



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

No. S ECI 2020 00306

Case: S ECI 2020 00306

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B E T W E E N

DAVID SHIMSHON

First Plaintiff

JULIAN COUGAN

Second Plaintiff

-and-

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

(in accordance with the Schedule of Parties to this Amended Statement of Claim)

First Defendants

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

Second Defendant

**FURTHER AMENDED STATEMENT OF CLAIM**

**(Filed pursuant to Order 3 of the Orders made by Justice John Dixon on 12 May 2022)**

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Filed on behalf of:	The <u>First Plaintiff and the</u> <u>Second Plaintiff</u>	DX: N/A
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## A. NOTES

1. In this Further Amended Statement of Claim:
  - (a) capitalised terms not otherwise defined in this or subsequent sections are defined in Schedule A; and
  - (b) any reference to a document identification number beginning with “NAB” is a reference to a document tendered in evidence in the Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry (**Royal Commission**) with the same identification number.

## B. THE PARTIES

2. The First Plaintiff and Second Plaintiff (together, the **Plaintiffs**) brings this proceeding as a representative party pursuant to Part 4A of the *Supreme Court Act 1986* (Vic) on ~~his~~their own behalf and on behalf of the Group Members described in paragraph 3.
3. The Plaintiffs and the persons whom ~~he~~they represents (**Group Members**) are each persons who are not a Judge, Associate Judge or Judicial Registrar of the Supreme Court of Victoria, and fall within at least one of the following categories:
  - (a) at any time was a member of the The Universal Super Scheme (**TUSS**) who held an Accrued Default Amount (**ADA**) attributable to the MLC MasterKey Business Super product (incorporating MLC MasterKey Personal Super) (**MasterKey**) (a **NAB ADA**) that was transferred by the Second Defendant (**NULIS**) on or about 3 December 2016 or on or about 25 March 2017 to a MySuper Product (each such member being a **NAB ADA Member**);

OR

- (b) at any time received payment from a deceased NAB ADA Member of all or part of the interest of that NAB ADA Member attributable to a NAB ADA transferred in the circumstances set out in subparagraph (a);

OR

- (c) satisfy both of the following paragraphs:
  - (i) was the spouse of a person who was a NAB ADA Member; and
  - (ii) pursuant to an order or settlement in a *Family Law Act 1975* (Cth) (**Family Law Act**) proceeding or a superannuation agreement within the meaning of Part VIIIIB of that Act, at any time received a transfer from the NAB ADA Member of

all or part of the NAB ADA Member's interest attributable to a NAB ADA transferred in the circumstances set out in subparagraph (a);

and who have suffered loss or damage by or resulting from the conduct of some or all of the Defendants pleaded in this Amended Statement of Claim.

4. As at the date of the commencement of this proceeding, there were seven or more persons who had claims against the Defendants in respect of the matters set out in this Amended Statement of Claim.

5. The First Defendant (**MLC Nominees**):

(a) is and at all material times has been a company incorporated under the *Corporations Act 2001* (Cth) (**Corporations Act**);

(b) was at all material times until 1 July 2016, the trustee of TUSS;

(c) was at all material times until at least 1 July 2016, an RSE Licensee under the *Superannuation Industry (Supervision) Act 1993* (Cth) (**SIS Act**); and

(d) was at all material times until at least 1 July 2016, a holder of an Australian Financial Services Licence (**AFSL**).

6. NULIS:

(a) is and at all material times has been a company incorporated under the *Corporations Act*;

(b) is and has been at all material times since 9 May 2016 (inclusive), the trustee of the MLC Super Fund (ABN 70 732 426 024);

(c) is and has been at all material times since 1 March 2006 (inclusive), an RSE Licensee under the *SIS Act*; and

(d) is and has been at all material times since at least 1 July 2016, a holder of an AFSL.

### **C. THE NATIONAL AUSTRALIA BANK GROUP**

7. National Australia Bank Limited (ACN 004 044 937) (**NAB**):

(a) is and at all material times has been a company incorporated under the *Corporations Act*;

- (b) is and at all material times has been an Associate, Related Body Corporate, Holding Company and Ultimate Holding Company of MLC Nominees and NULIS;
  - (c) is and at all material times has been the Ultimate Holding Company of a group of companies including but not limited to MLC Nominees, NULIS, and National Wealth Management Services Limited;
  - (d) was at all material times until 3 October 2016 the Ultimate Holding Company of MLC Limited;
- (the companies referred to in (c) and (d) above are the **NAB Group**).

#### **D. THE FUNDS**

8. TUSS (a **Fund**) was at all material times until at least 1 July 2016:
- (a) a trust constituted and governed by a trust deed dated 12 May 1989 as amended from time to time (**TUSS Trust Deed**); and
  - (b) a Superannuation Fund, a Regulated Superannuation Fund, a Superannuation Entity, a Public Offer Superannuation Fund and a Registrable Superannuation Entity.

##### **Particulars**

- i. Amending Deed Poll – The Universal Super Scheme dated 14 March 2013 at page 1 (the **TUSS Amending Deed Poll**).

9. The MLC Super Fund (also a **Fund**) is and has been at all material times:
- (a) since 9 May 2016, a trust constituted and governed by a trust deed dated 9 May 2016 as amended from time to time (**MLC Super Trust Deed**); and
  - (b) since at least 1 July 2016, a Superannuation Fund, a Regulated Superannuation Fund, a Superannuation Entity, a Public Offer Superannuation Fund and a Registrable Superannuation Entity.

##### **Particulars**

- i. ~~Deed of Amendment – MLC Super Fund dated 20 December 2017 at page 1 and 5.~~

10. At all material times until 1 July 2016, MLC Nominees offered in TUSS superannuation products, including MasterKey.

## D2. THE NATURE OF AND THE RIGHTS AND OBLIGATIONS RELATING TO AN NAB ADA

10A. At all material times:

- (a) NAB ADAs were constituted entirely by contributions made by the NAB ADA Member and/or the NAB ADA Member's employers to TUSS and/or the MLC Super Fund, along with investment returns on those contributions, net of fees, commissions and any other charges; and
- (b) those contributions were made for the exclusive use and enjoyment of the NAB ADA Member and/or their permitted successors and assigns.

10B. At all material times, each NAB ADA was comprised of:

- (a) preserved benefits, within the meaning of r 6.03 of the *Superannuation Industry (Supervision) Regulations 1994 (Cth) (SIS Regulations)*; and/or
- (b) restricted non-preserved benefits, within the meaning of r 6.08 of the SIS Regulations; and/or
- (c) unrestricted non-preserved benefits, within the meaning of 6.10 and 6.12 of the SIS Regulations.

