



**IN THE SUPREME COURT OF VICTORIA AT MELBOURNE  
COMMON LAW DIVISION  
MAJOR TORTS LIST**

Case: S ECI 2020 00306  
Filed on: 22/06/2022 12:17 PM

S ECI 2020 00306

**BETWEEN**

**DAVID SHIMSHON**

First Plaintiff

**JULIAN COUGAN**

Second Plaintiff

and

**MLC NOMINEES PTY LIMITED (ACN 002 814 959)**

First Defendant

**NULIS NOMINEES (AUSTRALIA) LIMITED (ACN 008 515 633)**

Second Defendant

**DEFENCE TO FURTHER AMENDED STATEMENT OF CLAIM**

---

Date of Document:	22 June 2022	Solicitors Code: 21455
Filed on behalf of:	The Defendants	DX: N/A
Prepared by:	Allens 126 Phillip Street Sydney NSW 2000	Telephone: 02 9230 4000 Ref: RJDS:JJCS:120914553 Email: Ross.Drinnan@allens.com.au

---

To the Plaintiff's Further Amended Statement of Claim filed on 18 May 2022, the First Defendant (**MLC Nominees**) and the Second Defendant (**NULIS**) say by way of defence:

**A. NOTES**

1. In answer to paragraph 1 of the Further Amended Statement of Claim, MLC Nominees and NULIS say that, in this Defence:
  - (a) except where otherwise noted, they have adopted the definitions used in the Further Amended Statement of Claim but do not, by doing so, admit any allegation implied by the defined terms so used; and

- (b) they have adopted the approach described in sub-paragraph 1(b) of the Further Amended Statement of Claim in respect of document identification numbers.

**B. THE PARTIES**

2. MLC Nominees and NULIS do not plead to paragraph 2 of the Further Amended Statement of Claim on the basis that no allegations are made against them.

3. In answer to paragraph 3 of the Further Amended Statement of Claim, MLC Nominees and NULIS:

- (a) deny that the Plaintiffs and/or the persons whom they represent have suffered loss or damage by or resulting from the conduct of one or both of MLC Nominees and NULIS pleaded in the Further Amended Statement of Claim;

(b) say that:

- (i) an ADA attributable to the MLC MasterKey Business Super product (incorporating MLC MasterKey Personal Super) (and defined as a 'NAB ADA' in the Further Amended Statement of Claim) is referred to as a **MasterKey ADA** in this Defence; and

- (ii) a member of TUSS who held a MasterKey ADA that was transferred by NULIS on or about 3 December 2016 or on or about 25 March 2017 to a MySuper Product (and defined as a 'NAB ADA Member' in the Further Amended Statement of Claim) is referred to as a **MasterKey ADA Member** in this Defence; and

- (c) otherwise do not plead to the paragraph on the basis that no allegations are made against them.

4. In answer to paragraph 4 of the Further Amended Statement of Claim, MLC Nominees and NULIS:

- (a) admit that there are seven or more persons falling within the criteria in sub-paragraphs 3(a) to (c) of the Further Amended Statement of Claim;
  - (b) refer to and repeat paragraph 3 above; and
  - (c) otherwise deny the allegations in the paragraph.
5. MLC Nominees and NULIS admit the allegations in paragraph 5 of the Further Amended Statement of Claim.
6. MLC Nominees and NULIS admit the allegations in paragraph 6 of the Further Amended Statement of Claim.

**C. THE NATIONAL AUSTRALIA BANK GROUP**

7. In answer to paragraph 7 of the Further Amended Statement of Claim, MLC Nominees and NULIS:
- (a) admit the allegations in sub-paragraphs (a) and (d);
  - (b) admit the allegations in sub-paragraphs (b) and (c) in respect of the period up to and including 31 May 2021; and
  - (c) otherwise deny the allegations in sub-paragraphs (b) and (c) and say further that, effective 1 June 2021, NAB sold its interests in MLC Nominees, NULIS and National Wealth Management Services Limited to IOOF Limited (now known as Insignia Limited).

**D. THE FUNDS**

8. In answer to paragraph 8 of the Further Amended Statement of Claim, MLC Nominees and NULIS:
- (a) admit the allegations in the paragraph; and
  - (b) rely on all of the terms of the TUSS Trust Deed (as amended from time to time) for their full force and effect.

**Particulars**

*Amending Deed Poll – The Universal Super Scheme dated 14 March 2013*

9. In answer to paragraph 9 of the Further Amended Statement of Claim, MLC Nominees and NULIS:
- (a) admit the allegations in the paragraph; and
  - (b) rely on all of the terms of the MLC Super Trust Deed (as amended from time to time) for their full force and effect.

**Particulars**

*MLC Super Fund Trust Deed dated 9 May 2016*

*MLC Super Fund Amending Deed Poll dated 16 June 2016*

*MLC Super Fund Amending Deed Poll dated 27 June 2016*

*MLC Super Fund Deed of Amendment dated 20 December 2017*

10. In answer to paragraph 10 of the Further Amended Statement of Claim, MLC Nominees and NULIS:
- (a) admit that, prior to 1 July 2016, MLC Nominees offered corporate superannuation products, including MasterKey, in TUSS; and
  - (b) otherwise deny the allegations in the paragraph.

**D2. THE NATURE OF AND THE RIGHTS AND OBLIGATIONS RELATING TO A MASTERKEY ADA**

- 10A. In answer to paragraph 10A of the Further Amended Statement of Claim, MLC Nominees and NULIS:
- (a) say that the MasterKey ADAs were funded at least in part by contributions made by the MasterKey ADA Members and/or the MasterKey ADA Members' employers to TUSS and/or the MLC Super Fund, along with investment returns on those contributions, net of fees, costs and taxes;

- (b) do not know and therefore cannot admit why the MasterKey ADA Members and/or their employers made those contributions, save to say that MasterKey ADA Members' employers were obliged by the *Superannuation Guarantee (Administration) Act 1992* (Cth) to make superannuation contributions of a specified percentage of each MasterKey ADA Member's 'ordinary time earnings'; and
  - (c) otherwise deny the allegations in the paragraph.
- 10B. MLC Nominees and NULIS admit the allegations in paragraph 10B of the Further Amended Statement of Claim and rely on all of the terms of the SIS Regulations for their full force and effect.
- 10C. In answer to paragraph 10C of the Further Amended Statement of Claim, MLC Nominees and NULIS:
  - (a) admit the paragraph, save as to the extent that if the condition of release that is satisfied by the MasterKey ADA Member is death, any preserved benefits or restricted non-preserved benefits are not able to be cashed by the MasterKey ADA Member;
  - (b) rely on all of the terms of the SIS Regulations for their full force and effect; and
  - (c) otherwise deny the allegations in the paragraph.
- 10D. In answer to paragraph 10D of the Further Amended Statement of Claim, MLC Nominees and NULIS:
  - (a) admit that where some or all of a MasterKey ADA was comprised of unrestricted non-preserved benefits, the MasterKey ADA Member was able to cash that part of the MasterKey ADA at any time subject to the terms of the respective trust deed;
  - (b) rely on all of the terms of the SIS Regulations for their full force and effect; and
  - (c) otherwise deny the allegations in the paragraph.
- 10E. In answer to paragraph 10E of the Further Amended Statement of Claim, MLC Nominees

and NULIS:

- (a) admit the allegations in sub-paragraph (a), and rely on all of the terms of the SIS Regulations for their full force and effect;
- (b) admit the allegations in sub-paragraph (b), and rely on all of the terms of the SIS Regulations for their full force and effect;
- (c) in respect of sub-paragraph (c):
  - (i) say that MLC Nominees, prior to 1 July 2016, and NULIS, from 1 July 2016, were able (but not required) to maintain accounts or sub-accounts for each MasterKey ADA Member (**NAB Accounts**);
  - (ii) rely on all of the terms of the respective trust deeds for their full force and effect; and
  - (iii) otherwise deny the allegations in the sub-paragraph;

