

NOTICE OF FILING

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Details of Filing

Document Lodged: Defence - Form 33 - Rule 16.32
File Number: NSD1736/2019
File Title: MERVYN LAWRENCE BRADY v NULIS NOMINEES (AUSTRALIA) LIMITED (ACN 008 515 633) IN ITS CAPACITY AS TRUSTEE OF THE MLC SUPER FUND
Registry: NEW SOUTH WALES REGISTRY - FEDERAL COURT OF AUSTRALIA



Sia Lagos

Dated: 26/08/2022 4:04:35 PM AEST

Registrar

Important Information

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

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Form 33
Rule 16.32

Defence to Fourth Further Amended Statement of Claim

No. NSD1736/2019

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

Mervyn Lawrence Brady

Applicant

NULIS Nominees (Australia) Limited (ACN 008 515 633) in its capacity as trustee of the MLC Super Fund

Respondent

Introduction

- A. The Respondent (**NULIS**) is the trustee of the MLC Super Fund. The proceedings relate to the interests of certain members of the MLC Super Fund who were transferred on 1 July 2016, by successor fund transfer, from a superannuation fund known as The Universal Super Scheme (**TUSS**) to the MLC Super Fund (the **SFT**).
- B. The Applicant impugns two resolutions of the NULIS Board made in connection with the preparation and consideration of the proposed SFT, namely:
- (i) the decision made on 10 June 2016 “to approve to maintain the current grandfathered commission arrangements pertaining to the products which form part of T USS following the proposed SFT to the MLC Super Fund”; and
 - (ii) the decision made on 16 June 2016 to approve the Licensee Remuneration Agreement in its current form, and to approve an Amending Deed to the Internal Remuneration Agreement effective from the date of the SFT, being the contractual documents pursuant to which adviser remuneration (including grandfathered commissions) was paid prior to the SFT.

Prepared on behalf of NULIS Nominees (Australia) Limited (ACN 008 515 633) in its capacity as trustee of the MLC Super Fund, the Respondent.

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- C. The Applicant both divorces the terms of those resolutions from the context of the SFT as a whole and mischaracterises the nature of the decisions made by NULIS at that time. Prior to the SFT, grandfathered commission arrangements were part of the product structure for certain products of TUSS. The SFT was part of a broader simplification and transformation proposal that involved separating the superannuation business from a life insurance business, and increasing investment and scale in the superannuation business and its products. A statutory precondition for the SFT to proceed was that the transfer of the benefits of members of TUSS to the MLC Super Fund satisfied an equivalency of rights test. Relevant to that assessment was an understanding of the approach the receiving trustee (NULIS) would take following the SFT in respect of the fees charged for the same products. The grandfathered commission arrangements were an aspect of that assessment because they were part of the existing fee structures for certain TUSS products. The resolution of the NULIS Board on 10 June 2016 was, in context, a resolution to continue the grandfathered commission arrangements following the SFT for the time being. That resolution: (i) enabled the equivalency of rights test to be satisfied because it kept the structure of the products the same; (ii) enabled the SFT to proceed on 1 July 2016 without delay; and (iii) enabled NULIS thereafter to pursue a plan to trade-up legacy products to modern products in the context of a simplified superannuation business structure afforded by the SFT. The resolution of the NULIS Board on 16 June 2016 was a requisite decision to facilitate those three matters by maintaining the contractual status quo in relation to the payment of remuneration to financial services licensees following the SFT.
- D. To the extent the Applicant's case makes allegations concerning the terms applicable to particular products, those are matters which necessarily fall to be determined on a product-by-product basis according to the precise terms applicable to each product (which vary). All of the Applicant's allegations hinging on the proposition that ongoing services needed to be provided in return for commission payments fall into this category. This includes the claimed breach of trust - because there is nothing in schedule 1 clause 3.7 of the MLC Super Fund Trust Deed that requires "ongoing services or benefits" to be provided by financial services licensees or advisers to members in return for a particular portion of a fee, and any quid pro quo requirement in that clause is satisfied by the Trustee's ongoing administration of the fund. Further, to the extent the Applicant claims that certain terms were not complied with, the assessment of breach, and of any loss, would need to consider the individual circumstances of the Applicant and each Group Member and do not give rise to common questions.
- E. The Applicant also wrongly miscasts the conduct of NULIS after 1 July 2016. Immediately after the SFT, NULIS maintained the structure of the TUSS products whilst progressively furthering a plan to trade-up legacy products to modern products. Since 1 July 2016, strategies have been developed and changes have been made to improve the products associated with the TUSS Division of the MLC Super Fund, including the fee structures of those products. These improvements have included the trade-up of over 110,000 members across 18 products in the MLC Super Fund (comprising more than \$10.3 billion in funds under management) to non-commission products; and have resulted in the cessation of all grandfathered commission payments made on behalf of NULIS.

- F. In addition to the deficiencies in the Applicant's case identified above, the Applicant proceeds on an incorrect understanding of the law concerning both conflicted remuneration and the standard by which the conduct of a trustee is to be assessed under s 52 of the *Superannuation Industry (Supervision) Act 1993* (Cth) (**SIS Act**). As to the latter, all relevant circumstances are to be taken into account and the conduct of the trustee is to be assessed prospectively and in the absence of hindsight. The conduct of a trustee is also assessed with due regard to the fact that more than one course of action may often be regarded as being in the best interests of the beneficiaries. Further, the covenants under ss 52(2)(e) and 52(2)(f) of the SIS Act do not require a trustee to ensure that all beneficiaries receive identical terms and conditions.
- G. Moreover, the Applicant purports to seek relief on behalf of members of the MLC Super Fund whose interest has not vested and who have no present entitlement to an interest in any particular property of, or any identifiable portion of, the MLC Super Fund. As the interests of such members in the MLC Super Fund have not yet vested, they have not suffered loss or damage as a result of any contravention of s 54B(1) of the SIS Act (which is denied), and cannot bring an action under s 55(3) of the SIS Act.
- H. The Applicant also contends that the Applicant and Group Members are entitled to a statutory performance injunction requiring NULIS to restore, or pay equitable compensation into, the accounts of the Applicant and Group Members. That contention misconstrues the purpose and effect of s 315(3) of the SIS Act, which does not permit the grant of an injunction in the circumstances.
- I. Accordingly, NULIS denies the allegations of contraventions alleged, including pursuant to an injunction sought under s 315(3) of the SIS Act. NULIS also denies that the loss claimed to have been suffered by the Applicant and Group Members was a result of NULIS's conduct for the purposes of s 55(3) of the SIS Act.
- J. Further, if, which is denied, NULIS is liable to compensate the Applicant or any of the Group Members for any loss or damage alleged, the statutory scheme and basal principles of trust law require restoration of the MLC Super Fund such that any and all compensation is to be paid into the relevant member's superannuation balance, including to ensure there is no de facto release of preserved benefits, for example, by the payment of sums to any third party litigation funder.

In response to the allegations in the Fourth Further Amended Statement of Claim filed by the Applicant on 12 August 2022 (**4FASOC**), the Respondent (**NULIS**) says as follows:

- 1A NULIS notes that the allegations of contravention contained in the 4FASOC relate to a period ending on 23 September 2020, and accordingly understands that the period referred to as ‘all material times’ in the 4FASOC ends on or by 23 September 2020 and pleads only in respect of that period unless otherwise stated.
- 1 In response to paragraph 1 of the 4FASOC, NULIS:
- (a) refers to and repeats paragraph 3 below;
 - (b) admits that the Applicant brings the proceeding on his own behalf and seeks to bring the proceeding as a representative party on behalf of the persons described in paragraph 3 of the 4FASOC, pursuant to Part IVA of the *Federal Court of Australia Act 1976* (Cth); and
 - (c) otherwise denies the paragraph.
- 2 In response to paragraph 2 of the 4FASOC, NULIS:
- (a) as to subparagraph 2(a):
 - (i) denies that the Applicant was a member of “The Universal Superannuation Scheme Fund”; and
 - (ii) admits that the Applicant was a member of The Universal Super Scheme (ABN 44 928 361 101) (**TUSS**) prior to 1 July 2016; and
 - (b) admits subparagraph 2(b).
- 3 In response to paragraph 3 of the 4FASOC, NULIS:
- (a) denies that NULIS has contravened the *Superannuation Industry (Supervision) Act 1993* (Cth) (**SIS Act**) as alleged in paragraphs 53 to 59 of the 4FASOC and, under cover of that denial, says there are no persons who fall within the description in subparagraph 3(c) of the 4FASOC; and
 - (b) otherwise does not know and cannot admit the paragraph.
- 4 In response to paragraph 4 of the 4FASOC, NULIS:
- (a) admits subparagraph 4(a);
 - (b) admits subparagraph 4(b);
 - (c) admits subparagraph 4(c);

- (d) as to subparagraph 4(d):
- (i) admits that, on and from 1 July 2016, NULIS was carrying on a business that included acting as trustee of the MLC Super Fund (ABN 70 732 426 024) (**MLC Super Fund**) and investing money on behalf of the beneficiaries of the MLC Super Fund, within the meaning of s 52(3) of the SIS Act;
 - (ii) admits that, on and from 1 July 2016, NULIS held itself out as having particular knowledge, skill and experience in carrying out its duties as trustee of the MLC Super Fund;
 - (iii) says that NULIS is also the trustee of other registrable superannuation entities (**RSEs**) which are not relevant to these proceedings and does not plead to subparagraph 4(d) in respect of those entities; and
 - (iv) otherwise denies the subparagraph;
- (e) as to subparagraph 4(e):
- (i) says that NULIS was a wholly owned subsidiary of National Wealth Management Services Limited (ACN 071 514 264) (**NWMSL**) (renamed MLC Wealth Limited from 25 June 2020) between 26 May 2016 and 23 September 2020;
 - (ii) says that NWMSL was a wholly owned subsidiary of National Wealth Management Holdings Limited (ACN 093 329 983) (**NWMHL**) (renamed MLC Wealth Holdings Limited from 22 February 2021) between 12 January 2016 and 23 September 2020;
 - (iii) says that NWMHL was a wholly owned subsidiary of National Australia Bank Limited (ACN 004 044 937, AFSL 230686) (**NAB**) between 11 August 2008 and 23 September 2020; and
 - (iv) otherwise denies the subparagraph; and
- (f) admits subparagraph 4(f).

4A In response to paragraph 4A of the 4FASOC, NULIS:

- (a) admits the paragraph; and
- (b) says further that the Services Agreement between NULIS and NWMSL dated 30 June 2016 was subsequently amended from time to time.

Particulars

Amending Agreement to the Services Agreement between NULIS and NWMSL dated 22 June 2017.

Deed of Variation to the Services Agreement between NULIS and
NWMSL dated 14 February 2018.

