

NOTICE OF FILING

This document was lodged electronically in the FEDERAL COURT OF AUSTRALIA (FCA) on 12/08/2022 12:18:57 PM AEST and has been accepted for filing under the Court's Rules. Details of filing follow and important additional information about these are set out below.

Details of Filing

Document Lodged: Statement of Claim - Form 17 - Rule 8.06(1)(a)
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: 12/08/2022 1:00:05 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.

The date and time of lodgment also shown above are the date and time that the document was received by the Court. Under the Court's Rules the date of filing of the document is the day it was lodged (if that is a business day for the Registry which accepts it and the document was received by 4.30 pm local time at that Registry) or otherwise the next working day for that Registry.



Form 17
Rule 8.05(1)(a)

FourthThird Further Amended Statement of claim
(Amended on 12 August 2022 pursuant to the order of Markovic J made on 11 August 2022)

No. NSD1736 of 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

A Parties

- 1 The Applicant brings this proceeding on his own behalf and as the representative party for and on behalf of the Group Members described in paragraph 3 of the Statement of Claim pursuant to Part IVA of the *Federal Court of Australia Act 1976* (Cth).

Particulars

At the time of the filing of the Statement of Claim there were 7 or more persons who had claims against the Respondent in respect of the matters pleaded in the Statement of Claim.

- 2 The Applicant is and was at all material times:
- (a) a member of The Universal Superannuation Scheme Fund (ABN 44 928 361 101) (**TUSS**) prior to 1 July 2016;
 - (b) a member of the MLC Super Fund (ABN 70 732 426 024) (**MLC Super Fund**) from 1 July 2016.

Particulars

- (i) The Applicant is and was at all material times a member of the MLC MasterKey Allocated Pension Gold Star;

Filed on behalf of (name & role of party) Mervyn Lawrence Brady, Applicant

Prepared by (name of person/lawyer) Bill Petrovski

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(include state and postcode)

(ii) Customer no. 5566217 and account no. 8301190.

- 3 The members of the group to whom this proceeding relates (**Group Members**) are those persons who:
- (a) were members of TUSS prior 1 July 2016;
 - (b) became members of the MLC Super Fund from 1 July 2016;
 - (c) had accounts that were affected by the Respondent's contraventions pleaded in this ~~Third~~Fourth Further Amended Statement of Claim; and
 - (d) are not a Justice, Registrar, District Registrar or Deputy District Registrar of the High Court of Australia or the Federal Court of Australia.
- 4 The Respondent (**NULIS**) at all material times was, and is:
- (a) a company duly incorporated pursuant to the *Corporations Act 2001* (Cth) (**Corporations Act**) and capable of being sued;
 - (b) a trading corporation within the meaning of the *Australian Securities and Investments Commission Act 2001* (Cth) (**ASIC Act**);
 - (c) the holder of an Australian Financial Services licence (no. 236465) (**AFSL**);
 - (d) a body corporate:
 - (i) carrying on the business of acting as a trustee of superannuation entities and investing money on behalf of the beneficiaries of those superannuation entities; and
 - (ii) holding itself out as having particular knowledge, skill and experience in carrying out such a business;
 - (e) a wholly owned subsidiary of National Wealth Management Services Limited (**NWMSL**), which was a wholly owned subsidiary of National Wealth Holdings Limited (**NWMH**), which in turn was a wholly owned subsidiary of National Australia Bank Limited (**NAB**);
 - (f) a registrable superannuation entity licensee (**RSE licensee**) under s 10(1) of the *Superannuation Industry (Supervision) Act 1993* (Cth) (**SIS Act**) (license no. L0000741).

NWMSL and NULIS Services Agreement

- 4A On 30 June 2016, NULIS (as Trustee) and NWMSL (as Service Provider) entered into a superannuation business services agreement (the **Services Agreement**).

Particulars

The Services Agreement was in writing and executed by Tom Garde under Power of Attorney for NULIS and Louise Anne Tillett under Power of Attorney for NWMSL.

- 4B The Services Agreement contained terms to the following effect:
- (a) NULIS appoints NWMSL to provide services to the Trustee following a successor fund transfer of TUSS (and other superannuation funds) into the MLC Super Fund.

Particulars

Services Agreement, Recitals.

- (b) NWMSL was to provide NULIS the following categories of services: Mandatory Obligations, General, Risk, Investment, Insurance, Product, Member, Finance, Taxation, Legal, Procuring other service providers, Administration of insurance in super, SuperEzy services, Superpay services, Member Advice Services and Investment research and governance and product support.

Particulars

Services Agreement, cl 2(a), cl 3 and Schedules 1 and 3-8.

- (c) Under the Services Agreement, NWMSL was required to notify NULIS of any conflict of interest between NWMSL and/or NULIS on the one hand, and another entity within NAB and its Related Bodies Corporate on the other “in relation to the Services or this agreement...”.

Particulars

Services Agreement, cl 3.5.

- (d) NWMSL’s performance of services in accordance with the Services Agreement required NULIS to appoint (on suitable terms) NWMSL, or one or more Responsible Persons (within the meaning of paragraph 11 of SP 520) or Superannuation Staff (a person used by NWMSL in providing the services specified in clause 3.1 of the Services Agreement) as either a delegate to exercise one or more of NULIS’s powers or as agent of NULIS.

Particulars

Services Agreement, cl 6.1 and cl 1 definitions.

- 4C By reason of the term alleged at paragraph 4B(d) above, and the matters in (a) to (g) below, an agency existed between NWMSL and NULIS from 1 July 2016 such that the knowledge and actions of NWMSL (and its employees or agents, including Brian Marriott (**Marriott**), Andrew Lawless (**Lawless**), Damian Murphy (**Murphy**), Kathy Vincent (**Vincent**), Paul Carter (**Carter**) and Matthew Lawrance (**Lawrance**)) are taken to be the knowledge and actions of NULIS:

- (a) NULIS did not employ any staff or run any operations;
- (b) NAB seconded staff to NWMSL which provided staff and services as well as business outcomes (Fiduciary and Commercial) to NULIS under the Services Agreement, and provided all the services and operations required to run NULIS’s business;
- (c) Executive officer Responsible Persons for NULIS included Vincent, Carter, Lawrance, Murphy and Marriott;
- (d) A NULIS Responsible Person is a person who makes or participates in activities or makes decisions that could materially affect the whole or a substantial part of NULIS business operations or have the capacity to affect significantly NULIS business operations or its financial standing either directly or indirectly;

- (e) Lawless was an employee or agent of NWMSL or NAB or MLC Limited or MLC Nominees Pty Ltd with the employment role title “Product Development Manager Retail Platforms” who provided services to NULIS;
- (f) The Office of the Trustee (**OTT**) was staffed by Marriott and other NWMSL or NAB employees and was the delegate of NULIS supporting its Board in meeting its governance and fiduciary responsibilities, including appointing and removing Responsible Persons for NULIS;
- (g) Marriott was the delegate of NULIS to approve matters including non material changes to policies and to adopt policies of MLC Nominees Pty Ltd (ACN 002 814 959) (**MLC Nominees**) and PFS Nominees Pty Ltd (ACN 082 026 480) (**PFS**).

Particulars

- (i) Services Agreement, cl 6.1 and cl 1 definitions of Effective Date and Superannuation Staff;
 - (ii) Combined NULIS, MLC Nominees and PFS Board Pack for 26 October 2016 meeting (NAB.005.562.4357 at pp 4, 14, 20-22);
 - (iii) OTT Charter from at least 21 April 2011 and Board approved 26 August 2016 (NLS.501.021.0001);
 - (iv) NULIS Due Diligence & Delegations Framework paper by Daniel Levy and Brian Marriott dated 30 November 2015 (NAB.005.562.0528 at pp 29-30).
- 5 Unless otherwise stated, each reference to NULIS in this pleading is to be read as a reference to NULIS in its capacity as the trustee for the MLC Super Fund.
- 6 PFS at all material times was, and is:
- (a) a wholly owned subsidiary of NAB;
 - (b) the holder of an RSE license (no. L0002912); and
 - (c) an entity within the NAB Wealth division.
- 7 MLC Nominees was at all material times:
- (a) a wholly owned subsidiary of NAB;
 - (b) the holder of an RSE license (no. L0002998);
 - (c) an entity within the NAB Wealth division; and
 - (d) prior to 1 July 2016, the trustee of TUSS.
- 8 Each reference to MLC Nominees in this pleading is to be read as a reference to MLC Nominees in its capacity as trustee for TUSS.
- 9 At all material times:
- (a) Peggy Yvonne O’Neal (**O’Neal**) was a director and member of the board of directors of, and an executive officer Responsible Person for NULIS, Nicole Susan Smith (**Smith**) was a director and member of the board of directors of, and an executive

- officer Responsible Person for, NULIS and Marriott was a company secretary, the Chief Operating Officer of, and an executive officer Responsible Person for NULIS;
- (b) the conduct of O’Neal, Smith and Marriott is to be taken to be the conduct of NULIS by reason of the fact that:
- (i) O’Neal and Smith at all material times were members of the board of directors of NULIS; and
 - (ii) O’Neal, Smith and Marriott at all material times were NULIS Responsible Persons; or
 - (iii) alternatively to subparagraphs (i) and (ii) above, O’Neal, Smith and Marriott were each agents of NULIS.
- (c) the knowledge of O’Neal, Smith and Marriott is attributed to NULIS by reason of the fact that:
- (i) O’Neal, Smith and Marriott were each agents of NULIS holding senior positions on behalf of NULIS and as such were under a duty to communicate to the board of NULIS the knowledge gained by each of them in their positions; and
 - (ii) O’Neal, Smith and Marriott were NULIS Responsible Persons and as such were under a duty to communicate to the board of NULIS the knowledge gained by them in that position; and/or
 - (iii) further or alternatively to subparagraphs (i) and (ii) above, O’Neal, Smith and Marriott were each the directing mind and will of NULIS in relation to the matters alleged in this Third-Fourth Further Amended Statement of Claim.
- (d) the admissions made by Smith, O’Neal and Carter in the representations made by them to the Banking Royal Commission as pleaded and particularised in this Third Fourth Further Amended Statement of Claim are taken to be admissions by NULIS, by reason of the fact that Smith, O’Neal and Carter had authority to make statements on behalf of NULIS in relation to the matters with respect to which the representations were made.

B Background

B.1 TUSS

10 TUSS was established by a trust deed dated 12 May 1989 and amended from time to time.

11 MLC Nominees was at all material times prior to 1 July 2016 the trustee of TUSS.

12 Prior to 1 July 2016, MLC Nominees offered superannuation products under the following divisions:

- (a) MasterKey Business Super (**MKBS**) which was a corporate employer division designed to enable employers to satisfy their superannuation guarantee obligations in relation to their employees; and
- (b) MasterKey Personal Super (**MKPS**) which was a personal division to which a member was automatically transferred after ceasing employment with the relevant employer sponsor.

Particulars

The Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry (**RC**) – Witness statement of Smith dated 1 August 2018 at [11] and [12].

- 13 At all material times, NAB maintained a network of financial services licensees which included NAB (through the trading names NAB Financial Planning and NAB Private Wealth), GWM Adviser Services Limited (including through the trading names MLC Advice, Garvan Financial Planning, MLC Financial Planning as well as its authorised representatives MK Financial Planning Services and Advantedge Financial Solutions Pty Ltd) Meritum Financial Group Pty Ltd, Apogee Financial Planning Limited and JBWere Limited (together, **the NAB Adviser network**).

Particulars

RC – Witness statement of Ross Andrew Barnwell dated 13 April 2018 at [1], [3], [90] and Annexure A.