**Particulars**

*Amending Deed Poll – The Universal Super Scheme dated 14 March 2013, clauses 1.1 and 5.5.*

*MLC Super Fund Amending Deed Poll dated 27 June 2016, Sch 1, clauses 1.1 and 5.5.*

- (d) in respect of sub-paragraph (d):
  - (i) say that to the extent that MLC Nominees or NULIS maintained NAB Accounts, then MLC Nominees, prior to 1 July 2016, and NULIS, from 1 July 2016, were required to ensure that the value of each MasterKey ADA was equal to the balance of all NAB Accounts for that MasterKey ADA Member, subject to the terms of each MasterKey ADA;
  - (ii) rely on all of the terms of the respective trust deeds for their full force and effect; and

- (iii) otherwise deny the allegations in the sub-paragraph;

**Particulars**

*Amending Deed Poll – The Universal Super Scheme dated 14 March 2013, clause 8.1(b)(1).*

*MLC Super Fund Amending Deed Poll dated 27 June 2016, Sch 1, clause 8.1(b)(1).*

- (e) in respect of sub-paragraph (e):
  - (i) say that MLC Nominees, prior to 1 July 2016, and NULIS, from 1 July 2016, were able to maintain NAB Accounts, were required to credit or debit a NAB Account with any portion of any assets MLC Nominees or NULIS (as applicable) determined to be attributable to that NAB Account, and had the ability to otherwise credit and debit those NAB Accounts with any other amount and in any other manner they considered appropriate;
  - (ii) rely on all of the terms of the respective trust deeds for their full force and effect; and
  - (iii) otherwise deny the allegations in the sub-paragraph;

**Particulars**

*Amending Deed Poll – The Universal Super Scheme dated 14 March 2013, clause 5.5.*

*MLC Super Fund Amending Deed Poll dated 27 June 2016, Sch 1, clause 5.5.*

- (f) admit the allegations in sub-paragraph (f), and rely on all of the terms of the respective trust deeds for their full force and effect;
- (g) admit the allegations in sub-paragraph (g), and rely on all of the terms of the SIS Regulations for their full force and effect;
- (h) in respect of sub-paragraph (h);

- (i) admit that MLC Nominees, prior to 1 July 2016, and NULIS, from 1 July 2016, were required to determine net earnings and allocate these to any Accounts, or otherwise deal with net earnings in accordance with the trust deed, in the manner (and at such times) determined by the respective trustee;
- (ii) rely on all of the terms of the respective trust deeds for their full force and effect; and
- (iii) otherwise deny the allegations in the sub-paragraph; and

**Particulars**

*Amending Deed Poll – The Universal Super Scheme dated 14 March 2013, clause 6.4(a).*

*MLC Super Fund Amending Deed Poll dated 27 June 2016, Sch 1, clause 6.4(a).*

- (i) admit the allegations in sub-paragraph (i), and rely on all of the terms of the SIS Regulations, the *Family Law Act 1975* (Cth), and the *Family Law (Superannuation) Regulations 2001* (Cth) for their full force and effect.

10F. In answer to paragraph 10F of the Further Amended Statement of Claim, MLC Nominees and NULIS:

- (a) in respect of sub-paragraph (a):
  - (i) say that they may permit a MasterKey ADA Member to invest all or part of their NAB Account according to a specific investment strategy on such terms and conditions as the Trustee considers appropriate (and in the case of TUSS, subject to the approval of the Principal Company (as defined in the TUSS Amending Deed dated 14 March 2013));
  - (ii) rely on all of the terms of the respective trust deeds for their full force and effect; and

- (iii) otherwise deny the allegations in the sub-paragraph;

**Particulars**

*Amending Deed Poll – The Universal Super Scheme dated 14 March 2013, clause 6.2.*

*MLC Super Fund Amending Deed Poll dated 27 June 2016, Sch 1, clause 6.2.*

- (b) in respect of sub-paragraph (b):
  - (i) say that they were required to determine net earnings, the manner in which net earnings were to be allocated to Accounts, and the timing of such allocations, in the manner (and at such times) determined by the respective trustee;
  - (ii) rely on all of the terms of the respective trust deeds for their full force and effect; and
  - (iii) otherwise deny the allegations in the sub-paragraph.

**Particulars**

*Amending Deed Poll – The Universal Super Scheme dated 14 March 2013, clause 6.4.*

*MLC Super Fund Amending Deed Poll dated 27 June 2016, Sch 1, clause 6.4.*

- (c) in respect of sub-paragraph (c):
  - (i) say that they were required to allocate net earnings to the NAB ADA Member's Account in accordance with the respective trust deed in the manner (and at such times) determined by the respective trustee;
  - (ii) rely on all of the terms of the respective trust deeds for their full force and effect; and

- (iii) otherwise deny the allegations in the sub-paragraph;

**Particulars**

*Amending Deed Poll – The Universal Super Scheme dated 14 March 2013, clause 6.4.*

*MLC Super Fund Amending Deed Poll dated 27 June 2016, Sch 1, clause 6.4.*

- (d) in respect of sub-paragraph (d),
  - (i) rely on all of the terms of the SIS Regulations and the respective trust deeds for their full force and effect, including the conditions that must be satisfied in order for a trustee to be required to transfer a MasterKey ADA upon request, and the various exceptions to that requirement; and
  - (ii) otherwise admit the allegations in the sub-paragraph; and
- (e) admit the allegations in sub-paragraph (e), and rely on all of the terms of the SIS Regulations for their full force and effect.

10G. In answer to paragraph 10G of the Further Amended Statement of Claim, MLC Nominees and NULIS:

- (a) refer to and repeat paragraphs 10C and 10D above;
- (b) say further that if the condition of release that is satisfied by the MasterKey ADA Member is death, then the MasterKey ADA Member did not have a present right to receive payment;
- (c) rely on all of the terms of the SIS Regulations for their full force and effect; and
- (d) otherwise deny the allegations in the paragraph.

10H. In answer to paragraph 10H of the Further Amended Statement of Claim, MLC Nominees and NULIS:

- (a) refer to and repeat paragraphs 10A, 10E and 10F above; and

- (b) otherwise deny the allegations in the paragraph.

## **E. OBLIGATIONS OF MLC NOMINEES AND NULIS AS TRUSTEES**

### **SIS Act Covenants**

11. MLC Nominees and NULIS admit the allegations in paragraph 11 of the Further Amended Statement of Claim.
12. MLC Nominees and NULIS admit the allegations in paragraph 12 of the Further Amended Statement of Claim.
13. In answer to paragraph 13 of the Further Amended Statement of Claim, MLC Nominees and NULIS:
  - (a) in relation to sub-paragraph 13(a), deny the allegations in the sub-paragraph and say that:
    - (i) pursuant to section 52(2)(b) of the SIS Act, at all material times since 1 July 2013 (inclusive) the Governing Rules of TUSS have been taken to contain a covenant by MLC Nominees to exercise, in relation to all matters affecting the Fund, the same degree of care, skill and diligence as a prudent superannuation trustee would exercise in relation to an entity of which they are trustee and on behalf of the beneficiaries of which they make investments; and
    - (ii) pursuant to section 52(2)(b) of the SIS Act, at all material times since 9 May 2016 (inclusive) the Governing Rules of the MLC Super Fund have been taken to contain a covenant by NULIS to exercise, in relation to all matters affecting the Fund, the same degree of care, skill and diligence as a prudent superannuation trustee would exercise in relation to an entity of which they are trustee and on behalf of the beneficiaries of which they make investments; and

- (b) admit the allegations in sub-paragraphs 13(b) and (c).
14. In answer to paragraph 14 of the Further Amended Statement of Claim, MLC Nominees and NULIS:
- (a) admit the allegations in sub-paragraphs 14(a) and (c); and
  - (b) in relation to sub-paragraph 14(b):
    - (i) refer to and repeat paragraph 13 above;
    - (ii) say that they were required not to contravene the covenants admitted in paragraph 13 above; and
    - (iii) otherwise deny the allegations in the sub-paragraph.
15. MLC Nominees and NULIS admit the allegations in paragraph 15 of the Further Amended Statement of Claim.