- 4B NULIS admits paragraph 4B of the 4FASOC.
- 4C NULIS denies paragraph 4C of the 4FASOC.
- 5 In response to paragraph 5 of the 4FASOC, NULIS:
- (a) says that:
 - (i) NULIS executed the trust deed for the MLC Super Fund on 9 May 2016, which has subsequently been amended from time to time (**MLC Super Fund Trust Deed**); and
 - (ii) any reference to NULIS in the 4FASOC in respect of the period prior to 9 May 2016 cannot be a reference to NULIS in its capacity as trustee of the MLC Super Fund; and
 - (b) otherwise does not plead to the paragraph on the basis that there is no allegation pleaded against it.
- 6 In response to paragraph 6 of the 4FASOC, NULIS:
- (a) admits that PFS Nominees Pty Ltd (ACN 082 026 480) (**PFS**) was, between 18 May 2004 and 23 September 2020, indirectly, a wholly owned subsidiary of NAB;
 - (b) admits that PFS was the holder of an RSE licence (no. L0002912) between 30 May 2006 and 15 February 2017;
 - (c) says that PFS was, between 18 May 2004 and 23 September 2020, an entity within the Wealth segment of NAB's operations; and
 - (d) says that PFS was, at all material times prior to 1 July 2016, the trustee of the Plum Superannuation Fund (ABN 20 339 905 340), the National Australia Bank Group Superannuation Fund A (ABN 59 929 570 050), the BHP Billiton Superannuation Fund (ABN 30 187 082 512) and the Worsley Alumina Superannuation Fund (ABN 51 469 547 458) (**Plum Funds**); and
 - (e) otherwise denies the paragraph.
- 7 In response to paragraph 7 of the 4FASOC, NULIS:
- (a) admits that MLC Nominees Pty Ltd (ACN 002 814 959) (**MLC Nominees**) was, between at least 22 January 2001 and 23 September 2020, indirectly, a wholly owned subsidiary of NAB;
 - (b) admits that MLC Nominees was the holder of an RSE licence (no. L0002998) between 3 June 2006 and 15 February 2017;

- (c) says that MLC Nominees was, between at least 22 January 2001 and 23 September 2020, an entity within the Wealth segment of NAB's operations;
 - (d) admits subparagraph 7(d); and
 - (e) otherwise denies the paragraph.
- 8 NULIS does not plead to paragraph 8 of the 4FASOC on the basis that there is no allegation pleaded against it.
- 9 In response to paragraph 9 of the 4FASOC, NULIS:
- (a) as to subparagraph 9(a):
 - (i) admits that Peggy O'Neal (**O'Neal**) was, from 14 February 2011 to 31 March 2020, a non-executive director and member of the board of directors of NULIS (**NULIS Board**), and a Responsible Person of NULIS within the meaning of paragraph 11 of SPS 520;
 - (ii) admits that Nicole Smith (**Smith**) was, from October 2009 to June 2018, a non-executive director and member of the NULIS Board and a Responsible Person of NULIS within the meaning of paragraph 11 of SPS 520;
 - (iii) admits that Brian Marriott (**Marriott**) was a company secretary of NULIS and a Responsible Person of NULIS within the meaning of paragraph 11 of SPS 520 between 26 March 2015 and 1 October 2021;
 - (iv) admits that Marriott was the Chief Operating Officer of NULIS (although the title of this role changed to General Manager, Office of the Super Trustee in July 2020) between 25 February 2010 and 1 October 2021; and
 - (v) otherwise denies the subparagraph;
 - (b) says that subparagraph 9(b) is liable to be struck out because it fails to identify the particular conduct relied upon or the capacity in which the relevant individual engaged in the conduct and, under cover of that objection, denies the subparagraph;
 - (c) says that subparagraph 9(c) is liable to be struck out because it fails to identify the particular knowledge relied upon and, under cover of that objection, repeats subparagraph 9(b) above and denies the subparagraph; and
 - (d) as to subparagraph 9(d):
 - (i) refers to and repeats its responses to any paragraph of the 4FASOC to which subparagraph 9(d) refers;
 - (ii) denies that subparagraph 9(d) identifies with sufficient particularity the material facts relied upon; and

(iii) otherwise denies the subparagraph.

10 NULIS admits paragraph 10 of the 4FASOC.

11 NULIS admits paragraph 11 of the 4FASOC.

12 In response to paragraph 12 of the 4FASOC, NULIS:

- (a) says that, prior to 1 July 2016, MLC Nominees offered corporate superannuation products known as MLC MasterKey Business Super (**MKBS**) and MLC MasterKey Personal Super (**MKPS**) respectively in TUSS;
- (b) denies that MKBS and MKPS were “divisions” of TUSS;
- (c) denies that MLC Nominees offered superannuation products “under” either MKBS or MKPS; and
- (d) otherwise admits the paragraph.

13 In response to paragraph 13 of the 4FASOC, NULIS:

- (a) admits that NAB and certain of its subsidiaries, including GWM Adviser Services Limited (ACN 002 071 749, AFSL 230692) (**GWM**), Meritum Financial Group Pty Ltd (ACN 106 888 215, AFSL 245569) (**Meritum**), Apogee Financial Planning Limited (ACN 056 426 932, AFSL 230689) (**Apogee**) and JBWere Limited (ACN 137 978 360, AFSL 341162) (**JBWere**) were, at all material times, financial service licensees;
- (b) admits that MK Financial Planning Services Pty Ltd (ACN 107 737 379) (**MK Financial Planning Services**) was, from 12 March 2004 to 1 May 2020, an authorised representative of GWM;
- (c) admits that Advantedge Financial Solutions Pty Ltd (ACN 117 551 292) (**Advantedge**) was, from 13 February 2007 to 29 August 2019, an authorised representative of GWM;
- (d) says that GWM traded under various registered business names, including Garvan Financial Planning, MLC Advice and MLC Financial Planning;
- (e) says that NAB Financial Planning and NAB Private Wealth operated under NAB’s AFSL; and
- (f) otherwise denies the paragraph.

14 In response to paragraph 14 of the 4FASOC, NULIS:

- (a) as to subparagraph 14(a):
 - (i) says that, at all material times, there have been certain authorised representatives of:

- (A) NAB;
- (B) GWM;
- (C) Meritum;
- (D) Apogee; and
- (E) JBWere;

that have provided financial product advice to persons as retail clients under s 761G(1) of the *Corporations Act 2001* (Cth) (**Corporations Act**);

- (ii) says that Advantedge was, at all material times until 29 August 2019, a provider of financial product advice to persons as retail clients under s 761G(1) of the Corporations Act; and
 - (iii) otherwise denies the subparagraph; and
- (b) as to subparagraph 14(b):
- (i) admits that NAB, GWM, Apogee, Meritum and JBWere were associates of NULIS for the purposes of the SIS Act at all material times;
 - (ii) insofar as it is alleged Advantedge was a member of the NAB Adviser Network, admits that Advantedge was an associate of NULIS for the purposes of the SIS Act at all material times; and
 - (iii) otherwise denies the subparagraph;
- (c) as to subparagraph 14(c):
- (i) refers to and repeats subparagraph 14(b)(ii) above;
 - (ii) admits that each authorised representative of the financial services licensees referred to in paragraph 13(a) above that was a related body corporate of NULIS was an associate of NULIS for the purposes of the SIS Act for the period in which that entity was a related body corporate of NULIS; and
 - (iii) otherwise denies the subparagraph;
- (d) as to subparagraph 14(d):
- (i) refers to and repeats subparagraph 14(b)(i) above; and
 - (ii) admits that NWMSL was, at all material times, an associate of NULIS for the purposes of the SIS Act; and

- (e) as to subparagraph 14(e), admits that MLC Limited was an associate of NULIS for the purposes of the SIS Act at all material times prior to October 2016.
- 15 In response to paragraph 15 of the 4FASOC, NULIS:
- (a) as to subparagraph 15(a):
 - (i) admits that at all material times there were financial services licensees other than those pleaded in subparagraph 13(a) above (**Other Licensees**); and
 - (ii) otherwise denies the subparagraph; and
 - (b) does not know and cannot admit subparagraph 15(b).
- 16 In response to paragraph 16 of the 4FASOC, NULIS:
- (a) as to subparagraph 16(a):
 - (i) says that, from time to time prior to 1 July 2016:
 - (A) GWM, and certain of its authorised representatives including Advantedge and MK Financial Planning;
 - (B) Meritum, and certain of its authorised representatives;
 - (C) Apogee, and certain of its authorised representatives;
 - (D) JBWere, and certain of its authorised representatives;
 - (E) NAB Financial Planning; and
 - (F) NAB Private Wealth,

(**NAB-Aligned Advisers**) recommended financial products from approved product lists which included financial products that were, at that time, 'on sale' within TUSS, and submitted applications on behalf of persons for 'on sale' financial products within TUSS following which the product would be issued to that person;
 - (ii) says that the financial products of TUSS in respect of which Grandfathered Remuneration (as defined in paragraph 24 of this Defence) was given were progressively taken 'off sale' at various points in time prior to 1 July 2016, after which such products were no longer recommended by NAB-Aligned Advisers; and
 - (iii) otherwise denies the subparagraph; and

- (b) as to subparagraph 16(b):
- (i) says that, from time to time prior to 1 July 2016, certain Other Licensees and certain of their authorised representatives recommended financial products from approved products lists which included financial products that were, at that time, 'on sale' within TUSS, and submitted applications on behalf of persons for 'on sale' financial products within TUSS following which the product would be issued to that person;
 - (ii) says that the financial products of TUSS in respect of which Grandfathered Remuneration (as defined in paragraph 24 of this Defence) was given were progressively taken 'off sale' at various points in time prior to 1 July 2016, after which such products were no longer recommended by the Other Licensees and authorised representatives pleaded in subparagraph 16(b)(i) above; and
 - (iii) otherwise denies the subparagraph.

17 In response to paragraph 17 of the 4FASOC, NULIS:

- (a) denies subparagraph 17(h) of the 4FASOC on the basis that clause 5.2(a) of the MLC Super Fund Trust Deed and the "Important Notes" are not applicable to members of the TUSS Division;
- (b) otherwise admits paragraph 17 of the 4FASOC; and
- (c) says further that, in respect of members of the TUSS Division of the MLC Super Fund, the MLC Super Fund Trust Deed provided:
 - (i) by clause 1.3(a)(2) read with clause 2.3(a), that NULIS must comply with a requirement of the Relevant Law;
 - (ii) by Schedule 1 clause 4.2(a), that NULIS must administer a Member Package in accordance with the terms of the Member Package from time to time; and
 - (iii) by Schedule 1 clause 4.2(b), that the terms of a Member Package are to be determined and recorded in writing by NULIS and made available to members in a manner determined by NULIS.

18 In response to paragraph 18 of the 4FASOC, NULIS:

- (a) admits the paragraph; and
- (b) says further that there were no member benefits transferred from TUSS or the Plum Funds to the MLC Super Fund until 1 July 2016.

19 NULIS admits paragraph 19 of the 4FASOC.

- 20 In response to paragraph 20 of the 4FASOC, NULIS:
- (a) admits that, from 1 July 2016, NULIS offered the MKBS and MKPS products previously offered by TUSS through the TUSS Division of the MLC Super Fund;
 - (b) says that, at all times since 9 May 2016, there has been two divisions of the MLC Super Fund, namely the TUSS Division and the Plum Division; and
 - (c) otherwise denies the paragraph.
- 21 In response to paragraph 21 of the 4FASOC, NULIS:
- (a) says that MKBS and MKPS are products within the TUSS Division of the MLC Super Fund;
 - (b) says that, from 1 July 2016, the TUSS Division of the MLC Super Fund included a number of products, and certain fee variants existed; and
 - (c) otherwise denies the paragraph.
- 22 In response to paragraph 22 of the 4FASOC, NULIS:
- (a) admits that, by deed titled “Successor Fund Merger Deed” dated 1 July 2016 (**Successor Fund Merger Deed**), the MLC Super Fund became the successor fund of TUSS;
 - (b) says that, on 1 July 2016, NULIS admitted:
 - (i) all members of TUSS as members and beneficiaries of the TUSS Division within the MLC Super Fund; and
 - (ii) all members of the Plum Funds as members and beneficiaries of the Plum Division within the MLC Super Fund;
 - (c) refers to and repeats paragraphs 47 to 49 below; and
 - (d) otherwise denies the paragraph.
- 23 In response to paragraph 23 of the 4FASOC, NULIS:
- (a) admits that Schedule 1 to the *Corporations Amendment (Future of Financial Advice) Act 2012* (Cth) commenced on 1 July 2012;
 - (b) admits that Schedule 1 to the *Corporations Amendment (Further Future of Financial Advice Measures) Act 2012* (Cth) commenced on 1 July 2012; and
 - (c) says that the phrase “compliance with those amendments became mandatory” is embarrassing within the meaning of r 16.02(2)(d) of the *Federal Court Rules 2011* (Cth) (**Rules**) and, under cover of that objection, otherwise denies the paragraph.

24 In response to paragraph 24 of the 4FASOC, NULIS:

- (a) says that the defined term “Conflicted Remuneration” is used by the Applicant in paragraph 24 (and throughout the 4FASOC) incorrectly because it fails to have regard to benefits which, by operation of Division 4 of Part 7.7A of the Corporations Act and Division 4 of Part 7.7A of the *Corporations Regulations 2001* (Cth) (**Corporations Regulations**), are not included in the definition of “conflicted remuneration” set out in s 963A of the Corporations Act;
- (b) says that, in the period following 1 July 2013, Division 4 of Part 7.7A of the Corporations Act (including the definition of “conflicted remuneration” set out in s 963A) did not extend to benefits given in certain circumstances, including those benefits that:
 - (i) were given by a platform operator, and either:
 - (A) were given under an arrangement that was entered into before the application day (within the meaning of s 1528(4) of the Corporations Act); or
 - (B) would have been given as pleaded in subparagraph 24(b)(i)(A) above had it not been redirected under one or more later arrangements; or

Particulars

Corporations Act s 1528(2).