10C. At all material times, where some or all of a NAB ADA was comprised of:

- (a) preserved benefits; and/or
- (b) restricted non-preserved benefits;

upon satisfaction by the NAB ADA Member of a condition of release, that part of the NAB ADA that was comprised of preserved benefits or restricted non-preserved benefits was able to be cashed by the NAB ADA Member subject to any applicable cashing restrictions.

### **Particulars**

- i. SIS Regulations, rr 6.18 and 6.19, Sch. 1 (Conditions of release of benefits), Pt 1 (Regulated superannuation funds) – column 3 (**Condition of Release**).

10D. At all material times, where some or all of a NAB ADA was comprised of unrestricted non-preserved benefits, the NAB ADA Member was able to cash that part of the NAB ADA at any time.

### **Particulars**

- i. SIS Regulations, rr 6.20.

10E. At all material times, MLC Nominees, prior to 1 July 2016, and NULIS, from 1 July 2016:

(a) was required (subject to exceptions) to allocate contributions made on behalf of a NAB ADA Member into TUSS or the MLC Super Fund to a NAB ADA Member within 28 days after the end of the month in which the contribution was received or, if it was not reasonably practicable to do so, within such longer period as was reasonable in the circumstances:

**Particulars**

i. SIS Regulations, rr 7.08(1) and (2)

(b) was required (subject to exceptions) to maintain minimum benefits for NAB ADA Members in TUSS and the MLC Super Fund and ensure that the NAB ADA Member's minimum benefits were kept in the Fund until they were cashed, rolled over or transferred in accordance with the SIS Regulations:

**Particulars**

i. SIS Regulations, rr 5.08(1) and (1A)

(c) was required to maintain accounts or sub-accounts for each NAB ADA Member (**NAB Accounts**):

**Particulars**

i. The requirement to maintain accounts arises from:

a. the ability for the trustee to maintain any account or sub-accounts pursuant to the TUSS Amending Deed Poll, clauses 1.1 and 5.5 and the Trust Deed – MLC Super Fund dated 9 May 2016, and as amended on 27 June 2016 Schedule 1 (TUSS Division) (**the MLC Super Fund Amending Deed Poll**), clauses 1.1 and 5.5; together with

b. the requirement for the trustee to debit or credit the NAB Accounts with any portion of the Fund assets or Fund expenses that the Trustee determined was attributable to the NAB Account pursuant to the TUSS Amending Deed Poll, clause 5.5(b) and the MLC Super Fund Amending Deed Poll, clause 5.5(b).

(d) was required to ensure that the value of each NAB ADA was equal to the balance of all NAB Accounts for that NAB ADA Member:

**Particulars**

i. The TUSS Amending Deed Poll, clause 8.1(b)(1).

ii. The MLC Amending Deed Poll, clause 8.1(b)(1).

(e) was required to debit or credit the NAB Accounts with any portion of the Fund assets or Fund expenses that the Trustee determined was attributable to the NAB Account;

**Particulars**

- i. The TUSS Amending Deed Poll, clause 5.5(b).
- ii. The MLC Amending Deed Poll, clause 5.5(b).

(f) where an Investment Direction was made, was required to ensure that any gains, losses or expenses incurred in respect of the investment choice were attributed to the NAB ADA Member who made the Investment Direction;

**Particulars**

- i. The TUSS Amending Deed Poll, clause 6.2.
- ii. The MLC Super Fund Amending Deed Poll, clause 6.2.

(g) was required to determine the investment return to be credited or debited from time to time to a member's benefit (or benefits of a particular kind) in the fund and was required to do so in a way that was fair and reasonable as between all the members of the fund and the various kinds of benefits of each member of the fund;

**Particulars**

- i. SIS Regulations, rr 5.01A, 5.03(1) and 5.03(2).

(h) was required to determine net earnings and allocate these to any Accounts, or otherwise deal with net earnings in accordance with the trust deed; and

**Particulars**

- i. The TUSS Amending Deed Poll, clause 6.4(a).
- ii. The MLC Super Fund Amending Deed Poll, clause 6.4(a).

(i) was required to transfer the benefit entitlement of a beneficiary to another superannuation entity or the regulator in circumstances required by the relevant law, including by rolling over, transferring or allotting the beneficiary's interest to another fund.

**Particulars**

- i. The TUSS Amending Deed Poll, clause 7.2(b)(2).
- ii. The MLC Super Fund Amending Deed Poll, clause 7.2(b)(2).
- iii. Divisions 6.4, 6.5, 6.7 and 7A of the SIS Regulations and provisions of the Family Law Act and Family Law (Superannuation) Regulations 2001 (Cth), r 14G.



(together, the **NAB ADA Obligations**)

10F. At all material times, a NAB ADA Member had the following rights as a member of TUSS and/or the MLC Super Fund:

(a) the right to direct the trustee to invest all or part of their NAB Account according to a specific investment strategy (**Investment Direction**):

**Particulars**

i. The TUSS Amending Deed Poll, clause 6.2.

ii. The MLC Super Fund Amending Deed Poll, clause 6.2.

(a)(b) the right to require the trustee to determine net earnings, the manner in which net earnings were to be allocated to Accounts, and the timing of such allocations:

**Particulars**

i. The TUSS Amending Deed Poll, clause 6.4.

ii. The MLC Super Fund Amending Deed Poll, clause 6.4.

(c) the right to require the trustee to allocate net earnings to the NAB ADA Member's Account in accordance with the determinations referred to at 10F(b) above, or otherwise deal with them in accordance with the trust deed:

**Particulars**

iii. The TUSS Amending Deed Poll, clause 6.4.

iv. The MLC Super Fund Amending Deed Poll, clause 6.4.

(d) the right to request that their NAB ADA be transferred (including by way of rollover or allotment) to another Fund, and if so, the Trustee was required to transfer the NAB ADA (**NAB ADA Transfer**); and

**Particulars**

i. The TUSS Amending Deed Poll, clause 7.2.

ii. The MLC Super Fund Amending Deed Poll, clause 7.2.

iii. SIS Regulations, rr 6.33 and 6.34.

(e) the right to accrued benefits, and (subject to exceptions) the claim to, and amount of, those accrued benefits must not have been altered adversely to the beneficiary by amendment of the governing rules or by any other act carried out, or consented to, by the trustee of the fund.

**Particulars**

i. SIS Regulations, rr 13.16(1) and (2).