- 14 At all material times:
- (a) the authorised representatives of the members of the NAB Adviser network were providers of financial product advice to persons as retail clients under ss 761G(1) and 761GA of the Corporations Act; and
 - (b) the members of the NAB Adviser network were associates of NULIS for the purposes of the SIS Act;
 - (c) each authorised representative of a member of the NAB Adviser network that was a related body corporate of NULIS was an associate of NULIS for the purposes of the SIS Act;
 - (d) NAB and NWMSL were associates of NULIS for the purposes of the SIS Act;
 - (e) prior to October 2016, MLC Limited was an associate of NULIS for the purposes of the SIS Act.

Particulars

RC – Witness statement of Ross Andrew Barnwell dated 13 April 2018 at [1], [3], [25] and Annexure A.

- 15 At all material times:
- (a) there were financial services licensees other than members of the NAB Adviser network (**Other Licensees**);
 - (b) the authorised representatives of the Other Licensees were providers of financial product advice to persons as retail clients under ss 761G(1) and 761GA of the Corporations Act.
- 16 At all material times prior to 1 July 2016 financial products were promoted and distributed to members of TUSS by:
- (a) the members of the NAB Adviser network and their authorised representatives; and/or

(b) the Other Licensees and their authorised representatives.

B.2 MLC Super Fund

17 The MLC Super Fund was established by a trust deed dated 9 May 2016 and amended from time to time (**MLC Super Fund Trust Deed**). The trust deed relevantly provided in respect of members of the TUSS Division:

(a) The following defined terms:

(i) a 'Beneficiary' includes:

(A) a Member; or

(B) any other person who is entitled to be paid a benefit from the Fund;

(ii) a 'Member' is a person admitted as a member of the Fund and who has not ceased to be a member;

(iii) an 'Account' is an account maintained by the Trustee for a Beneficiary.

Particulars

MLC Super Fund Trust Deed, cl 1.1.

(b) The Trustee must hold the Fund assets on trust for the Beneficiaries subject to the terms of this deed.

Particulars

MLC Super Fund Trust Deed, cl 3.1.

(c) The Trustee:

(i) may maintain any accounts or sub-accounts it determines including accounts or sub-accounts to record the benefits of the Beneficiaries (which may be represented by notional units of value) and accounts or sub-accounts for amounts which may become but are not yet vested in a Beneficiary; and

(ii) must credit or debit an account or sub-account with any portion of any assets that are attributable to this Division (or any Division Expense) it determines is attributable to that account or sub-account (which may be represented by notional units of value) and may otherwise credit and debit those accounts or sub-accounts with any amount and in any manner it considers appropriate.

Particulars

MLC Super Fund Trust Deed, Schedule 1, cl 5.5 (a) and (b).

- (d) A Beneficiary has no right to claim any interest or exercise any right in any particular asset of this Division.

Particulars

MLC Super Fund Trust Deed, Schedule 1, cl 6.3.

- (e) The Trustee must set out in the terms of a Member Package, or otherwise determine, the details of benefits payable to a Beneficiary from this Division.

Particulars

MLC Super Fund Trust Deed, Schedule 1, cl 8.1(a).

- (f) Unless stated otherwise in the terms of a Member Package:
 - (i) a Member's benefit is equal to the balance of all Accounts maintained for the Member under a Member Package;
 - (ii) a Member's benefit is payable on the retirement of the Member;
 - (iii) if a Member is insured under a Policy against temporary disablement, and a benefit is paid under that Policy to the Trustee because the Member is temporarily disabled, the Trustee must pay the benefit received by the Trustee to the Member; and
 - (iv) if a Member becomes Totally and Permanently Disabled, the Member's benefit must be paid following the Member's written request (if this is required by the Trustee).

Particulars

MLC Super Fund Trust Deed, Schedule 1, cl 8.1(b).

- (g) The Trustee:
 - (i) may, (but is not obliged to) pay all or part of any benefit when permitted by the Relevant Law; and
 - (ii) must pay any benefit or interest in this Division when required by the Relevant Law.

Particulars

MLC Super Fund Trust Deed, Schedule 1, cl 8.2 (a) and (b).

- (h) The Trustee must:
 - (i) administer each of the Products in accordance with the terms of that Product;

- (ii) comply with the duties that it owes beneficiaries prior to making any changes to the terms of a Product; and;
- (iii) disclose any amended terms of the Product to new and existing members in writing.

Particulars

MLC Super Fund Trust Deed, cl 2.3(a) and 5.2(a), and 'Important Note' items 7.1 and 7.2

- (i) The Trustee may charge for the administration and operation of the TUSS Division.

Particulars

MLC Super Fund Trust Deed Schedule 1 TUSS Division, clause 3.7(a).

- 18 From 9 May 2016, NULIS has been the trustee of the MLC Super Fund.

Particulars

RC – Transcript Carter dated 6 August 2018 at page 4210.

- 19 From no later than 1 July 2016, the MLC Super Fund was and is:

- (a) a registrable superannuation entity within s10(1) of the SIS Act;
- (b) a regulated superannuation fund within s19(1) of the SIS Act.

- 20 From no later than 1 July 2016, the MLC Super Fund offered superannuation products under the MKBS and MKPS divisions that were previously offered by TUSS.

Particulars

RC – Witness statement of Smith dated 1 August 2018 at [11] & [12]

- 21 From 1 July 2016, the MLC Super Fund included a number of products within the MKBS and MKPS divisions, and a number of fee variants within each of those products.

Particulars

10 June 2016 Board Pack, Appendix 3

- 22 The Applicant and Group Members became members of the MLC Super Fund through the successor fund transfer described at paragraphs 47 to 49 below.

Particulars

RC – Transcript Carter, dated 6 August 2018 at page 4210.

B.3 FoFA

- 23 The Future of Financial Advice (**FoFA**) amendments to the Corporations Act commenced on 1 July 2012 and compliance with those amendments became mandatory on 1 July 2013.

Particulars

- (i) *Corporations Amendment (Future of Financial Advice) Act 2012* (Cth) (No. 67, 2012), ss 1 and 3 and Sch1; and
- (ii) *Corporations Amendment (Further Future of Financial Advice Measures) Act 2012* (Cth) (No. 68, 2012), ss 1 and 3 and Sch1.

24 From 1 July 2013 to 23 September 2020, any benefit given to a financial services licensee, or a representative of a financial services licensee, who provided financial product advice to persons as retail clients, was conflicted remuneration within the meaning of s 963A of the Corporations Act if it was a benefit that, because of the nature of the benefit or the circumstances in which it was given:

- (a) could reasonably be expected to influence the choice of financial product recommended by the licensee or representative to retail clients; or
- (b) could reasonably be expected to influence the financial product advice given to retail clients by the licensee or representative.

(Conflicted Remuneration)

Particulars

Corporations Act, s 963A.

25 From 1 July 2013 to 23 September 2020, subject to the qualification in paragraph 28 below, financial services licensees were prohibited from accepting Conflicted Remuneration.

Particulars

Corporations Act, s 963E(1).

26 From 1 July 2013 to 23 September 2020, subject to the qualification in paragraph 28 below, authorised representatives of financial services licensees were prohibited from accepting Conflicted Remuneration.

Particulars

Corporations Act, s 963G(1).

27 From 1 July 2013 to 23 September 2020, subject to the qualification in paragraph 28 below, issuers and sellers of financial products were prohibited from giving a financial services licensee, or a representative of the licensee, Conflicted Remuneration.

Particulars

Corporations Act, s 963K.

28 The prohibition on Conflicted Remuneration did not apply to benefits given to financial services licensees under an arrangement entered into before 1 July 2013 and not given by a platform operator.

Particulars

Corporations Act, s 1528(1) and *Corporations Regulations 2001* (Cth) reg 7.7A.16.

B.4 Grandfathering of Conflicted Remuneration

29 Between 1 July 2013 and to 1 July 2016, financial services licensees and their authorised representatives were paid Conflicted Remuneration (including asset-based and

contribution-based commissions) in respect of financial products acquired by members of TUSS.

30 Between 1 July 2013 and to 1 July 2016, Conflicted Remuneration was paid by the members of TUSS, pursuant to an arrangement purportedly entered into before 1 July 2013 involving the following processes:

- (a) MLC Limited obtained the Conflicted Remuneration from members of TUSS by:
- (i) deducting those amounts from the accounts of members of TUSS; or
 - (ii) incorporating those amounts into the declared unit price of their financial products.

Particulars

10 June 2016 Board Pack at page 20.

- (b) MLC Nominees allowed MLC Limited to deduct the Conflicted Remuneration as administration, investment and contribution fees from member's accounts.

Particulars

10 June 2016 Board Pack at page 20.

- (c) NWMSL paid the Conflicted Remuneration to the financial services licensees from its bank account;

Particulars

- (i) 10 June 2016 Board Pack at page 21;
- (ii) Licensee Remuneration Agreement, cl 3.1(c).

- (d) MLC Limited subsequently reimbursed NWMSL the Conflicted Remuneration at the end of each month.

Particulars

10 June 2016 Board Pack at page 21.

31 The arrangement pleaded in paragraph 30 included terms that NULIS (in its own right, not as trustee) or the other relevant MLC Issuer or MLC Payer (as defined in the Licensee Remuneration Agreement) could:

- (a) request the return of conflicted remuneration payments or reduce future payments by those amounts; and

Particulars

Licensee Remuneration Agreement, cl 3.1(g).

- (b) terminate the obligation to pay the Conflicted Remuneration to the financial services licensees on 30 days written notice.

Particulars

Licensee Remuneration Agreement, cl 5.1(a).

- 31A The Licensee Remuneration Agreement did not contain terms which allowed NULIS to terminate the agreement if it:
- (a) determined that the financial advisers or Dealerships had not provided advice or financial services to members where they were required to do so; or
 - (b) determined that paying Conflicted Remuneration would cause a breach of duty to members.

Particulars

“Dealerships” are any corporate entities associated with a financial adviser.

B.5 SIS Act

- 32 At all material times the governing rules of the MLC Super Fund contained the covenants set out in s 52(2) of the SIS Act.

Particulars

- (i) SIS Act, s 52(1); and
- (ii) MLC Super Fund Trust Deed established 9 May 2016 and amended 16 June 2016 and 20 December 2017 at page 16.

- 33 At all material times NULIS covenanted:

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

Particulars

SIS Act, s 52(2)(b).

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

Particulars

SIS Act, s 52(2)(c).

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

Particulars

SIS Act, s 52(2)(d).

- (d) to act fairly in dealing with classes of beneficiaries within the entity;

Particulars

SIS Act, s 52(2)(e).

- (e) to act fairly in dealing with beneficiaries within a class.

Particulars

SIS Act, s 52(2)(f).

- (f) not to enter into any contract, or do anything else, that would prevent the trustee from, or hinder the trustee in, properly performing or exercising the trustee's functions and powers;

Particulars

SIS Act, s 52(2)(h).

(together, the **Statutory Covenants**)

B.6 Successor Fund Transfer

- 33A On 14 May 2015, MLC Nominees, NULIS and PFS held a combined board meeting in which they considered and noted a paper authored by O'Neal titled "Successor Fund Transfer Committee Report" which updated the Boards on the key activities undertaken by the Successor Fund Transfer Committee.

Particulars

14 May 2015 Minutes of Meeting NLS.501.009.0018 and Report NAB.005.561.8780.

- 33B On 12 August 2015:

- (a) a workshop was held to discuss a potential successor fund transfer from TUSS; and
- (b) consideration was being given to the implications of losing grandfathering of adviser arrangements and a preference for transferring from TUSS to a new fund with a new trustee.

