop CJ, Jacobson and Gordon JJ; *Commonwealth Bank of Australia v Kojic* (2016) 249 FCR 421 at [54]–[59] per Allsop CJ, Besanko J agreeing at [69] and Edelman J agreeing at [85]; *Colin R Price & Associates Pty Ltd v Four Oaks Pty Ltd* (2017) 251 FCR 404 at [56] per Rares, Murphy and Davies JJ.

<sup>22</sup> *Tanwar Enterprises Pty Ltd v Cauchi* (2003) 217 CLR 315 at [26] per Gleeson CJ, McHugh, Gummow, Hayne and Heydon JJ.

<sup>23</sup> *Paciocco v Australia and New Zealand Banking Group Limited* (2015) 236 FCR 199 at [297] per Allsop CJ (Besanko J agreeing at [371] and Middleton J agreeing at [398]).

<sup>24</sup> *Commercial Bank of Australia Limited v Amadio* (1983) 151 CLR 447 at 462 per Mason J.

<sup>25</sup> *Commercial Bank of Australia Limited v Amadio* (1983) 151 CLR 447 at 462 per Mason J; *Australian Competition and Consumer Commission v C G Berbatis Holdings Pty Limited* (2003) 214 CLR 51 at [12] per Gleeson CJ, [55] per Gummow and Hayne JJ; *Thorne v Kennedy* (2017) 91 ALJR 1260 at [38] per Kiefel CJ, Bell, Gageler, Keane and Edelman JJ.

<sup>26</sup> Section 5(1) and s 12BA(1) of the ASIC Act relevantly provide that “*financial service*” has the meaning given by s 12BAB, which provides in para (1)(b) that a person provides a financial service if they deal in a financial product. For the purposes of s 12BAB(1)(b), s 12BAB(7)(b) defines dealing in a financial product to include “*issuing*” a financial product. The definitions of “*financial product*” in s 5(1) and s 12BA(1) of the ASIC Act refer to s 12BAA. The relevant element of the definition in that section is s 12BAA(7)(k) which speaks of “*a credit facility (within the meaning of the regulations)*”. The amendments by which this provision and others were included in the ASIC Act renders earlier decisions such as *Permanent Trustee Australia Limited v Saitannis* [2002] NSWSC 1209 and *Manso v David* [2003] NSWSC 905 irrelevant insofar as they held that a loan and mortgage were not financial products under the ASIC Act. Regulation 2B of the *ASIC Regulations 2001* provides an extensive definition of what is a “*credit facility*” for the purposes of s 12BAA(7)(k) and includes the provision of a mortgage that secures obligations under a credit contract and related guarantees.

<sup>27</sup> Transcript 21 May 2018 (Flanagan), T2049:45-47.

- 27 First, Ms Flanagan gave clear evidence that she understood the purport and effect of the guarantee and mortgage. There is no evidence that Ms Flanagan was under a special disadvantage or disability at any time that prevented her from understanding what she was doing. She knew she was putting up her house as security, in circumstances where her Daughter and the Daughter's Partner did not have sufficient assets of their own.<sup>28</sup> She knew that if the loan was not repaid then Westpac could seek to recover the amount of the loan from her,<sup>29</sup> including by selling her home.<sup>30</sup>
- 28 Accordingly, from the time her Daughter first asked her to provide the guarantee to Westpac, Ms Flanagan knew the effect and consequences of doing so and could, and did, make a fully informed decision to do so with full awareness of the risks involved. It is significant that Ms Flanagan had this understanding even before she met with the business banker or obtained independent legal advice. While Ms Flanagan had experienced significant health issues before 2010, there was no evidence or suggestion that those physical difficulties affected her mental capacity or understanding of what she was doing. Even during her evidence, despite her health problems, she clearly understood the questions, the transaction itself and articulated how she wanted to help her Daughter. There is no reason to believe that she would have presented any differently to both the business banker and the Solicitor at the time the guarantee was given.
- 29 Second, Ms Flanagan recalled during her oral evidence that the guarantee documents were read to her when she came into the Westpac branch on 8 December 2010.<sup>31</sup> The guarantee included a warning, on its cover page, which explained in plain language the risk created by signing it and, on page 3, the amount guaranteed. Accordingly, to the extent that she was unable to read the documents herself, this disadvantage was overcome. Ms Flanagan was used to having documents read to her.<sup>32</sup> While Ms Flanagan initially said in her statement that she did not know the amount of the loan or how much she would owe under the guarantee,<sup>33</sup> and then said in oral evidence to the Commission that she thought the loan was for \$50,000,<sup>34</sup> she subsequently accepted that she did not really remember.<sup>35</sup> The interview checklist records that Ms Flanagan had explained to her all of the matters recorded in the interview checklist completed by the business banker.<sup>36</sup>
- 30 Third, Ms Flanagan received independent legal advice. Despite Ms Flanagan's statutory declaration in 2014 asserting that she did not get such advice, both FOS in its determination<sup>37</sup> and Counsel Assisting in closing submissions<sup>38</sup> accepted (on the basis of the documentary evidence and the evidence of Ms Beiglari that she obtained the file from the Solicitor) that this advice was provided. This was a requirement of Westpac's policies and a specific condition precedent of the loan. The provision of this advice distinguishes Ms Flanagan's case from other

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<sup>28</sup> Transcript 21 May 2018 (Flanagan), T2048:29-34.

<sup>29</sup> Transcript 21 May 2018 (Flanagan), T2048:41-42.

<sup>30</sup> Transcript 21 May 2018 (Flanagan), T2048:44-45.

<sup>31</sup> Transcript 21 May 2018 (Flanagan), T2045:40 and T2046:1.

<sup>32</sup> Ex 3.6 Witness Statement of Flanagan [WIT.0001.0032.0001] (**Flanagan Statement**): [11].

<sup>33</sup> Flanagan Statement: [21].

<sup>34</sup> Transcript 21 May 2018 (Flanagan), T2044.24, T2048.27 and T2049.17.

<sup>35</sup> Transcript 21 May 2018 (Flanagan), T2050:1-2.

<sup>36</sup> Ex 3.10.30.1 AW4-30 [WBC.104.001.9141].

<sup>37</sup> Ex 3.10.64 AW4-64 [WBC.407.001.0943 at .0947-.0948].