(together, the NAB ADA Rights)

10G. By reason of the matters alleged at paragraphs 10C and 10D above, NAB ADA Members, who had NAB ADAs which were in part or whole:

(a) preserved benefits or restricted non-preserved benefits where a Condition of Release was satisfied; and/or

(b) unrestricted non-preserved benefits;

had a present right to receive payment in respect of those benefits on their election to do so and subject to any applicable cashing restrictions.

**Particulars**

i. SIS Regulations, rr 6.18 and 6.19, Sch. 1 (Conditions of release of benefits), Pt 1 (Regulated superannuation funds) – column 3.

ii. Cashing restrictions do not apply in respect of 10G(b).

10H. By reason of the matters alleged at paragraphs 10A, 10E and 10F above, where a NAB ADA was comprised, at least in part, of preserved benefits and/or restricted non-preserved benefits, and no Condition of Release had been satisfied in relation to those preserved and/or restricted non-preserved benefits, NAB ADA Members had a present right to direct, control and manage their NAB ADA in accordance with the applicable regulatory scheme and trust instruments and a present right to receive payment in the future in respect of that part (being the part comprised of preserved benefits and/or restricted non-preserved benefits) of their NAB ADA.

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

**SIS Act Covenants**

11. Pursuant to the SIS Act, and for the purposes of that Act, at all material times until at least 1 July 2016 (inclusive), the terms of the TUSS Trust Deed were part of the Governing Rules of TUSS and at all material times from 9 May 2016 (inclusive), the terms of the MLC Super Trust Deed were part of the Governing Rules of the MLC Super Fund.
12. At all material times up to 30 June 2013 (inclusive), pursuant to s 52 of the SIS Act (as then in force), the Governing Rules of TUSS were taken to contain covenants by MLC Nominees:

- (a) to exercise the same degree of care, skill and diligence as an ordinary prudent person would exercise in dealing with property of another for whom the person felt morally bound to provide (**Pre-2013 Care and Skill Covenant**); and
  - (b) to ensure that its duties and powers were performed and exercised in the best interests of the beneficiaries (**Pre-2013 Best Interests Covenant**).
13. Pursuant to s 52 of the SIS Act, at all material times since 1 July 2013 (inclusive), the Governing Rules of TUSS have been taken to contain covenants by MLC Nominees and at all material times since 9 May 2016 (inclusive), the Governing Rules of the MLC Super Fund have been taken to contain covenants by NULIS:
- (a) to exercise, in relation to all matters affecting the Fund of which it is trustee, the same degree of care, skill and diligence as a prudent person, whose profession, business or employment is or includes acting as a trustee of a Superannuation Entity and investing money on behalf of beneficiaries of the Superannuation Entity, would exercise in relation to an entity of which it is trustee and on behalf of the beneficiaries which it makes investments (**Care and Skill Covenant**);
  - (b) to perform its duties and exercise its powers in the best interests of the beneficiaries (**Best Interests Covenant**); and
  - (c) where there is a conflict between its duties to the beneficiaries, or the interests of the beneficiaries, and its duties to any other person or the interests of it or an Associate of it:
    - (i) to give priority to the duties to and interests of the beneficiaries over the duties to and interests of other persons;
    - (ii) to ensure that the duties to the beneficiaries are met despite the conflict;
    - (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;**(No Conflicts Covenant)**.
14. By s 55(1) of the SIS Act (as in force prior to its repeal on 6 April 2019):
- (a) MLC Nominees was required at all material times up to 30 June 2013 (inclusive), not to contravene the covenants set out at paragraph 12 above;

- (b) MLC Nominees was required at all material times from 1 July 2013 (inclusive), and NULIS at all material times from 9 May 2016 (inclusive) not to contravene the covenants set out at paragraph 13 above; and
  - (c) MLC Nominees was required at all material times not to contravene any covenant contained, or taken to be contained, in the Governing Rules of TUSS and NULIS was required at all material times not to contravene any covenant contained, or taken to be contained, in the Governing Rules of the MLC Super Fund.
15. Pursuant to s 7 of the SIS Act, the requirements of the SIS Act apply and applied despite any provision in the Governing Rules of a Fund.

### **Obligations at general law**

16. Further or in the alternative, at all material times up to 30 June 2013 (inclusive), each of the covenants set out in paragraph 12 above was an implied term of the TUSS Trust Deed (the **Pre-2013 Implied Terms**).
17. Further or in the alternative, at all material times from 1 July 2013 (inclusive), each of the covenants set out in paragraph 13 above has been an implied term of the TUSS Trust Deed and at all material times from 9 May 2016 (inclusive) each of the covenants set out in paragraph 13 above has been an implied term of the MLC Super Trust Deed (the **Implied Terms**).
18. Further or in the alternative, at all material times until at least 1 July 2016 (inclusive), MLC Nominees owed to the beneficiaries of TUSS and at all material times from at least 9 May 2016, NULIS owed and continues to owe to the beneficiaries of the MLC Super Fund:
- (a) a duty to carry out the terms of the trust of which it is trustee (**Duty to Perform the Trust Terms**);
  - (b) a duty to deal with the assets of the Fund of which it is trustee in the best interests of the beneficiaries of the Fund (**Best Interests Duty**);
  - (c) a duty to exercise care, diligence and skill of a prudent professional trustee in the management and investment of the assets of the Fund of which it is trustee (**Duty of Prudent Management**);
  - (d) (subject, since 1 July 2013, to s 58B of the SIS Act) a duty to avoid, in performing its role as trustee of a Fund:

- (i) conflicts between its duties to beneficiaries and the interests of beneficiaries, on the one hand, and its personal interests or interests of associated third parties;
- (ii) further or alternatively, engagements with associated third parties which are inconsistent with its duties to beneficiaries and the interests of beneficiaries;

**(General Law Conflicts Duty)**; and

- (e) (subject, since 1 July 2013, to s 58B of the SIS Act) a duty to avoid obtaining, and to avoid associated third parties obtaining, unauthorised profits by reason of acting as trustee of a Fund (**General Law Profits Duty**).

#### **Particulars**

- i. The duties arise at law from the relationship between MLC Nominees as trustee of TUSS and beneficiaries of TUSS and from the relationship between NULIS as trustee of the MLC Super Fund and beneficiaries of the MLC Super Fund.