**Obligations at general law**

16. MLC Nominees and NULIS deny the allegations in paragraph 16 of the Further Amended Statement of Claim.
17. MLC Nominees and NULIS deny the allegations in paragraph 17 of the Further Amended Statement of Claim.
18. In answer to paragraph 18 of the Further Amended Statement of Claim, MLC Nominees and NULIS:
- (a) admit the allegations in sub-paragraph 18(a), but say the Duty to Perform the Trust Terms was subject to section 7 of the SIS Act;
  - (b) in relation to sub-paragraph 18(b), admit that they had a duty to perform their duties and exercise their powers in the best interests of the beneficiaries, subject to the terms of the TUSS Trust Deed or MLC Super Trust Deed (as applicable), and otherwise deny the allegations in the sub-paragraph;

- (c) in relation to sub-paragraph 18(c):
  - (i) say that they owed to the beneficiaries of TUSS or the MLC Super Fund (as applicable) a duty to exercise the same care and skill an ordinary prudent person of business would exercise in conducting the business of TUSS or the MLC Super Fund (as applicable) as if it were their own; and
  - (ii) otherwise deny the allegations in the sub-paragraph;
- (d) in relation to sub-paragraph 18(d):
  - (i) deny the allegations in the sub-paragraph, but say that they were required to comply with the covenant taken to be contained in the governing rules of TUSS or the MLC Super Fund (as applicable) by section 52(2)(d) of the SIS Act;
  - (ii) say that at all relevant times MLC Nominees and its related bodies corporate were not restricted from:
    - (A) contracting with any person transacting with or associated with TUSS;
    - or
    - (B) being interested in such a transaction or having any interest (direct or indirect) in the person transacting; and

**Particulars**

*TUSS Trust Deed dated 12 May 1989, cl 12(i)*

*TUSS Trust Deed as amended by the Amending Deed Poll –*

*The Universal Super Scheme dated 14 March 2013, cl 3.11.*

- (iii) say that, from 9 May 2016, NULIS and its related bodies corporate were authorised to:

- (A) deal with one another (including, for NULIS, as trustee of the MLC Super Fund or in any other capacity) and retain for their own benefit any profit or other benefit arising pursuant to such dealing;
- (B) contract with any person associated with NULIS;
- (C) contract with any related body corporate of NULIS and, in the course of such transacting or dealing, benefit the related body corporate;
- (D) have any interest in a person contracting with NULIS and retain any profit or other benefit arising from such a transaction; and
- (E) act in the same or a similar capacity in relation to any other superannuation entity; and

**Particulars**

*MLC Super Trust Deed dated 9 May 2016, cl 4.6.*

- (e) in relation to sub-paragraph 18(e):
  - (i) deny the allegations in the sub-paragraph; and
  - (ii) refer to and repeat sub-paragraph 18(d) above.

**F. MYSUPER RIGHTS AND OBLIGATIONS**

- 18A. MLC Nominees and NULIS admit the allegations in paragraph 18A of the Further Amended Statement of Claim, and rely on all of the terms of the SIS Act for their full force and effect.
- 19. MLC Nominees and NULIS admit the allegations in paragraph 19 of the Further Amended Statement of Claim.
- 19A. In answer to paragraph 19A of the Further Amended Statement of Claim, MLC Nominees and NULIS:

- (a) refer to and repeat paragraph 25(b) below in respect of the way the defined term 'Conflicted Remuneration' is used by the Plaintiffs in the paragraph (and throughout the Further Amended Statement of Claim);
  - (b) rely on all of the terms of the SIS Act for their full force and effect; and
  - (c) otherwise admit the allegations in the paragraph.
- 19B. MLC Nominees and NULIS admit the allegations in paragraph 19B of the Further Amended Statement of Claim, and rely on all of the terms of the SIS Act for their full force and effect.
- 19C. In answer to paragraph 19C of the Further Amended Statement of Claim, MLC Nominees and NULIS:
- (a) say that at all material times, in respect of a MySuper product, an RSE Licensee (as a trustee of an RSE) was entitled to charge one or more of the following kinds of fees in relation to that product:
    - (i) an administration fee;
    - (ii) an investment fee;
    - (iii) a buy-sell spread;
    - (iv) a switching fee;
    - (v) an exit fee;
    - (vi) an activity fee;
    - (vii) an advice fee; and
    - (viii) an insurance fee;
  - (b) say that if an RSE Licensee (as a trustee of an RSE) charged an activity fee or an insurance fee to a member in relation to a MySuper product, the fee must be no more than it would be if it were charged on a cost recovery basis;

- (c) say that the requirement pleaded in (b) above did not apply to an investment fee;
  - (d) rely on all of the terms of the SIS Act for their full force and effect; and
  - (e) otherwise deny the allegations in the paragraph.
- 19D. In answer to paragraph 19D of the Further Amended Statement of Claim, MLC Nominees and NULIS:
- (a) say that pursuant to s 29VD of the SIS Act, where fees were payable to an investment manager by reference to the performance of investments made by the investment manager on behalf of the RSE Licensee (as a trustee of an RSE), the RSE Licensee was required to ensure that:
    - (i) if, under the arrangement, a fee is or fees are payable to the investment manager in addition to the performance-based fee, the other fee or fees must be set or adjusted so that they are lower than they would be if the arrangement did not include the performance-based fee;
    - (ii) the period over which entitlement to the performance-based fee is determined under the arrangement must be appropriate to the kinds of investment to which the performance-based fee relates;
    - (iii) under the arrangement, the performance of the investment must be measured by comparison with the performance of investments of a similar kind;
    - (iv) for the purposes of working out the performance-based fee payable under the arrangement, the performance of the investment must be determined on an after-costs and, where possible, an after-tax basis; and
    - (v) under the arrangement, the performance-based fee must be calculated in a way that includes disincentives for poorly performing investments; and
  - (b) rely on all of the terms of the SIS Act for their full force and effect; and

- (c) otherwise deny the allegations in the paragraph.
- 19E. MLC Nominees and NULIS admit the allegations in paragraph 19E of the Further Amended Statement of Claim, rely on all of the terms of the SIS Act for their full force and effect, and say that s 29VN of the SIS Act was repealed on 6 April 2019.
20. In answer to paragraph 20 of the Further Amended Statement of Claim, MLC Nominees and NULIS:
- (a) rely on the terms of SPS 410 for their full force and effect;
  - (b) in relation to sub-paragraph 20(d), say that a MySuper Product is a 'suitable' product for the purposes of paragraph 11 of SPS 410 only if it both:
    - (i) satisfies the matters in sub-paragraphs 11(a) to (c) of SPS 410; and
    - (ii) the RSE Licensee has made a Promotion of Financial Interests Determination; and
  - (c) otherwise admit the allegations in the paragraph.
- 20A. In answer to paragraph 20A of the Further Amended Statement of Claim, MLC Nominees and NULIS:
- (a) say that SPS 410 outlined the requirements for an RSE licensee during the transition period from 1 January 2013 to 1 July 2017;
  - (b) say further that SPG 410 outlined APRA's expectation that the attribution of accrued default amounts to a MySuper product would occur at the earliest opportunity possible where it was in the best interests of beneficiaries to do so;
  - (c) rely on the terms of SPS 410 and SPG 410 for their full force and effect; and
  - (d) otherwise deny the allegations in the paragraph.

#### **Particulars**

*Prudential Practice Guide SPG 410 – MySuper Transition dated February 2013.*

*Prudential Standard SPS 410 MySuper Transition.*

- 21. MLC Nominees and NULIS admit the allegations in paragraph 21 of the Further Amended Statement of Claim.
- 21A. MLC Nominees and NULIS admit the allegations in paragraph 21A of the Further Amended Statement of Claim, and rely on all of the terms of the SIS Regulations for their full force and effect.