<sup>38</sup> Transcript 1 June 2018 (Hodge QC), T3038:7-9.

cases where guarantees have been set aside as unconscionable.<sup>39</sup> In a number of recent cases, the provision of independent legal advice has been a powerful or decisive factor in Courts finding that no unconscionable conduct has occurred.<sup>40</sup>

- 31 Westpac received and relied upon a Schedule 2 declaration made by Ms Flanagan, as witnessed by the Solicitor. This document was in the form prescribed for use in NSW by the Solicitors' Rules made by the Council of the NSW Law Society pursuant to its power under s 57B of the *Legal Profession Act 1987* (NSW). The Solicitors' Rules were in force at the relevant time.
- 32 Rule 45 of the Solicitors' Rules set out the professional obligations and approved practice for solicitors advising proposed signatories, including guarantors, about loan or security documents. rule 45.4.4 provided that a solicitor must not advise a proposed signatory in the presence of any other signatory other than with fully informed consent in accordance with the principles set out by the Privy Council in *Clark Boyce v Mouat*<sup>41</sup>. Rule 45.5.1 provided that a solicitor must identify the proposed signatory by reference to a primary document.
- 33 Rule 45.6.1 of the Solicitors' Rules provided that the solicitor should advise a proposed signatory of those matters which the solicitor exercising professional skill and judgment considers appropriate. Rule 45.6.3 sets out certain matters that a solicitor should advise a guarantor of, including that:
- a. if the guarantor fails to remedy any failure by the borrower to comply with the terms of the loan, then the lender can sue the guarantor personally, take possession of the guarantor's property and, if the proceeds of sale are insufficient to cover the debt, sue the guarantor for the deficit; and
  - b. the lender can exercise its rights against the guarantor even if it has not pursued the borrower.
- 34 Rule 45.6.4 required the Solicitor to advise that they did not profess any qualification to give financial advice and, if the proposed signatory has any questions about any financial aspect of the transaction or the documents, the proposed signatory should consult an accountant or other financial counsellor of the proposed signatory's choice before signing the documents.
- 35 Rule 45.7.2 provided that any statutory declaration, in evidence of independent advice, provided by a guarantor must be in the form, relevantly, of Schedule 2. This was the form which was used by Ms Flanagan. Rule 45.7.3 provided that another solicitor, including a solicitor acting for the lender, must not aid, abet, counsel or procure any other solicitor to tender evidence other than in conformity with this rule and in the authorised form approved and published by the NSW Law Society from time to time.

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<sup>39</sup> For example, *Commercial Bank of Australia v Amadio* 1983) 151 CLR 447 and *Garcia v National Australia Bank Ltd* (1998) 194 CLR 395 were cases where no independent legal advice was provided.

<sup>40</sup> See, for example, *National Australia Bank Ltd v Wehbeh* [2014] VSC 431 (wife received independent legal advice and NAB understood this to be the case); *Bendigo Adelaide Bank Ltd v Torbay Enterprises Pty Ltd* [2014] WASC 191 (bank required independent legal advice and solicitor had guarantor sign acknowledgement of advice provided, described by Court as a "text book example of what a lender in the position of the plaintiff [bank] has to do to ensure a wife providing a guarantee is fully informed as to her potential liability"; *Greentown Bellambi Pty Ltd v Wong* [2017] NSWSC 872 (in-house counsel in husband's company provided advice to wife about a guarantee).

<sup>41</sup> [1994] 1 AC 428 at 437.



- 36 Accordingly, while the Commission has expressed concerns about the extent to which the Schedule 2 declaration discloses the substance or adequacy of the legal advice provided by the Solicitor to Ms Flanagan,<sup>42</sup> it was the prescribed form for evidencing such advice in effect at the time, pursuant to the professional rules which had the force of law. Any solicitor acting for the lender was precluded by law from requesting any departure from it. This meant that a lender, such as Westpac, was entitled to rely upon the Schedule 2 declaration as evidence of independent advice and to act on the basis that the solicitor had provided appropriate advice (as required by Rule 45.6.1) including about the matters prescribed in Rule 45.6.3. The Courts have found that lenders are entitled to rely on declarations or certificates such as these in the absence of notice of any reason to doubt their validity.<sup>43</sup>
- 37 In this case, the Solicitor who provided the advice had practised for 25 years when he gave advice to Ms Flanagan. There is no reason to think he acted other than in accordance with his professional obligations and gave full and frank advice. While the business banker filled out 'yes' to the questions posed in the form of acknowledgement in the guarantee, the guarantee was signed by Ms Flanagan at a later date with the Solicitor, and after receiving advice from the Solicitor. There is no basis on which to conclude that the conduct of the business banker had any bearing or effect on the advice the Solicitor was required by his professional obligations to give to Ms Flanagan.
- 38 In light of these circumstances, as well as the general position established by the Courts, it was not unconscionable for Westpac to accept a guarantee from Ms Flanagan and then rely upon it when the Borrower defaulted. Ms Flanagan made a fully informed decision with the benefit of independent legal advice to give the guarantee in order to facilitate lending for the benefit of her Daughter which would not otherwise have been able to occur. She was entitled, as an adult who owned her home outright, to pledge it as security to help her Daughter. Westpac was conscious of the need to ensure she made a fully informed decision and that she was aware of all the risks, and ensured she obtained independent legal advice, which she did.
- 39 There were four matters identified by Counsel Assisting as indicating unconscionable conduct in this case. For the following reasons, none reveal unconscionable conduct:
- a. Superior bargaining position: While it is accepted that Westpac would have been unlikely to depart from the standard terms of its guarantee and mortgage even if Ms Flanagan had so requested, Ms Flanagan was able to refuse to give the guarantee and mortgage if she wished to, as was outlined in the warning on the guarantee itself (which was subsequently read out). Ms Flanagan was no doubt advised by the Solicitor that she could choose not to give the guarantee if she did not want to. An inequality of bargaining power is not sufficient to give rise to a special disability in isolation.<sup>44</sup>
  - b. Personal circumstances: Ms Flanagan was on a disability pension, could not read and suffered health issues when she gave the guarantee. However, her inability to read was addressed through reading the documents out to her and was further addressed through the

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<sup>42</sup> Transcript 21 May 2018 (Beiglari), T2058:29-37.

<sup>43</sup> See, for example, *Westpac Banking Corporation v Digne* (2014) 17 BPR 33,551.