Particulars

- (i) "Project Astro": Confidential Trustee Workshop dated 12 August 2015 NLS.501.007.0001 at pp 4-7;

- (ii) email from David Higgins to Lawless dated 14 September 2015 NLS.606.029.0016.
- 33C In or around October 2015, NAB began a process to sell 80% of its interest in MLC Limited to a third party.
- 33D As part of the sale process referred to in paragraph 33C above:
- (a) NAB provided a letter containing undertakings to MLC Nominees and PFS to support a successor fund transfer as part of any sale, in a form proposed by NAB to be effected in accordance with the requirements specified by NAB;
 - (b) It was a key structural requirement of NAB that “NULIS is proposed to be the new Trustee entity because this will help to preserve grandfathering of the FoFA arrangements for (the MLC Super Fund). NULIS will need to be satisfied with the FOFA grandfathering advice”;
 - (c) It was a key successor fund transfer requirement of NAB that the MLC Super Fund “will be used as the target fund if necessary to preserve grandfathering of arrangements”;
 - (d) It was a key successor fund transfer requirement of NAB that “The new Trustee will support Financial Planners to provide continued support to members through arrangements such as member directed adviser service fees and grandfathered remuneration”.

Particulars

The letter and related “NAB Wealth’s proposed superfund amalgamation – Key Requirements” document were considered by the boards of MLC Nominees, NULIS and PFS at the 14 October 2015 board meeting and resulted in those boards approving the issue of letters from them to NAB: NAB.005.562.0210 at 0302 and following in particular at pages 94-109 of 138.

- 33E On 28 October 2015, NAB announced the sale of 80% of MLC Limited to Nippon Life for \$2.4billion.

Particulars

ASX, NAB 2015 Full Year Results – Delivering on strategic agenda.

- 33F On 10 and 11 November 2015, NAB executives:
- (a) considered proposed entity structures for any successor fund transfer as part of a paper titled “Mars Entity Setup Stream”; and
 - (b) reviewed a draft board paper titled “Project Mars – Retail Product Strategy” for the upcoming board meeting on 2 December 2015.

Particulars

- (i) paper titled “Mars Entity Setup Stream” NLS.613.001.4327;

- (ii) email from Brad Tallents to Bernadette Demasi dated 10 November 2015 NLS.613.001.4326; and
 - (iii) email from Linda Holliday to Roger Rowlinson and others dated 11 November 2015 attaching draft paper titled "Project Mars – Retail Product Strategy" NLS.613.001.4360.
- 34 On 2 December 2015, or at a subsequent board meeting on a date currently unknown to the Applicant and Group Members, MLC Nominees, NULIS and PFS jointly:
- (a) embarked on a project to simplify "NAB Wealth's" super fund structures by amalgamating TUSS into a new super fund by way of a successor fund transfer; and
 - (b) decided that by 30 September 2019 only two retail superannuation and pension products would exist within the new fund.

Particulars

2 December 2015 Board Pack at pages 21 and 22.

- 35 On 2 December 2015, the boards of MLC Nominees, NULIS and PFS were presented with a paper titled "Project Mars – Retail Product Strategy" which in support of the decision in paragraph 34(b) above stated that:
- (a) it was a 'key requirement' that the 'Successor Trustee' be supportive of grandfathered adviser commissions;
 - (b) to preserve grandfathering under FoFA, legacy products with embedded trail commissions will be traded up to MLC MasterKey Super & Pension (**MKSP**);
 - (c) the target off-sale MKSP product will be enhanced prior to the trade-ups to offer the same investment menu as the on-sale MLC MasterKey Super & Pension Fundamentals (**MKSPF**) product; and
 - (d) under the proposal, the 'Successor Trustee' would be responsible for making all trade up decisions, including but not limited to establishing a fee scale for each type of member.

Particulars

2 December 2015 Board Pack at page 22.

- 35A On 2 March 2016, the boards of MLC Nominees, NULIS and PFS met to consider, amongst other things, a proposed operating model for NULIS as part of the successor fund transfer.

Particulars

2 March 2016 Minutes of Meeting NLS.501.009.0088 at page 4.

- 35B On 31 March 2016, employees of NWMSL or NAB identified arguments that purported to explain why the continuation of Conflicted Remuneration in the successor fund would be in the best interests of members.

Particulars

Email from Lawless to Dougal Guild and Vincent dated 31 March 2016 NLS.603.003.6887.

35C On 6 April 2016 in advance of a proposed NULIS board meeting scheduled for 7 April 2016:

- (a) Smith was asked for additional information to be tabled at the board meeting which supports the request for grandfathering; and
- (b) Lawless circulated an email suggesting that deciding not to pay advisers/dealer groups their 'contractual right' to aggregate amounts of between \$53m and \$80m in Conflicted Remuneration would damage adviser relationships and be likely to result in mass-attrition.

Particulars

- (i) email from Evelyn Horton to Smith dated 6 April 2016 NLS.602.003.2632 at 2634; and
- (ii) email from Lawless to Vincent dated 6 April 2016 NLS.602.003.2632.

35D On 7 April 2016:

- (a) the NULIS board was asked to approve the continuation of Conflicted Remuneration in the MLC Super Fund in relation to products transferred as part of the successor fund transfer;
- (b) the NULIS board approved the Roles and Responsibilities Charter enclosed in a paper entitled "Proposed NULIS Operating Model Update"; and
- (c) Following that meeting, on 20 April 2016, Marriott sent an email to Dougal Guild at NAB expressing that it would be a very bad thing to say that NAB had some directive capacity over the trustee, NULIS.

Particulars

- (i) NULIS board meeting agenda and proposed resolution dated 7 April 2016 NAB.005.562.1746, at 1746-1750;
- (ii) Proposed NULIS Operating Model - Update and attached Roles & Responsibilities Charter NAB.005.562.1746, at 1751-1761; and
- (iii) Email from Marriott to Dougal Guild dated 20 April 2016 NLS.603.004.7113.

35E The Roles and Responsibilities Charter referred to in paragraph 35D above required NULIS to take into account the interests of NAB and gave NAB the ability to guide and influence aspects of NULIS's decision-making.

36 On 23 April 2016, NULIS sent an email to employees of '*NAB Wealth*' which:

- (a) discussed the draft versions of the 10 June 2016 Board Pack;
- (b) stated that it was "*a cute argument to make that we should grandfather because (the members) are getting something in return for them being paid when all the paper trail will tell a different story*";

- (c) stated that *“the only basis the Trustee should support grandfathering”* is *“if wholesale dissatisfaction is generated with advisers and the highly probable adverse impact that would have on remaining members;”* and
- (d) stated that the *“Trustee”* should only support grandfathering for a limited duration if there was a *“clear change management plan which will be part of the ‘transformation’ work that is committed to over the next 3 years.”*

Particulars

Email from Marriott sent on 23 April 2016 at 4:17pm to various staff members of NAB Wealth.

- 37 On 8 May 2016, NULIS sent an email to employees of *‘NAB Wealth’* which:
- (a) discussed the content of a draft of the 10 June 2016 Board Pack;
 - (b) stated that *“the commercial arguments made in the paper should be a secondary consideration to the member interest considerations”*;
 - (c) stated that *“the fiduciary considerations are what is most relevant, and I would like to see some of the commercial aspects tempered”*;
 - (d) stated that the draft was making a lot of the License Remuneration Agreement and that the *“awkward truth”* was that *“no one ever came to the Trustee to agree being a party to that agreement”*;
 - (e) stated that it is likely the group would have *“issues”* with the *“representations made by”* the draft, but that *“legal advisers acting solely in each Trustees interests would consider that and whether it does in fact represent an exposure to any of the Trustee(s) versus an exposure to NAB or some of its controlled entities”*; and
 - (f) stated that *“the paper leaves me in doubt as to whose interests are being represented and whether we are managing conflicts appropriately”*.

Particulars

Email from Marriott sent on 8 May 2016 at 11:35 am to various staff members of NAB Wealth.

- 38 In or around May 2016, the representatives of NULIS consulted with ASIC about NULIS’s intention to continue grandfathered commission payments.

Particulars

10 June 2016 Board Papers at pages 22 and 23.

- 39 In or around May 2016, the representatives of NULIS provided ASIC with a briefing paper dated 20 May 2016 which:
- (a) informed ASIC of NULIS’s intention to continue grandfathered commission payments; and
 - (b) set out the bases upon which NAB said that NULIS was a platform operator;

Particulars

10 June 2016 Board Papers, Appendix 4 at [1.2] and [4.1] – [4.7].

- 40 In or around May 2016, the representatives of NULIS:
- (a) met with ASIC; and
 - (b) indicated that NULIS was not seeking a 'no action' letter but would proceed on the basis of the legal advice it had received.

Particulars

- (i) RC – Transcript Peter Kell 17 August 2018 at page 5256
 - (ii) 10 June 2016 Board Papers, Appendix 4 at [1.1] and [5.1]
- 41 On 10 June 2016 the directors of NULIS, including O'Neal, considered a paper dated 6 June 2016 titled 'SFT Proposal – Continuation of Commission Grandfathering' (**Grandfathering Paper**).

Particulars

10 June 2016 Board Pack at pages 19 to 69.

- 42 The Grandfathering Paper set out 3 options to deal with Conflicted Remuneration following the SFT, being to:
- (a) have NULIS continue to pay the Conflicted Remuneration to advisers through NWMSL in place of MLC Limited and have NULIS charge member fees in the same way and calculated on the same basis as MLC Limited (**option 1**);
 - (b) cease the payment of Conflicted Remuneration by terminating the remuneration arrangements with financial services licensees (**option 2**); or
 - (c) stop Conflicted Remuneration payments and set up alternative remuneration for financial services licensees (**option 3**).

Particulars

10 June 2016 Board Paper at pages 22, 23 and 24.

- 43 The Grandfathering Paper stated that management recommended that the board of NULIS approve option 1 on the following bases:
- (a) this option was consistent with MLC Nominees' current strategic position which was to:
 - (i) allow the continuation of Conflicted Remuneration payments in the short to medium term to avoid a reduction in sales and adverse retention impacts with adverse consequences for Members of the MLC Super Fund; and
 - (ii) give favourable consideration to the appropriateness of continuing Conflicted Remuneration payments until such time that management had reviewed and recommended to the board of NULIS the trade – up of legacy products to MKSP and MKSPF.

Particulars

10 June 2016 Board Paper at pages 22 and 23.

- (b) as part of the proposed SFT, in most cases, the fees presently charged by MLC Limited would (where appropriate and practicable) instead be charged by NULIS in the same way and calculated on the same basis;

Particulars

10 June 2016 Board Paper at page 22.

- (c) by continuing the existing Conflicted Remuneration payments to financial services licensees, the equivalency of the rights and interests of the Members of the MLC Super Fund would be maintained;

Particulars

10 June 2016 Board Paper at page 23.

- (d) a decision to approve the continued the Conflicted Remuneration payments to financial services licensees would not impact the ability of the current SFT date to proceed as intended.

Particulars

10 June 2016 Board Paper at page 23.

- 44 The Grandfathering Paper stated that in considering whether it would be appropriate for the board of NULIS to approve option 1, management had also considered options 2 and 3.

Particulars

10 June 2016 Board Paper at pages 23 and 24.

- 45 The Grandfathering Paper set out in relation to option 2 the following matters:
- (a) a significant impact to member attrition was considered possible due to consequent financial adviser dissatisfaction;
- (b) a significant reduction in funds under management would arise due to high levels of member attrition;
- (c) the remaining members would likely incur increased fees and costs since:
- (i) a largely fixed expense base continued to apply and remained to be “spread” across a reducing membership base;
- (ii) membership fees may need to be increased to cover the increased per member costs to enable member benefits to be maintained;
- (d) any increase in member fees would reduce the competitiveness of each product within the market which would negatively impact the ability of financial advisers to fulfil their best interests duty in recommending NULIS’s products when compared to similar market options;
- (e) an environment of continuing reduction in inflows and increase in outflows would arise which may threaten the sustainability of both individual products and the MLC Super Fund as a whole;
- (f) separate legal advice would need to be obtained to determine whether the Conflicted Remuneration payments could be terminated without exposing MLC

Nominees or NULIS or any other entity of the NAB Group to liability for breach of contract; and

- (g) the program of work that would be required to remove Conflicted Remuneration arrangements attached to member accounts would be both costly and time-consuming and would cause delays to the SFT and subsequent plans to trade-up legacy products to MKSP and MKSPF.