**G. DEFAULT INVESTMENT OPTIONS**

- 22. MLC Nominees and NULIS admit the allegations in paragraph 22 of the Further Amended Statement of Claim.
- 23. In answer to paragraph 23 of the Further Amended Statement of Claim, MLC Nominees and NULIS:
  - (a) say that amounts invested in Default Investments Options that are not ADAs as defined in section 20B of the SIS Act are not 'NAB ADAs'; and
  - (b) otherwise admit the allegations in the paragraph, but refer to such amounts in this Defence as MasterKey ADAs.
- 24. In answer to paragraph 24 of the Further Amended Statement of Claim, MLC Nominees and NULIS:
  - (a) admit that the methods described in sub-paragraphs 24(a) to (d) were ways in which a Default Member would cease to have a MasterKey ADA attributable to them:
    - (i) with respect to directions given to MLC Nominees, for the period from 1 January 2013 to 30 June 2016; and

- (ii) with respect to directions given to NULIS, at all material times from 1 July 2016;
  - (b) say that there were other ways in which a Default Member would cease to have a MasterKey ADA attributable to them, including if the ADA was cashed out or the member commenced a pension in the fund; and
  - (c) otherwise deny the allegations in the paragraph.
25. In answer to paragraph 25 of the Further Amended Statement of Claim, MLC Nominees and NULIS:
- (a) rely upon the provisions of Division 4 of Part 7.7A of the Corporations Act and Division 4 of Part 7.7A of the Corporations Regs for their full force and effect;
  - (b) say that the defined term 'Conflicted Remuneration' is used by the Plaintiffs in the paragraph (and throughout the Further Amended Statement of Claim) incorrectly because it fails to have regard to benefits which, by operation of Division 4 of Part 7.7A of the Corporations Act and Division 4 of Part 7.7A of the Corporations Regs, are not included in the definition of 'conflicted remuneration' set out in section 963A of the Corporations Act;
  - (c) say that, in the period following 1 July 2013, Division 4 of Part 7.7A of the Corporations Act (including the definition of 'conflicted remuneration' set out in section 963A) did not extend to benefits given in certain circumstances, including those benefits that:
    - (i) were given by a platform operator, and either:
      - (A) were given under an arrangement that was entered into before the application day (within the meaning of section 1528(4) of the Corporations Act); or

- (B) would have been given as pleaded in paragraph 25(c)(i)(A) above had it not been redirected under one or more later arrangements; or

**Particulars**

*Corporations Act section 1528(2).*

*Corporations Regs regulation 7.7A.16.*

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

**Particulars**

*Corporations Act section 1528(1).*

- (d) say that, to the extent that any benefits were provided to Financial Services Licensees or their representatives that would otherwise fall within the meaning of the paragraph, Division 4 of Part 7.7A of the Corporations Act (including the definition of 'conflicted remuneration' set out in section 963A) did not apply to such benefits by reason of:

- (i) section 1528(2) of the Corporations Act and regulation 7.7A.16 of the Corporations Regs; or
- (ii) further and in the alternative, section 1528(1) of the Corporations Act if, (which is not admitted) MLC Nominees or NULIS (as applicable) was not a platform operator, or was not a platform operator in respect of certain products;

- (e) accordingly deny the allegations in the paragraph; and
- (f) in this Defence, refer to benefits given in the circumstances referred to in subparagraphs 25(c) and (d) above as **Grandfathered Remuneration**.

26. In answer to paragraph 26 of the Further Amended Statement of Claim, MLC Nominees and NULIS:
- (a) refer to and repeat paragraph 25 above;
  - (b) admit that some of the Financial Service Licensees and/or representatives of Financial Services Licensees to whom Grandfathered Remuneration in respect of MasterKey ADAs was paid fell within the categories in sub-paragraphs (a) to (d) of that paragraph; and
  - (c) otherwise deny the allegations in the paragraph.
27. In answer to paragraph 27 of the Further Amended Statement of Claim, MLC Nominees and NULIS:
- (a) deny the allegations in the paragraph;
  - (b) refer to and repeat paragraph 25 above; and
  - (c) admit that fees charged to Default Members were used to fund the Grandfathered Remuneration paid in respect of MasterKey ADAs.

**H. MLC NOMINEES' MYSUPER PRODUCT IN TUSS**

28. MLC Nominees and NULIS admit the allegations in paragraph 28 of the Further Amended Statement of Claim, and say that the application was made on or about 5 July 2013.
29. MLC Nominees and NULIS admit the allegations in paragraph 29 of the Further Amended Statement of Claim.
30. MLC Nominees and NULIS admit the allegations in paragraph 30 of the Further Amended Statement of Claim, and say that the authorisation was given on or about 2 September 2013.

**Particulars**

*Letter from APRA to MLC Nominees dated 30 August 2013, received by MLC Nominees on or about 2 September 2013.*

31. MLC Nominees and NULIS admit the allegations in paragraph 31 of the Further Amended Statement of Claim.

32. MLC Nominees and NULIS admit the allegations in paragraph 32 of the Further Amended Statement of Claim.

**I. MLC NOMINEES' MYSUPER PRODUCT MONITORING**

33. In answer to paragraph 33 of the Further Amended Statement of Claim, MLC Nominees and NULIS:

- (a) admit that in 2014 the Board of MLC Nominees made a determination under section 29VN(b) of the SIS Act; and
- (b) otherwise deny the allegations in the paragraph.

34. In answer to paragraph 34 of the Further Amended Statement of Claim, MLC Nominees and NULIS:

- (a) admit that, on 23 September 2015, the Board of MLC Nominees made a determination under section 29VN(b) of the SIS Act; and

**Particulars**

*Minutes of meeting of the Boards of MLC Nominees and NULIS on 23 September 2015.*

- (b) otherwise deny the allegations in the paragraph.

**J. MYSUPER TRANSITION PLANNING BY MLC NOMINEES**

35. In answer to paragraph 35 of the Further Amended Statement of Claim, MLC Nominees and NULIS:

- (a) admit the allegations in the paragraph; and

- (b) say further that MLC Nominees, through National Wealth Management Services Limited (**NWMSL**) (under a delegation agreement with MLC Limited in its capacity as administrator of TUSS under an administration agreement with MLC Nominees), prepared the initial MySuper Transition Plan.

**Particulars**

*Service Level Agreement between MLC Nominees, MLC Limited, NWMSL and other entities dated 12 December 2006 (NAB.1101.0010.0277).*

*Superannuation Administration Delegation Agreement between MLC Limited, MLC Investments Limited and NWMSL dated 10 September 2007 (NAB.1105.0609.3751).*

*Deed of confirmation of administrative services between MLC Nominees and MLC Limited dated 28 April 2011 (NNO.0010.0001.1225).*

*Administration Agreement between MLC Nominees and MLC Limited dated 30 June 2011 (NNL.001.035.0001).*

*Deed of Amendment between MLC Nominees and MLC Limited dated 13 December 2013 (NAB.1101.0010.0269).*

*Administration Agreement between MLC Nominees and MLC Limited dated 23 September 2014 (NAB.1101.0005.0239).*

36. MLC Nominees and NULIS admit the allegations in paragraph 36 of the Further Amended Statement of Claim, and say that the approval was given on 13 December 2012.
37. In answer to paragraph 37 of the Further Amended Statement of Claim, MLC Nominees and NULIS:
- (a) admit the allegations in the paragraph; and
- (b) say further that the work was undertaken by MLC Nominees through NWMSL (under a delegation agreement with MLC Limited in its capacity as administrator of TUSS under an administration agreement with MLC Nominees).