#### **F. MYSUPER RIGHTS AND OBLIGATIONS**

18A. If an RSE Licensee made an application under s 29S of the SIS Act for authority to offer a class of beneficial interest in a regulated superannuation fund as a MySuper Product, the RSE Licensee was required to:

- (a) make an election in accordance with s 29SAA of the SIS Act; and
- (b) give effect to the election made in accordance with s 29SAA of the SIS Act

#### **Particulars**

- i. Section 29S(2)(f)(i) of the SIS Act.
- ii. Section 29E(6B) of the SIS Act.

19. If an RSE Licensee that made an application before 1 July 2017 (**MySuper Application**) for authority from the Australian Prudential Regulation Authority (**APRA**) to offer a class of beneficial interest in a Regulated Superannuation Fund as a MySuper Product, made elections in accordance with s 387(1)(a) to (c) of the SIS Act, the RSE Licensee was taken to make an election in accordance with s 29SAA of the SIS Act (**ADA Transfer Election**).

19A. At all material times, an RSE Licensee (as a trustee of an RSE) was required not to charge members with a beneficial interest in a MySuper Product for payment of Conflicted Remuneration (the **Conflicted Remuneration Obligation**).

**Particulars**

- i. Pursuant to s 29S of the SIS Act, a MySuper Application was required to be accompanied by an election not to charge MySuper members for payment of conflicted remuneration in accordance with s 29SAC of the SIS Act.

19B. At all material times, in respect of a MySuper Product, an RSE Licensee (as a trustee of an RSE) was required to ensure that, inter alia, the following obligations were satisfied:

- (a) a single diversified investment strategy was adopted in relation to assets of the fund to the extent that they were attributed to the MySuper Product;
- (b) all members who held a beneficial interest in the MySuper Product are entitled to have access to the same options, benefits and facilities (except with respect to the benefit provided by risk insurance);
- (c) amounts were attributed to members in relation to their beneficial interest in the MySuper Product in a way that did not stream gains or losses relating to any assets of the fund to only some of those members (except as permitted under a lifecycle exception); and
- (d) the same process was to be adopted in attributing amounts to members in relation to their beneficial interest in the MySuper Product (except as necessary to allow for fee subsidisation by employers).

(the **Beneficial MySuper Obligations**).

**Particulars**

- i. Pursuant to s 29T(1)(g) of the SIS Act, in authorising a MySuper Application, APRA was required to be satisfied that governing rules of the fund had the characteristics specified in s 29TC of the SIS Act.

19C. At all material times, in respect of a MySuper Product, an RSE Licensee (as a trustee of an RSE) was required to ensure that:

- (a) only the following types of fees, as defined in s 29V(2) to (9) of the SIS Act, were charged in respect of the beneficial interest of a member in a MySuper Product:
- (i) an administration fee;
- (ii) an investment fee on a cost recovery basis;
- (iii) a buy-sell spread fee;
- (iv) a switching fee;

(v) an activity fee;

(vi) an exit fee;

(vii) an advice fee; and

(viii) an insurance fee on a cost recovery basis; and

(b) one of the charging rules as set out in s 29VA of the SIS Act was satisfied in respect of any fee charged in relation to a beneficial interest in a MySuper Product.

**(the MySuper Fee Obligations).**

### **Particulars**

i. Pursuant to s 29V and 29VC of the SIS Act, upon obtaining authority from APRA, an RSE Licensee was only permitted to charge the types of fees alleged in paragraph 19C(a).

19D. 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:

(a) any base fee charged in addition to a performance-based fee was to be set at a level lower than it would have been if the arrangement with the investment manager did not include a performance-based fee;

(b) the performance-based fee was determined over a period determined appropriate to investments to which the performance-based fee related; and

(c) the performance-based fee was to be calculated in a way that included disincentives for poorly performing investments.

**(the MySuper Investment Fee Obligations).**

19E. Pursuant to s 29VN of the SIS Act, an RSE Licensee (as a trustee of an RSE) was required to:

(a) promote the financial interests of the beneficiaries of the fund who hold a MySuper Product, in particular returns to those beneficiaries (after the deduction of fees, costs and taxes); and

(b) determine on an annual basis whether the beneficiaries of the fund who hold the MySuper Product are disadvantaged, in comparison to the beneficiaries of other funds who hold a MySuper Product within those other funds, and to include such determination in the investment strategy for the fund.

**(the MySuper Financial Interests Obligations).**

20. Pursuant to Prudential Standard SPS 410 MySuper Transition (**SPS 410**), each RSE Licensee that received authority from APRA to offer a class of beneficial interest in a regulated superannuation fund as a MySuper Product (**Authority**), and made an ADA Transfer Election, was required:
- (a) by no later than 30 September 2013, and quarterly thereafter, to identify all members holding an ADA in each Registrable Superannuation Entity within its business operations;
  - (b) by no later than 1 July 2013, to prepare a transition plan (**Transition Plan**) approved by the Board of the RSE Licensee in respect of each Registrable Superannuation Entity within its business operations which held an ADA;
  - (c) after 1 July 2013, to regularly review and give effect to the Transition Plan;
  - (d) (unless the RSE Licensee met the criteria set out paragraph 4 of SPS 410) by no later than 30 June 2016, to identify one or more MySuper Products to which ADAs in a Registrable Superannuation Entity could be attributed after:
    - (i) determining that MySuper Product or those MySuper Products to be suitable having regard to the matters in subparagraphs 11(a) to (c) of SPS 410 (**Suitability Determination**); and
    - (ii) forming the view that the attribution of members' ADAs to that MySuper Product or those MySuper Products would promote the financial interests of those members or that class of members (**Promotion of Financial Interests Determination**); and
  - (e) (unless the RSE Licensee met the criteria set out paragraph 4 of SPS 410) to either:
    - (i) attribute ADAs to a MySuper Product identified following the Suitability Determination and the Promotion of Financial Interests Determination, no later than 120 days from the day of notification of a member in accordance with Regulation 9.46 of the *Superannuation Industry (Supervision) Regulations 1994* (Cth) (**ADA Transfer**); or
    - (ii) where a member had directed the RSE Licensee in writing within 90 days of notification of the member, attribute the ADA of the member to another MySuper Product or investment option within a Choice Product in the Registrable Superannuation Entity; ~~and~~



20A. Pursuant to Prudential Practice Guide SPG 410 MySuper Transition (SPG 410), each RSE Licensee that received Authority from APRA and made an ADA Transfer Election was expected by APRA to attribute ADAs to a MySuper Product at the earliest opportunity possible where it was in the best interests of beneficiaries to do so.