Corporations Regulations reg 7.7A.16.

- (ii) were not given by a platform operator, and were given under an arrangement entered into before the application day (within the meaning of s 1528(4) of the Corporations Act);

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Corporations Act s 1528(1).

- (c) says that, to the extent that NULIS provided any benefits that would otherwise fall within the meaning of paragraph 24 of the 4FASOC, Division 4 of Part 7.7A of the Corporations Act (including the definition of “conflicted remuneration” set out in s 963A) did not apply to such benefits by reason of:
 - (i) s 1528(2) of the Corporations Act and reg 7.7A.16 of the Corporations Regulations; or
 - (ii) further and in the alternative, s 1528(1) of the Corporations Act if, which is not admitted, NULIS was not a platform operator, or was not a platform operator in respect of certain products;
- (d) accordingly denies the paragraph; and

- (e) in this Defence, refers to benefits given in the circumstances referred to in subparagraphs 24(b) and (c) above as “**Grandfathered Remuneration**”.

24A To the extent that any allegation in the 4FASOC concerns the payment of plan service fees, NULIS says that:

- (a) all persons who paid plan service fees in the period 1 July 2016 to 23 September 2020 have been refunded the entirety of the plan service fees paid from their accounts, together with interest, except where the plan service fees were paid from the accounts of persons who held the MKBS product and who had a financial services licensee linked to their account at the time the fee was paid (**MKBS Plan Service Fee Members**);
- (b) plan service fees were charged to MKBS Plan Service Fee Members and paid to the financial services licensee linked to the member’s account (**MKBS Plan Service Fees**) for providing group-based financial services tailored to the needs of employees in the member’s company, which services were arranged by the member’s employer; and

Particulars

Reference guide titled ‘Changes to your MLC MasterKey Business Super Plan’ dated 1 June 2012.

MKBS product disclosure statement dated 30 September 2016.

- (c) having regard to the terms pursuant to which MKBS Plan Service Fees were paid as pleaded in subparagraph 24A(b) above, such fees are not:
- (i) conflicted remuneration (as defined in s 963A of the Corporations Act);
- (ii) Conflicted Remuneration (as defined in paragraph 24 of the 4FASOC);
or
- (iii) Grandfathered Remuneration (as defined in subparagraph 24(e) above).

25 In response to paragraph 25 of the 4FASOC, NULIS:

- (a) refers to and repeats paragraphs 24 and 24A above;
- (b) says that the provisions of Division 4 of Part 7.7A of the Corporations Act (including the definition of “conflicted remuneration” in s 963A and the prohibition in s 963E(1)) do not apply to Grandfathered Remuneration; and
- (c) otherwise admits the paragraph.

26 In response to paragraph 26 of the 4FASOC, NULIS:

- (a) refers to and repeats paragraphs 24 and 24A above;

- (b) says that the provisions of Division 4 of Part 7.7A of the Corporations Act (including the definition of “conflicted remuneration” in s 963A and the prohibition in s 963G(1)) do not apply to Grandfathered Remuneration; and
 - (c) otherwise admits the paragraph.
- 27 In response to paragraph 27 of the 4FASOC, NULIS:
 - (a) refers to and repeats paragraphs 24 and 24A above;
 - (b) says that the provisions of Division 4 of Part 7.7A of the Corporations Act (including the definition of “conflicted remuneration” in s 963A and the prohibition in s 963K) do not apply to Grandfathered Remuneration; and
 - (c) otherwise admits the paragraph.
- 28 In response to paragraph 28 of the 4FASOC, NULIS:
 - (a) refers to and repeats paragraphs 24 and 24A above;
 - (b) says that the provisions of Division 4 of Part 7.7A of the Corporations Act (including the definition of “conflicted remuneration” in s 963A) do not apply to Grandfathered Remuneration; and
 - (c) otherwise admits the paragraph.
- 29 In response to paragraph 29 of the 4FASOC, NULIS:
 - (a) refers to and repeats paragraphs 24 and 24A above; and
 - (b) otherwise admits the paragraph, if the defined term “Grandfathered Remuneration” is substituted for the defined term “Conflicted Remuneration”, but otherwise denies the paragraph.
- 30 In response to paragraph 30 of the 4FASOC, NULIS:
 - (a) refers to and repeats paragraphs 24, 24A and 29 above;
 - (b) otherwise admits that, between 1 July 2013 and 1 July 2016, Grandfathered Remuneration was given in respect of certain products of TUSS, and says further that:
 - (i) MLC Limited (ACN 000 000 402) (**MLCL**) charged variously administration fees, contribution fees and insurance premiums, and did so by way of deduction from the accounts of certain members of TUSS, or as part of the declared unit price of the applicable financial product, pursuant to an agreement with MLC Nominees or under other individual per member policies;

Particulars

Amending Agreement between MLCL and MLC Nominees dated 26 April 2013, clauses 6.1 and 10.1.

- (ii) NWMSL paid remuneration to financial services licensees in respect of certain TUSS products pursuant to agreements with financial services licensees; and

Particulars

Licensee remuneration agreement – Terms and conditions dated August 2011, clause 3.1(c).

Licensee remuneration agreement – Terms and conditions dated October 2013, clause 3.1(c).

- (iii) where NWMSL paid remuneration to financial service licensees under the agreements referred to in subparagraph 30(b)(ii) above, MLCL then reimbursed NWMSL; and

Particulars

Internal Remuneration Agreement between MLC Investments Ltd, MLCL and NWMSL dated 1 October 2008, clause 3.2.

Internal Remuneration Amending Agreement between MLC Investments Ltd, MLCL, Navigator Australia Limited and NWMSL dated 5 September 2011, clause 2.1(c).

- (c) otherwise denies the paragraph.

31 In response to paragraph 31 of the 4FASOC, NULIS:

- (a1) refers to and repeats paragraph 30 above;
- (a) admits that from October 2013, the Licensee Remuneration Agreement provided that the MLC Issuer or MLC Payer could request the return of remuneration which is subsequently deemed to be conflicted remuneration, or reduce future payments by the corresponding amount;

Particulars

Licensee remuneration agreement – Terms and conditions dated October 2013, clause 3.1(g).

- (b) says that the MLC Issuer, MLC Payer or financial services licensee could terminate the Licensee Remuneration Agreement on the giving of 30 days' written notice to the other; and

Particulars

Licensee remuneration agreement – Terms and conditions dated August 2011, clause 5.1.

Licensee remuneration agreement – Terms and conditions dated October 2013, clause 5.1.

- (c) otherwise denies the paragraph.

31A In response to paragraph 31A of the 4FASOC, NULIS:

- (a) as to subparagraph 31A(a):

- (i) says that the Licensee Remuneration Agreement provided that the remuneration paid to a financial services licensee for the provision of financial services could be terminated where the MLC Issuer or MLC Payer was advised by the relevant holder of the MLC Product, or reasonably believed, that the financial services licensee no longer provided the financial services to which the remuneration related; and

Particulars

Licensee remuneration agreement – Terms and conditions dated August 2011, clause 4.4(a)(i).

Licensee remuneration agreement – Terms and conditions dated October 2013, clause 4.4(a)(i).

- (ii) otherwise denies the subparagraph; and

- (b) as to subparagraph 31A(b):

- (i) says that the Licensee Remuneration Agreement provided that the remuneration paid to a financial services licensee could be terminated where:

- (A) the MLC Payer was not permitted to make any remuneration payments in respect of an MLC Product pursuant to any law; or

Particulars

Licensee remuneration agreement – Terms and conditions dated August 2011, clause 4.4(a)(v).

Licensee remuneration agreement – Terms and conditions dated October 2013, clause 4.4(a)(v).

- (B) the remuneration was, in the sole opinion of the MLC Issuer or MLC Payer or otherwise, banned pursuant to Part 7.7A of the Corporations Act; and

Particulars

Licensee remuneration agreement – Terms and conditions dated August 2011, clause 4.4(a)(vii).

Licensee remuneration agreement – Terms and conditions dated October 2013, clause 4.4(a)(vii).

(ii) otherwise denies the subparagraph.

32 NULIS admits paragraph 32 of the 4FASOC.

33 In response to paragraph 33 of the 4FASOC, NULIS:

(a) refers to and repeats paragraph 5 above;

(b) admits that, on and from 9 May 2016, NULIS made the covenants in ss 52(2)(b) to 52(2)(f) and 52(2)(h) of the SIS Act (**Statutory Covenants**) in its capacity as trustee of the MLC Super Fund, the terms of which are set out in subparagraphs 33(a)-(f) of the 4FASOC;

(c) denies that NULIS made the Statutory Covenants in respect of the MLC Super Fund at any time prior to 9 May 2016;

(d) says that NULIS also made the Statutory Covenants in respect of other registrable superannuation entities which are not relevant to these proceedings; and

(e) otherwise denies the paragraph.

33A NULIS admits paragraph 33A of the 4FASOC.

33B NULIS admits paragraph 33B of the 4FASOC.

33C In response to paragraph 33C of the 4FASOC, NULIS:

(a) admits the paragraph; and

(b) says further that:

(i) in October 2015, NAB announced an agreement to sell 80% of NAB Wealth's life insurance business to a third party, Nippon Life, for \$2.4 billion; and

(ii) the sale of the life insurance business was to occur through the sale of NAB's 80% interest in MLCL after the extraction of NAB's superannuation and investments business and certain other restructuring steps, including proposed successor fund transfers.

33D In response to paragraph 33D of the 4FASOC, NULIS:

- (a) as to subparagraph 33D(a):
 - (i) admits that NAB provided a letter to MLC Nominees and PFS dated 9 October 2015 in which NAB confirmed its intention that the proposed initial successor fund transfers and transformation be effected in accordance with the requirements set out in the document attached to, and the principles stated in, that letter;
 - (ii) otherwise denies the subparagraph; and
 - (iii) says further that the letter referred to in subparagraph 33D(a)(i) above also recognised the fiduciary role of MLC Nominees and PFS and that they must give priority to the interests of members over the interests of any other person including its shareholders;
- (b) as to subparagraphs 33D(b)-(d):
 - (i) says that the matters listed in subparagraphs 33D(b) and 33D(c) were listed as “Actions” not “Requirements”; and
 - (ii) otherwise admits the subparagraphs; and
- (c) says further that at the board meeting of MLC Nominees, NULIS and PFS on 2 March 2016, the directors of NULIS noted and discussed that:
 - (i) management advised that the grandfathering of commission payments was an initial consideration for selecting NULIS as the proposed receiving trustee in relation to the proposed successor fund transfer, but that was no longer the case;
 - (ii) whether or not to continue the current grandfathered commission arrangements had yet to be considered, and would be considered as part of the SFT considerations by each board; and
 - (iii) NULIS was selected as the proposed receiving trustee in relation to the proposed successor fund transfer predominantly due to lower execution risk and the minimisation of disruption to existing NULIS RSEs.

Particulars

Minutes of Board Meeting of MLC Nominees, NULIS and PFS on 2 March 2016 at page 4.

33E In response to paragraph 33E of the 4FASOC, NULIS:

- (a) refers to and repeats paragraph 33C above; and
- (b) otherwise denies the paragraph.

33F In response to paragraph 33F of the 4FASOC, NULIS:

- (a) admits that on 10 November 2015, Brad Tallents sent an email to Bernadette Demasi attaching, among other things, a paper entitled “Mars Entity Setup Stream”, the stated purpose of which was to seek approval from the “CIW LT” on the proposed structure of the future NAB superannuation entity;
- (b) admits that, on 11 November 2015, Linda Holliday requested Roger Rowlinson and Daniel Levy to review a draft board paper for the combined MLC Nominees, NULIS and PFS board meeting titled “Project Mars – Retail Product Strategy”; and
- (c) says that the phrase “NAB executives” is embarrassing within the meaning of r 16.02(2)(d) of the Rules and, under cover of that objection, otherwise denies the paragraph.