**Particulars**

*Refer to and repeat the particulars to paragraph 35 above.*

38. MLC Nominees and NULIS admit the allegations in paragraph 38 of the Further Amended Statement of Claim, but note that such ADAs are referred to as MasterKey ADAs in this Defence.
39. MLC Nominees and NULIS admit the allegations in paragraph 39 of the Further Amended Statement of Claim, and say that SPS 410 required that, by no later than 1 July 2013, an RSE Licensee prepare, and thereafter regularly review and give effect to, a transition plan, approved by the Board of the RSE Licensee.

**K. TRANSFER OF MASTERKEY ADAs TO TRANSITION INVESTMENT OPTIONS**

40. In answer to paragraph 40 of the Further Amended Statement of Claim, MLC Nominees and NULIS:
- (a) deny the allegations in the paragraph; and
  - (b) say that:
    - (i) the use of Transition Investment Options was considered by the Board of MLC Nominees on 17 July 2014;
    - (ii) at its meeting of 4 and 5 December 2014, the Board of MLC Nominees approved updates to the MySuper Transition Plan which included the use of Transition Investment Options for MasterKey ADA balances in the Horizon 2, 3, 4 and 5 investment options; and
    - (iii) MasterKey ADAs in the Horizon 2, 3, 4 and 5 investment options only were transferred to Transition Investment Options.

**Particulars**

*NULIS MySuper Transition Plan dated 22 May 2017, section 5.5  
(NAB.005.734.0001 at 0009).*

41. In answer to paragraph 41 of the Further Amended Statement of Claim, MLC Nominees and NULIS:

- (a) refer to and repeat paragraph 40 above;
- (b) say further that MLC Nominees, through NWMSL (under a delegation agreement with MLC Limited in its capacity as administrator of TUSS under an administration agreement with MLC Nominees), had separated the assets attributable to MasterKey ADAs from the assets attributable to Choice Products members in the Horizon 2, 3, 4 and 5 investment options by transferring those assets to the corresponding Transition Investment Options in June and July 2015; and
- (c) otherwise deny the allegations in the paragraph.

**Particulars**

*MySuper Transition Plan dated 22 May 2017, section 5.7 –*

*NAB.005.734.0001 at 0012.*

*Refer to and repeat the particulars to paragraph 35 above.*

42. In answer to paragraph 42 of the Further Amended Statement of Claim MLC Nominees and NULIS:

- (a) say that the Transition Investment Options had a different fee structure to MLC MySuper, which for most MasterKey ADA Members included higher fees than would be payable by those MasterKey ADA Members upon transfer of their MasterKey ADAs to MLC MySuper;
- (b) say that for some MasterKey ADA Members, the Transition Investment Options had the same or lower fees than would be payable by those MasterKey ADA Members upon transfer of their MasterKey ADAs to MLC MySuper;
- (c) refer to and repeat paragraph 25 above in relation to the concept of Grandfathered Remuneration;

- (d) admit that some fees payable on Transition Investment Options were deducted from the assets attributable to MasterKey ADA Members; and
  - (e) otherwise deny the allegations in the paragraph.
43. In answer to paragraph 43 of the Further Amended Statement of Claim, MLC Nominees and NULIS:
- (a) admit the allegations in the paragraph;
  - (b) say further that the work was undertaken by MLC Nominees through NWMSL (under a delegation agreement with MLC Limited in its capacity as administrator of TUSS under an administration agreement with MLC Nominees); and
  - (c) say further that that process also took into account adjustments for other differences between the Transition Investment Options and MLC MySuper including, without limitation:
    - (i) differing levels of asset classes;
    - (ii) the fact that funds were managed by different investment managers; and
    - (iii) differing levels of illiquid assets.

**Particulars**

*MySuper Transition Plan dated 22 May 2017, section 5.7 –*

*NAB.005.734.0001 at 0007.*

*Refer to and repeat the particulars to paragraph 35 above.*

**L. SUCCESSOR FUND TRANSFER**

44. MLC Nominees and NULIS admit the allegations in paragraph 44 of the Further Amended Statement of Claim.
45. In answer to paragraph 45 of the Further Amended Statement of Claim, MLC Nominees and NULIS:

- (a) say that the assets attributable to the MasterKey ADAs that were in Transition Investment Options immediately before the Successor Fund Transfer were transferred in specie to corresponding Transition Investment Options established in the MLC Super Fund immediately after the Successor Fund Transfer;
  - (b) say that those MasterKey ADAs remained invested in those Transition Investment Options until they were transferred to a Choice Product nominated by the member, cashed or rolled over to another fund or transferred to a MySuper product in accordance with the processes referred to in paragraph 24 above; and
  - (c) otherwise deny the allegations in the paragraph.
46. MLC Nominees and NULIS admit the allegations in paragraph 46 of the Further Amended Statement of Claim.

**M. NULIS' MYSUPER PRODUCT IN THE MLC SUPER FUND**

47. MLC Nominees and NULIS admit the allegations in paragraph 47 of the Further Amended Statement of Claim.
48. MLC Nominees and NULIS admit the allegations in paragraph 48 of the Further Amended Statement of Claim, and say that the application was made on 9 June 2016.

**Particulars**

*Letter from NULIS to APRA dated 9 June 2016.*

49. MLC Nominees and NULIS admit the allegations in paragraph 49 of the Further Amended Statement of Claim.
50. MLC Nominees and NULIS admit the allegations in paragraph 50 of the Further Amended Statement of Claim, and say that the authorisation was given on 23 June 2016.

**Particulars**

*Letter from APRA to NULIS dated 23 June 2016.*

51. MLC Nominees and NULIS admit the allegations in paragraph 51 of the Further Amended Statement of Claim.

52. MLC Nominees and NULIS admit the allegations in paragraph 52 of the Further Amended Statement of Claim.

**N. NULIS' MYSUPER PRODUCT MONITORING**

53. In answer to paragraph 53 of the Further Amended Statement of Claim, MLC Nominees and NULIS:

- (a) admit that, from at least October 2016, the Board of NULIS made an annual determination under section 29VN(b) of the SIS Act; and
- (b) otherwise deny the allegations in the paragraph.

**O. ADA TRANSFERS**

54. MLC Nominees and NULIS admit the allegations in paragraph 54 of the Further Amended Statement of Claim.

55. In answer to paragraph 55 of the Further Amended Statement of Claim, MLC Nominees and NULIS:

- (a) say that in August 2016 NULIS provided notice in writing to over 300,000 MasterKey ADA Members (including the Plaintiffs) of the expected transfer of their MasterKey ADAs to NULIS MySuper; and
- (b) otherwise admit the allegations in the paragraph.

**Particulars**

*By way of example, letters from NULIS to the Plaintiffs dated August 2016.*

56. MLC Nominees and NULIS admit the allegations in paragraph 56 of the Further Amended Statement of Claim.

57. MLC Nominees and NULIS admit the allegations in paragraph 57 of the Further Amended Statement of Claim.

58. MLC Nominees and NULIS admit the allegations in paragraph 58 of the Further Amended Statement of Claim.

**P. ALLEGED CONFLICTING INTERESTS**

**Member fees and NAB Group revenue**

59. In answer to paragraph 59 of the Further Amended Statement of Claim, MLC Nominees and NULIS:

- (a) say that the fees charged to most MasterKey ADA Members in respect of amounts transferred to NULIS MySuper were less than the fees charged in respect of their MasterKey ADAs before the ADA Transfers;
- (b) say that the fees charged to some MasterKey ADA Members in respect of amounts transferred to NULIS MySuper were the same or higher than the fees charged in respect of their MasterKey ADAs before the ADA Transfers; and
- (c) otherwise deny the allegations in the paragraph.

60. MLC Nominees and NULIS admit the allegations in paragraph 60 of the Further Amended Statement of Claim.

**Member fees and Grandfathered Remuneration**

61. In answer to paragraph 61 of the Further Amended Statement of Claim, MLC Nominees and NULIS:

- (a) refer to and repeat paragraph 25 above;
- (b) say that, after the ADA Transfers of MasterKey ADAs, NULIS ceased paying Grandfathered Remuneration in respect of those ADAs; and
- (c) otherwise deny the allegations in the paragraph.