Particulars

10 June 2016 Board Paper at pages 23 and 24.

- 46 The Grandfathering Paper set out in relation to option 3 the following matters:
- (a) advice concerning the legality of this option for all products would be required;
 - (b) new system functionality would need to be built to approve the adviser service fee for about half of the TUSS products and which created a time and cost consideration for NULIS;
 - (c) calculating and applying an adviser service fee to each member account which was commensurate to the commissions currently paid to financial service licensees would be complex and involve some degree of calculation risk for NULIS;
 - (d) there was no reason to believe that members would derive any particular benefit from the change since they would be placed in a fee neutral position and would not gain any additional rights or benefits; and
 - (e) the SFT could be delayed by as much as 12 months which would impact future initiatives since the work effort would divert time, resources and funding away from other strategic initiatives which would derive benefit for members, such as the plans to trade – up legacy products to MKSP and MKSPF.

Particulars

10 June 2016 Board Paper at page 24.

- 46A The Grandfathering Paper contained a recommendation from the NAB Chief Risk Officer, Murphy, that 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 on-going member interests (the **Legacy Commission Review**). Murphy only considered the approach outlined in the Grandfathering Paper appropriate on the basis of support for the status quo and in the context of the proposed NAB group review of product sales commissions.
- 46B Prior to 6 June 2016, the Grandfathering Paper was the subject of input and discussion from various employees of NAB or NWMSL. In particular:
- (a) on 23 April 2016, Marriott commented that the only basis that the Trustee should support the continued payment of Conflicted Remuneration into the successor fund was the impact on scale if wholesale dissatisfaction was generated with advisers and the highly probable adverse impact that would have on remaining members, and that the Trustee should only support the continued payment of Conflicted Remuneration with a clear change management plan which would be part of the

transformation work committed to over the next three years that would result in any grandfathering decision being limited in duration;

- (b) references that would have supported removing commissions were removed at the suggestion of employees of NAB or NWMSL including David Higgins, Lisa Neaves, Tom Garde; and
- (c) language quantifying compensation asserted to be payable due to a breach of asserted contractual obligations was qualified then removed from the draft Grandfathering Paper.

Particulars

- (i) 23 April 2016 email from Marriott to Tom Garde and others NLS.600.003.2111 at 2113;
- (ii) 25 April 2016 email from Tom Garde to Carter and others NLS.603.005.1022;
- (iii) Draft Grandfathering Paper NLS.603.005.1026;
- (iv) Draft Grandfathering Paper NLS.601.004.5396 at 5404;
- (v) Draft Grandfathering Papers NLS.601.004.6438 at 6443 and NLS.601.005.1630 at 1636, NLS.501.002.0185 at 0188, cf NLS.601.005.9259 at 9264-9265;
- (vi) 8 May 2016 email from Marriott to Tom Garde and others NAB.076.027.5933 at 5934; and
- (vii) Draft Grandfathering Paper NLS.601.005.3614.

- 47 At the 10 June 2016 meeting, the directors of NULIS, including O’Neal, adopted option 1 and resolved “*to approve to maintain the current grandfathered commission arrangements pertaining to the products which form part of TUSS following the proposed SFT to the MLC Super Fund*” (**Grandfathering Decision** or **making the Grandfathering Decision** as appropriate).

Particulars

Minutes of Board Meeting of MLC Nominees, NULIS and PFS dated 10 June 2016 at NLS.501.009.0204 at 0207.

- 47A At the 10 June 2016 meeting, the directors of NULIS requested a paper setting out the controls framework for the continuation of Conflicted Remuneration on any successor fund transfer and an assurance be undertaken in respect of the controls to ensure FOFA obligations concerning the payment and eligibility of commissions were operating effectively (**FOFA Obligation Assurance**).

Particulars

10 June 2016 Minutes of Meeting; Agenda Item 4; NLS.501.009.0204 at page 3.

- 47B On 16 June 2016 the board of NULIS resolved to approve the Legacy Product Principles as set out in a paper entitled “TUSS Legacy Product SFT Principles” dated 10 June 2016 prepared by Vincent and Carter (the **LPP**).

Particulars

Paper at NAB.005.562.3064 at page 5, Minutes NLS.501.009.0214 at page 4.

- 47C The LPP consisted of:
- (a) Principle 1: ensure member equivalency and member benefits (particularly no additional cost or risk to members);
 - (b) Principle 2: “lift and drop” being a principle to avoid any significant system and process changes associated with a product proposal provided that the option delivers member equivalence and maintains member benefits;
 - (c) Principle 3: meet the requirements of the shareholder proposal; and
 - (d) Principle 4: Acceptable execution and delivered risk.
- 47D The LPP were part of a three year program to trade up the legacy products and investment options to a modern equivalent (the **Trade Up Program**).
- 47E The LPP did not recommend maintaining the payment of Conflicted Remuneration to advisers when approving or implementing the Trade Up Program.
- 47F On 16 June 2016, the directors of NULIS and MLC Nominees requested an outline of how the Licensee Remuneration Arrangements would be monitored and reported.

Particulars

16 June 2016 Board Meeting Minutes; Agenda Item 12; NLS.501.009.0214 at page 9.

- 47G On 16 June 2016, the board of MLC Nominees approved:
- (a) The Licensee Remuneration Agreement in its current form until the date of the successor fund transfer; and
 - (b) The removal of MLC Nominees as an MLC Issuer from the Licensee Remuneration Agreement with effect from the date of the successor fund transfer.

Particulars

Minutes of meeting of MLC Nominees, NULIS and PFS dated 16 June 2016, Agenda Item 12 NLS.501.009.0214 at 0222.

- 47H On 16 June 2016, the board of NULIS approved the:
- (a) Licensee Remuneration Agreement in its current form, subject to legal advice; and

- (b) Amending Deed to the Internal Remuneration Agreement from the successor fund transfer date.

(the **LRA Approval Decision**)

Particulars

Minutes of meeting of MLC Nominees, NULIS and PFS dated 16 June 2016, Agenda Item 12 NLS.501.009.0214 at 0222.

- 47I The effect of the LRA Approval Decision was that:
- (a) NULIS assumed an exposure to potential contractual liability to pay NWMSL the Conflicted Remuneration paid by NWMSL to the financial services licensees and their authorised representatives; and
- (b) the Applicant and Group Members received no benefits for NULIS assuming the obligation in (a).
- 47J On 1 July 2016 the Internal Remuneration Agreement was amended to include NULIS as an MLC Issuer.

Particulars

Amending Deed – Internal Remuneration Agreement dated 1 July 2016, cl 2.1 NLS.501.005.4396 at 4408.

- 48 On 1 July 2016 the superannuation interests of the members of TUSS were transferred to the MLC Super Fund by successor fund transfer (**SFT**).

Particulars

- (i) RC – Witness statement of O’Neal dated 19 July 2018 at [23];
- (ii) RC – Witness statement of Carter dated 30 July 2018 at [50]; and
- (iii) Successor Fund Merger Deed dated 1 July 2016 NNO.0003.0004.0055.

- 49 The effect of the SFT was that:
- (a) each of the members of TUSS became members of the MLC Super Fund;
- (b) NULIS was acknowledged to be the trustee of the MLC Super Fund;
- (c) the MasterKey products were moved into the MLC Super Fund;
- (d) NULIS became the trustee responsible for MasterKey Business Super and MasterKey Personal Super;
- (e) MLC Limited ceased to be administrator of TUSS; and
- (f) NWMSL commenced to provide superannuation business services to NULIS.

Particulars

- (i) RC – Witness statement of Smith dated 1 August 2018 at [21]; and

- (ii) Successor Fund Merger Deed dated 1 July 2016 NNO.0003.0004.0055.

Implementation and Trade Up

- 50 From 1 July 2016 to 23 September 2020, NULIS implemented the Grandfathering Decision by:
- (a) paying or allowing to be paid Conflicted Remuneration to the financial services licensees and their authorised representatives; and
 - (b) obtaining or allowing to be obtained Conflicted Remuneration from the members of the MLC Super Fund by:
 - (i) deducting those amounts from the accounts of the members of the MLC Super Fund, including through the charging of administration fees; or
 - (ii) maintaining those amounts as part of the declared unit price of their financial products.

(implementing the Grandfathering Decision)

- 50A After the SFT, MLC Limited and NAB proposed to implement the Trade Up Program by trading up certain legacy retail products to more modern products within the MLC Super Fund in three tranches.

Particulars

- (i) the first tranche of products were “Ex-Aviva” products which were to be traded up into the “MLC MasterKey Super Fundamentals” with a target completion date of 30 June 2017;
 - (ii) the second tranche of products were “Five Star” and “Other” products which were to be traded up into the “MLC MasterKey Super and Pension” product with a target completion date of 30 September 2017;
 - (iii) the third tranche of products were the “Gold Star” products which were to be traded up into the “MLC MasterKey Super and Pension” products with a target completion date of 30 September 2019; and
 - (iv) Ex-Aviva Retail Trade Up Business Case Workshop dated 16 August 2016 NLS.601.008.2345.
- 50B On 2 September 2016 an SFT Trade Up trustee workshop was held which discussed a Legacy Retail Product Roadmap prepared by Vincent.

Particulars

Legacy Retail Product Road-Map NLS.602.008.5200.

- 50C Contrary to the LPP, the Legacy Retail Product Roadmap identified the preservation of grandfathering under FOFA (as Conflicted Remuneration) as a Trade Up principle agreed in December 2015.

Particulars

Legacy Retail Product Road-Map NLS.602.008.5200 at 5201, page 2.

- 50CA It was not legally possible to preserve the grandfathering arrangements for the Conflicted Remuneration while moving members from the Legacy Products into new products on a different platform.

Particulars

Expert report of Murray Jones dated 21 April 2022 (**Jones**) at [215]

Legacy Products are the products listed in Appendix 3 to the Grandfathering Paper;

NMA.502.001.4244 and NMA.502.001.1345, being examples of the relevant PDS documents;

see also section 1528 Corporations Act and regs 7.7A.16 and 7.7A.16A(2) Corporations Regulations, and Jones, [25.3], [209]-[219] and section E.2, in particular [367]-[368].

- 50D On 13 September 2016, Evelyn Horton (an independent director at NULIS) sent an email to Smith, Carter and Marriott regarding a level of discomfort about continuing to grandfather pre-FOFA fees being paid to advisers (as Conflicted Remuneration).

Particulars

Email from Horton to Smith, Marriott and others dated 13 September 2016 NLS.600.015.6249.