34 In response to paragraph 34 of the 4FASOC, NULIS:

- (a) says that on 2 December 2015 the board of MLC Nominees noted and discussed a paper dated 25 November 2015 titled “Project Mars – Retail Project Strategy” (**Retail Product Strategy Paper**); and

Particulars

Minutes of Board Meeting of MLC Nominees, NULIS and PFS on 2 December 2015 at page 3.

- (b) otherwise denies the paragraph.

35 In response to paragraph 35 of the 4FASOC, NULIS:

- (a) says that the Retail Product Strategy Paper was included in the board pack for the board meeting on 2 December 2015 which was provided to the boards of MLC Nominees, NULIS and PFS;
- (b) says that the Retail Product Strategy Paper was addressed to MLC Nominees and aimed to provide it (as the then trustee of TUSS) with details of the administrator’s then proposed strategy for retail legacy products within TUSS to be traded-up to more modern products within the new fund;
- (c) says that, at the board meeting on 2 December 2015, the Retail Product Strategy Paper was noted and discussed by the board of MLC Nominees only;
- (d) denies that any statement in the Retail Product Strategy Paper was made “in support of the decision in paragraph 34(b)” of the 4FASOC; and
- (e) otherwise admits the paragraph.

35A NULIS admits paragraph 35A of the 4FASOC.

35B In response to paragraph 35B of the 4FASOC, NULIS:

- (a) admits that on 31 March 2016, Andrew Lawless sent an email to Dougal Guild (**Guild**) and Kathy Vincent (**Vincent**) which set out “some arguments as to why the continuation of FoFA grandfathering in the new Super Fund would be in the best interests of members”;
- (b) admits that Guild and Vincent were employees of NAB or NWMSL; and
- (c) otherwise denies the paragraph.

35C In response to paragraph 35C of the 4FASOC, NULIS:

- (a) admits the paragraph, if the defined term “Grandfathered Remuneration” is substituted for the defined term “Conflicted Remuneration”, but otherwise denies the paragraph; and
- (b) says further that the email from Evelyn Horton to Nicole Smith dated 6 April 2016 also sought clarification on how stopping the payments of commissions would work.

35D In response to paragraph 35D of the 4FASOC, NULIS:

- (a) admits subparagraph 35D(a) if the defined term “Grandfathered Remuneration” is substituted for the defined term “Conflicted Remuneration”, but otherwise denies the subparagraph; and
- (b) as to subparagraph 35D(b):
 - (i) denies the subparagraph; and
 - (ii) says further that, on 7 April 2016, NULIS resolved to approve the version of the Roles and Responsibilities Charter annexed to the paper entitled ‘Proposed NULIS Operating Model Update’ “subject to changes requested by the Board”; and

Particulars

Minutes of Board Meeting of MLC Nominees, NULIS and PFS on 7 April 2016, at page 2.

- (c) as to subparagraph 35D(c):
 - (i) admits that, on 20 April 2016, Marriott sent an email to Guild (whose role at the time was “Manager, NAB Wealth Transformation Hub”) which stated “... intending to continue commission payment seems far too emphatic a statement and would seem to be saying that NAB has some directive capacity over the Trustee - that would be a very bad thing to say”; and
 - (ii) otherwise denies the subparagraph.

35E In response to paragraph 35E of the 4FASOC, NULIS:

- (a) says that the Roles and Responsibilities Charters as approved by NULIS, NWMSL and NAB from time to time contained words to the following effect:
- (i) it is expected the interests of NAB and NULIS will generally be aligned over the longer term. However, should there be any conflict in these interests, NAB recognises that NULIS in its role as a fiduciary has a primary obligation to prioritise the interests of its customers;

Particulars

Roles and Responsibilities Charter approved by NULIS on 7 April 2016, NWMSL on 29 April 2016 and NAB on 2 May 2016, clause 5.

Roles and Responsibilities Charter approved by NULIS on 8 December 2017, NWMSL on 22 March 2018 and NAB on 30 May 2018, clause 5.

Roles and Responsibilities Charter approved by NULIS, NWMSL and NAB in September 2020, clause 5.

- (ii) NULIS recognises NAB's objective and is expected to achieve NAB's strategic priorities and financial expectations, subject to also meeting its fiduciary and regulatory obligations;

Particulars

Roles and Responsibilities Charter approved by NULIS on 7 April 2016, NWMSL on 29 April 2016 and NAB on 2 May 2016, clause 7.

Roles and Responsibilities Charter approved by NULIS on 8 December 2017, NWMSL on 22 March 2018 and NAB on 30 May 2018, clause 7.

Roles and Responsibilities Charter approved by NULIS, NWMSL and NAB in September 2020, clauses 22 and 23.

- (iii) NULIS will consider and approve the superannuation strategy having regard for NULIS' fiduciary obligations and NAB's objective; and

Particulars

Roles and Responsibilities Charter approved by NULIS on 7 April 2016, NWMSL on 29 April 2016 and NAB on 2 May 2016, clause 18.

Roles and Responsibilities Charter approved by NULIS on 8 December 2017, NWMSL on 22 March 2018 and NAB on 30 May 2018, clause 18.

Roles and Responsibilities Charter approved by NULIS, NWMSL and NAB in September 2020, clause 18.

- (iv) NAB expects NULIS to appropriately consider and balance customer and shareholder interests to meet both fiduciary and shareholder expectations; and

Particulars

Roles and Responsibilities Charter approved by NULIS on 7 April 2016, NWMSL on 29 April 2016 and NAB on 2 May 2016, clause 22.

Roles and Responsibilities Charter approved by NULIS on 8 December 2017, NWMSL on 22 March 2018 and NAB on 30 May 2018, clause 22.

Roles and Responsibilities Charter approved by NULIS, NWMSL and NAB in September 2020, clause 18.

- (b) otherwise denies the paragraph.

36 In response to paragraph 36 of the 4FASOC, NULIS:

- (a) says that the email was sent by Marriott to Tom Garde (**Garde**), Andy Ridings, Guild, Vincent, Meera Ghelani (**Ghelani**) and Alan Hui (**Hui**) on 23 April 2016;
- (b) denies that the email:
 - (i) was sent by NULIS to employees of 'NAB Wealth'; or
 - (ii) discussed draft versions of the 10 June 2016 Board Pack;
- (c) says that subparagraph 36(b) inaccurately quotes the email by inserting "(the members)" instead of "these people" and inserting "them" instead of "the commissions", and accordingly denies the subparagraph;
- (d) says that subparagraph 36(c) misstates the proposed basis for supporting grandfathering by omitting the words "(assuming there is a legal basis to do so)";
- (e) says that the email also stated that the transformation work would result in any grandfathering decision being limited in duration; and
- (f) otherwise admits the paragraph.

37 In response to paragraph 37 of the 4FASOC, NULIS:

- (a) admits that an email was sent by Marriott to Lisa Neaves, Ghelani, Vincent, Garde, Paul Carter, Andrew Taylor, Hui and Damian Murphy (**Murphy**) on 8 May 2016;
- (b) denies that the email:
 - (i) was sent by NULIS to employees of 'NAB Wealth'; or

- (ii) discussed draft versions of the 10 June 2016 Board Pack; and
 - (c) otherwise admits the paragraph.
- 38 In response to paragraph 38 of the 4FASOC, NULIS:
- (a) admits that, on 2 June 2016, a meeting took place between representatives of MLC Nominees, NULIS and ASIC;
 - (b) says that, at the meeting on 2 June 2016, the proposal to continue the payment to financial services licensees of commission relating to products held by transferring fund members following the proposed successor fund transfer was discussed; and
 - (c) otherwise denies the paragraph.
- 39 In response to paragraph 39 of the 4FASOC, NULIS:
- (a) admits that, on 20 May 2016, a document titled “Briefing Note Proposed Successor Fund Transfers: Continuation of Grandfathered Commissions” dated 20 May 2016 was provided to ASIC; and
 - (b) otherwise denies the paragraph.
- 40 In response to paragraph 40 of the 4FASOC, NULIS:
- (a) refers to and repeats paragraph 38 above; and
 - (b) admits the paragraph.
- 41 In response to paragraph 41 of the 4FASOC, NULIS:
- (a) says that the NULIS Board noted and discussed a paper dated 6 June 2016 titled “SFT Proposal – Continuation of Commission Grandfathering” (**Grandfathering Paper**) at a board meeting on 10 June 2016;
 - (b) says that, at the meeting on 10 June 2016, the boards of MLC Nominees and PFS also considered the Grandfathering Paper;
 - (c) says that on 19 May 2016, the directors of NULIS were also provided with, and subsequently considered, an earlier version of the paper titled “SFT Proposal – Continuation of Commission Grandfathering” ahead of a workshop on 25 May 2016 (**Workshop Paper**);
 - (d) says that the directors of NULIS attended a workshop on 25 May 2016 at which the Workshop Paper was discussed;
 - (e) says that the contents of the Workshop Paper were not replicated in full in the Grandfathering Paper as the Workshop Paper had already been considered by the directors of NULIS ahead of and during the workshop on 25 May 2016; and

(f) otherwise denies the paragraph.

42 In response to paragraph 42 of the 4FASOC, NULIS:

- (a) says that the Grandfathering Paper repeated the three options which were first set out in the Workshop Paper;
- (b) in respect of subparagraph 42(a), says that the Grandfathering Paper also proposed that MLCL should continue to pay commission in respect of member benefits where it continued to receive the revenue from which commission was funded; and
- (c) otherwise denies the paragraph.

Particulars

Grandfathering Paper at page 22.

43 In response to paragraph 43 of the 4FASOC, NULIS:

- (a) says that the Grandfathering Paper repeated the recommendation in the Workshop Paper to approve to maintain the current grandfathered commission arrangements pertaining to the products which form part of TUSS following the proposed successor fund transfer to the MLC Super Fund;
- (b) says that the Workshop Paper set out additional matters in relation to “option 1”;

Particulars

In relation to “option 1”, the Workshop Paper stated, inter alia, that:

- (i) the SFT could proceed as planned and future member benefits would be enabled (Workshop Paper at pages 2 and 4);
 - (ii) management intended to commence a program of work to trade-up legacy TUSS products following the SFT, at which point management would give consideration to whether removing grandfathered commission structures could lead to better member outcomes (Workshop Paper at page 4); and
 - (iii) the staggered removal of grandfathered commissions would lessen the detrimental impacts that would be occasioned by “option 2” (Workshop Paper at page 4).
- (c) denies that the Grandfathering Paper referred to “Members of the MLC Super Fund” as alleged in subparagraph 43(a)(i);

- (d) says that the Grandfathering Paper also stated that:
- (i) member fees would remain the same and the service which was provided to members by their financial adviser would continue on the same basis;
 - (ii) management intended to commence a program of work to trade-up legacy TUSS products following the SFT, and that program was due to commence from “next year”;
 - (iii) the Trustee’s risk appetite in respect of legacy products would be a key consideration in respect of continuing commission payments; and

Particulars

Grandfathering Paper at pages 22-23.

- (e) otherwise admits the paragraph if the defined term “Grandfathered Remuneration” is substituted for the defined term “Conflicted Remuneration”, but otherwise denies the paragraph.

44 In response to paragraph 44 of the 4FASOC, NULIS:

- (a) says that the Workshop Paper set out further detail in relation to “option 1”, “option 2” and “option 3” respectively; and

Particulars

NULIS refers to and repeats the particulars to paragraphs 43(b) above, 45(a) below and 46(a) below.

- (b) otherwise admits the paragraph, if the defined term “Grandfathered Remuneration” is substituted for the defined term “Conflicted Remuneration”, but otherwise denies the paragraph.