<sup>44</sup> *Australian Competition and Consumer Commission v C G Berbatis Holdings Pty Ltd* (2003) 214 CLR 51 at [11] (per Gleeson CJ).

provision of independent legal advice, as required by Westpac's policy. Ms Flanagan was aware that a consequence of giving the guarantee was that she might be called upon to repay the loan and could lose her home if the Borrower defaulted on the loan. On this basis, her personal circumstances do not give rise to a claim of unconscionable conduct.

- c. Lack of benefit: This is dealt with under B1 above and the paragraphs directly below.
- d. Employee conduct: As noted, the business banker's conduct in filling out the forms was not appropriate. It is not Westpac's policy to pre-complete such forms. Nevertheless, as already addressed, there is no reason to think that this conduct prevented the Solicitor from fulfilling his duties to his client or otherwise compromised the process in a material way.

40 As to any perceived lack of benefit, this was addressed in *Williams v Commonwealth Bank of Australia* [2013] NSWSC 335 where an elderly father gave a guarantee and mortgage in favour of CBA for the business debts of his son. Pembroke J found that the guarantor had not established a claim of unconscionability, stating that it was not enough that the father was simply elderly at the time he gave his guarantee and mortgage, nor was it enough that he obtained no personal benefit from the transaction other than the moral satisfaction to be derived from the gift of paternal benevolence to his youngest son.<sup>45</sup> Similarly to Ms Flanagan's evidence, his Honour found that there was "*no realistic prospect...that the plaintiff would reconsider his decision to support his youngest son*".<sup>46</sup>

41 The bank employees had no duty to investigate the father's motives or familial circumstances "or *the possible wider effect of the transaction on the guarantor's personal, moral or financial obligations*". However, his Honour did state that notice of such matters may provide the exception.<sup>47</sup> The bank's responsibility is to ensure the guarantor understands "*the particular nature of the transaction...and comprehends its legal effect*" and the desirability of independent legal advice, and to provide the guarantor with the opportunity to obtain such advice.<sup>48</sup>

42 Ms Flanagan's case is also very different from that considered in *Garcia v National Australia Bank Ltd* (1998) 194 CLR 395 (**Garcia**).<sup>49</sup> That case concerned a mortgage executed by a husband and wife, and a number of guarantees subsequently executed by the wife to secure debts owed by her husband's company. Applying the 'special equity' attaching to wives, as emanating from *Yerkey v Jones* (1939) 63 CLR 649, the High Court held that the enforcement of the guarantee was unconscionable because of the confluence of four factors:

- a. the wife did not understand the purport and effect of the transaction;
- b. the transaction was voluntary, in the sense that Mrs Garcia obtained no benefit from it;
- c. the bank was taken to have understood that the husband may not have fully and accurately explained the purport and effect of the transaction to his wife; and

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<sup>45</sup> [2013] NSWSC 335 at [34].

<sup>46</sup> [2013] NSWSC 335 at [22], [26], [28].

<sup>47</sup> [2013] NSWSC 335 at [35].

<sup>48</sup> [2013] NSWSC 335 at [36].

<sup>49</sup> See Transcript 1 June 2018 (Commissioner), T3038:42-44.

d. the bank nonetheless did not take steps to explain the transaction to the wife or find out that a stranger had explained it to her.<sup>50</sup>

43 Ms Flanagan's case is not analogous with the wife in *Garcia* for a number of reasons. Ms Flanagan did understand, from the very beginning, the purport and effect of the guarantee (cf. the first factor); the guarantee, including its cover page warning, were read by the business banker to Ms Flanagan (cf. the third factor); and Ms Flanagan received independent legal advice from a stranger to the bank as to the purport and effect of the transaction (cf. the third and fourth factors). This was recognised by Dixon J in *Yerkey v Jones*,<sup>51</sup> where his Honour said (at 686):

*[I]f the wife has been in receipt of the advice of a stranger whom the creditor believes on reasonable grounds to be competent, independent and disinterested, then the circumstances would need to be very exceptional before the creditor could be held bound by any equity which otherwise might arise from the husband's conduct and his wife's actual failure to understand the transaction.*

44 Further, Ms Flanagan's role as a 50% shareholder and, as she expressed it, a 'silent partner' also distinguishes her from the wife in *Garcia*. In any event the fact that a guarantor is a 'volunteer' does not, by itself, make the taking of the guarantee unconscionable, particularly where the guarantor understands what they are doing.<sup>52</sup>

45 Further, the Courts have not extended the 'special equity' from a husband/wife relationship to that of a parent/child.

46 For these reasons, the provision of independent legal advice, and the receipt of evidence of it being provided before a loan is advanced, is an important part of Westpac's policies and practices to ensure that unconscionable conduct does not occur.

### **B3. Whether accepting the guarantee was below community standards and expectations**

Whether Westpac engaged in conduct falling below community standards in accepting and relying on the guarantee.<sup>53</sup>

47 Section 12CC(1) of the 2010 ASIC Act and s 12CB(1) of the current ASIC Act, and other statutory norms of conduct relating to unconscionability, take account of accepted and acceptable community values as to proper business practices in determining whether a contravention has occurred. On the basis of the matters set out above in Part B2, it was not below community standards and expectations for Westpac to accept and rely upon Ms Flanagan's guarantee.

<sup>50</sup> At 395 per Gaudron, McHugh, Gummow and Hayne JJ.

<sup>51</sup> (1939) 63 CLR 649.

<sup>52</sup> See for example, *Williams v Commonwealth Bank of Australia* [2013] NSWSC 335, where the Court held that the lack of benefit received by an elderly guarantor of his son's debts was not sufficient to set aside the guarantee given the guarantor understood the effect of giving the guarantee and *National Australia Bank Ltd v Wehbeh* [2014] VSC 431, where the Court held that the limited benefit obtained by the wife was not an obstacle to her claim of unconscionable conduct, but what was fatal to her claim was that she did receive independent legal advice about the guarantee and NAB understood that to be the case.

<sup>53</sup> Transcript 1 June 2018 (Hodge QC), T3039:23-25.

#### **B4. Whether the response to the request for a life interest was below community standards and expectations**

Whether Westpac engaged in conduct falling below community standards in failing to respond to Ms Flanagan's request for a life interest in a timely and reasonable way.