- 50E From 5 October 2016 to 1 May 2017, the Trade Up Program was the subject of input and discussion from various NAB, NWMSL and NULIS employees and executives designed to preserve the payment of Conflicted Remuneration on trade-up. In particular:

- (a) on 3 November 2016, a business case workshop for the Trade-Up Program nominated the preservation of grandfathering under FOFA (as Conflicted Remuneration) to be the “desired future state” for Gold Star and remaining NULIS Capsil Products;
- (b) NAB employees and executives nominated the preservation of grandfathered commissions as part of the Trade-Up Program (as Conflicted Remuneration) to be critical to secure support from their advisers, IFA’s and dealer groups to optimise funds flow and offset the revenue gap arising from My Super and trade ups eroding their margins;
- (c) NAB employees and executives identified that if Conflicted Remuneration was not grandfathered:

- (i) authorised representatives would suffer a loss to the value of their businesses;
 - (ii) authorised representatives would likely leave the NAB Adviser network and/or cease to be Other Licensees in favour of a competitor;
 - (iii) the ability for authorised representatives to borrow or raise capital would be hindered; and
 - (iv) authorised representatives would have difficulty in securing the same value to their business under the Buyer of Last Resort Policy; and
- (d) at a meeting on 1 December 2016, NULIS directors agreed, or alternatively gave implicit approval, to the proposal to grandfather commissions during the Trade-Up Program.

Particulars

- (i) 3 November 2016 Business Case Workshop Draft NLS.602.008.7667 at 7671, slide 5;
- (ii) 4 November 2016 email from Timothy Gorst (**Gorst**) (Senior Manager NAB Wealth Transformation Program) to Shaune Egan (**Egan**) (Head of Product Development – Platforms NAB) NLS.602.008.8770 at 8771;
- (iii) 4 November 2016 email from Kellie Stansell (**Stansell**) to Lawless and others NLS.602.008.8636;
- (iv) 4 November 2016 email from Gorst to Lawless and others NLS.602.008.8636;
- (v) 7 November 2016 email and powerpoint from Egan to Lawless NLS.602.008.8770 at 8770 and NLS.602.008.8774;
- (vi) 9 November 2016 email from Gorst to Lawless NLS.602.008.8878;
- (vii) 9 November 2016 email from Gorst to Egan, Riddell, Lawless and Stansell NLS.602.009.0143;
- (viii) 14 November 2016 email from Lawless to Stansell and others NLS.602.009.0136;
- (ix) 16 November 2016 email and powerpoint entitled “preserving Grandfathered Commissions is Critical” from Gorst to Lawless and others NLS.602.009.0544 and NLS.602.009.0545;
- (x) 18 November 2016 email from Lawless to Gorst and others NLS.602.009.2016;
- (xi) 1 December 2016 email and notes of meeting with NULIS Directors NLS.602.010.0758 and NLS.602.010.0804; and

- (xii) 16 February 2017 document entitled "CAPSIL Retail Trade Up" NLS.602.013.1658.

50F On 17 May 2017, Lawless circulated to Marriott and others the final version of the board workshop paper on Adviser Commissions on Product Trade Up for a workshop of the NULIS board to be held on 23 May 2017.

Particulars

Email from Lawless to Marriott and others dated 17 May 2017 NLS.602.016.3592.

50G The board workshop paper referred to in paragraph 50F above contained a management recommendation to continue the payment of grandfathered commissions (as Conflicted Remuneration) on Five Star and Gold Star products but not Ex-Aviva products.

Particulars

Board workshop – Adviser Commissions on product trade up NLS.606.025.5343 at 5346.

50H The recommendation alleged at paragraph 50G above was made on the basis that management believed there would be a very high likelihood of legal action by Licensees, particularly for Five Star/Gold Star, and the flow on effects to an adviser's business valuation via their Buyer of Last Resort Arrangements which was likely to be a big issue for aligned advisers.

Particulars

Board workshop – Adviser Commissions on product trade up NLS.606.025.5343 at 5345.

50I On 7 and 8 December 2017, NULIS held a board meeting, as well as a workshop at which Vincent sought support for a three year transition to cease all asset and contribution based commissions (as Conflicted Remuneration) by 2021.

Particulars

Gold Star/Five Star Trade Up Workshop Pack dated 7/8 December 2017 NLS.501.007.1234 and Board Meeting and Workshop Agenda NAB.005.562.6813.

50J By August 2018 the Trade-Up Program was proposed to be amended so that all legacy products would be traded up to the non-commission MasterKey Super & Pension Fundamentals by the end of 2020.

Particulars

Board paper dated 15 August 2018 for Board Meeting 22/23 August 2018 NLS.602.023.2312.

50K On 3 February 2020 as part of the Trade Up Program:

- (a) NULIS resolved to approve the trade up of members of MLC MasterKey Super and Pension to MLC MasterKey Super and Pension Fundamentals, effective 7 May 2020; and
- (b) NULIS resolved to approve the trade up of members of MLC MasterKey Superannuation, MLC MasterKey Allocated Pension and MLC Personal Superannuation Savings Plan products to MLC MasterKey Super Fundamentals, effective 5 June 2020.

Particulars

Minutes of meeting dated 3 February 2020 Agenda items 6A and 7A
NLS.501.009.0635 at 0640 and 0641.

- 51 At the times of making the Grandfathering Decision:
- (a) all of the benefits of the SFT could be achieved without grandfathering commissions;
 - (b) NULIS would not have been in breach of any contractual obligation if it decided not to pay Conflicted Remuneration as it did not have any contracts with financial services licensees prior to the SFT or the LRA Approval Decision;
 - (c) the only basis NULIS had identified to support grandfathering was that it could avoid a reduction in sales and adverse retention impacts with adverse consequences for members, including due to a reduction in the scale of the fund;
 - (d) NULIS had not quantified, or attempted to quantify, the negative impact in subparagraph (c) above;
 - (e) NULIS was under no legal obligation to continue making Conflicted Remuneration payments;
 - (f) if Conflicted Remuneration payments ceased, the Applicant and each of the Group Members would have no legal liability to the members of the NAB Adviser network or their authorised representatives or Other Licensees or their authorised representatives;
 - (g) no additional benefits or services would be received by the Applicant and each of the Group Members in return for the continuation of Conflicted Remuneration payments;
 - (h) as a consequence of (g) above, it was in the financial interests of the Applicant and each of the Group Members for the Conflicted Remuneration payments to cease;
 - (i) NULIS had not considered or quantified any benefit to the Applicant and each of the Group Members that would match or exceed the detriment to the Applicant and each of the Group Members caused by the continued payment of Conflicted Remuneration;
 - (i1) no benefits or services were provided to the Applicant and Group Members in exchange for the Conflicted Remuneration payments;

- (i2) alternatively to sub-paragraph (i1) above, NULIS did not have adequate systems in place to ensure that benefits or services were being provided to the Applicant and Group Members in exchange for the Conflicted Remuneration payments;
- (i3) NULIS was required to take into account the interests of NAB in making the decisions by reason of the Roles and Responsibilities Charter as pleaded at paragraphs 35D and 35E above;
- (i4) the Grandfathering Decision was implemented in part to prevent possible legal action by members of the NAB Adviser network and Other Licensees and their authorised representatives over the payment of Conflicted Remuneration and Buyer of Last Resort policies;
- (i5) there were classes of beneficiaries, or beneficiaries within those classes, who were paying Conflicted Remuneration without receiving the services to which they were entitled (including ongoing advice);
- (i6) there were classes of beneficiaries, or beneficiaries within those classes, who were paying Conflicted Remuneration without corresponding entitlements to the provision of services (including ongoing advice);
- (i7) different classes of beneficiaries and beneficiaries within a class, were receiving unequal benefits or services in return for the Conflicted Remuneration payments they made in that:
 - (i) there were classes of beneficiaries required to pay Conflicted Remuneration without receiving any services (including ongoing advice);
 - (ii) there were classes of beneficiaries who were entitled to receive services (including ongoing advice) in exchange for paying Conflicted Remuneration; and
 - (iii) there were classes of beneficiaries who were not required to pay Conflicted Remuneration and who received the same services as the classes of beneficiaries in (i);

Particulars to (i5) to (i7)

Letter from William Roberts to King & Wood Mallesons dated 13 August 2021, including the annexure to that letter. The classes of beneficiaries referred to are as specified in particular (ai) to paragraph 56;

Jones at Sections D.2.3, D.3.4 and Appendix E;

- (iv) there were classes of beneficiaries who were in high-fee Conflicted Remuneration Legacy Products with equivalent features to low fee non-Conflicted Remuneration paying 'On Sale Products'.

Particulars to (i7)(iv)

Jones at Section C.7.6, Section D.2.3. and Appendix E, [24.2], [113], [151] and [152];

All TUSS products that paid commissions are significantly more expensive than products that did not pay commissions, with the exception of MLC MK Allocated Pension Gold Star;

With the exception of MLC MK Allocated Pension Gold Star, the fees on Conflicted Remuneration paying products were 200% to 400% higher than the fees on equivalent non-Conflicted Remuneration paying products;

The relevant classes are the Legacy Products and the On Sale Products;

On Sale Products are MKSPF and the non-commission version of MKBS/MKPS;

The “*features*” of these products that are said to be comparable are all features apart from the requirement to pay commissions;

These features are said to be “*equivalent*” on the basis that they are equivalent. Without limitation, the word conveys its usual meaning of equal to or corresponding with each other in value, amount, function and/or meaning overall;

- (i8) there were classes of beneficiaries, or beneficiaries within those classes, in which the payment of Conflicted Remuneration was governed by a Licensee Remuneration Agreement (**LRA**), Product Disclosure Statement (**PDS**) and/or Remuneration Schedule that required the provision of ongoing advice in exchange for the Conflicted Remuneration, and classes of beneficiaries, or beneficiaries within those classes in which the payment of Conflicted Remuneration was not governed by an LRA, PDS and/or Remuneration Schedule that required the provision of ongoing advice in exchange for the Conflicted Remuneration.

Particulars to (i8)

The relevant classes of beneficiaries are the classes of members holding each Legacy Product;

Jones Appendix E provides full particulars of the differences between classes in relation to the 9 highest commission-paying Legacy Products;

see Jones at Section C.7.6, D2.3 at [240];

- (j) the Grandfathering Decision was made to ensure that the current Conflicted Remuneration arrangements continued following the proposed SFT to NULIS, in circumstances where there was a conflict between NULIS’s duties to, and the financial interests of, the Applicant and each of the Group Members on the one hand and its own interests and the interests of the members of the NAB Adviser network, NAB, NWMSL and MLC Limited; and

- (k) having regard to the matters in sub-paragraphs 51(a) to (j) above, the decision referred to in sub-paragraph (j) was not made for a proper purpose.

Particulars

- (i) RC – Transcript Carter – 6 August 2018 at page 4216;
- (ii) RC – Transcript Carter – 6 August 2018 at pages 4217 and 4219;
- (iii) RC – Transcript Smith – 8 August 2018 at 4391;
- (iv) 10 June 2016 Board Paper at page 23;
- (v) Email from Marriott sent on 23 April 2016 at 4:17 pm;
- (vi) Email from Marriott sent on 8 May 2016 at 11:35 am;
- (vii) The particulars to paragraph 53 below are repeated;
- (viii) The particulars to paragraph 50E above are repeated; and
- (ix) Paragraph 50H above is repeated.

- 51A At the times of implementing the Grandfathering Decision each of the matters in sub-paragraphs 51 (a), (c), (d), (g), (h) and (i7), to (k) above were matters that existed.

Particulars

The particulars to paragraph 51 above are repeated.

- 52 At the times of:

- (a) Making the Grandfathering Decision, NULIS knew or ought to have known each of the matters in sub-paragraphs 51(a) to (k) above; and
- (b) implementing the Grandfathering Decision, NULIS knew or ought to have known each of the matters in paragraph 51A.

Particulars

- (i) RC – Transcript Carter – 6 August 2018 at page 4216;
- (ii) RC – Transcript Carter – 6 August 2018 at page 4217;
- (iii) 10 June 2016 Board Paper at page 23;
- (iv) Email from Marriott sent on 23 April 2016 at 4:17pm; and
- (v) Email from Marriott sent on 8 May 2016 at 11:35 am.