45 In response to paragraph 45 of the 4FASOC, NULIS:

- (a) says that the Workshop Paper set out additional matters in relation to option 2;

Particulars

In relation to “option 2”, the Workshop Paper stated, inter alia, that:

- (i) members would be worse off as a result of increased attrition which would likely necessitate increased member fees and impact the sustainability of the fund (Workshop Paper at pages 2 and 5);
- (ii) there would be significant detrimental impacts to inflows and outflows expected which would threaten the financial

sustainability of products, member benefits and the new fund as a whole (Workshop Paper at page 2);

- (iii) there would be a financial commitment to implement “option 2”, including delay costs to the SFT (Workshop Paper at pages 2 and 6);
- (iv) the SFT would be delayed by at least 3 - 6 months (Workshop Paper at pages 2 and 6);
- (v) future member benefits would be unlikely due to impacts of product and fund sustainability (Workshop Paper at page 2);
- (vi) it was estimated that if financial advisers could establish there had been a breach of contract resulting in loss as a result of ceasing commission payments, the compensation that would collectively be payable would be in excess of \$200 million (Workshop Paper at page 5); and
- (vii) if the grandfathered commission arrangements were not continued following the SFT:
 - (A) member attrition rates could be 40% - 50% (equating to an approximate loss in funds under management of \$4.87 billion - \$6.10 billion); and
 - (B) annual funds inflows could be reduced by 30% - 40% (equating to approximately \$899 million - \$1.198 billion per annum),

(Workshop Paper at page 5).

- (b) denies that the Grandfathering Paper referred to the “MLC Super Fund” as alleged in subparagraph 45(e);
- (c) says that the Grandfathering Paper also stated that a reduction in competitiveness of each product would also have the cascading effect of further reducing sales and increasing member attrition; and

Particulars

Grandfathering Paper at page 23.

- (d) otherwise admits the paragraph, if the defined term “Grandfathered Remuneration” is substituted for the defined term “Conflicted Remuneration”, but otherwise denies the paragraph.

46 In response to paragraph 46 of the 4FASOC, NULIS:

- (a) says that the Workshop Paper set out additional matters in relation to option 3;

Particulars

In relation to “option 3”, the Workshop Paper stated, inter alia, that:

- (i) members would be placed in a fee neutral position with no additional rights or benefits (Workshop Paper at page 2);
- (ii) there would be a multi-million dollar financial commitment required which would not generate any member or commercial benefit (Workshop Paper at pages 2 and 7);
- (iii) the SFT would be delayed by approximately 12 months (Workshop Paper at pages 2 and 7);
- (iv) future member benefits would be significantly delayed and some would likely be de-prioritised due to the expense of delivery of “option 3” (Workshop Paper at page 2);
- (v) the possibility of “option 3” being achievable for only a sub-set of TUSS products was highly possible (Workshop Paper at page 7);
- (vi) management believed the cost and effort required was not in members’ best interests (Workshop Paper at page 7);
- (vii) the work required to establish adviser service fees would be significant, including, in addition to the work required for “option 2”, the added complexity of building the functionality to support adviser service fees for around half of the TUSS products (Workshop Paper at page 7); and
- (viii) if the SFT was delayed as a consequence of adopting “option 3”, the associated benefits of the SFT for members would be deferred including:
 - (A) the opportunity to provide more efficient and seamless transition of members through different life stages as part of a single RSE environment;
 - (B) the opportunity to provide a more co-ordinated approach to investment menu construction across funds; and
 - (C) ongoing investment in product improvement and enhanced member services through progressive trade-ups of legacy products,

(Workshop Paper at page 7).

- (b) says that the Grandfathering Paper stated that new system functionality would need to be built “to support” the adviser service fee, and accordingly denies that the Grandfathering Paper stated that new system functionality would need

to be built “to approve” the adviser service fee as alleged in subparagraph 46(b); and

Particulars

Grandfathering Paper at page 24.

- (c) otherwise admits the paragraph, if the defined term “Grandfathered Remuneration” is substituted for the defined term “Conflicted Remuneration”, but otherwise denies the paragraph.

46A In response to paragraph 46A of the 4FASOC, NULIS:

- (a) admits that the Grandfathering Paper included commentary by the Chief Risk Officer, Murphy, including that he recommended there be a review of all commission payments for legacy products, whether in the context of trade-ups or otherwise, to address fee comparability and service to retail customers to satisfy ongoing member interests; and
- (b) otherwise does not know and cannot admit the paragraph.

46B In response to paragraph 46B of the 4FASOC, NULIS:

- (a) admits that, prior to 6 June 2016, the Grandfathering Paper was the subject of input and discussion;
- (b) refers to and repeats paragraph 36 above; and
- (c) otherwise denies the paragraph, including because the paragraph is vague and embarrassing within the meaning of r 16.02(2)(d) of the Rules and fails to identify the material facts relied upon.

47 In response to paragraph 47 of the 4FASOC, NULIS:

- (a) admits that the NULIS Board resolved to approve to maintain the current grandfathered commission arrangements pertaining to the products which form part of TUSS following the proposed successor fund transfer to the MLC Super Fund, but says that paragraph 47 of the 4FASOC miscasts the resolution and the nature of the decision made on 10 June 2016, including by reference to the Applicant’s inapt defined term “Conflicted Remuneration” (as to which NULIS refers to and repeats paragraph 24 above);

Particulars

Minutes of Board Meeting of MLC Nominees, NULIS and PFS on 10 June 2016 at page 4.

- (b) denies that any plan service fees were the subject of the resolution pleaded in subparagraph 47(a) above, and says further that, prior to making that resolution, the NULIS Board noted and discussed that “[t]he risks associated with charging explicit fees for advice related services (*Adviser Service Fees*

and Plan Service Fees) is being addressed separately and are not directly related to the payment of commissions”;

Particulars

Minutes of Board Meeting of MLC Nominees, NULIS and PFS on 10 June 2016 at page 4.

- (c) says further that a decision as to whether to continue the grandfathered commission arrangements for the time being following the proposed successor fund transfer was considered by the NULIS Board in the context of a broader simplification and transformation proposal involving, inter alia:
- (i) successor fund transfers to amalgamate five funds (being TUSS and the Plum Funds) into the MLC Super Fund (**SFT**); and
 - (ii) the legacy products being progressively “traded-up” to modern products in the three-year period following the SFT,
- (the **Proposal**);
- (d) says further that prior to 1 July 2016, the NULIS Board considered the Proposal, including the question of equivalency of members’ rights and the benefits of the Proposal for members, on multiple occasions;

Particulars

- (i) The benefits identified included:
 - (A) the investment committed in separating the life and super businesses was expected to deliver scale benefits for members in on sale products and significant benefits for members in off sale products through trade-up opportunities to equivalent modern products; and
 - (B) a further investment of \$300 million had been committed by NAB that was expected to deliver significant future service and product improvements to members.
- (ii) The NULIS directors considered the Proposal on multiple occasions including:
 - (A) at a board meeting on 2 March 2016;
 - Paper titled “Proposed NULIS Operating Model” dated 25 February 2016.
 - Minutes of Board Meeting of MLC Nominees, NULIS and PFS on 2 March 2016 at page 3.
 - (B) at a board meeting on 7 April 2016;

Paper titled "SFT Proposal" dated 1 April 2016.

Minutes of Board Meeting of NULIS on 7 April 2016 at page 2.

(C) at a board meeting on 5 May 2016;

Paper titled "Member Equivalence and Best Interest and Successor Fund Merger Deed" dated 29 April 2016.

Minutes of Board Meeting of NULIS on 5 May 2016 at pages 3-6.

(D) at a workshop on 25 May 2016;

Workshop Paper.

(E) at a workshop on 2 June 2016;

Paper titled "TUSS Legacy Product SFT Principles".

(F) at a board meeting on 10 June 2016; and

Grandfathering Paper.

Minutes of Board Meeting of MLC Nominees, NULIS and PFS on 10 June 2016 at page 3.

(G) at a board meeting on 16 June 2016;

Paper titled "TUSS Legacy Product SFT Principles" dated 10 June 2016.

Minutes of Board Meeting of MLC Nominees, NULIS and PFS on 16 June 2016 at page 3.

(e) says further that satisfaction of an equivalency of members' rights test was a pre-condition to any SFT occurring;

Particulars

Superannuation Industry (Supervision) Regulations 1994 (Cth) (SIS Regulations) reg 1.03(1) (definition of "successor fund") and reg 6.29.

(f) says further that the proposed SFT was designed to ensure the equivalence of members' rights;

Particulars

The SFT was designed to ensure, inter alia, that:

(i) there would be no change to product terms or conditions;

- (ii) there would be no increase to product fees, charges or premiums or imposition of transaction costs;
- (iii) there would be no change to account values (members or reserves) or insurance arrangements;
- (iv) there would be no change in administrative platform or the computer system administering the products;
- (v) there would be no costs passed on to members for the creation of the new fund or for execution of the SFT; and
- (vi) there would be no impact to the adequacy of resources.

Paper titled "TUSS Legacy Product SFT Principles" dated 10 June 2016.

- (g) says further that the proposed SFT was also designed to improve certain rights of members;

Particulars

The improvements included:

- (i) that members would no longer be charged an exit fee when switching between "Plum" and "MLC" products as they would all be within one fund;

Paper titled "NAB Wealth Successor Fund Transfer – Member Equivalence and Best Interests" dated 18 June 2016, Appendix 3.

- (ii) fee reductions for fixed rate funds products; and

Paper titled "NAB Wealth Successor Fund Transfer – Member Equivalence and Best Interests" dated 18 June 2016, Appendix 3.

- (iii) the operational risk financial requirement (**ORFR**) being initially funded by NAB, enabling the removal of existing ORFR levies and the release of existing member funded ORFR reserves for the benefit of members.

Paper titled "SFT Proposal" dated 1 April 2016.

- (h) says further that the continuation of Grandfathered Remuneration following the SFT was one of the factors relevant to the assessment of equivalency of members' rights;
- (i) says further that on 7 April 2016, the NULIS Board requested a paper that set out all the issues that the board needed to consider with respect to the

continuation of the grandfathered commission arrangements, which paper was provided to the board in the form of the Grandfathering Paper;

Particulars

Minutes of Board Meeting of NULIS on 7 April 2016 at page 2.

- (j) says further that the directors of NULIS were also provided with, and considered, the Workshop Paper at a workshop on 25 May 2016;

Particulars

Workshop Paper.

- (k) says further that the continuation of the Grandfathered Remuneration arrangements for the time being was only one element of the overall package of terms of the SFT which the NULIS Board considered;
- (l) says further that the resolution pleaded in subparagraph 47(a) above was made in the context pleaded in subparagraphs 47(b)-(i) above;
- (m) says further that, on 27 June 2016, the board of MLC Nominees resolved that it was satisfied that:
- (i) upon execution of the Successor Fund Merger Deed, the MLC Super Fund would confer on each member equivalent rights to the rights that the member had under TUSS in respect of their benefit entitlements transferred; and

Particulars

Minutes of Board Meeting of MLC Nominees and PFS on 27 June 2016 at page 2.

- (ii) it was in the best interests of the beneficiaries of TUSS that the benefit entitlements of members be transferred from TUSS to the MLC Super Fund;

Particulars

Minutes of Board Meeting of MLC Nominees and PFS on 27 June 2016 at page 2.

- (n) says further that, on 27 June 2016, the board of PFS resolved that it was satisfied that:
- (i) upon execution of the Successor Fund Merger Deed, the MLC Super Fund would confer on each member equivalent rights to the rights that the member had in the Plum Funds in respect of their benefit entitlements transferred; and

Particulars

Minutes of Board Meeting of MLC Nominees and PFS on 27 June 2016 at pages 2 and 3.

- (ii) it was in the best interests of the beneficiaries of the Plum Funds that the benefit entitlements of members be transferred from those funds to the MLC Super Fund;

Particulars

Minutes of Board Meeting of MLC Nominees and PFS on 27 June 2016 at page 3.

- (o) says further that on 27 June 2016, the NULIS Board resolved to agree that the MLC Super Fund was a “successor fund” within the meaning of the SIS Regulations and to approve the transfer of the members and assets from TUSS and the Plum Funds to the MLC Super Fund;

Particulars

Minutes of Board Meeting of NULIS on 27 June 2016 at page 2.