#### Particulars

- i. Prudential Practice Guide SPG 410 – MySuper Transition dated February 2013 stated ADA Transfers should occur at “the earliest opportunity possible where it is in the best interests of beneficiaries to do so”; “Notwithstanding that the legislation allows for an RSE licensee to move accrued default amounts at any time up until 30 June 2017, APRA expects that the transfer to a MySuper product would be made much earlier than 1 July 2017 when it is in the best interests of members. APRA would expect the RSE licensee’s Transition Plan to reflect this approach”; and “In exercising its powers and performing its duties in the best interest of members, an RSE licensee would ordinarily consider the timing of the transition”

21. An RSE Licensee with Authority to offer a MySuper Product is and has at all material times since 1 July 2013 been required to make publicly available a product dashboard (**MySuper Dashboard**) with the following information in respect of the MySuper Product:

- (a) the return target (**Return Target**);
- (b) the return (**Return**);
- (c) a comparison between the Return Target and the Return (**Return Comparison**);
- (d) the level of investment risk (**Investment Risk**); and
- (e) a statement of fees and other costs (**Fees and Costs**);

in accordance with s 1017BA of the Corporations Act and regs 7.9.07Q to 7.9.07W of the *Corporations Regulations 2001* (Cth) (**Corporations Regs**).

21A. Pursuant to regulation 9.46A of the SIS Regulations, from the date of the first periodic statement sent to each NAB ADA Member after the member’s NAB ADA had been identified, MLC Nominees, at all material times from 1 July 2013 (inclusive), and NULIS at all material times from 9 May 2016 (inclusive), were required to provide the Plaintiffs and Group Members with periodic notices setting out the matters prescribed in the regulations.

## G. DEFAULT INVESTMENT OPTIONS

22. At all material times until at least 29 November 2013, MLC Nominees offered default investment options in MasterKey:

- (a) that an employer could nominate as the default option into which were invested the assets of TUSS attributable to any TUSS member who was an employee of the employer and who had not given MLC Nominees ~~a direction as to the investment option into which the assets of TUSS attributable to the member should be invested~~ (an Investment Direction); or
- (b) if an employer did not nominate a default investment option and no Investment Direction was given by the employee, into which MLC Nominees determined from time to time the assets of TUSS attributable to that employee would be and were invested;

(Default Investment Options).

### Particulars

- i. Investment options that were also Default Investment Options offered by MLC Nominees included but were not limited to MLC Horizon 5 Growth, MLC Horizon 4 Balanced, MLC Horizon 3 Conservative Growth, MLC Horizon 2 Stable, MLC Index Plus Balanced, MLC Index Plus Growth, MLC Index Plus Conservative.

23. From 1 January 2013 (inclusive), amounts invested in Default Investment Options in accordance with one of the procedures set out in paragraph 22 above were NAB ADAs.

### Particulars

- i. The amounts were deemed ADAs by operation of s 20B of the SIS Act.

24. At all material times from 1 January 2013, a member to whom a NAB ADA was attributable (**Default Member**) continued to have a NAB ADA attributable to them unless and until:

- (a) a direction was given to MLC Nominees by the Default Member to transfer the NAB ADA:
  - (i) to investment options in Choice Products in TUSS (other than those that had prior to 29 November 2013 been Default Investment Options in which those amounts had been invested); or

- (ii) to funds outside TUSS;

and MLC Nominees transferred the NAB ADA in accordance with the direction;

- (b) a direction was given to NULIS by the Default Member to transfer the NAB ADA:

- (i) to investment options in Choice Products in the MLC Super Fund; or

- (ii) to funds outside the MLC Super Fund;

and NULIS transferred the NAB ADA in accordance with the direction;

- (c) the NAB ADA became the subject of an ADA Transfer; or

- (d) a direction was given to MLC Nominees or NULIS by the Default Member to remain invested in the Default Investment Options in which those amounts were invested at the time of the direction (**Retention Direction**) and the NAB ADA remained invested in accordance with that direction.

25. At all material times unless and until NAB ADAs were transferred in accordance with one of the procedures set out at paragraph 24(a) to (c) above, until 1 July 2016 (inclusive), MLC Nominees and/or MLC Limited and, after 1 July 2016 (inclusive), NULIS and/or MLC Limited and/or National Wealth Management Services Limited, paid Conflicted Remuneration to Financial Services Licensees, or representatives of Financial Service Licensees, who, because of the nature of the Conflicted Remuneration or the circumstances in which it was given:

- (a) could reasonably be expected to have been influenced in the choice of the financial product advice they recommended to the Default Member or the Default Member's employer; or

- (b) could reasonably be expected to have been influenced in the financial product advice they gave to the Default Member or the Default Member's employer;

**(Conflicted Financial Advisers).**

#### **Particulars**

i.        Board Papers of MLC Nominees and PFS Nominees dated 10 June 2016 – NAB.005.562.2934\_E at 2935\_E – 2937\_E.

ii. On the basis of the information available to the Plaintiffs prior to discovery, the Conflicted Remuneration paid to Financial Services

Licensees, or representatives of Financial Service Licensees included but may not be limited to:

a. Plan service fees (or asset-based commissions) charged in respect of NAB ADAs: Board Papers of MLC Nominees and PFS Nominees dated 10 June 2016 – NAB.005.562.2934 E at 2977 E; MLC MKPS PDS Sept 2016 – NAB.005.521.0729 at 0734; Statement of Peggy O’Neal dated 19 July 2018 – WIT.0001.0078.0001 at 0045.

b. Insurance commissions charged in respect of insurance premiums paid by NAB ADA Members: Board Papers of MLC Nominees and PFS Nominees dated 10 June 2016 – NAB.005.562.2934 E at 2977 E; MLC MKPS PDS Sept 2016 – NAB.005.521.0729 at 0734.

±.iii. Further particulars in respect of Conflicted Remuneration may be provided following discovery.

26. At all material times, some Conflicted Financial Advisers who received, ~~and in some cases continue to receive~~, Conflicted Remuneration, in the circumstances stated in paragraph 25 above, are or were:

- (a) companies in the NAB Group;
- (b) employees of companies in the NAB Group;
- (c) Authorised Representatives of companies in the NAB Group; or
- (d) employees or Authorised Representatives of corporate Authorised Representatives of companies in the NAB Group;

**(NAB Conflicted Financial Advisers).**

#### **Particulars**

- i. Board Papers of MLC Nominees and PFS Nominees dated 10 June 2016 – NAB.005.562.2934\_E at 2935\_E.