- 52A At the time of making the LRA Approval Decision:

- (a) all of the benefits of the SFT could be achieved without NULIS agreeing to be bound by the Internal Remuneration Agreement and the Licensee Remuneration Agreement;

- (b) NULIS would not have been in breach of any contractual obligation if it decided not to make the LRA Approval Decision as it was not bound by the Internal Remuneration Agreement or the Licensee Remuneration Agreement;
- (c) the SFT could have been implemented without making the LRA Approval Decision;
- (d) NULIS was not under any contractual obligation to make the Conflicted Remuneration payments;
- (e) no additional benefits or services would be received by the Applicant and each of the Group Members in return for NULIS agreeing to be bound by the Internal Remuneration Agreement and the Licensee Remuneration Agreement; and
- (f) it was in the interests of the Applicant and Group Members for the trustee not to assume any exposure to potential contractual liability to pay the Conflicted Remuneration.

Particulars

The particulars to paragraph 51 above are repeated.

- 52B At the time of making the LRA Approval Decision, NULIS knew or ought to have known of each of the matters in sub-paragraphs 52A(a) to (f) above.

Particulars

- (i) Email from Marriott sent on 23 April 2016 at 4:17pm; and
- (ii) Email from Marriott sent on 8 May 2016 at 11:35am.

Contraventions

- 53 From at least 10 June 2016 to 23 September 2020, there was and is a conflict between NULIS's duties to, and the financial interests of, the Applicant and each of the Group Members, on the one hand, and NULIS's own interests and the interests of the members of the NAB Adviser network, NAB, NWMSL and MLC Limited (between 10 June 2016 and October 2016) on the other hand.

Particulars

- (i) It was and is NULIS's duty to take all reasonable steps to ensure, and it was and is in the financial interests of the Applicant and each of the Group Members, that Conflicted Remuneration payments not be made.
- (ii) It was and is in the financial interests of NULIS, NAB, NWMSL and MLC Limited (between 10 June 2016 and October 2016) for the Applicant and each of the Group Members to continue making Conflicted Remuneration payments.
- (iii) It was and is in the interests of NULIS, NAB, NWMSL and MLC Limited (between 10 June 2016 and October 2016) to maintain good relations with the NAB Adviser network and their authorised representatives in relation to

the promotion and distribution of the financial products by continuing to make the Conflicted Remuneration payments.

- (iv) It was and is in the interests of NULIS, NAB, NWMSL and MLC Limited (between 10 June 2016 and October 2016) to maintain good relations with the Other Licensees in relation to the promotion and distribution of the financial products by continuing to make the Conflicted Remuneration payments.
- (v) The conflict was material having regard to the total amount of Conflicted Remuneration payments expected to be paid and paid.
- (vi) The Applicant refers to the particulars to paragraph 50E above.

54 At the times of making the Grandfathering Decision and implementing the Grandfathering Decision, NULIS knew that there was a conflict between NULIS's duties to, and the financial interests of, the Applicant and Group Members, on the one hand, and NULIS's own interests and the interests of the members of the NAB Adviser network, NAB, NWMSL and MLC Limited (between 10 June 2016 and October 2016).

Particulars

- (i) Each of the directors of NULIS, including O'Neal, received and read the 10 June 2016 Board Pack;
- (ii) The Applicant refers to and repeats paragraph 9 above.

55 Alternatively to paragraph 54 above, at the times of making the Grandfathering Decision and implementing the Grandfathering Decision, NULIS ought to have known the matters pleaded in paragraph 54 above.

Particulars

The Applicant repeats the particulars to paragraph 54 above.

56 In making the Grandfathering Decision and implementing the Grandfathering Decision, NULIS contravened, and continues to contravene to 23 September 2020, the covenants in ss 52(2)(b), (e) and (f) of the SIS Act.

Particulars

- (ai) The classes of beneficiaries for the purpose of the covenants in ss s 52(2) (e) and (f) were:
 - (i) the members of the TUSS Division and the members of the PLUM Division respectively; and/or
 - (ii) the members of the MLC Super Fund holding each of the products, or member packages within the TUSS Division respectively.
- (a) A prudent superannuation trustee in the position of trustee of the MLC Super Fund would have identified some or all of the following considerations as relevant:
 - (i) whether NULIS was under any legal obligation to continue making the Conflicted Remuneration payments after the SFT;

- (ii) whether NULIS, or the Applicant and each of the Group Members, would be exposed to any legal liability if the Conflicted Remuneration payments were ceased;
- (iii) the amounts that the Applicant and each of the Group Members would pay if the Conflicted Remuneration payments were continued after the SFT (individually and in the aggregate);
- (iv) whether any benefits or services would be received by the Applicant and each of the Group Members in return for the continuation of the Conflicted Remuneration payments (and if so, their value);
- (v) whether, and to what extent, the financial impact to the Applicant and each of the Group Members would outweigh any benefits or services they would otherwise receive if the Conflicted Remuneration payments were continued;
- (v1) whether, and to what extent, NULIS's request on 10 June 2016 for the FOFA Obligation Assurance as pleaded in paragraph 47A above, had been complied with;
- (v2) whether, and to what extent, NULIS's request on 16 June 2016 to monitor the Licensee Remuneration Arrangements as pleaded at paragraph 47F above, had been complied with;
- (v3) whether, and to what extent, the change management plan referred to at paragraph 36(d) above had been implemented and achieved;
- (v4) whether, and to what extent, the Legacy Commission Review referred to at paragraph 46A above had been implemented and achieved;
- (v5) whether, and to what extent, different classes of beneficiaries and beneficiaries within a class, paid different rates or amounts of Conflicted Remuneration;
- (v6) whether, and to what extent, different classes of beneficiaries and beneficiaries within a class, were receiving equal benefits or services in return for the Conflicted Remuneration payments they made;
- (vi) whether there was any conflict between NULIS's duties to, and the financial interests of, the Applicant and each of the Group Members on the one hand and its own interests and the interests of the members of the NAB Adviser network, NAB, NWMSL and MLC Limited (between 10 June 2016 and October 2016);
- (vii) whether priority would be given to NULIS's duties to, and the financial interests of, the Applicant and each of the Group Members over its own interests and the interests of the members of the NAB Adviser network, NAB, NWMSL and MLC Limited (between 10 June 2016 and October 2016);
- (viii) whether, and to what extent, the financial interests of the Applicant and each of the Group Members would be adversely affected by any such conflict;
- (ix) whether the Grandfathering Decision and its implementation were made only for proper purposes;

- (x) whether, and to what extent, there was unfairness between the beneficiaries within the classes in particular (ai), by reason of the following circumstances:
 - (A) where members within a class were required to pay Conflicted Remuneration despite not having an adviser; and/or
 - (B) where members within a class were paying Conflicted Remuneration in exchange for services, (including ongoing advice), but that service was not being provided.
 - (xi) whether, and to what extent, there was unfairness between the classes in particular (ai) by reason of the following circumstances:
 - (A) the charging of Conflicted Remuneration in relation to some products without a requirement to provide ongoing services, (including ongoing advice), in circumstances where Conflicted Remuneration was not charged in relation to other products unless ongoing services, (including ongoing financial advice) was provided;
 - (B) the charging to and payment of Conflicted Remuneration in relation to some classes without a requirement to provide or the monitoring of the provision of ongoing services, (including ongoing advice), where other classes are not charged and do not pay that Conflicted Remuneration; and
 - (C) allowing some classes of members to stay in Legacy Products, while other members were in equivalent but low-fee On-Sale Products, without any proper justification.
 - (xii) whether, and to what extent, the charging of fees for the purposes of funding Conflicted Remuneration was allowed under the terms of the trust deed;
 - (xiii) whether the charging of fees for the purposes of funding Conflicted Remuneration was consistent with the sole purpose test in s 62 of the SIS Act;
 - (xiv) whether the PDSs promised the provision of annual or other ongoing advice in exchange for the payment of Conflicted Remuneration; and
 - (xv) whether the LRAs and Remuneration Schedules required the provision of annual or other ongoing advice in exchange for the payment of Conflicted Remuneration.
- (b) A prudent superannuation trustee in the position of trustee of the MLC Super Fund would have taken all reasonable steps to obtain the relevant information and advice (including that of experts) so as to:
- (i) ascertain the matters in sub-paragraphs (a) (i) to (xv) above;

- (ii) ascertain whether, and to what extent, ceasing the Conflicted Remuneration payments would cause:
 - (A) dissatisfaction among the authorised representatives of the members of the NAB Adviser network and Other Licensees;
 - (B) a reduction in the funds under management and number of members in the MLC Super Fund;
 - (C) an increase in the costs for the remaining members of the MLC Super Fund;
 - (D) a reduction in the competitiveness of the financial products of the MLC Super Fund;
 - (E) a threat to the sustainability of the MLC Super Fund as a whole;
 - (F) further costs to be incurred in ceasing the conflicted remuneration payments; and
 - (G) further costs to be incurred and the steps to be taken in setting up alternative remuneration arrangements with the authorised representatives of the NAB Adviser network and Other Licensees.
 - (iii) ascertain whether, and to what extent, any of the matters in subparagraph (ii) above would affect the interests of the Applicant and each of the Group Members;
 - (iv) ascertain how many members of the MLC Super Fund were receiving active financial advice (i.e. receiving a service in exchange for the fees paid);
 - (v) ascertain whether, and to what extent, the financial impact to the Applicant and each of the Group Members would outweigh any benefits or services they would otherwise receive if the Conflicted Remuneration payments were continued;
 - (vi) ascertain whether the Grandfathering Decision and its implementation were made only for proper purposes;
 - (vii) ascertain whether, and to what extent, Conflicted Remuneration was being charged to and paid by members when ongoing services, including ongoing advice, were not being provided.
- (c) A prudent superannuation trustee in the position of trustee of the MLC Super Fund would have taken into account some or all of the following relevant considerations:
- (i) each of the matters pleaded in paragraph 51 above;
 - (ii) the amounts the Applicant and each of the Group Members would pay if the Conflicted Remuneration payments were continued;
 - (iii) the interests of the Applicant and each of the Group Members, the interests of NULIS, and that the Conflicted Remuneration payments were not in the financial interests of the Applicant and each of the Group Members; and

- (iv) whether an adequate response had been provided to the requests for information in particular (b)(ii); and
 - (v) the charging of fees to the Applicant and the Group Members for the purposes of funding Conflicted Remuneration was not authorised by the terms of the MLC Super Fund Trust Deed and, in particular, cl. 3.7 of Schedule 1, where no ongoing services or benefits would be provided to the Applicant and Group Members in return for the payment of Conflicted Remuneration.
- (d) A prudent superannuation trustee in the position of trustee of the MLC Super Fund would not have taken into account any of the matters referred to in subparagraphs (b) (ii) (A) – (G) above without first having taken all reasonable steps to obtain the relevant information and advice (including that of experts) on such matters.
- (e) By reason of the matters particularised in subparagraphs (a) to (d) above and in circumstances where the financial interests of the Applicant and each of the Group Members were adversely affected in a significant way by the above conflict, a prudent superannuation trustee in the position of trustee of the MLC Super Fund would not:
- (i) have made the Grandfathering Decision or implemented the Grandfathering Decision; or
 - (ii) continued to make the Conflicted Remuneration payments.
- (f) Further or in the alternative to sub-paragraphs (a) to (e) above, a prudent superannuation trustee in the position of trustee of the MLC Super Fund would not have:
- (i) made the Grandfathering Decision or implemented the Grandfathering Decision; or
 - (ii) continued to make the Conflicted Remuneration payments.
- in the circumstances (including those pleaded in paragraph 51 above) that existed at the time.
- (g) Further, or in the alternative to sub-paragraphs (a) to (f) above, a prudent superannuation trustee in the position of trustee of the MLC Super Fund would have:
- (i) acted fairly in dealing with and as between each of the classes in particular (ai); and
 - (ii) acted fairly in dealing with and as between beneficiaries within each of the classes in particular (ai);
- by ensuring that at the time of making the Grandfathering Decision and implementing the Grandfathering Decision there were not classes or beneficiaries within those classes who were:
- (iii) paying Conflicted Remuneration without receiving the services to which they were entitled (including ongoing advice);

- (iv) being charged Conflicted Remuneration without corresponding entitlements to the provision of services, (including ongoing advice);
- (v) being charged and paying Conflicted Remuneration when other classes or beneficiaries within those classes were not charged and did not pay Conflicted Remuneration; or
- (vi) in Legacy Products, while other members were in equivalent but low-fee On Sale Products, without any proper justification.