- (p) says further that, had the NULIS Board not made the resolution referred to in paragraph 47(a) above, the SFT would have been delayed by up to 12 months, during which period Grandfathered Remuneration would have continued to be paid to financial services licensees in respect of TUSS products (**Counterfactual Period**); and

Particulars

Workshop Paper at page 2; further particulars may be provided in conjunction with NULIS’s evidence.

- (q) otherwise denies the paragraph.

47A NULIS admits paragraph 47A of the 4FASOC if the defined term “Grandfathered Remuneration” is substituted for the defined term “Conflicted Remuneration”, but otherwise denies the paragraph.

47B NULIS admits paragraph 47B of the 4FASOC.

47C In response to paragraph 47C of the 4FASOC, NULIS:

- (a) admits subparagraphs 47C(a), (c) and (d); and
- (b) as to subparagraph 47C(b):
- (i) admits the subparagraph; and

- (ii) says further that the subparagraph omits reference to the express objective of “Principle 2” of the Legacy Product Principles (**LPP**) which was “to minimise impacts to SFT timelines and commitments”.

47D In response to paragraph 47D of the 4FASOC, NULIS:

- (a) denies the paragraph; and
- (b) says further that the LPP were principles used to assess the proposed solutions to extract legacy products and investment options from the life investment policy issued by MLCL as part of the successor fund transfer.

47E NULIS admits paragraph 47E of the 4FASOC.

47F NULIS admits paragraph 47F of the 4FASOC.

47G NULIS admits paragraph 47G of the 4FASOC.

47H NULIS admits paragraph 47H of the 4FASOC.

47I In response to paragraph 47I of the 4FASOC, NULIS:

- (a) admits subparagraph 47I(a) insofar as the allegation relates to products in the TUSS Division of the MLC Super Fund from 1 July 2016, and if the defined term “Grandfathered Remuneration” is substituted for the defined term “Conflicted Remuneration”, and only insofar as the allegation relates to Grandfathered Remuneration paid to financial services licensees, but otherwise denies the subparagraph; and
- (b) otherwise denies the paragraph.

47J NULIS admits paragraph 47J of the 4FASOC.

48 NULIS admits paragraph 48 of the 4FASOC.

49 In response to paragraph 49 of the 4FASOC, NULIS:

- (a) says that NULIS was already the trustee of the MLC Super Fund as at 1 July 2016, having executed the trust deed on 9 May 2016, and accordingly denies subparagraph 49(b); and

Particulars

MLC Super Fund Trust Deed.

- (b) otherwise admits the paragraph.

50 In response to paragraph 50 of the 4FASOC, NULIS:

- (a1) refers to and repeats paragraph 24A above;

- (a) otherwise admits that from 1 July 2016 to 23 September 2020:
 - (i) Grandfathered Remuneration was given to financial services licensees in respect of certain products; and
 - (ii) remuneration was on paid to authorised representatives of financial services licensees, but says it does not know the amount of such payments or the arrangements under which such payments were made;
- (b) denies paragraph 50(a) of the 4FASOC;
- (c) denies paragraph 50(b) of the 4FASOC;
- (d) says further that:
 - (i) NULIS or MLCL charged variously administration fees, contribution fees and insurance premiums in respect of certain products, which:
 - (A) were set out in product disclosure statements issued by NULIS;

Particulars

Product disclosure statements issued by NULIS between 1 July 2016 and 23 September 2020 which have been discovered in the proceeding.

- (B) were paid out of the assets of the MLC Super Fund or from amounts paid into or out of the assets of the MLC Super Fund; and

Particulars

MLC Super Fund Trust Deed, clause 1.3 and Schedule 1, clauses 3.7, 4.2 and 5.5.

- (C) were allocated as separate charges to the accounts maintained in respect of certain members of the TUSS Division of the MLC Super Fund, or included as an expense in determining the declared unit price of the applicable financial products,

and that such funds were used to pay Grandfathered Remuneration;

- (ii) NWMSL paid Grandfathered Remuneration to financial services licensees in respect of certain products, and was subsequently reimbursed by NULIS in its corporate capacity;

Particulars

Licensee remuneration agreement – Terms and conditions dated June 2016, clause 3.1(c).

Licensee remuneration agreement – Terms and conditions dated October 2019, clause 3.1(c).

Licensee remuneration agreement – Terms and conditions dated April 2020, clause 3.1(c).

Internal Remuneration Agreement between MLC Investments Ltd, MLCL and NWMSL dated 1 October 2008, clause 3.2.

Internal Remuneration Amending Agreement between MLC Investments Ltd, MLCL, Navigator Australia Limited and NWMSL dated 5 September 2011, clause 2.1(c).

Amending deed – Internal Remuneration Agreement between MLC Investments Ltd, MLCL, Navigator Australia Limited and NWMSL dated 30 May 2016, clause 2.1(a).

Amending deed – Internal Remuneration Agreement between MLC Investments Ltd, NULIS, Navigator Australia Limited and NWMSL dated 1 July 2016, clause 2.1.

- (iii) NWMSL paid Grandfathered Remuneration to financial services licensees in respect of certain products as the payment agent of MLCL and/or was subsequently reimbursed by MLCL;

Particulars

Licensee remuneration agreement – MLC Life Insurance Products dated June 2016, clause 3.1(c).

Licensee remuneration agreement – MLC Life Insurance Products dated November 2016, clause 3.1(c).

Remuneration Agreement between NWMSL and MLCL dated 30 June 2016, clauses 3.1 and 3.2.

Services Agreement (Administration of Insurance in Superannuation) between NWMSL and MLCL dated 30 June 2016, clause 6.4 and Schedule 3.

These products were:

- (i) MLC Capital Guaranteed Personal Super Series 1;
- (ii) MLC Capital Guaranteed Personal Super Series 2;
- (iii) MLC Fixed Term Pension;
- (iv) MLC Super Pension;
- (v) Whole of Life;

- (vi) Endowment;
 - (vii) MLC Whole of Life Superannuation;
 - (viii) MLC Endowment Superannuation; and
 - (ix) MLC Pure Endowment Superannuation.
- (e) refers to and repeats paragraph 47 above; and
- (f) says further that, since 1 July 2016, strategies have been developed, and changes have been made by NULIS, to improve products, including their fee structure, in the MLC Super Fund.

Particulars

The changes that have been made have included, inter alia:

- (i) a first tranche of products ceased attracting Grandfathered Remuneration after 8 September 2017 following NULIS's decision to trade-up 10 products within the TUSS Division of the MLC Super Fund (**First Tranche Products**) by varying the terms of such products so as to adopt the same fee structure and product features as the MLC MasterKey Super Fundamentals product within the TUSS Division of the MLC Super Fund (in respect of which there are no commissions paid to financial services licensees) (see the Minutes of NULIS Board Sub-Committee Meeting on 24 July 2017 at page 6).

The First Tranche Products were:

- (A) Blueprint;
 - (B) Dimension;
 - (C) Employer Funded Dimension;
 - (D) Executive Dimension;
 - (E) Financial Security Plan;
 - (F) MLC Combination Plan (Norwich Combination Plan);
 - (G) MLC Life I (Nulife);
 - (H) MLC Life II (Nulife II);
 - (I) MLC Link (Nulink); and
 - (J) MLC Superannuation Plan (Norwich Superannuation Plan);
- (ii) a strategy was developed for, and on 12 February 2018, NULIS resolved to implement, a reduction to the administration fees paid by

- members with an account in the MLC MasterKey Superannuation Five Star or MLC MasterKey Allocated Pension Five Star products, which was effective from 11 April 2018 (see the Minutes of Board Meeting of NULIS on 12 February 2018 at pages 5-6);
- (iii) a strategy was developed for, and on 21 September 2018, NULIS resolved to implement, a waiver of the withdrawal fees associated with the MLC MasterKey Superannuation Gold Star product, which was effective from 8 March 2019 (see the Minutes of Board Meeting of NULIS on 21 September 2018 at page 5);
 - (iv) a strategy was developed for, and on 29 November 2018, NULIS resolved to implement:
 - (A) a reduction to the administration fees paid by members with an account in the MLC MasterKey Super Fundamentals or MLC MasterKey Pension Fundamentals products, which was effective from 1 April 2019 (see the Minutes of Board Meeting of NULIS on 29 and 30 November 2018 at page 9); and
 - (B) the removal of the exit fee and contribution splitting fee from MKBS and MKPS product terms, which was effective from mid-March 2019 (see the Minutes of Board Meeting of NULIS on 29 and 30 November 2018 at page 10);
 - (v) a strategy was developed, and on 30 September 2018 was implemented, for the cessation of certain Grandfathered Remuneration in the MKPS product, through the removal of the Adviser Contribution Fee payable in respect of that product;
 - (vi) a strategy was developed, and on 30 November 2018 was implemented, for the cessation of certain Grandfathered Remuneration in the MKBS product, through the removal of the Adviser Contribution Fee payable in respect of that product;
 - (vii) a second tranche of products ceased attracting Grandfathered Remuneration after 7 May 2020 following NULIS's decision to trade-up the MLC MasterKey Super and MLC MasterKey Pension products within the TUSS Division of the MLC Super Fund by:
 - (A) varying the terms of the MLC MasterKey Super product so as to adopt the same fee structure and product features as the MLC MasterKey Super Fundamentals product within the TUSS Division of the MLC Super Fund (in respect of which there are no commissions paid to financial services licensees); and
 - (B) varying the terms of the MLC MasterKey Pension product so as to adopt the same fee structure and product features as the MLC MasterKey Pension Fundamentals product within the TUSS Division of the MLC Super Fund (in respect of which

there are no commissions paid to financial services licensees);
and

- (viii) a third tranche of products ceased attracting Grandfathered Remuneration after 5 June 2020 following NULIS's decision to trade-up the MLC MasterKey Superannuation Gold Star, MLC MasterKey Superannuation Five Star, MLC Personal Superannuation Savings Plan, MLC MasterKey Allocated Pension Gold Star and MLC MasterKey Allocated Pension Five Star products within the TUSS Division of the MLC Super Fund by:
 - (A) varying the terms of the MLC MasterKey Superannuation Gold Star, MLC MasterKey Superannuation Five Star and MLC Personal Superannuation Savings Plan products so as to adopt the same fee structure and product features as the MLC MasterKey Super Fundamentals product within the TUSS Division of the MLC Super Fund (in respect of which there are no commissions paid to financial services licensees); and
 - (B) varying the terms of the MLC MasterKey Allocated Pension Gold Star and MLC MasterKey Allocated Pension Five Star products so as to adopt the same fee structure and product features as the MLC MasterKey Pension Fundamentals product within the TUSS Division of the MLC Super Fund (in respect of which there are no commissions paid to financial services licensees);
- (ix) a strategy was developed for, and on –27 - 28 August 2020, NULIS resolved to implement, the cessation of Grandfathered Remuneration in respect of the MLC MasterKey Term Allocated Pension product, with the final Grandfathered Remuneration payments made on 4 December 2020 (see the Minutes of Board Meeting of NULIS on 27 - 28 August 2020 at page 16); and
- (x) a strategy was developed, and on 31 October 2020 was implemented, for the cessation of Grandfathered Remuneration in respect of the MKBS and MKPS products through the removal of the insurance commissions payable in respect of those products;
- (g) says further that there has been no Grandfathered Remuneration paid by NWMSL and subsequently reimbursed by NULIS (as pleaded in subparagraph 50(d)(ii) above) since 4 December 2020; and
- (h) says further that, at all material times:
 - (i) the MLC Super Fund product offering included products which did not attract Grandfathered Remuneration (**Non-Commission Products**) and the Applicant and Group Members were entitled at any time to rollover their benefits (within the meaning of that term in the SIS Act and SIS Regulations) into Non-Commission Products of their choosing; and

- (ii) further or in the alternative, the Applicant and Group Members were entitled to seek to agree with their financial adviser a reduction or cessation of the Grandfathered Remuneration payable in respect of any products that they held.

50A In response to paragraph 50A of the 4FASOC, NULIS:

- (a) refers to and repeats subparagraph 50(f) above; and
- (b) otherwise denies the paragraph.

50B NULIS admits paragraph 50B of the 4FASOC.