62. In answer to paragraph 62 of the Further Amended Statement of Claim, MLC Nominees and NULIS:

- (a) refer to and repeat paragraph 25 above;
- (b) say that, after the ADA Transfers of MasterKey ADAs, NULIS ceased charging members any fees relating to Grandfathered Remuneration in respect of those ADAs; and
- (c) otherwise deny the allegations in the paragraph.

**Q. ALLEGED CONTRAVENTIONS OF TRUSTEE COVENANTS**

**Alleged contraventions of Care and Skill Covenants**

63. In answer to paragraph 63 of the Further Amended Statement of Claim, MLC Nominees and NULIS:

- (a) to the extent that the paragraph makes any allegation regarding the outcome of a Promotion of Financial Interests Determination made by MLC Nominees or NULIS as a matter of fact, deny that allegation;
- (b) refer to and repeat paragraph 20 above;
- (c) say that where the outcome of the Promotion of Financial Interests Determination showed that it was in the financial interests of MasterKey ADA Members as a class for ADA Transfers to take place as soon as reasonably practicable, a prudent trustee would have made the relevant ADA Transfers as soon as reasonably practicable; and
- (d) otherwise deny the allegations in the paragraph.

64. In answer to paragraph 64 of the Further Amended Statement of Claim, MLC Nominees and NULIS:

- (a) refer to and repeat paragraph 35 above in respect of sub-paragraph 64(a);

- (b) refer to and repeat paragraph 36 above in respect of sub-paragraph 64(b);
- (b1) refer to and repeat paragraphs 19A and 28 above in respect of sub-paragraph 64(b1);
- (c) refer to and repeat paragraph 30 above in respect of sub-paragraph 64(c);
- (d) refer to and repeat paragraph 31 above in respect of sub-paragraph 64(d);
- (e) refer to and repeat paragraph 37 above in respect of sub-paragraph 64(e);
- (f) refer to and repeat paragraph 38 above in respect of sub-paragraph 64(f);
- (g) refer to and repeat paragraph 32 above in respect of sub-paragraph 64(g);
- (h) refer to and repeat paragraph 40 above in respect of sub-paragraph 64(h);
- (i) refer to and repeat paragraph 41 above in respect of sub-paragraph 64(i); and
- (j) otherwise deny the matters pleaded in the paragraph and say further:
  - (i) the transition of the MasterKey ADAs to a MySuper Product involved the transition of more than \$8 billion of assets, affecting more than 340,000 MasterKey ADA Members;
  - (ii) the transition process was carried out in accordance with their statutory and general law duties and the following principles:
    - (A) giving priority to the interests of members of TUSS and the MLC Super Fund (as applicable);
    - (B) managing risks and costs, and considering the impact of the transition on all members;
    - (C) minimising the impact on members, their retirement outcomes and benefits; and

- (D) providing for members to be given sufficient information and for them to be engaged in a way that promoted informed choice and advice;
- (iii) their objective was to have all of the MasterKey ADAs transitioned as early as possible within the permissible transition period, while acting in the overall best interests of members of TUSS and the MLC Super Fund (as applicable);
- (iv) a successful transition in accordance with the principles described in subparagraphs (ii) and (iii) above required a number of impediments and challenges to be addressed;
- (v) those impediments and challenges included (but were not limited to):
  - (A) the need to change the underlying investment strategy and asset allocation of numerous investment options with differing growth/defensive asset allocations to the long-term asset allocation for a MySuper Product;
  - (B) the possibility that, when MasterKey ADAs were transferred from existing investments to a MySuper Product, some funds within TUSS and the MLC Super Fund (as applicable) would become too small to be viable and would need to be closed;
  - (C) the transactional costs and potentially substantial taxation impacts of the sale and purchase of underlying investments;
  - (D) the importance of giving MasterKey ADA Members time to make informed investment choices; and
  - (E) the execution risk associated with implementing the transition;
- (vi) the transition of the MasterKey ADAs was undertaken in stages as the impediments were resolved for each group of members, and where the

transition did not result in a detriment to other members of TUSS and the MLC Super Fund (as applicable); and

- (vii) the transition was completed by 31 March 2017, in advance of the deadline of 1 July 2017.

**Particulars**

*MLC MySuper Transition Plan dated 2 December 2016;*

*NULIS MySuper Transition Plan dated 22 May 2017, section 5 –*

*NAB.005.734.0001 at 0005-0013.*

- 65. In answer to paragraph 65 of the Further Amended Statement of Claim, MLC Nominees and NULIS:
  - (a) refer to and repeat paragraphs 12, 13 and 64 above; and
  - (b) otherwise deny the allegations in the paragraph.
  
- 66. In answer to paragraph 66 of the Further Amended Statement of Claim, MLC Nominees and NULIS:
  - (a) refer to and repeat paragraphs 40, 41, 43 and 64 above; and
  - (b) otherwise deny the allegations in the paragraph.
  
- 67. In answer to paragraph 67 of the Further Amended Statement of Claim, MLC Nominees and NULIS:
  - (a) refer to and repeat paragraphs 12, 13 and 64 above; and
  - (b) otherwise deny the allegations in the paragraph.

**Alleged contraventions of Best Interests Covenants**

68. In answer to paragraph 68 of the Further Amended Statement of Claim, MLC Nominees and NULIS:
- (a) to the extent that the paragraph makes any allegation regarding the outcome of a Promotion of Financial Interests Determination as a matter of fact, deny that allegation;
  - (b) refer to and repeat paragraph 20 above;
  - (c) say that where the outcome of the Promotion of Financial Interests Determination showed that it was in the financial interests of MasterKey ADA Members as a class for ADA Transfers to take place as soon as reasonably practicable, a trustee of a Superannuation Entity would have made the relevant ADA Transfers as soon as reasonably practicable; and
  - (d) otherwise deny the allegations in the paragraph.
69. In answer to paragraph 69 of the Further Amended Statement of Claim, MLC Nominees and NULIS:
- (a) refer to and repeat paragraphs 12 and 64 above; and
  - (b) otherwise deny the allegations in the paragraph.
70. In answer to paragraph 70 of the Further Amended Statement of Claim, MLC Nominees and NULIS:
- (a) refer to and repeat paragraphs 12 and 64 above; and
  - (b) otherwise deny the allegations in the paragraph.

**Alleged contraventions of No Conflicts Covenants**

71. MLC Nominees and NULIS deny the allegations in paragraph 71 of the Further Amended Statement of Claim.

72. In answer to paragraph 72 of the Further Amended Statement of Claim, MLC Nominees and NULIS:
- (a) refer to and repeat paragraphs 25, 61 and 62 above;
  - (b) admit that there was a conflict between the interests of MasterKey ADA Members who would be charged lower fees in respect of Grandfathered Remuneration if the ADA Transfers occurred earlier, and the interests of Financial Service Licensees and/or representatives of Financial Services Licensees within the NAB Group to whom Grandfathered Remuneration in respect of MasterKey ADAs was paid; and
  - (c) otherwise deny the allegations in the paragraph.
73. In answer to paragraph 73 of the Further Amended Statement of Claim, MLC Nominees and NULIS:
- (a) to the extent that the paragraph makes any allegation regarding the outcome of a Promotion of Financial Interests Determination as a matter of fact, deny that allegation;
  - (b) refer to and repeat paragraphs 20, 71 and 72 above;
  - (c) say that, where the outcome of the Promotion of Financial Interests Determination showed that it was in the financial interests of MasterKey ADA Members as a class for ADA Transfers to take place as soon as reasonably practicable, a trustee would have made the relevant ADA Transfers as soon as reasonably practicable;
  - (d) rely on the terms of the prudential standards in relation to conflicts to their full force and effect; and
  - (e) otherwise deny the allegations in the paragraph.
74. In answer to paragraph 74 of the Further Amended Statement of Claim, MLC Nominees and NULIS:

- (a) refer to and repeat paragraphs 64 and 71 above; and
  - (b) otherwise deny the allegations in the paragraph.
75. In answer to paragraph 75 of the Further Amended Statement of Claim, MLC Nominees and NULIS:
- (a) refer to and repeat paragraphs 64 and 71 above;
  - (b) rely on the terms of SPS 521 to their full force and effect; and
  - (c) otherwise deny the allegations in the paragraph.
76. In answer to paragraph 76 of the Further Amended Statement of Claim, MLC Nominees and NULIS:
- (a) refer to and repeat paragraphs 64 and 71 above; and
  - (b) otherwise deny the allegations in the paragraph.
77. In answer to paragraph 77 of the Further Amended Statement of Claim, MLC Nominees and NULIS:
- (a) refer to and repeat paragraphs 64 and 71 above;
  - (b) rely on the terms of the applicable prudential standards to their full force and effect;  
and
  - (c) otherwise deny the allegations in the paragraph.
78. In answer to paragraph 78 of the Further Amended Statement of Claim, MLC Nominees and NULIS:
- (a) refer to and repeat paragraphs 64 and 72 above; and
  - (b) otherwise deny the allegations in the paragraph.
79. In answer to paragraph 79 of the Further Amended Statement of Claim, MLC Nominees and NULIS:

- (a) refer to and repeat paragraphs 64 and 72 above;
  - (b) rely on the terms of the applicable prudential standards; and
  - (c) otherwise deny the allegations in the paragraph.
80. In answer to paragraph 80 of the Further Amended Statement of Claim, MLC Nominees and NULIS:
- (a) refer to and repeat paragraphs 64 and 72 above; and
  - (b) otherwise deny the allegations in the paragraph.
81. In answer to paragraph 81 of the Further Amended Statement of Claim, MLC Nominees and NULIS:
- (a) refer to and repeat paragraphs 64 and 72 above;
  - (b) rely on the terms of the applicable prudential standards; and
  - (c) otherwise deny the allegations in the paragraph.

**R. ALLEGED BREACHES OF GENERAL LAW OBLIGATIONS**

82. In answer to paragraph 82 of the Further Amended Statement of Claim, MLC Nominees and NULIS:
- (a) refer to and repeat paragraph 17 above in respect of sub-paragraph 82(a);
  - (b) refer to and repeat paragraph 18 above in respect of sub-paragraphs 82(b) to (d);
  - (c) refer to and repeat paragraphs 59 to 61 above in respect of sub-paragraph 82(e);
  - (d) refer to and repeat paragraph 64 above; and
  - (e) otherwise deny the allegations in the paragraph.
83. In answer to paragraph 83 of the Further Amended Statement of Claim, MLC Nominees and NULIS:

- (a) refer to and repeat paragraph 17 above in respect of sub-paragraph 83(a);
- (b) refer to and repeat paragraph 18 above in respect of sub-paragraphs 83(b) to (d);
- (c) refer to and repeat paragraphs 59 to 61 above in respect of sub-paragraph 83(e);
- (d) refer to and repeat paragraph 64 above; and
- (e) otherwise deny the allegations in the paragraph.

**R1 CAUSATION OF LOSS AND DAMAGE**

83A. In answer to paragraph 83A of the Further Amended Statement of Claim, MLC Nominees and NULIS:

- (a) repeat paragraphs 10E and 10F above; and
- (b) otherwise deny the allegations in the paragraph.

83B. In answer to paragraph 83B of the Further Amended Statement of Claim, MLC Nominees and NULIS:

- (a) repeat paragraphs 19A to 19E and 83A above; and
- (b) otherwise deny the allegations in the paragraph.

83C. In answer to paragraph 83C of the Further Amended Statement of Claim, MLC Nominees and NULIS:

- (a) repeat paragraphs 19A to 19E and 83A above; and
- (b) otherwise deny the allegations in the paragraph.

83D. MLC Nominees and NULIS deny the allegations in paragraph 83D of the Further Amended Statement of Claim.

83E. MLC Nominees and NULIS deny the allegations in paragraph 83E of the Further Amended Statement of Claim.

83F. MLC Nominees and NULIS deny the allegations in paragraph 83F of the Further Amended

Statement of Claim.

83G. MLC Nominees and NULIS deny the allegations in paragraph 83G of the Further Amended Statement of Claim.

83H. MLC Nominees and NULIS deny the allegations in paragraph 83H of the Further Amended Statement of Claim.

**Category 1 Group Members – Former MasterKey ADA Members**

83I. MLC Nominees and NULIS deny the allegations in paragraph 83I of the Further Amended Statement of Claim.

**Category 2 Group Members – Current MasterKey ADA Members**

83J. MLC Nominees and NULIS deny the allegations in paragraph 83J of the Further Amended Statement of Claim.

83K. MLC Nominees and NULIS deny the allegations in paragraph 83K of the Further Amended Statement of Claim.

83L. MLC Nominees and NULIS deny the allegations in paragraph 83L of the Further Amended Statement of Claim.

**Category 3 Group Members – Transferred unrestricted former MasterKey ADA Members**

83M. MLC Nominees and NULIS deny the allegations in paragraph 83M of the Further Amended Statement of Claim and say that any interest of a MasterKey ADA Member in another superannuation fund would be subject to the SIS Regulations and any applicable trust instrument of that fund.

**Category 4 Group Members – Transferred restricted former MasterKey ADA Members**

83N. MLC Nominees and NULIS deny the allegations in 83N of the Further Amended Statement of Claim and say that any interest of a MasterKey ADA Member in another superannuation fund would be subject to the SIS Regulations and any applicable trust instrument of that fund.

83O. MLC Nominees and NULIS deny the allegations in 83O of the Further Amended Statement of Claim and say that any interest of a MasterKey ADA Member in another superannuation fund would be subject to the SIS Regulations and any applicable trust instrument of that fund.

**Causation of Loss or Damage – Group Members in Categories 1 to 4**

83P. In answer to paragraph 83P of the Further Amended Statement of Claim, MLC Nominees and NULIS:

- (a) refer to and repeat paragraphs 83I to 83O above; and
- (b) deny the allegations in the paragraph.

**Category 5 Group Members – claiming because of deceased MasterKey ADA Member**

83Q. MLC Nominees and NULIS deny the allegations in paragraph 83Q of the Further Amended Statement of Claim.

**Category 6 Group Members – claiming because of spousal MasterKey ADA Member**

83R. MLC Nominees and NULIS deny the allegations in paragraph 83R of the Further Amended Statement of Claim.

83S. MLC Nominees and NULIS deny the allegations in paragraph 83S of the Further Amended Statement of Claim.

83T. MLC Nominees and NULIS deny the allegations in paragraph 83T of the Further Amended Statement of Claim.

**Causation of Loss or Damage – Group Members in Categories 5 and 6**

83U. MLC Nominees and NULIS deny the allegations in paragraph 83U of the Further Amended Statement of Claim.