Sub-Particulars

Jones [24.2], [113], [151], [152], and [190.10].

- (h) Further particulars are set out in the letter from William Roberts to King & Wood Mallesons dated 13 August 2021, including the annexure to that letter.

57 In making the Grandfathering Decision and implementing the Grandfathering Decision, NULIS contravened, and continues to contravene to 23 September 2020, the covenant in s 52(2)(c) of the SIS Act.

Particulars

- (a) A prudent superannuation trustee in the position of trustee of the MLC Super Fund would have engaged in the conduct set out in particulars (a), (b), (c), (d) and (f) to paragraph 56 above;
- (b) A prudent superannuation trustee in the position of trustee of the MLC Super Fund would have engaged in the conduct set out in particulars (i) (ii), (iii) and (v) to paragraph 58 below;
- (c) By reason of the matters particularised in subparagraphs (a) and (b) above and in circumstances where the financial interests of the Applicant and each of the Group Members were adversely affected in a significant way by the above conflict, a prudent superannuation trustee in the position of trustee of the MLC Super Fund would not have:
 - (i) made the Grandfathering Decision or implemented the Grandfathering Decision; or
 - (ii) continued to make the Conflicted Remuneration payments.

58 In making the Grandfathering Decision and implementing the Grandfathering Decision in the premises of paragraphs 53 to 55 above, NULIS contravened, and continues to contravene to 23 September 2020, the covenant in s 52(2)(d) of the SIS Act.

Particulars

- (i) A prudent superannuation trustee in the position of trustee of the MLC Super Fund would have identified:
 - (A) the duty of NULIS to the Applicant and each of the Group Members as set out in the particular (i) to paragraph 53 above;

- (B) the financial interests of the Applicant and each of the Group Members as set out in particular (i) to paragraph 53 above;
 - (C) the financial interests of NULIS as set out in particular (ii) to paragraph 53 above;
 - (D) the interests of NULIS as set out in particular (iii) and (iv) to paragraph 53 above;
 - (E) each of the matters in particulars (a) (i) to (ixv) of paragraph 56.
- (ii) A prudent superannuation trustee in the position of trustee of the MLC Super Fund would not have:
- (A) preferred its own financial interests over the financial interests of the Applicant and each of the Group Members;
 - (B) preferred its own interests and the interests of the NAB Adviser network, NAB, NWMSL and MLC Limited (between 10 June 2016 and October 2016) over the financial interests of the Applicant and each of the Group Members.
- (iii) A prudent superannuation trustee in the position of trustee of the MLC Super Fund would have:
- (A) preferred its duties to, and the interests of, the Applicant and each of the Group Members over the interests of itself and members of the NAB Adviser network, NAB, NWMSL and MLC Limited (between 10 June 2016 and October 2016);
 - (B) ensured that its duties to the Applicant and each of the Group Members were met despite the conflict;
 - (C) ensured that the financial interests of the Applicant and each of the Group Members were not adversely affected by the conflict.
- (iv) By reason of the matters particularised in subparagraphs (i) to (iii) above and in circumstances where the financial interests of the Applicant and each of the Group Members were adversely affected in a significant way by the above conflict, a prudent superannuation trustee in the position of trustee of the MLC Super Fund would not have:
- (A) made the Grandfathering Decision or implemented the Grandfathering Decision;
 - (B) continued to make the Conflicted Remuneration payments.
- (v) Further, and in the alternative to particular (iv) above, particulars (c) and (f) to paragraph 56 ~~is-are~~ repeated.

58A At the time of making the LRA Approval Decision, NULIS knew that there was a conflict between NULIS's duties to, and the financial interests of, the Applicant and Group

Members, on the one hand, and NULIS's own interests and the interests of the members of the NAB Adviser network, NAB, NWMSL and MLC Limited on the other hand.

Particulars

- (i) Each of the directors of NULIS, including O'Neal and Smith, received and read the board pack for the 16 June 2016 board meeting; and
- (ii) The Applicant refers to and repeats paragraph 9 above.

58B Alternatively to paragraph 58A above, at the time of making the LRA Approval Decision, NULIS ought to have known the matters pleaded in paragraph 58A above.

Particulars

The Applicant repeats the particulars to paragraph 58A above.

58C In making the LRA Approval Decision, NULIS contravened the covenants in ss 52(2)(b), (e), (f) and (h) of the SIS Act.

Particulars

- (i) A prudent superannuation trustee in the position of trustee of the MLC Super Fund would have identified some or all of the following considerations as relevant:
 - (A) the Applicant refers to and repeats particulars (a)(i) to (ixv) to paragraph 56 above; and
 - (B) whether the LRA Approval Decision and its implementation were made only for proper purposes.
- (ii) A prudent superannuation trustee in the position of trustee of the MLC Super Fund would have taken all reasonable steps to obtain the relevant information and advice (including that of experts) so as to:
 - (A) ascertain the matters referred to in particulars (b)(i) to (vi) to paragraph 56 above; and
 - (B) ascertain whether the LRA Approval Decision and its implementation were made only for proper purposes.
- (iii) A prudent superannuation trustee in the position of trustee of the MLC Super Fund would have taken into account some or all of the following relevant considerations:
 - (A) each of the matters pleaded and particularised in paragraphs 52A and 56 (c) above;

- (B) the amounts the Applicant and each of the Group Members would pay if the Conflicted Remuneration payments were continued as a consequence of making the LRA Approval Decision; and
 - (C) the interests of the Applicant and each of the Group Members, the interests of NULIS, and that the Conflicted Remuneration payments were not in the financial interests of the Applicant and each of the Group Members.
- (iv) A prudent superannuation trustee in the position of trustee of the MLC Super Fund would not have taken into account any of the matters referred to in paragraph 56 (b) (ii) (A) - (G) above without first having taken all reasonable steps to obtain the relevant information and advice (including that of experts) on such matters.
- (v) By reason of the matters particularised in subparagraphs (i) to (iv) above and in circumstances where the financial interests of the Applicant and each of the Group Members were adversely affected in a significant way by the above conflict, a prudent superannuation trustee in the position of the MLC Super Fund would not have made the LRA Approval Decision.
- (vi) Further or in the alternative to sub-paragraphs (i) to (v) above, a prudent superannuation trustee in the position of the trustee of the MLC Super Fund would not have made the LRA Approval Decision in the circumstances (including those pleaded in paragraph 52A above) that existed at the time.
- (vii) Further or in the alternative to sub-paragraphs (i) to (v) above, a prudent superannuation trustee would not have made the LRA Approval decision without:
- (A) requiring as a condition of that decision that those arrangements could be terminated without cost or damage to either the MLC Super Fund or itself where it:
 - (1) determined that the financial advisers or Dealerships had not provided advice or financial services to members where they were required to do so; or
 - (2) determined that paying Conflicted Remuneration would cause a breach of duty to members.
- See Jones at [359].
- (B) amending the Services Agreement with NWMSL to require NWMSL to:

- (1) monitor whether advisers had provided written advice to members annually or other ongoing advice for legacy retail products before paying Conflicted Remuneration;
- (2) monitor whether advisers had provided group-based advice to members before paying the Employer Service Fee (**ESF**) and the Plan Service Fee (**PSF**);
- (3) provide the trustee with reports on how NWMSL has monitored the written advice and tailored financial services as set out above;
- (4) provide confirmations that it only paid Conflicted Remuneration to financial advisers and their Dealerships where they had provided written advice or tailored financial services to members as required by the relevant PDS, LRA and Remuneration Schedule; and
- (5) ceased paying Conflicted Remuneration to financial advisers and Dealerships who did not meet the Special Terms required for Conflicted Remuneration payments.

See Jones at [129], Table 4, [246] and [404].

58D In making the LRA Approval Decision, NULIS contravened the covenant in s52(2)(c) of the Act.

Particulars

- (i) A prudent superannuation trustee in the position of trustee of the MLC Super Fund would have engaged in the conduct set out in the particulars to paragraphs 56 (c) and 58C above;
- (ii) A prudent superannuation trustee in the position of the trustee of the MLC Super Fund would have engaged in the conduct set out in particulars (i), (ii), (iii) and (iv) to paragraph 58E below;
- (iii) By reason of the matters particularised in subparagraphs (a) and (b) above and in circumstances where the financial interests of the Group Members were adversely affected in a significant way by the above conflict, a prudent superannuation trustee in the position of the trustee of the MLC Super Fund would not have made the LRA Approval Decision.

58E In making the LRA Approval Decision in the premises of paragraphs 58A and 58B above, NULIS contravened the covenant in s52(2)(d) of the SIS Act.

Particulars

- (i) a prudent superannuation trustee in the position of the trustee of the MLC Super Fund would have identified:
 - (A) the duty of NULIS to the Applicant and each of the Group Members as set out in particular (i) to paragraph 53 above;
 - (B) the financial interests of the Applicant and each of the Group Members as set out in particular (i) to paragraph 53 above;
 - (C) the financial interests of NULIS as set out in particular (ii) to paragraph 53 above;
 - (D) the interests of NULIS as set out in particulars (iii) and (iv) to paragraph 53 above;
 - (E) each of the matters in particulars (a) (i) to (ix) of paragraph 56.
- (ii) a prudent superannuation trustee in the position of the trustee of the MLC Super Fund would not have:
 - (A) preferred its own financial interests over the financial interests of the Applicant and each of the Group Members;
 - (B) preferred its own interests and the interests of the NAB Adviser network, NAB, NWMSL and MLC Limited over the financial interests of the Applicant and each of the Group Members.
- (iii) A prudent superannuation trustee in the position of trustee of the MLC Super Fund would have:
 - (A) preferred its duties to, and the interests of, the Applicant and each of the Group Members over the interests of itself and members of the NAB Adviser network, NAB, NWMSL and MLC Limited;
 - (B) ensured that its duties to the Applicant and each of the Group Members were met despite the conflict;
 - (C) ensured that the financial interests of the Applicant and each of the Group Members were not adversely affected by the conflict;
 - (D) engaged in the conduct set out in the particulars to paragraph 56 (c) above.
- (iv) By reason of the matters particularized in subparagraphs (i) to (iii) above and in circumstances where the financial interests of the Applicant and each of the Group Members were adversely affected in a significant way by the above conflict, a prudent superannuation trustee in the position of trustee of the MLC Super Fund would not have made the LRA Approval Decision.

59 The contraventions by NULIS pleaded in paragraphs 56, 57, 58, 58C, 58D and 58E above also constituted:

- (a) contraventions by it of s 55(1) of the SIS Act (prior to 6 April 2019); and
- (b) contraventions by it of s 54B(1) of the SIS Act (from 6 April 2019 to 23 September 2020).

59A Further or in the alternative, the charging by NULIS of fees to the accounts of the Applicant and the Group Members for the purposes of funding Conflicted Remuneration:

(a) was not authorised by the terms of the MLC Super Fund Trust Deed, and in particular Schedule 1 cl. 3.7; and

(a)(b) was a breach of the trust established by clause 3.1 of the MLC Super Fund Trust Deed.