50C In response to paragraph 50C of the 4FASOC, NULIS:

- (a) admits that the draft Legacy Retail Product Roadmap particularised by the Applicant (**Draft Roadmap**) stated, in effect, that there was a previous agreement in December 2015 that legacy products with embedded trail commissions would be traded up to MLC MasterKey Super and Pension (which was commission based), subject to (among other things) demonstration it was in the members' best interests;
- (b) otherwise denies the paragraph; and
- (c) says further that:
 - (i) NULIS was not the trustee of the MLC Super Fund in December 2015; and
 - (ii) on 2 December 2015, the Board of MLC Nominees:
 - (A) noted and discussed the Retail Product Strategy Paper; and
 - (B) noted discussions held during the workshop held prior to the board meeting.

Particulars

Minutes of Board Meeting of MLC Nominees, NULIS and PFS on 2 December 2015 at page 3.

50CA NULIS denies paragraph 50CA of the 4FASOC.

50D NULIS admits paragraph 50D of the 4FASOC if the defined term "Grandfathered Remuneration" is substituted for the defined term "Conflicted Remuneration", but otherwise denies the paragraph.

50E In response to paragraph 50E of the 4FASOC, NULIS:

- (a) admits that:
 - (i) on 2 November 2016, a document entitled “NULIS Capsil Product Trade Up – Business Case Workshop” (**Capsil Trade-Up Strategy Pack**) was circulated by David Romanowski for the workshop to be held on 3 November 2016;
 - (ii) under the heading “Desired Future State”, slide 5 of the Capsil Trade-Up Strategy Pack stated that the Gold Star and remaining NULIS Capsil products would be traded up to MLC MasterKey Super and Pension to preserve grandfathering under FOFA; and
 - (iii) on 1 December 2016, Timothy Gorst circulated notes entitled “1 December Five Star / Gold Star Board Workshop - Feedback From Directors”;
- (b) denies subparagraph 50E(d); and
- (c) otherwise denies the paragraph, including because the paragraph is vague and embarrassing within the meaning of r 16.02(2)(d) of the Rules and fails to identify the material facts relied upon.

50F NULIS admits paragraph 50F of the 4FASOC.

50G NULIS admits paragraph 50G of the 4FASOC, if the defined term “Grandfathered Remuneration” is substituted for the defined term “Conflicted Remuneration”, but otherwise denies the paragraph.

50H In response to paragraph 50H of the 4FASOC, NULIS:

- (a) admits that one of the bases of management’s recommendation was as alleged in paragraph 50H; and
- (b) otherwise denies the paragraph.

50I In response to paragraph 50I of the 4FASOC, NULIS:

- (a) admits that on 7 and 8 December 2017, a meeting of the NULIS Board was held, and the directors of NULIS attended a workshop, at which management’s proposal to seek the Trustee’s support for a three year transition to cease all asset and contribution based commissions within the MLC Super Fund was discussed; and
- (b) otherwise denies the paragraph.

50J In response to paragraph 50J of the 4FASOC, NULIS:

- (a) refers to and repeats paragraph 47D above; and

(b) denies the paragraph.

50K In response to paragraph 50K of the 4FASOC, NULIS:

(c) refers to and repeats paragraph 47D above;

(d) denies the paragraph; and

(e) says further that the resolutions referred to in paragraph 50K were passed “subject to business readiness”.

51 In response to paragraph 51 of the 4FASOC, NULIS:

(a) refers to and repeats paragraphs 47 and 50 above;

(b) says that the NULIS Board considered the overall package of terms of the SFT as designed, only one part of which involved the continuation of Grandfathered Remuneration for the time being, and accordingly denies that the “Grandfathering Decision” was made as pleaded in paragraph 47 of the 4FASOC;

(c) denies subparagraph 51(a);

(d) as to subparagraph 51(b):

(i) admits the subparagraph in respect of remuneration paid to financial services licensees for products issued to members of TUSS, if the defined term “Grandfathered Remuneration” is substituted for the defined term “Conflicted Remuneration”, and otherwise denies the subparagraph;

(ii) says that, notwithstanding that NULIS did not have any contracts with financial services licensees in relation to the payment of Grandfathered Remuneration in respect of products issued to members of TUSS, such financial services licensees may have made claims against NULIS asserting other causes of action had the payment of Grandfathered Remuneration in respect of those products ceased following the SFT; and

Particulars

Various causes of action may have been asserted by, or on behalf of, financial services licensees. These may have included misleading or deceptive conduct, misrepresentation and/or unconscionable conduct.

(iii) otherwise denies the subparagraph;

(e) as to subparagraph 51(c):

(i) refers to and repeats paragraph 47 above; and

- (ii) denies the subparagraph;
- (f) denies subparagraph 51(d) and says further that estimates were provided to the NULIS Board prior to 1 July 2016 that, if the grandfathered commission arrangements were not continued following the SFT:
 - (i) member attrition rates could be 40% - 50% (equating to an approximate loss in funds under management of \$4.87 billion - \$6.10 billion); and
 - (ii) annual funds inflows could be reduced by 30% - 40% (equating to approximately \$899 million - \$1.198 billion per annum);

Particulars

Workshop Paper at page 5.

- (g) admits subparagraph 51(e) in respect of remuneration paid to financial services licensees for products issued to members of TUSS, if the defined term "Grandfathered Remuneration" is substituted for the defined term "Conflicted Remuneration", and otherwise denies the subparagraph;
- (h) does not know and cannot admit subparagraph 51(f);
- (i) denies subparagraph 51(g);
- (j) as to subparagraph 51(h):
 - (i) refers to and repeats subparagraph 51(i) above; and
 - (ii) denies the subparagraph;
- (k) denies subparagraph 51(i);
- (l) as to subparagraph 51(i1):
 - (i) refers to and repeats subparagraphs 18(b), 22(b), 24 and 24A above;
 - (ii) otherwise admits that no ongoing benefits or services were required to be provided by financial services licensees as a condition of payment of the Grandfathered Remuneration, as any Grandfathered Remuneration was payable in respect of services already provided, namely, in connection with the issue of a relevant product to the Applicant and Group Members pursuant to an application submitted by the financial services licensee or its authorised representative; and
 - (iii) otherwise denies the subparagraph;
- (m) as to subparagraph 51(i2):
 - (i) refers to and repeats subparagraph 51(l) above;

- (ii) admits that, for the reasons pleaded in subparagraph 51(l) above, NULIS was not required to have systems in place to ensure ongoing benefits or services were provided by financial services licensees as a condition of payment of the Grandfathered Remuneration; and
- (iii) otherwise denies the subparagraph;
- (n) as to subparagraph 51(i3):
 - (i) refers to and repeats paragraph 35D and 35E above; and
 - (ii) otherwise denies the subparagraph;
- (o) as to subparagraph 51(i4):
 - (i) admits that the NULIS Board, in passing the resolution referred to in subparagraph 47(a) above, took into account possible legal action by financial services licensees; and
 - (ii) otherwise denies the subparagraph;
- (p) as to subparagraphs 51(i5)-(i8):
 - (i) refers to and repeats subparagraphs 18(b), 22(b), 24, 24A and 51(l) above;
 - (ii) admits that members of the Plum Funds were not required to pay fees from which Grandfathered Remuneration was paid; and
- (q) otherwise denies the subparagraphs;denies subparagraph 51(j);
- (r) denies subparagraph 51(k); and
- (s) says further that if, which is denied, the terms of any relevant products included a corresponding entitlement to the provision of some form of ongoing “services” from financial services licensees and/or advisers to individual members in return for a particular portion of the fees the subject of these proceedings, then the existence of that requirement, and the scope of services required, turns upon the particular terms of each product (which vary).

51A In response to paragraph 51A of the 4FASOC, NULIS:

- (a) denies that the “Grandfathering Decision” was implemented as pleaded in paragraph 50 of the FASOC;
- (b) says further that NULIS has, since 1 July 2016, implemented the plan to trade-up legacy products to modern products;
- (c) denies the allegations in subparagraphs 51(a), (b), (c), (d), (g), (h), (i), (j) and (k) insofar as they are made in relation to the period from 1 July 2016 to 23 September 2020 by paragraph 51A;

- (d) insofar as the allegations in subparagraph 51(e) are made in relation to the period from 1 July 2016 to 23 September 2020 by paragraph 51A:
- (i) refers to and repeats paragraph 50 above; and
 - (ii) denies the subparagraph;
- (e) insofar as the allegations in subparagraph 51(f) are made in relation to the period from 1 July 2016 to 23 September 2020 by paragraph 51A, does not know and cannot admit the subparagraph;
- (f) insofar as the allegations in subparagraph 51(i1) are made in relation to the period from 1 July 2016 to 23 September 2020 by paragraph 51A:
- (i) refers to and repeats paragraph 24A above;
 - (ii) otherwise admits that no ongoing benefits or services were required to be provided by financial services licensees as a condition of payment of the Grandfathered Remuneration, as any Grandfathered Remuneration was payable in respect of services already provided, namely, in connection with the issue of a relevant product to the Applicant and Group Members pursuant to an application submitted by the financial services licensee or its authorised representative; and
 - (iii) otherwise denies the subparagraph;
- (g) insofar as the allegations in subparagraph 51(i2) are made in relation to the period from 1 July 2016 to 23 September 2020 by paragraph 51A:
- (i) refers to and repeats subparagraph 51A(f) above;
 - (ii) insofar as the allegations relate to MKBS Plan Service Fees, denies the allegations;
 - (iii) otherwise admits that, for the reasons pleaded in subparagraph 51A(f)(i) above, NULIS was not required to have systems in place to ensure ongoing benefits or services were provided by financial services licensees as a condition of payment of any Grandfathered Remuneration; and
 - (iv) otherwise denies the subparagraph;
- (h) insofar as the allegations in subparagraph 51(i3) are made in relation to the period from 1 July 2016 to 23 September 2020 by paragraph 51A:
- (i) refers to and repeats paragraphs 35D and 35E above; and
 - (ii) otherwise denies the subparagraph;
- (i) insofar as the allegations in subparagraph 51(i4) are made in relation to the period from 1 July 2016 to 23 September 2020 by paragraph 51A:

- (i) refers to and repeats subparagraph 51(o) above; and
 - (ii) otherwise denies the subparagraph;
- (j) insofar as the allegations in subparagraphs 51(i5)-(i8) are made in relation to the period from 1 July 2016 to 23 September 2020 by paragraph 51A:
- (i) admits that members of the Plum Division of the MLC Super Fund were not required to pay fees from which Grandfathered Remuneration was paid;
 - (ii) refers to and repeats paragraph 24A above;
 - (iii) refers to and repeats subparagraph 51 A(f) above;
 - (iv) otherwise denies the subparagraphs; and
 - (v) says further that if, which is denied, the terms of any relevant products included a corresponding entitlement to the provision of some form of ongoing “services” from financial services licensees and/or advisers to individual members in return for a particular portion of the fees the subject of these proceedings, then the existence of that requirement, and the scope of services required, turns upon the particular terms of each product (which vary); and
- (k) says further that the phrase “were matters that existed” is embarrassing within the meaning of r 16.02(2)(d) of the Rules and, under cover of that objection, otherwise denies the paragraph.

52 In response to paragraph 52 of the 4FASOC, NULIS:

- (a) refers to and repeats paragraphs 51 and 51A above; and
- (b) denies the paragraph.

52A In response to paragraph 52A of the 4FASOC, NULIS:

- (a) refers to and repeats paragraph 47 above;
- (b) as to subparagraph 52A(a):
 - (i) refers to and repeats subparagraph 51(c) above; and
 - (ii) denies the subparagraph;
- (c) as to subparagraph 52A(b):
 - (i) refers to and repeats paragraph 47I above; and
 - (ii) otherwise admits the subparagraph;
- (d) denies subparagraph 52A(c);

- (e) as to subparagraph 52A(d):
 - (i) admits the subparagraph if the defined term “Grandfathered Remuneration” is substituted for the defined term “Conflicted Remuneration”, and otherwise denies the subparagraph; and
 - (ii) says further that notwithstanding that NULIS did not have a contractual obligation to pay financial services licensees grandfathered commissions in respect of products issued to members of TUSS at the time of making the LRA Approval Decision, such financial services licensees may have made claims against NULIS asserting other causes of action had the payment of grandfathered commissions in respect of those products ceased following the SFT;

Particulars

Various causes of action may have been asserted by, or on behalf of, financial services licensees. These may have included misleading or deceptive conduct, misrepresentation and/or unconscionable conduct.