- 48 Westpac accepts that it should have dealt with Ms Flanagan's complaint to FOS better and that this conduct may have fallen below community standards.
- 49 Ms Flanagan's FOS complaint made it clear that the outcome sought by Ms Flanagan was to negotiate a hardship arrangement that would allow her to remain in her property for the duration of her life.<sup>54</sup> Westpac should have progressed this request with greater urgency than it did, and with more understanding of, and compassion for, Ms Flanagan's situation.<sup>55</sup> The outcome ultimately reached with Ms Flanagan could and should have been reached earlier.
- 50 As to what any third party, such as an executor, is to do after Ms Flanagan's death,<sup>56</sup> this matter will be resolved by reference to the Deed of Release entered into by Ms Flanagan on 31 March 2015.<sup>57</sup> This Deed was drafted by Ms Flanagan's lawyer, Ms Beiglari.<sup>58</sup> This Deed sets out the basis on which Ms Flanagan has resolved her dispute with Westpac and releases all claims against Westpac. It is binding on any executor (cl 13.1). There would be no need for any third party on Ms Flanagan's death to consider any document other than the Deed in order to understand what Ms Flanagan envisaged would happen on her death, and how her dispute with Westpac was resolved.

#### **B5. Whether the current position is itself conduct below community standards and expectations**

Whether Westpac engaged in conduct falling below community standards in its continued insistence that its behaviour in taking the guarantee was acceptable.<sup>59</sup>

- 51 Westpac submits that it did not engage in conduct falling below community standards in maintaining that the taking of the guarantee was acceptable.
- 52 As explained above, Westpac considers that it has a proper basis for concluding, both in 2010 and now, that it was appropriate for it to accept and rely upon Ms Flanagan's guarantee. This position was also accepted by FOS in its determination of Ms Flanagan's complaint.
- 53 It is not below community standards and expectations for a bank to hold such a view, when it has a proper basis for doing so. The fact that an independent body has assessed the matter and concluded that the bank's view is the correct one supports the position that it is not below those expectations for the bank to continue to hold that view.

<sup>54</sup> Ex 3.10.44 AW4-44 [WBC.407.001.0775].

<sup>55</sup> Welsh Statement: [109].

<sup>56</sup> Transcript 1 June 2018 (Commissioner), T3039:31-44.

<sup>57</sup> Ex 3.10.67 AW4-67 [WBC.407.001.0698].

<sup>58</sup> Ex 3.10.66 AW4-66 [WBC.104.001.9153] (Email between Westpac and Legal Aid dated 18 March 2015).

<sup>59</sup> Transcript 1 June 2018 (Hodge QC), T3039:28.

## ANNEXURE

### PROPOSED FINDINGS OF FACT

#### Loan application and approval

- 54 In 2010, Ms Flanagan (then 59 years old)<sup>60</sup> was visited by her Daughter at home.<sup>61</sup> Her Daughter told her that ‘the bank’ would give her a loan to buy a Poolwerx franchise if Ms Flanagan “*put [her] house up as security for the loan*”.<sup>62</sup> Ms Flanagan understood that her Daughter would make the loan repayments.<sup>63</sup> She asked her Daughter if she could meet the repayments and her Daughter said that she could.<sup>64</sup>
- 55 Ms Flanagan knew that she was putting up her house as security for a loan to the Borrower,<sup>65</sup> that her Daughter and her Daughter’s Partner needed her to do that because they did not have any assets of their own to put up as security,<sup>66</sup> and that if the loan was not repaid then Westpac could seek to recover the amount of the loan from her,<sup>67</sup> including by trying to sell her home.<sup>68</sup>
- 56 Ms Flanagan’s evidence-in-chief was that she thought the amount of the loan was \$50,000,<sup>69</sup> but she accepted that her memory of what she knew at the time she entered into the guarantee is very poor<sup>70</sup> and that, ultimately, she did not really remember how much the loan was for.<sup>71</sup>
- 57 Ms Flanagan specifically recalled discussing with her Daughter that Ms Flanagan would be a ‘silent partner’ in the business.<sup>72</sup> This is consistent with the instructions she gave to Dana Beiglari in 2014, the solicitor from Legal Aid NSW who was helping her at that point.<sup>73</sup> When Ms Flanagan spoke to Ms Beiglari in 2014, she was unclear exactly what being a “silent partner” meant in terms of her role with the business.<sup>74</sup> Ms Flanagan could not recall whether her Daughter or her Daughter’s Partner talked to her about working in the business.
- 58 On 6 August 2010, the Daughter’s Partner entered a Poolwerx franchise agreement for one of the three franchises ultimately acquired (Glenmore Park),<sup>75</sup> which was varied on 29 September 2010 to make the Borrower the franchisee.<sup>76</sup> From the Borrower’s registration as a company on 30 July 2010, the Daughter’s Partner was its sole director and the Daughter was its company secretary.<sup>77</sup>
- 59 On 23 September 2010, the Borrower applied to Westpac for a loan of \$160,000.<sup>78</sup> The purpose of the loan, as described in the loan application, was to purchase three Poolwerx franchises, two

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<sup>60</sup> Mrs Flanagan is now 67 years old: Flanagan Statement: [3].

<sup>61</sup> Flanagan Statement: [12].

<sup>62</sup> Flanagan Statement: [12]; Transcript 21 May 2018 (Flanagan), T2044:13-21.

<sup>63</sup> Flanagan Statement: [12].

<sup>64</sup> Flanagan Statement: [12].

<sup>65</sup> Transcript 21 May 2018 (Flanagan), T2048:29-30.

<sup>66</sup> Transcript 21 May 2018 (Flanagan), T2048:32-34.

<sup>67</sup> Transcript 21 May 2018 (Flanagan), T2048:41-42.

<sup>68</sup> Transcript 21 May 2018 (Flanagan), T2048:44-45.

<sup>69</sup> Transcript 21 May 2018 (Flanagan), T2044:23-25.

<sup>70</sup> Transcript 21 May 2018 (Flanagan), T2049:45-47.

<sup>71</sup> Transcript 21 May 2018 (Flanagan), T2050:1-2.

<sup>72</sup> Transcript 21 May 2018 (Flanagan), T2044:41-42.

<sup>73</sup> Ex 3.8 Witness Statement of Beiglari [WIT.0001.0036.0001] (**Beiglari Statement**): [13(d)].