27. Conflicted Remuneration paid in the circumstances stated in paragraph 25 above was paid, until 1 July 2016 (inclusive), by MLC Nominees and/or MLC Limited and, after 1 July 2016 (inclusive), by NULIS and/or MLC Limited and/or National Wealth Management Services Limited to Conflicted Financial Advisers, including NAB Conflicted Financial Advisers, from the fees charged to Default Members.

**Particulars**

- i. Board Papers of MLC Nominees and PFS Nominees dated 10 June 2016 – NAB.005.562.2934\_E at 2935\_E.

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

- 28. On a date as yet unknown but prior to 29 November 2013, MLC Nominees made a MySuper Application to APRA for Authority to offer a MySuper Product within TUSS.

**Particulars**

- i. The fact of the MySuper Application may be inferred from the fact that MLC Nominees offered a MySuper product effective from 29 November 2013, as pleaded at paragraph 31 below.

- 29. By its MySuper Application, MLC Nominees made an ADA Transfer Election.

**Particulars**

- i. The fact of the ADA Transfer Election may be inferred from the fact that MLC Nominees prepared and updated a Transition Plan for the transfer of NAB ADAs, as pleaded at paragraphs 35, 36 and 39 below.

- 30. On a date in September 2013 as yet unknown to the Plaintiff, MLC Nominees received Authority from APRA to offer a MySuper Product within TUSS.

**Particulars**

- i. MLC MySuper Transition Plan dated 5 December 2013 – NAB.005.561.4232\_E at 4254\_E.

- 31. By 29 November 2013, MLC Nominees had:

- (a) established a MySuper Product referred to as **MLC MySuper** in TUSS; and
- (b) commenced receiving contributions into MLC MySuper.

**Particulars**

- A. NULIS MySuper Transition Plan dated 22 May 2017 – NAB.005.734.0001 at 0004.
- B. MLC MySuper Transition Plan dated 5 December 2013 – NAB.005.561.4232\_E at 4254\_E .

32. By at least 5 December 2013, MLC Nominees:
- (a) had made a Suitability Determination in respect of MLC MySuper;
  - (b) had made a Promotion of Financial Interests Determination in respect of MLC MySuper; and/or
  - (c) determined that MLC MySuper was the product into which it would make ADA Transfers of NAB ADAs.

#### **Particulars**

- A. MLC MySuper Transition Plan dated 5 December 2013 – NAB.005.561.4232\_E at 4254\_E.

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

33. On a date as yet unknown in 2014, the Board of MLC Nominees determined that members who held the MLC MySuper product were not disadvantaged in comparison to the beneficiaries of other funds who held a MySuper Product (an **Adequacy of Scale Determination**).

#### **Particulars**

- A. Minutes of combined MLC Nominees, NULIS and PFS Nominees Pty Ltd Board Meeting on 26 October 2016 – NAB.005.562.4470\_E at 4471\_E.

34. On a date as yet unknown in 2015, the Board of MLC Nominees determined that members who held the MLC MySuper product were not disadvantaged in comparison to the beneficiaries of other funds who held a MySuper Product.

#### **Particulars**

- A. Minutes of combined MLC Nominees, NULIS and PFS Nominees Pty Ltd Board Meeting on 26 October 2016 – NAB.005.562.4470\_E at 4471\_E.

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

35. By a date in December 2012, MLC Nominees had prepared an initial MySuper Transition Plan.

**Particulars**

- i. NULIS MySuper Transition Plan dated 22 May 2017 – NAB.005.734.0001 at 0017.

36. By 13 December 2012, the Board of MLC Nominees had approved the initial MySuper Transition Plan.

**Particulars**

- i. NULIS MySuper Transition Plan dated 22 May 2017 – NAB.005.734.0001 at 0017.

37. By at least 30 September 2013, MLC Nominees had identified all members with a NAB ADA and the value of each NAB ADA.

**Particulars**

- i. NULIS MySuper Transition Plan dated 22 May 2017 – NAB.005.734.0001 at 0005.
- ii. MLC MySuper Transition Plan dated 5 December 2013 – NAB.005.561.4232\_E at 4253\_E.

38. By at least 28 October 2013, MLC Nominees had reported to APRA the NAB ADAs that had been identified by 30 September 2013.

**Particulars**

- i. MLC MySuper Transition Plan dated 5 December 2013 – NAB.005.561.4232\_E at 4253\_E.

39. The initial MySuper Transition Plan was:

- (a) amended and approved by the Board of MLC Nominees on 10 April 2013;
- (b) further amended and approved by the Board of MLC Nominees on 5 December 2013;
- (c) further amended and approved by the Board of MLC Nominees on a date in December 2014;
- (d) further amended and approved by the Board of MLC Nominees on a date in December 2015.

**Particulars**

- i. MLC MySuper Transition Plan dated 5 December 2013 – NAB.005.561.4232\_E at 4248\_E.
- ii. NULIS MySuper Transition Plan dated 22 May 2017 – NAB.005.734.0001 at 0017.

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

40. On a date in July 2014, MLC Nominees determined to transition NAB ADAs to products in TUSS known as **Transition Investment Options**.

**Particulars**

- A. NULIS MySuper Transition Plan dated 22 May 2017 – NAB.005.734.0001 at 0009.

41. On a date in June 2015, MLC Nominees segregated the majority of the assets attributable to NAB ADAs within Transition Investment Options.

**Particulars**

- i. NULIS MySuper Transition Plan dated 22 May 2017 – NAB.005.734.0001 at 0009, 0012, 0013.

42. At all material times, Transition Investment Options had features that included:

- (a) higher fees than MLC MySuper; and
- (b) the deduction of fees from the assets attributable to NAB ADA Members for the purposes of paying Conflicted Remuneration.

**Particulars**

- i. MLC MasterKey Personal Super Investment Menu dated 30 September 2016 at pages 16, 27, 29.
- ii. Board Papers of MLC Nominees and PFS Nominees dated 10 June 2016 – NAB.005.562.2934\_E at 2935\_E.

43. Between June 2015 and June 2016, MLC Nominees bought and sold assets to bring the underlying investment strategy and asset allocation for each Transition Investment Option into line with the underlying investment strategy and asset allocation, respectively, for MLC MySuper.



### Particulars

- i. The strategic asset allocation in each Transition Investment Option was changed from that which had existed in respect of the Default Investment Options to a 70% growth / 30% defensive split, as existed in MLC MySuper.
- ii. NULIS MySuper Transition Plan dated 22 May 2017 – NAB.005.734.0001 at 0007, 0009.