- (f) as to subparagraph 52A(e):
 - (i) refers to and repeats subparagraph 51(i) above; and
 - (ii) denies the subparagraph; and
- (g) as to subparagraph 52A(f):
 - (i) refers to and repeats subparagraph 51(j) above; and
 - (ii) denies the subparagraph.

52B In response to paragraph 52B of the 4FASOC, NULIS:

- (a) refers to and repeats paragraph 52A above; and
- (b) denies the paragraph.

53 In response to paragraph 53 of the 4FASOC, NULIS:

- (a) refers to and repeats paragraph 33 above, and says that NULIS’ covenant to perform its duties and exercise its powers in the best interests of the beneficiaries of the MLC Super Fund was, and is, a duty to act in the best interests of the existing beneficiaries of the MLC Super Fund from time to time, and did not extend to a duty to act in the best interests of the Applicant and/or the Group Members except to the extent and for the periods during which the Applicant and each Group Member was a member of the MLC Super Fund;
- (b) denies that it owed any duty to the Applicant and/or any Group Member as pleaded at any time prior to 1 July 2016; and

- (c) otherwise denies the paragraph.
- 54 In response to paragraph 54 of the 4FASOC, NULIS:
- (a) refers to and repeats paragraphs 33, 51, 51A and 53 above; and
 - (b) denies the paragraph.
- 55 In response to paragraph 55 of the 4FASOC, NULIS:
- (a) refers to and repeats paragraphs 33, 51, 51A and 53 above; and
 - (b) denies the paragraph.
- 56 In response to paragraph 56 of the 4FASOC, NULIS:
- (a) refers to and repeats paragraphs 47, 50, 51, 51A and 52 above; and
 - (b) denies the paragraph.
- 57 In response to paragraph 57 of the 4FASOC, NULIS:
- (a) refers to and repeats paragraphs 47, 50, 51, 51A and 52 above; and
 - (b) denies the paragraph.
- 58 In response to paragraph 58 of the 4FASOC, NULIS:
- (a) refers to and repeats paragraphs 47, 50, 51, 51A and 52 above; and
 - (b) denies the paragraph.
- 58A In response to paragraph 58A of the 4FASOC, NULIS:
- (a) refers to and repeats paragraphs 47H, 47I, 52A and 52B above; and
 - (b) denies the paragraph.
- 58B In response to paragraph 58B of the 4FASOC, NULIS:
- (a) refers to and repeats paragraph 58A above; and
 - (b) denies the paragraph.
- 58C In response to paragraph 58C of the 4FASOC, NULIS:
- (a) refers to and repeats paragraphs 47H, 47I, 52A, 52B, 58A and 58B above; and
 - (b) denies the paragraph.
- 58D In response to paragraph 58D of the 4FASOC, NULIS:
- (a) refers to and repeats paragraphs 47H, 47I, 52A, 52B, 58A and 58B above; and

- (b) denies the paragraph.
- 58E In response to paragraph 58E of the 4FASOC, NULIS:
- (a) refers to and repeats paragraphs 47H, 47I, 52A, 52B, 58A and 58B above; and
- (b) denies the paragraph.
- 59 In response to paragraph 59 of the 4FASOC, NULIS:
- (a) refers to and repeats paragraphs 56, 57, 58, 58C, 58D and 58E above; and
- (b) denies the paragraph.
- 59A NULIS denies paragraph 59A of the 4FASOC and says further that if, which is denied, the Applicant or any Group Members had an entitlement to receive benefits or services from financial services licensees or advisers of a particular kind and at a particular time in return for the charging by NULIS of fees to the accounts of the Applicant and Group Members, then that entitlement (including as to its scope) and the assessment of any breach would need to consider the individual circumstances of the Applicant and each Group Member.
- 60 NULIS denies paragraph 60 of the 4FASOC.
- 60A In response to paragraph 60A of the 4FASOC, NULIS:
- (a) refers to and repeats paragraph 17 above;
- (b) in respect of the Applicant:
- (i) admits that, from 1 July 2016, the Applicant had unrestricted non-preserved benefits (as that term is used in the SIS Regulations) in the TUSS Division of the MLC Super Fund;
- (ii) says that the quantum of those benefits at any given time was subject, inter alia, to the charging of costs against such benefits pursuant to reg 5.02 of the SIS Regulations;
- (iii) admits that, from 1 July 2016, the Applicant was entitled to payment of those benefits in accordance with ss 31 - 34 of the SIS Act and Part 6 of the SIS Regulations and subject, inter alia, to the charging of costs against such benefits pursuant to reg 5.02 of the SIS Regulations; and
- (iv) admits that, from 1 July 2016 to the date of this Defence, the Applicant's interest in the MLC Super Fund was an equitable proprietary interest in a share of the assets of the TUSS Division of the MLC Super Fund, such share to be determined in accordance with the governing rules of the MLC Super Fund, the SIS Act and the SIS Regulations;

- (c) in respect of the Group Members:
 - (i) refers to and repeats paragraph 3 above;
 - (ii) admits that members of the TUSS Division of the MLC Fund from time to time have had a beneficial interest in the MLC Super Fund, but that the precise form and quantum of such interest is contingent on particular events and circumstances personal to individual members and which NULIS cannot plead to in global terms;
 - (iii) denies that any member of the TUSS Division of the MLC Fund had any interest (including any proprietary interest) in any individual piece of trust property, or any identifiable portion of the MLC Super Fund, or any immediate right to payment in respect of preserved or restricted non-preserved benefits;
 - (iv) denies that the Group Members had a “valuable interest” in the TUSS Division of the MLC Super Fund, if what is meant by that term is that Group Members had a proprietary interest in the amount standing to the credit of the account maintained in respect of that member in the TUSS Division of the MLC Super Fund; and
 - (v) says further that any interest in respect of any benefits was subject to the governing rules of the MLC Super Fund, the SIS Act and the SIS Regulations; and
- (d) otherwise denies the paragraph.

60B In response to paragraph 60B of the 4FASOC, NULIS:

- (a) denies that it obtained Conflicted Remuneration from the Applicant and each Group Member and therefore denies the paragraph; and
- (b) further or in the alternative:
 - (i) refers to and repeats paragraphs 24, 24A and 50 and subparagraph 60A(a) above; and
 - (ii) denies that the payment of Grandfathered Remuneration to financial services licensees in respect of certain products as described in paragraph 50 above reduced the value of any interests of Group Members who, at the time, had not satisfied a condition of release or were not entitled to access unrestricted non-preserved benefits.

61 In response to paragraph 61 of the 4FASOC, NULIS:

- (a) refers to and repeats paragraphs 53 to 60B above;
- (b) denies the paragraph;

- (c) says further and in the alternative that, by reason of the matter pleaded at paragraph 47(o) above, the Applicant and each Group Member have suffered no loss as a result of NULIS's conduct for the Counterfactual Period;
- (d) says further and in the alternative that the Applicant has suffered no loss as a result of NULIS's conduct during the period commencing from the date this proceeding was filed and continuing; and
- (e) says further and in the alternative that no loss can have been suffered by any Group Member unless and until an entitlement arises to payment of their benefits in accordance with the governing rules of the MLC Super Fund, the SIS Act and the SIS Regulations.

61A NULIS denies paragraph 61A of the 4FASOC.

62 In response to paragraph 62 of the 4FASOC, NULIS:

- (a) refers to and repeats paragraphs 61 and 61A above;
- (b) denies the paragraph; and
- (c) says further that:
 - (i) if, which is denied, NULIS has misapplied any assets of the MLC Super Fund by deducting funds in breach of a Statutory Covenant (as alleged in paragraphs 56 to 59 of the 4FASOC), then NULIS, as trustee of the MLC Super Fund, is obliged to (and will) make good the assets of the MLC Super Fund, and the appropriate relief is an order that it do so;
 - (ii) upon the assets of the MLC Super Fund being made good, no loss or damage will have been suffered by the Applicant or by any Group Member who remains a member of the MLC Super Fund and there is no loss or damage to be recovered under s 55 of the SIS Act; and
 - (iii) further, if, which is denied, NULIS is liable under s 55 of the SIS Act to compensate the Applicant or any of the Group Members for any loss or damage alleged in paragraphs 61 and 61A of the 4FASOC, any such compensation must be effected by payment into the relevant person's superannuation balance. No payment can (or, alternatively, should) be ordered which would effect a *de facto* release of preserved benefits inconsistent with the scheme established by the SIS Regulations, including by the payment of sums to any third party litigation funder.

62A In response to paragraph 62A of the 4FASOC, NULIS:

- (a) refers to and repeats paragraphs 59A, 61 and 61A above;
- (b) denies the paragraph; and

- (c) says further that:
- (i) if, which is denied, NULIS has misapplied any assets of the MLC Super Fund by deducting funds in breach of trust (as alleged in paragraph 59A of the 4FASOC), then NULIS, as trustee of the MLC Super Fund, is obliged to (and will) make good the assets of the MLC Super Fund, and the appropriate relief is an order that it do so;
 - (ii) upon the assets of the MLC Super Fund being made good, no loss or damage will have been suffered by the Applicant or by any Group Member who remains a member of the MLC Super Fund and there is no loss or damage to be recovered; and
 - (iii) further, if, which is denied, the Applicant or Group Members have suffered loss or damage, any equitable compensation:
 - A. requires an assessment of individual circumstances; and
 - B. must be effected by payment into the relevant person's superannuation balance. No payment can (or, alternatively, should) be ordered which would effect a *de facto* release of preserved benefits inconsistent with the scheme established by the SIS Regulations, including by the payment of sums to any third party litigation funder.

62B In response to paragraph 62B of the 4FASOC, NULIS:

- (a) refers to and repeats paragraphs 53 to 60B above; and
- (b) denies the paragraph.

62C In response to paragraph 62C of the 4FASOC, NULIS:

- (a) refers to and repeats paragraph 62B above;
- (b) denies that s 315(3) of the SIS Act entitles the Applicant and Group Members to a mandatory injunction and says further that any power to grant an injunction is discretionary;
- (c) denies that it has "refused or failed" or "is refusing or failing" or that it is proposing "to refuse or fail" to do an act or thing that it is required by the SIS Act or by a condition imposed on its RSE license to do, such conduct being a pre-requisite for any power under s 315(3) to arise;
- (d) says further that if, which is denied, the Court had the power to grant an injunction under s 315(3) of the SIS Act and additionally considered that such an injunction should be granted in the Court's discretion, then any such injunction must be granted in terms that require payment into the relevant person's superannuation balance. No injunction can (or, alternatively, should) be ordered which would effect a *de facto* release of preserved benefits

inconsistent with the scheme established by the SIS Regulations, including by the payment of sums to any third party litigation funder; and

(e) otherwise denies the paragraph.

62D NULIS denies paragraph 62D of the 4FASOC.

62E NULIS denies paragraph 62E of the 4FASOC.

62F NULIS denies paragraph 62F of the 4FASOC.

63 In response to paragraph 63 of the 4FASOC, NULIS:

(a) refers to and repeats paragraphs 58A, 58B, 58C, 58D, 60B, 62D, 62E and 62F above; and

(b) denies the paragraph.

64 In response to paragraph 64 of the 4FASOC, NULIS denies that the Applicant is entitled, for himself or on behalf of each of the Group Members, to the relief set out in the Further Amended Originating Application.

Date: 26 August 2022



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Damian Gordon Lovell
Lawyer for the Respondent
King & Wood Mallesons

This pleading was prepared by Damian Gordon Lovell, lawyer and settled by David Thomas SC, Fiona Roughley and Celia Winnett, counsel.

Certificate of lawyer

I, Damian Gordon Lovell, certify to the Court that, in relation to the Defence to the Fourth Further Amended Statement of Claim filed on behalf of the Respondent, the factual and legal material available to me at present provides a proper basis for:

- (a) each allegation in the pleading; and
- (b) each denial in the pleading; and
- (c) each non admission in the pleading.

Date: 26 August 2022



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Lawyer for the Respondent