<sup>74</sup> Transcript 21 May 2018 (Beiglari), T2051:30-33.

<sup>75</sup> Ex 3.10.15 AW4-15 [WBC.104.001.9118] (Key Terms of Franchise Agreement dated 6 August 2010).

<sup>76</sup> Ex 3.10.16 AW4-16 [WBC.104.001.9128] (Deed of Variation dated 29 September 2010).

<sup>77</sup> Ex 3.10.12 AW4-12 [WBC.107.005.0241] (Company Extract dated 17 April 2018).

<sup>78</sup> Ex 3.10.11 AW4-11 [WBC.407.001.0057] (Loan Application dated 23 September 2010).

vehicles, stock and equipment and for \$8,000 working capital. In the application, Ms Flanagan was listed as a proposed guarantor of the loan and Ms Flanagan's home was offered as security. The application attached a business plan<sup>79</sup> which identified that the three franchise areas were Glenmore Park, Kingswood and Cranebrook.<sup>80</sup> The Kingswood and Cranebrook areas were outside of the territory covered by the Glenmore Park agreement signed on 6 August 2010.<sup>81</sup>

60 On 21 October 2010, Ms Flanagan was issued one of two shares in the Borrower. From that time, Ms Flanagan was a 50% shareholder in the Borrower.<sup>82</sup>

61 The Credit Submission was prepared by a local business banker on the basis of the information provided which was that Ms Flanagan was a shareholder, and that she would work in the business, and therefore receive a portion of the excess funds it generated by way of dividends or wages.<sup>83</sup> In her statement, Ms Flanagan said that she had no financial interest in the business and that she does not know how she came to be listed as a shareholder.<sup>84</sup> However, as noted already, Ms Flanagan's evidence was clear: she understood that she was a "silent partner" in the business.

62 On 2 December 2010, the business banker sent a letter to the Borrower communicating the approval of the loan and enclosing a loan agreement.<sup>85</sup> The agreement noted that the loan would be secured by guarantees from the Daughter's Partner, the Daughter and Ms Flanagan together with a mortgage over Ms Flanagan's home. The loan agreement included a specific condition that Ms Flanagan was to seek independent legal advice "*as to the nature and effect of the security being provided*" and provide written evidence of this advice to Westpac.

### The meeting at the branch on 8 December 2010

63 Ms Flanagan's recollection of the events of 2010 has been affected because of strokes that she has had since that time.<sup>86</sup> Ms Flanagan described herself as "*no good remembering yesterday*"<sup>87</sup> and with a "*memory like a sieve*".<sup>88</sup>

64 Ms Flanagan recalled that she was picked up by her Daughter and taken to a Westpac branch.<sup>89</sup> In her evidence-in-chief, Ms Flanagan said that her recollection of going to the Westpac branch was "*vague*"<sup>90</sup> and that she thinks she went twice,<sup>91</sup> not once, and that she met with "*[a] woman and a man ... in a side office*".<sup>92</sup> In cross examination, Ms Flanagan accepted that she could be combining two separate meetings: a meeting with a woman in the branch (the business banker) and a meeting with the Solicitor at a later time.<sup>93</sup> In light of the documentary record (in particular, the existence of the Solicitor's file), it is likely that Ms Flanagan's recollection that she attended

<sup>79</sup> See bottom of .0058 of Ex 3.10.11 AW4-11 [WBC.407.001.0057].

<sup>80</sup> Ex 3.10.14 AW4-14 [WBC.104.001.9171] (Business Plan dated 20 August 2010).

<sup>81</sup> See suburbs listed in the marketing areas of the Glenmore Park franchise agreement: Ex 3.10.15 AW4-15 [WBC.104.001.9118 at .9121].

<sup>82</sup> Ex 3.10.12 AW4-12 [WBC.107.005.0241] (Company Extract dated 17 April 2018).

<sup>83</sup> Ex 3.10.21 AW4-21 [WBC.407.001.0039] (Credit Submission).

<sup>84</sup> Flanagan Statement: [19].

<sup>85</sup> Ex 3.10.22 AW4-33 [WBC.407.001.0017] (Letter from Westpac to Borrower dated 2 December 2010).

<sup>86</sup> Transcript 21 May 2018 (Flanagan), T2044:9-11.

<sup>87</sup> Transcript 21 May 2018 (Flanagan), T2044:46.

<sup>88</sup> Transcript 21 May 2018 (Flanagan), T2049:12.

<sup>89</sup> Flanagan Statement: [13].

<sup>90</sup> Transcript 21 May 2018 (Flanagan), T2045:15.

<sup>91</sup> Transcript 21 May 2018 (Flanagan), T2045:17-20.

<sup>92</sup> Transcript 21 May 2018 (Flanagan), T2045: 26-27.

<sup>93</sup> Transcript 21 May 2018 (Flanagan), T2049: 5-8.

the branch twice is not correct, and that she instead met with the business banker on 8 December 2010 and the Solicitor on 10 December 2010.

65 At the branch, Ms Flanagan met with the business banker.<sup>94</sup> Ms Flanagan's evidence is that the business banker took both the Daughter and Ms Flanagan into a room.<sup>95</sup> Ms Flanagan cannot now recall what was said.<sup>96</sup> In a statutory declaration made in 2014, Ms Flanagan said the conversation occurred as follows:<sup>97</sup>

Business banker: *You know that you are putting your house up as security by signing the guarantee?*

Flanagan: *Yes. Can [the Daughter] cover the loan repayments?*

Business banker: *Yes. Do you know what the purpose of the loan is?*

Flanagan: *The loan is for [the Daughter's] business.*

66 Ms Flanagan cannot recall what she was told about the documents at the branch.<sup>98</sup>

67 Ms Flanagan recalls that the contents of the documents that she was to sign were read out to her at the branch.<sup>99</sup> This evidence should be preferred to Ms Flanagan's evidence to the contrary in paragraph 16 of her statement, particularly in the light of Ms Flanagan's evidence at paragraph 11 of her statement that when she needs assistance reading a document, she asks someone to read the document aloud.