Particulars

These fees were not charged for the “administration and operation” of the TUSS Division of the MLC Super Fund in accordance with Schedule 1 cl. 3.7 as no ongoing benefits or services were provided to the Applicant and Group Members in relation to their interests in the TUSS Division of the MLC Super Fund in return for the payment of Conflicted Remuneration.

Loss or Damage

60 Had NULIS complied with its Statutory Covenants in making the Grandfathering Decision and in implementing the Grandfathering Decision, and making the LRA Approval Decision, NULIS would not have:

- (a) made the Grandfathering Decision or implemented the Grandfathering Decision or made the LRA Approval Decision; or
- (b) continued to make the Conflicted Remuneration payments.

60A By reason of the matters pleaded in paragraphs 17(a) and (b) above, the Applicant and each Group Member during the period each of them was a Member of the Fund had a valuable interest, including an equitable proprietary interest, in the TUSS Division of the MLC Super Fund.

Particulars

- (i) The Applicant was a Member of the TUSS Division of the MLC Super Fund from 1 July 2016 to 23 February 2021 and the benefits in his account no 8301190 were “unrestricted and non-preserved” during that period; 2016 annual statement MLB.001.001.0085 at page 1; 2017 annual statement MLB.001.001.0087 at page 1; 2018 annual statement MLB.001.001.0089 at page 1; and 2019 annual statement MLB.001.001.0090 at page 1;
- (ii) SIS Regulations 1994 (Cth) reg 6.20;

- (iii) The valuable interest was the total account balance as recorded in the Applicant's individual account within the fund (whether or not that interest is classified as an equitable proprietary interest);
- (iiiv) Particulars of the period in which each of the Group Members was a Member of the TUSS Division of the MLC Super Fund and the benefits in their accounts shall be provided following the Initial Trial.

60B The value of the interests referred to in paragraph 60A was reduced by reason of NULIS obtaining the Conflicted Remuneration from the Applicant and each Group Member.

Particulars

- (i) The value of the Applicant's interest is that recorded in the 2016 annual statement MLB.001.001.0085 at page 1; 2017 annual statement MLB.001.001.0087 at page 1; 2018 annual statement MLB.001.001.0089 at page 1; and 2019 annual statement MLB.001.001.0090 at page 1 for account no 8301190;
- (ii) In the case of the Applicant, the Conflicted Remuneration was deducted by NULIS from account no 8301190 by including it in the calculation of the unit price for each investment option with the consequence that the balance in the account was reduced by the amount of the deduction; 2016 annual statement MLB.001.001.0085 at pp 3-4; 2017 annual statement MLB.001.001.0087 at pp 3-4; 2018 annual statement MLB.001.001.0089 at pp 3-4; and 2019 annual statement MLB.001.001.0090 at pp 3-4;
- (iiA) By reason of particulars (i) and (ii), the Applicant suffered a diminution in his individual account within the fund (whether or not that interest is classified as an equitable proprietary interest);
- (iii) Further particulars will be provided in conjunction with the Applicant's expert evidence;
- (iv) Particulars in respect of the Group Members shall be provided following the Initial Trial.

61 By reason of the matters pleaded in paragraphs 53 to 59A and 60 to 60B above, the Applicant and each Group Member have suffered, and continue to suffer, loss or damage.

Particulars

- (i) The contraventions have caused, and continue to cause, a reduction in the amount which the Applicant and each of the Group Members have received from the MLC Super Fund;
- (ii) The contraventions have caused, and continue to cause, a reduction in the amount which the Applicant and each of the Group Members can expect to receive from the MLC Super Fund;

- (iii) The contraventions have caused, and continue to cause, a reduction in the value of the interests referred to in paragraph 60A above;
- (iv) The particulars to paragraphs 60A and 60B above are repeated.

61A Further or in the alternative to paragraph 61 above, by reason of the matters pleaded in paragraphs 53 to 59A and 60 to 60B above, the Applicant and each Group Member, who

- (a) ceased to be a Member of the TUSS Division of the MLC Super Fund between 1 July 2016 and 23 February 2021; or
- (b) had “unrestricted non-preserved” benefits in the TUSS Division of the MLC Super Fund between 1 July 2016 and 23 February 2021,

suffered loss or damage.

Particulars

- (i) In the case of the Applicant, the particulars to paragraphs 60A(i) & (ii) and 60B(i) & (ii) above are repeated.
 - (ii) Particulars in respect of the Group Members shall be provided following the Initial Trial.
- 62 By reason of the matters pleaded in paragraphs 61 and 61A above, the Applicant and each of the Group Members is entitled to recover the amount of that loss or damage from NULIS.

Particulars

SIS Act, s 55(3).

62A By reason of the matters pleaded in paragraphs 59A, 61 and 61A above, the Applicant and each of the Group Members is entitled to have NULIS as trustee of the MLC Super Fund restore or pay equitable compensation into the accounts of the Applicant and each Group Member in the MLC Super Fund or, alternatively, pay equitable compensation to the Applicant and each Group Member for breach of trust.

- 62BA Further or in the alternative, by reason of the matters pleaded in paragraphs 53 to 59A and 60 to 60B above:
- (a) NULIS has breached the covenants contained in s 52(2)(b), (c), (d), (e) and (f) of the SIS Act as included in the MLC Super Fund Trust Deed by s 52(1) of the SIS Act;
 - (b) the covenants contained in s 52(2)(b), (c), (d), (e) and (f) of the SIS Act were at all material times terms of the MLC Super Fund Trust Deed;
 - (c) NULIS has also breached the terms of the MLC Super Fund Trust Deed, and in particular Schedule 1 cl. 3.7;
 - (de) a condition of the RSE licence was that NULIS was required to properly perform the duties of trustee in respect of the MLC Super Fund;

Particulars

SIS Act, s 29E(1)(b).

- (~~ed~~) NULIS as trustee of the MLC Super Fund was under a duty to restore or pay equitable compensation into the accounts of the Applicant and each Group Member in the MLC Super Fund or, alternatively, to pay equitable compensation to the Applicant and each Group Member for breach of trust;
- (~~fe~~) by reason of the conduct pleaded in paragraphs 53 to 59A and 60 to 60B above, NULIS breached the terms of the MLC Super Fund Trust Deed and the covenants as set out ~~in the covenants~~ in s 52(2)(b), (c), (d), (e) and (f) of the SIS Act;
- (~~gf~~) NULIS has failed to restore or pay equitable compensation into the accounts of the Applicant and each Group Member in the MLC Super Fund or, alternatively, to pay equitable compensation to the Applicant and each Group Member for breach of trust as required by the condition of the RSE licence;
- (~~hg~~) the Applicant and each Group Member are persons whose interests have been, are, or would be, affected by the conduct of NULIS as pleaded in sub-paragraph (~~ed~~) and (~~fe~~) above.

Particulars

The Applicant refers to and repeats paragraphs 59A, 59B, 60A, 60B and 60C above.

62CB In the premise of paragraph 62BA, the Applicant and Group Members are entitled to an injunction requiring NULIS to:

- (a) restore the accounts, or pay compensation into the accounts, of the Applicant and each Group Member in the MLC Super Fund; or
- (b) pay compensation to the Applicant and each Group Member.

Particulars

SIS Act, s 315(3).

62DC In the alternative to paragraphs 60A to 62CB, had NULIS complied with the Statutory Covenants it would have required prior to, and as a condition of, the SFT that members in Legacy Products that paid Conflicted Remuneration were transferred out of those products into On-Sale Products that did not pay Conflicted Remuneration.

Particulars

In the case of the Applicant, a prudent superannuation trustee would have transferred his interests from MLC MasterKey Allocated Pension Gold Star into MKSPF;

In the case of the sample group member, a prudent superannuation trustee would have transferred her interests from the commission version of MKBS into the non-commission version of MKBS;

See Jones, section G, in particular [429], [430.2] and [430.3];

“On Sale products that did not pay Conflicted Remuneration” are MKSPF and the non-commission version of MKBS;

“immediately” has its ordinary meaning (i.e. it is alleged that the trade-up of members should have been undertaken forthwith upon the SFT).

62ED In the alternative to paragraphs 60A to 62DG, had NULIS complied with its Statutory Covenants (and if it was not possible to transfer members prior to the SFT), NULIS would have taken steps immediately following the SFT to transfer members in Legacy Products that paid Conflicted Remuneration out of those products into On-Sale Products that did not pay Conflicted Remuneration.

Particulars

In the case of the Applicant, a prudent superannuation trustee would have transferred his interests from MLC MasterKey Allocated Pension Gold Star into MKSPF;

In the case of the sample group member, a prudent superannuation trustee would have transferred her interests from MLC MasterKey Business Super into the Non-Commission version of MLC MasterKey Business Super;

See Murray Jones, section G;

“immediately” has its ordinary meaning (i.e. it is alleged that the trade-up of members should have been undertaken forthwith upon the SFT).

62EE In the alternative to paragraphs 60A to 62ED, had NULIS complied with the Statutory Covenants in respect of the LRA Approval Decision, it would have:

- (a) not made the LRA Approval decision without requiring as a condition of that decision that the Licensee Remuneration Agreements could be terminated without cost or damage to either the MLC Super Fund or itself where it:
 - (i) determined that the financial advisers or Dealerships had not provided advice or financial services to members where they were required to do so; or
 - (ii) determined that continuing to pay Conflicted Remuneration or other Conflicted Remunerations would cause a breach of duty to members; and
- (b) amended the Services Agreement with NWMSL to require NWMSL to:
 - (i) monitor whether advisers had provided written advice to members annually or other ongoing advice for legacy retail products before paying Conflicted Remuneration;
 - (ii) monitor whether advisers had provided group-based advice to members before paying the ESF and the PSF;

- (iii) provide the trustee with reports on how NWMSL has monitored the advice and tailored financial services as set out above;
- (iv) provide confirmations that it only paid Conflicted Remuneration to financial advisers and their Dealerships where they had provided advice or tailored financial services to members as set out above; and
- (v) ceased paying Conflicted Remuneration to financial advisers and Dealerships who did not meet the Special Terms required for Conflicted Remuneration payments.

Particulars

“Special Terms” means “subject to any terms and conditions applicable to MLC Products as set out in the Remuneration Schedules, product disclosure statement or other relevant disclosure document, including any terms applicable to clawing back remuneration ...” see Jones at [226].

- 63 By reason of the matters pleaded in paragraphs 58A to 58D, 60BA and 62DC to 62FE above, the Applicant and each of the Group Members:
- (a) had the interests referred to in paragraph 60BA reduced in value by reason of the matters pleaded in paragraphs 62DC to 62FE above;
 - (b) have suffered loss or damage; and
 - (c) are entitled to recover that loss or damage from NULIS.

Relief claimed

64 The Applicant claims for himself and on behalf of each of the Group Members the relief set out in the accompanying Amended Originating Application.

Date: ~~12 August~~ 12 May 2022



.....
Signed by Blagoj (Bill) Petrovski, Lawyer for the Applicant

This pleading was prepared by Thomas Bagley, counsel, and settled by A S Martin SC and N Hutley SC.

Certificate of lawyer

I, Blagoj (Bill) Petrovski, certify to the Court that, in relation to the Fourth~~Third~~ Further Amended Statement of Claim filed on behalf of the Applicant, the factual and legal material available to me at present provides a proper basis for each allegation in the pleading.

Date: 12 August~~12 May~~ 2022

A handwritten signature in black ink, consisting of a stylized, cursive letter 'B' followed by a horizontal line extending to the right.

.....
Signed by Blagoj (Bill) Petrovski, Lawyer for the Applicant