### L. SUCCESSOR FUND TRANSFER

44. On 1 July 2016, MLC Nominees transferred the assets of members of TUSS, including NAB ADAs attributable to NAB ADA Members, to the MLC Super Fund (**Successor Fund Transfer**).
45. The NAB ADAs remained in the Transition Investment Options after the Successor Fund Transfer.
46. As part of the Successor Fund Transfer, from 1 July 2016:
  - (a) the members of TUSS became members of the MLC Super Fund;
  - (b) MLC Nominees ceased to be the trustee of a Fund which held NAB ADAs attributable to NAB ADA Members;
  - (c) NULIS became the trustee of a Fund which held NAB ADAs attributable to NAB ADA Members; and
  - (d) in NULIS' capacity as trustee of the MLC Super Fund, NULIS assumed all rights and liabilities of MLC Nominees in MLC Nominees' capacity as trustee of TUSS.

### Particulars

- i. Witness Statement of Peggy O'Neal dated 19 July 2018 in the Royal Commission – WIT.0001.0078.0001 at 0006 [22]-[23].
- ii. Witness Statement of Nicole Smith dated 1 August 2018 in the Royal Commission – WIT.0001.0093.0001 at 0006 [21].

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

47. On 9 May 2016, the MLC Super Fund was established with NULIS as its trustee.

**Particulars**

- i. Witness Statement of Paul Carter dated 30 July 2018 in the Royal Commission – WIT.0001.0087.0001 at 0014 [50].

48. On a date as yet unknown, NULIS made a MySuper Application to APRA for Authority to offer a MySuper Product within the MLC Super Fund.

**Particulars**

- i. The fact of the MySuper Application may be inferred from the fact that NULIS offered a MySuper product as pleaded in paragraph 51.

49. By its MySuper Application, NULIS made an ADA Transfer Election.

**Particulars**

- i. The fact of the ADA Transfer Election may be inferred from the fact that NULIS effected an ADA Transfer as pleaded at paragraphs 56 and 57 below.

50. On a date in June 2016, NULIS received Authority from APRA to offer a MySuper Product within the MLC Super Fund.

**Particulars**

- i. NULIS MySuper Transition Plan dated 22 May 2017 – NAB.005.734.0001 at 0006.

51. By 1 July 2016, NULIS had:

- (a) established a MySuper Product in the MLC Super Fund (**NULIS MySuper**); and
- (b) commenced receiving contributions into NULIS MySuper.

**Particulars**

- A. NULIS MySuper Transition Plan dated 22 May 2017 – NAB.005.734.0001 at 0003 and 0006.

52. At all material times, the strategic asset allocation in NULIS MySuper was the same as in MLC MySuper.

**Particulars**

- A. Each of NULIS MySuper and MLC MySuper had a strategic asset allocation of 70% growth assets and 30% defensive assets.

**N. NULIS MYSUPER PRODUCT MONITORING**

53. From at least October 2016, NULIS carried out annual Adequacy of Scale Determinations in respect of NULIS MySuper.

**Particulars**

- A. NULIS MySuper Transition Plan dated 22 May 2017 – NAB.005.734.0001 at 0004.
- B. Board Papers of MLC Nominees, NULIS Nominees and PFS Nominees dated 26 October 2016 – NAB.005.562.4470\_E at 4471\_E – 4479\_E.

**O. ADA TRANSFERS**

54. On a date as yet unknown, the Board of NULIS:

- (a) carried out a Suitability Determination and a Promotion of Financial Interests Determination;
- (b) determined NULIS MySuper to be a suitable MySuper Product that would promote the financial interests of the NAB ADA Members.

**Particulars**

- i. NULIS MySuper Transition Plan dated 22 May 2017 – NAB.005.734.0001 at 0006.

55. On a date in August 2016, NULIS provided some NAB ADA Members with a notice in writing of the expected transfer of their NAB ADAs to NULIS MySuper (**ADA Notice**).

56. On or about 3 December 2016, NULIS effected the transfer of approximately \$6,300,000,000 of NAB ADAs from the Transition Investment Options to NULIS MySuper (**First ADA Transfer**).

57. On or about 25 March 2017, NULIS effected the transfer of approximately \$563,000,000 of NAB ADAs from the default options in the MLC Super Fund to NULIS MySuper (**Second ADA Transfer**).

**Particulars**

- i. NULIS MySuper Transition Plan dated 22 May 2017 – NAB.005.734.0001 at 0013.

58. With effect from 22 May 2017, NULIS approved a MySuper Transition Plan in respect of the NAB ADAs.

#### **Particulars**

- i. NULIS MySuper Transition Plan dated 22 May 2017 – NAB.005.734.0001 at 0001.

### **P. CONFLICTING INTERESTS**

#### **Member fees and NAB Group revenue**

59. After the ADA Transfers of NAB ADAs, the value of the fees charged by NULIS and/or National Wealth Management Services Limited to most NAB ADA Members in respect of investment amounts transferred into NULIS MySuper was less than the value of the fees charged by:

- (a) MLC Nominees and/or MLC Limited, before 1 July 2016, and
- (b) NULIS and/or MLC Limited and/or National Wealth Management Services Limited, after 1 July 2016;

in respect of the NAB ADAs of those NAB ADA Members before the ADA Transfers.

60. After the ADA Transfers of NAB ADAs, the revenue derived by the NAB Group in respect of most NAB ADAs declined.

#### **Member fees and grandfathered ~~trailing~~ commissions**

61. After the ADA Transfers of NAB ADAs, Conflicted Remuneration earned by Conflicted Financial Advisers, including NAB Conflicted Financial Advisers, in respect of NAB ADAs which became the subject of the ADA Transfers, ceased.
62. After the ADA Transfers of NAB ADAs, fees charged to NAB ADA Members in respect of Conflicted Remuneration in relation to NAB ADAs which became the subject of the ADA Transfers, ceased.

## Q. CONTRAVENTIONS OF TRUSTEE COVENANTS

### Contraventions of Care and Skill Covenants

63. Where the outcome of the Promotion of Financial Interests Determination showed that it was in the financial interests of NAB ADA Members individually or as a class for ADA Transfers to take place as soon as reasonably practicable, a prudent trustee:

- (a) exercising the same degree of care, skill and diligence as an ordinary prudent person would exercise in dealing with property of another for whom the person felt morally bound to provide; and/or
- (b) in the position of MLC Nominees, before 1 July 2016, and NULIS, after 1 July 2016, whose profession, business or employment is or includes acting as a trustee of a Superannuation Entity and investing money on behalf of beneficiaries of the Superannuation Entity, in relation to an entity of which it is trustee and on behalf of the beneficiaries of which it makes investments;

would have made the relevant ADA Transfers as soon as reasonably practicable.