68 Ms Flanagan said that her Daughter was present during the entire meeting and did most of the talking.<sup>100</sup> Ms Flanagan also said that the business banker did not ask about her financial or medical circumstances or tell her to seek independent legal or financial advice.<sup>101</sup>

69 Westpac's record of the conversation with Ms Flanagan is contained in the interview checklist completed by the business banker on 14 December 2010. This checklist confirms that the business banker met with Ms Flanagan, pointed out or read out the warning on the guarantee and recommended that she obtain legal and financial advice.<sup>102</sup> The checklist contained a note that the Westpac banker was not to give the guarantor "*any prediction or comfort that the borrower will be able to pay the guaranteed amount*" and that it was the guarantor's responsibility to check for themselves the borrower's ability to repay.

70 The interview checklist should be preferred to Ms Flanagan's evidence as a contemporaneous record of what took place in the conversation between Ms Flanagan and the business banker because:

- a. Ms Flanagan's recollection of the events of 2010 is very poor;

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<sup>94</sup> Flanagan Statement: [13].

<sup>95</sup> Flanagan Statement: [14].

<sup>96</sup> Flanagan Statement: [14].

<sup>97</sup> Flanagan Statement: [14].

<sup>98</sup> Transcript 21 May 2018 (Flanagan), T2045:34-35.

<sup>99</sup> Transcript 21 May 2018 (Flanagan), T2045:37-42 and T2046:1.

<sup>100</sup> Flanagan Statement: [15] and [16].

<sup>101</sup> Flanagan Statement: [17].

<sup>102</sup> Ex 3.10.30.1 AW4-30 [WBC.104.001.9141].

- b. contemporaneous documents record that Ms Flanagan did obtain legal advice, and Ms Flanagan accepted that if she did get legal advice, it was probably because Westpac told her she should;<sup>103</sup>
- c. the guarantee, which Ms Flanagan says was read to her at the branch, stated in the warning on the cover page that Ms Flanagan “*should check for [herself] whether the [Borrower] can and will pay its debts*” and that she “*should see [her] own lawyer and financial adviser for advice on it and give them the information*” that Westpac has given her (being the guarantee pack);<sup>104</sup>
- d. the guarantee contained statements to the same effect in the form of acknowledgement, including item 5(e), which would also have been read aloud to Ms Flanagan;
- e. the interview checklist contained a prominent warning to Westpac staff not to give any prediction or comfort that the borrower would be able to repay the guaranteed amount, and that it was the guarantor’s responsibility to check that for themselves<sup>105</sup> (which Ms Flanagan did in this case), and there is no reason to conclude that the business banker would not have complied with this direction in this case.

### The advice given by the Solicitor

- 71 Ms Flanagan does not remember going to see a lawyer in connection with the guarantee and mortgage.<sup>106</sup> However, the documentary record makes it clear that she did so. The likely explanation for Ms Flanagan not now recalling meeting the Solicitor is that she has combined a meeting at the branch with the business banker and a meeting with the Solicitor into two meetings at the branch with a man and a woman.<sup>107</sup> As noted already, Ms Flanagan accepted that she may have combined the two meetings,<sup>108</sup> and that if she did meet with a solicitor about the guarantee, it was probably because Westpac had told her that she should get legal advice about the guarantee.<sup>109</sup>
- 72 On 10 December 2010 (a Friday), the Solicitor completed and witnessed a Schedule 2 Declaration executed by Ms Flanagan which confirmed she had received independent legal advice about the Borrower’s loan with Westpac and the security documents and after receiving that advice had freely and voluntarily signed the mortgage and the guarantee.<sup>110</sup> The ink from the pen used by Ms Flanagan and the Solicitor to sign the Declaration appears to be the same. The same pen appears to have been used to sign the mortgage and guarantee by Ms Flanagan and the Solicitor, and is different from the ink used by the business banker (by mistake) on the guarantee and mortgage, which was subsequently crossed out.<sup>111</sup>

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<sup>103</sup> Transcript 21 May 2018 (Flanagan), T2049:14-16.

<sup>104</sup> The guarantee pack is referred to in item 1 of the checklist at Ex 3.10.30.1 AW4-30 [WBC.104.001.9141], and included a copy of the terms and conditions of the “guaranteed transaction”, being the loan agreement with the Borrower.

<sup>105</sup> Ex 3.10.30.1 AW4-30 [WBC.104.001.9141].

<sup>106</sup> Transcript 21 May 2018 (Flanagan), T2046:16.

<sup>107</sup> Transcript 21 May 2018 (Flanagan), T2049:5-10.

<sup>108</sup> Transcript 21 May 2018 (Flanagan), T2049:5-10.

<sup>109</sup> Transcript 21 May 2018 (Flanagan), T2049:14-16.

<sup>110</sup> Ex 3.10.26 AW4-26 [WBC.104.001.9326].

<sup>111</sup> The security packet containing the original documents was not tendered, but as directed is available to the Commission as required.



- 73 The Solicitor was admitted in 1985.<sup>112</sup> He worked for the Attorney General's Department and the Legal Aid Commission before becoming a partner in firms in Penrith and Campbelltown.<sup>113</sup> His experience included property, conveyancing, debt recovery and franchising. He was ably equipped to provide advice to Ms Flanagan on the effect of, and risks created by, the guarantee and mortgage that Ms Flanagan ultimately signed in his presence. There is no evidence of any deficiency in the advice given by the Solicitor.
- 74 Based on Ms Flanagan's evidence as to her reasons for giving the guarantee and mortgage, it is likely that, having been advised by the Solicitor of the risks created by the guarantee and mortgage, she decided to proceed in any event. Her evidence was that she "*would have signed anything*"<sup>114</sup> for her Daughter because, as Ms Flanagan put it, "*[i]f you can't help your children, who can you help?*".<sup>115</sup> There is no evidence to suggest that the Solicitor's advice was in any way lacking, or failed to make clear to Ms Flanagan the risks of giving the guarantee and mortgage, including that she could lose her home if the Borrower defaulted.
- 75 Ms Beiglari obtained the Solicitor's file on 30 September 2014. The file, provided under cover of letter from the Solicitor's firm, contained a certificate of title, the relevant pages of the guarantee and the mortgage. The existence of this file establishes beyond doubt that Ms Flanagan did receive legal advice from the Solicitor.
- 76 The guarantee and mortgage are dated 8 December 2010 and the business banker's name was originally recorded as the witness before being struck through and replaced with the Solicitor's name. The likely explanation is that the business banker filled in her name as witness by mistake (in circumstances where she witnessed similar documents for the Daughter and the Daughter's Partner on the same day)<sup>116</sup> but realising her mistake, has crossed her name out and provided the documents to Ms Flanagan to take with her to see the Solicitor. New forms were not able to be printed because, for security reasons, soft copies of the documents are not provided in branch and are issued in hard copy by Westpac's loan centre.<sup>117</sup>
- 77 Accordingly, the findings that should be made in relation to the signing of the guarantee and mortgage are as follows:
- a. on 8 December 2010, Ms Flanagan attended the Westpac branch and met with the business banker, who gave her the documents contained in the guarantee pack, including the guarantee, the mortgage and the loan agreement with the Borrower;
  - b. Ms Flanagan had the documents read out to her, which included the warning on the front page of the guarantee and the form of acknowledgement;

<sup>112</sup> Ex 3.10.23 AW4-23 [WBC.107.005.0250] (Extract from online directory of Law Society of NSW).