**S. ALLEGED HARM TO THE PLAINTIFFS AND GROUP MEMBERS**

**Alleged harm to the First Plaintiff**

84. MLC Nominees and NULIS admit the allegations in paragraph 84 of the Further Amended Statement of Claim.
85. MLC Nominees and NULIS admit the allegations in paragraph 85 of the Further Amended Statement of Claim, and say that the First Plaintiff's MasterKey ADA was transferred as part of the First ADA Transfer.
- 85A. In answer to paragraph 85A of the Further Amended Statement of Claim, MLC Nominees and NULIS:
- (a) repeat paragraphs 83A, 83B, 83C, 84 and 85 above; and
  - (b) otherwise deny the allegations in the paragraph.
- 85B. MLC Nominees and NULIS deny the allegations in paragraph 85B of the Further Amended Statement of Claim.
- 85C. MLC Nominees and NULIS deny the allegations in paragraph 85C of the Further Amended Statement of Claim.
- 85D. MLC Nominees and NULIS deny the allegations in paragraph 85D of the Further Amended Statement of Claim.
- 85E. MLC Nominees and NULIS deny the allegations in paragraph 85E of the Further Amended Statement of Claim.
- 85F. MLC Nominees and NULIS admit the allegations in paragraph 85F of the Further Amended Statement of Claim.
- 85G. In answer to paragraph 85G of the Further Amended Statement of Claim, MLC Nominees and NULIS:
- (a) say that the First Plaintiff could have cashed unrestricted non-preserved benefits subject to the terms of the relevant trust deed;
  - (b) say that the First Plaintiff withdrew an amount of \$25,000 on 6 April 2017 in respect of a benefit paid out under a total and permanent disablement insurance policy, and

this withdrawal was made out of that part of his NAB ADA that was comprised of unrestricted non-preserved benefits; and

(c) otherwise deny the allegations in the paragraph.

85H. In answer to paragraph 85H of the Further Amended Statement of Claim, MLC Nominees and NULIS:

(a) refer to and repeat paragraph 85G above; and

(b) otherwise deny the allegations in the paragraph.

85I. MLC Nominees and NULIS deny the allegations in paragraph 85I of the Further Amended Statement of Claim.

86. MLC Nominees and NULIS deny the allegations in paragraph 86 of the Further Amended Statement of Claim.

87. MLC Nominees and NULIS deny the allegations in paragraph 87 of the Further Amended Statement of Claim.

87A. MLC Nominees and NULIS deny the allegations in paragraph 87A of the Further Amended Statement of Claim.

**Alleged harm to the Second Plaintiff**

87B. MLC Nominees and NULIS admit the allegations in paragraph 87B of the Further Amended Statement of Claim.

87C. MLC Nominees and NULIS admit the allegations in paragraph 87C of the Further Amended Statement of Claim, and say that the Second Plaintiff's MasterKey ADA was transferred as part of the First ADA Transfer.

87D. In answer to paragraph 87D of the Further Amended Statement of Claim, MLC Nominees and NULIS:

(a) refer to and repeat paragraphs 83A, 83B, 83C, 87B and 87C above; and

(b) otherwise deny the allegations in the paragraph.

87E. MLC Nominees and NULIS deny the allegations in paragraph 87E of the Further Amended Statement of Claim.

87F. MLC Nominees and NULIS deny the allegations in paragraph 87F of the Further Amended Statement of Claim.

87G. MLC Nominees and NULIS deny the allegations in paragraph 87G of the Further Amended Statement of Claim.

87H. MLC Nominees and NULIS deny the allegations in paragraph 87H of the Further Amended Statement of Claim.

87I. MLC Nominees and NULIS admit the allegations in paragraph 87I of the Further Amended Statement of Claim.

87J. MLC Nominees and NULIS deny the allegations in paragraph 87J of the Further Amended Statement of Claim.

87K. MLC Nominees and NULIS deny the allegations in paragraph 87K of the Further Amended Statement of Claim.

87L. MLC Nominees and NULIS deny the allegations in paragraph 87L of the Further Amended Statement of Claim.

87M. MLC Nominees and NULIS deny the allegations in paragraph 87M of the Further Amended Statement of Claim.

**Alleged harm to Group Members**

87N. MLC Nominees and NULIS deny the allegations in paragraph 87N of the Further Amended Statement of Claim.

87O. MLC Nominees and NULIS deny the allegations in paragraph 87O of the Further Amended Statement of Claim.

87P. MLC Nominees and NULIS deny the allegations in paragraph 87P of the Further Amended

Statement of Claim.

87Q. MLC Nominees and NULIS deny the allegations in paragraph 87Q of the Further Amended Statement of Claim.

88. MLC Nominees and NULIS deny the allegations in paragraph 88 of the Further Amended Statement of Claim.

89. MLC Nominees and NULIS deny the allegations in paragraph 89 of the Further Amended Statement of Claim.

89A. MLC Nominees and NULIS deny the allegations in paragraph 89A of the Further Amended Statement of Claim.

**T. ALLEGED COMMON QUESTIONS OF LAW AND FACT**

90. In answer to paragraph 90 of the Further Amended Statement of Claim, MLC Nominees and NULIS:

- (a) admit that the matters pleaded in sub-paragraphs 90(a), (b), (d), (e), (g) and (h) are common to the claims of the Plaintiffs and Group Members;
- (b) do not admit that the matters pleaded in sub-paragraph (l) are common to the claims of the Plaintiffs and Group Members; and
- (c) otherwise deny the allegations in the paragraph.

**U. PLAINTIFFS' PRAYER FOR RELIEF**

91. MLC Nominees and NULIS deny that the Plaintiffs and Group Members are entitled to the relief claimed and say further that:

- (a) if, which is denied, they did contravene the SIS Act in the manner pleaded in Section Q of the Further Amended Statement of Claim, then NULIS, as trustee of the MLC Super Fund, is obliged to (and will) make good the assets of the MLC Super Fund, and the appropriate relief is an order that it do so;

- (b) upon the assets of the MLC Super Fund being made good, no loss or damage will have been suffered by the Plaintiffs or by any Group Member who remains a member of the MLC Super Fund and there is no loss or damage to be recovered under section 55 of the SIS Act; and
- (c) further, if, which is denied, MLC Nominees and NULIS are liable under section 55 of the SIS Act to compensate the Plaintiffs or any of the Group Members for any loss or damage alleged in the Further Amended Statement of Claim, any such compensation must be effected by payment into the relevant person's superannuation balance. No payment can (or, alternatively, should) be ordered which would effect a de facto release of preserved benefits inconsistent with the scheme established by the *Superannuation Industry (Supervision) Regulations 1994* (Cth).

## V. FURTHER DEFENCES

92. To the extent the Plaintiffs allege contraventions of section 54B(1) of the SIS Act and seek relief in respect of those alleged contraventions, MLC Nominees and NULIS:
- (a) say that the proceedings are 'eligible proceedings' within the meaning of section 221(1) of the SIS Act, as they are proceedings for a contravention of a civil penalty provision (as defined in section 193) and do not include a proceeding for an offence;
  - (b) say that MLC Nominees and NULIS have acted honestly;
  - (c) say that having regard to all the circumstances of the case, MLC Nominees and NULIS ought fairly to be excused for the contravention if it appears to the Court that they have or may have contravened section 54B(1) of the SIS Act; and
  - (d) will rely upon section 221 of the SIS Act in seeking relief from the Court wholly from any liability to which they would otherwise be subject because of the contravention.

93. To the extent that the Plaintiffs allege that MLC Nominees contravened the SIS Act or breached the general law duties prior to 21 January 2014 (which is denied), MLC Nominees and NULIS say that any cause of action based upon:

(a) such contraventions of the SIS Act is statute-barred by:

(i) section 55(4) of the SIS Act; and

(ii) further, or in the alternative, section 5(1)(d) of the *Limitation of Actions Act 1958* (VIC),

and MLC Nominees and NULIS rely on those sections for their full force and effect;

and

(b) such breach of general law duties is statute-barred by section 21(2) of the *Limitation of Actions Act 1958* (VIC), and MLC Nominees and NULIS rely on that section for its full force and effect.

94. Further, or in the alternative, to the extent that the Plaintiffs allege that MLC Nominees breached the Implied Terms of the TUSS Trust Deed prior to 21 January 2014 (which is denied), MLC Nominees and NULIS:

(a) say that any cause of action based upon such breach is statute-barred by section 48 of the *Limitation Act 1969* (NSW); and

(b) rely on that section for its full force and effect.

22 June 2022

This Defence was prepared by Ross Drinnan and Jennifer Campbell of Allens, and settled by Matthew Darke SC and Kathleen Foley SC of counsel.

---

**Allens**

Solicitors for the Defendants