<sup>113</sup> Ex 3.10.24 AW4-24 [WBC.107.005.0247] (Extract from Solicitor's website).

<sup>114</sup> Transcript 21 May 2018 (Flanagan), T2046:43.

<sup>115</sup> Transcript 21 May 2018 (Flanagan), T2046:46.

<sup>116</sup> See guarantees executed by the Daughter and the Daughter's Partner at Ex 3.10.31.1 AW4-31 [WBC.104.001.9185] and Ex 3.10.31.2 AW4-31 [WBC.104.001.9193].

<sup>117</sup> Transcript 22 May 2018 (Welsh), T2130:35-42.

- c. the business banker recommended that Ms Flanagan obtain legal advice<sup>118</sup> and otherwise gave Ms Flanagan information consistent with the interview checklist that she subsequently completed;<sup>119</sup>
- d. the business banker incorrectly signed the guarantee and mortgage as witness before realising her mistake, crossing out her name and giving the documents to Ms Flanagan for her to take to obtain legal advice about them;
- e. on 10 December 2010, Ms Flanagan met with the Solicitor, who gave her legal advice about the loan and the effect and risks of the guarantee and mortgage;
- f. having received that advice, Ms Flanagan decided to sign the guarantee and mortgage in any event, and did so in the presence of the Solicitor;
- g. when signing the guarantee and mortgage, Ms Flanagan understood their contents (including by having had them read to her) and effect (including by reason of the legal advice she had received) and made a fully informed decision to give the guarantee and mortgage;<sup>120</sup>
- h. in particular, from the time Ms Flanagan was first asked to provide her home as security, she understood the effect of doing so and the consequences for her if the Borrower did not repay the loan (see paragraph [55] above), and therefore, regardless of the legal advice she received, at all times had a complete and accurate understanding of the effect and consequences of giving the guarantee and mortgage and made her decision to do so with that understanding; and
- i. in those circumstances, Ms Flanagan decided to give the guarantee and mortgage to “give her daughter a helping hand so that she would not have to struggle the way that she has in her life”;<sup>121</sup> but in any event also received the benefit of being a “silent partner” in the business and a 50% shareholder in the Borrower.

## Default by Borrower

- 78 The Borrower’s repayments became irregular in October 2011.<sup>122</sup> From March 2012 to November 2013, Westpac sent many letters about the outstanding debt to Ms Flanagan, as well as to the Daughter and the Daughter’s Partner.<sup>123</sup>
- 79 Ms Flanagan’s evidence is that she never saw any of these letters, as she was living with her Daughter for a time after she suffered the strokes.<sup>124</sup> However, Westpac’s records show that, on 14 May 2012, Ms Flanagan called Westpac’s contact centre, but the team member who took the call could not verify her identity and could not therefore discuss the file for privacy reasons.<sup>125</sup> On 20 May 2013, Westpac called Ms Flanagan but was unable to contact her.<sup>126</sup>

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<sup>118</sup> This follows from the fact that Ms Flanagan did obtain legal advice and accepted that, if she had done so, it was because she had been told to do so by Westpac: Transcript 21 May 2018 (Flanagan), T2049:14-16.

<sup>119</sup> Ex 3.10.30.1 AW4-30 [WBC.104.001.9141].

<sup>120</sup> Flanagan Statement: [12] and [14(a)].

<sup>121</sup> Ex 3.10.52 AW4-52 [WBC.104.001.9201 at .9203].

<sup>122</sup> Welsh Statement: [90].

<sup>123</sup> Ex 3.10.32 AW4-32 to Ex 3.10.38 AW4-38.

<sup>124</sup> Transcript 21 May 2018 (Flanagan), T2047:1-3.

<sup>125</sup> Welsh Statement: [95].

<sup>126</sup> Welsh Statement: [97].

80 On 10 December 2013, Westpac sent a letter requiring Ms Flanagan to deliver up vacant possession of her home.<sup>127</sup> On 7 February 2014, Westpac sent Ms Flanagan a letter notifying its intention to commence proceedings.<sup>128</sup> On 26 May 2014, Westpac commenced proceedings in the Supreme Court of NSW against the Daughter, the Daughter's Partner and Ms Flanagan.<sup>129</sup>

### FOS Dispute

81 After being served with the Statement of Claim, Ms Flanagan went to Legal Aid NSW. Following a meeting with one of her colleagues, Ms Flanagan met with Ms Beiglari.<sup>130</sup>

82 On 23 June 2014, Ms Flanagan, with the assistance of Ms Beiglari, lodged a complaint with FOS.<sup>131</sup> The complaint stated that the outcome sought was the negotiation of a hardship arrangement to allow Ms Flanagan to live in her home for the duration of her life. Ms Flanagan's ultimate goal from the FOS process was for her to remain in her property for the rest of her lifetime, and Ms Beiglari was hoping to achieve that outcome for her client by having Westpac agree not to enforce the guarantee until Ms Flanagan died or chose to sell the property.<sup>132</sup>

83 Westpac should have better handled the hardship request contained within the FOS complaint by progressing this request earlier and acting with more urgency and a greater degree of understanding and compassion for Ms Flanagan's situation.<sup>133</sup>

84 On 30 June 2014, Westpac wrote to Ms Beiglari stating that it understood Ms Flanagan had requested a repayment arrangement and requesting she complete an enclosed statement of position.<sup>134</sup> This was provided on 4 July 2014.<sup>135</sup>

85 On 4 July 2014, Ms Flanagan completed an authority directed to the Solicitor's firm directing it to release to Legal Aid all information held about her and a copy of her file.<sup>136</sup>

86 On 7 August 2014, Westpac wrote to FOS and noted that given Ms Flanagan's income, it would seem appropriate that a hardship repayment arrangement would need to be entered into also with the Daughter and the Daughter's Partner.<sup>137</sup>

87 On 20 August 2014, Legal Aid wrote to FOS setting out Ms Flanagan's complaint, including expanding the complaint to allege that Ms Flanagan had not been advised by Westpac to seek legal advice and that Ms Flanagan had not received legal advice.<sup>138</sup> The expansion in the complaint occurred as Ms Beiglari received more information and gave Ms Flanagan advice about expanding her claim.<sup>139</sup>

88 On around 1 September 2014, FOS moved the complaint from its 'financial difficulty' section to its 'maladministration' section.<sup>140</sup>

<sup>127</sup> Ex 3.10.40 AW4-40 [WBC.104.001.9226].

<sup>128</sup> Ex 3.10.41 AW4-41 [WBC.104.001.9225].

<sup>129</sup> Ex 3.10.43 AW4-43 [WBC.107.005.0407].

<sup>130</sup> Transcript 21 May 2018 (Flanagan), T2047:17-18.

<sup>131</sup> Transcript 21 May 2018 (Flanagan), T2047:29-30; Ex 3.10.44 AW4-44 [WBC.407.001.0775].

<sup>132</sup> Transcript 21 May 2018 (Beiglari), T2056:26-30.

<sup>133</sup> Welsh Statement: [109]; Transcript 21 May 2018 (Welsh), T2061:8-9.

<sup>134</sup> Ex 3.10.47 AW4-47 [WBC.107.005.0399]; Tranche 11 [WBC.407.001.0711].

<sup>135</sup> Ex 3.10.48 AW4-48 [WBC.407.001.0871] and Ex 3.10.49 AW4-49 [WBC.107.005.0396].

<sup>136</sup> Ex 3.8.6 DB-6 [RCD.0024.0006.0011 at .0012].

<sup>137</sup> Ex 3.10.51 AW4-51 [WBC.407.001.0954].

<sup>138</sup> Ex 3.10.52 AW4-52 [WBC.104.001.9201].

<sup>139</sup> Transcript 21 May 2018 (Beiglari), T2056:13-17.

<sup>140</sup> Ex 3.10.53 AW4-53 [WBC.407.001.0870] and Ex.3.10.54 AW4-54 [WBC.407.001.0785].

- 89 Ms Beiglari requested the Solicitor's file on 23 September 2014 (having received authority to do so from Ms Flanagan on 4 July 2014, as described above) and obtained the file on 30 September 2014. On receiving the file, Ms Beiglari noted that its existence and contents were inconsistent with the instructions she had received from Ms Flanagan,<sup>141</sup> but she did not take any further steps after receiving the file to contact the Solicitor.<sup>142</sup>
- 90 On 2 October 2014, Ms Flanagan made a statutory declaration, witnessed by Ms Beiglari, stating that she had not received legal advice.<sup>143</sup> This was provided to FOS on 7 October 2014.<sup>144</sup>
- 91 On 21 November 2014, Westpac stated to FOS that in the absence of any response or hardship request or contact from the Daughter and the Daughter's Partner, it was not willing to propose a moratorium on enforcement of the guarantee against Ms Flanagan.<sup>145</sup>
- 92 On 28 January 2015, FOS issued a Determination to the effect that:
- a. Westpac complied with its obligations to Ms Flanagan when it obtained the guarantee and, in particular, Ms Flanagan was provided with independent legal advice in relation to the guarantee; and
  - b. Westpac was entitled to enforce the guarantee, and Ms Flanagan was liable to repay the outstanding debt.<sup>146</sup>

## Resolution

- 93 After the FOS Determination, Ms Flanagan, with the assistance of Ms Beiglari, wrote to Westpac requesting hardship assistance on 11 March 2015.<sup>147</sup> By 12 March 2015, Westpac had agreed to provide the assistance.<sup>148</sup> Legal Aid thanked Westpac for providing the assistance and described it as *"such a good outcome for a very vulnerable client"*.<sup>149</sup> Westpac replied that eviction in Ms Flanagan's circumstances was *"not in line with what we would normally do"*.<sup>150</sup> Later, Legal Aid described it as a *"prompt and practical"* settlement.<sup>151</sup>
- 94 Legal Aid drafted a Deed of Release and provided it to Westpac on 18 March 2015.<sup>152</sup> On 31 March 2015, Westpac and Ms Flanagan entered the Deed of Release which meant that the secured amount was enforceable only on Ms Flanagan's death or the sale of her home (cl 1.1).<sup>153</sup> Clause 3.1 recorded Westpac's consent to Legal Aid NSW registering a charge of the property for legal fees incurred by Ms Flanagan.
- 95 On 18 June 2015, Legal Aid lodged a complaint with FOS about how the FOS case manager had handled the dispute.<sup>154</sup>

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<sup>141</sup> Transcript 21 May 2018 (Beiglari), T2058:17-19.

<sup>142</sup> Transcript 21 May 2018 (Beiglari), T2058:24-25.

<sup>143</sup> Ex 3.10.58 AW4-58 [WBC.407.001.1007].

<sup>144</sup> Ex 3.10.57 AW4-57 [WBC.407.001.0862].

<sup>145</sup> Ex 3.10.62 AW4-62 [WBC.407.001.1011].

<sup>146</sup> Ex 3.10.64 AW4-64 [WBC.407.001.0943].

<sup>147</sup> Ex 3.8.22 DB-22 [RCD.0024.0006.0679].

<sup>148</sup> Ex 3.10.69.1 AW4-69 [WBC.104.001.9155].

<sup>149</sup> Ex 3.10.69.1 AW4-69 [WBC.104.001.9155].

<sup>150</sup> Ex 3.8.23 DB-23 [RCD.0024.0006.0687].

<sup>151</sup> Ex 3.8.29 DB-29 [RCD.0024.0007.0001].

<sup>152</sup> Ex 3.10.66 AW4-66 [WBC.104.001.9153].

<sup>153</sup> Ex 3.8.27 DB-27 [RCD.0024.0006.0733].

<sup>154</sup> Ex 3.8.29 DB-29 [RCD.0024.0007.0001].