64. By failing to effect any ADA Transfers while it was trustee of TUSS, in circumstances where:

- (a) by a date in December 2012, MLC Nominees had prepared an initial MySuper Transition Plan;
- (b1) by a date in 2013, MLC Nominees had made an election in respect of its proposed MySuper Product within TUSS such that the Conflicted Remuneration Obligation applied to it;
- (b) by 13 December 2012, the Board of MLC Nominees had approved the initial MySuper Transition Plan;
- (c) by a date in September 2013, MLC Nominees had received Authority from APRA to offer a MySuper Product within TUSS;
- (d) by at least 29 November 2013, MLC Nominees had established MLC MySuper as a MySuper Product in TUSS;
- (e) by at least 30 September 2013, MLC Nominees had identified all members with a NAB ADA and the value of each NAB ADA;
- (f) by at least 28 October 2013, MLC Nominees had reported to APRA the NAB ADAs that had been identified by 30 September 2013;
- (g) by at least 5 December 2013, MLC Nominees had made a Suitability Determination in respect of MLC MySuper, had made a Promotion of Financial Interests Determination

in respect of MLC MySuper; and/or determined that MLC MySuper was the product into which it would make ADA Transfers of NAB ADAs;

- (h) by a date in July 2014, MLC Nominees had determined to transition NAB ADAs to Transition Investment Options; and/or
- (i) by a date in June 2015, MLC Nominees had segregated the majority of the assets attributable to NAB ADAs within Transition Investment Options;

MLC Nominees failed to effect the First and Second ADA Transfers as soon as reasonably practicable.

65. In the premises, by the acts and omissions and in the circumstances pleaded in paragraph 64 above, separately or in any combination, MLC Nominees contravened the Pre-2013 Care and Skill Covenant and the Care and Skill Covenant.

#### Particulars

- i. The best particulars that the Plaintiffs can provide at present are that MLC Nominees contravened the Pre-2013 Care and Skill Covenant on and from 10 April 2013, being the date on which MLC Nominees approved an amended MySuper Transition Plan, and the Care and Skill Covenant after 30 June 2013.
- ii. Further particulars may be provided after discovery and expert evidence.

66. By failing to effect the ADA Transfers until on or about 3 December 2016 and on or about 25 March 2017, in circumstances where:

- (a) by the date of the Successor Fund Transfer on 1 July 2016, the underlying investment strategy and asset allocation in the Transition Investment Options were each substantially the same as that in MLC MySuper; and
- (b) the underlying investment strategy and asset allocation in MLC MySuper was at all material times the same as that in NULIS MySuper;

NULIS failed to effect the First and Second ADA Transfers as soon as reasonably practicable.

67. In the premises, by the acts and omissions and in the circumstances pleaded in paragraph 66 above, NULIS contravened ~~the Pre-2013 Care and Skill Covenant~~ and the Care and Skill Covenant.

**Particulars**

- i. The best particulars that the Plaintiffs can provide at present are that by no later than 3 December 2016, NULIS had contravened the Care and Skill Covenant.
- ii. Further particulars may be provided after discovery and expert evidence.

**Contraventions of Best Interests Covenants**

68. Where the outcome of the Promotion of Financial Interests Determination showed that it was in the financial interests of NAB ADA Members individually or as a class for ADA Transfers to take place as soon as reasonably practicable, a trustee of a Superannuation Entity:
- (a) performing the trustee's duties and exercising the trustee's powers in the best interests of members of the Superannuation Entity; and/or
  - (b) ensuring that the trustee's duties are performed and the trustee's powers are exercised in the best interests of members of the Superannuation Entity;
- would have made the relevant ADA Transfers as soon as reasonably practicable.
69. In the premises, by the acts and omissions and in the circumstances pleaded in paragraph 64 above, separately or in any combination, MLC Nominees contravened the Pre-2013 Best Interests Covenant and the Best Interests Covenant.

**Particulars**

- i. The best particulars that the Plaintiffs can provide at present are that MLC Nominees contravened the Pre-2013 Best Interests Covenant on and from 10 April 2013, being the date on which MLC Nominees approved an amended MySuper Transition Plan, and the Best Interests Covenant after 30 June 2013.
- ii. Further particulars may be provided after discovery and expert evidence.

70. In the premises, by the acts and omissions and in the circumstances pleaded in paragraph 66 above, separately or in any combination, NULIS contravened ~~the Pre-2013 Best Interests Covenant~~ and the Best Interests Covenant.

**Particulars**

- i. The best particulars that the Plaintiffs can provide at present are that by no later than 3 December 2016, NULIS had contravened the Care and Skill Covenant.

ii. Further particulars may be provided after discovery and expert evidence

**Contraventions of No Conflicts Covenant**

71. For the reasons set out in paragraphs 59 and 60 above, there was a conflict between:
- (a) the interests of most NAB ADA Members who would be charged lower fees if the ADA Transfers occurred earlier; and
  - (b) the interests of the NAB Group whose revenue would decline if the ADA Transfers occurred earlier;
- (the **Revenue Conflict**).
72. For the reasons set out in paragraphs 61 and 62 above, there was a conflict between:
- (a) the interests of NAB ADA Members who would be charged less fees in respect of Conflicted Remuneration if the ADA Transfers occurred earlier; and
  - (b) the interests of Conflicted Financial Advisers, including NAB Conflicted Financial Advisers, if the ADA Transfers occurred earlier;
- (the ~~Trailing~~ **Commission Conflict**).

**Particulars**

The interests of Conflicted Financial Advisers would be adversely affected if an ADA Transfer occurred earlier as:

- i. The NAB Group would have less time to encourage NAB ADA Members to provide a Retention Direction;
  - ii. Conflicted Financial Advisers, including NAB Conflicted Financial Advisers, would have less time to encourage NAB ADA Members to provide a Retention Direction; and/or
  - iii. in respect of investments for which no direction was received from a NAB ADA member, Conflicted Financial Advisers, including NAB Conflicted Financial Advisers, would cease to receive Conflicted Remuneration earlier.
73. In the circumstances of the Revenue Conflict and/or the ~~Trailing~~ **Commission Conflict**, where the outcome of the Promotion of Financial Interests Determination showed that it was in the financial interests of NAB ADA Members as a class for ADA Transfers to take place as soon as reasonably practicable, a trustee:
- (a) giving priority to the duties to and interests of the beneficiaries over the duties to and interests of other persons;



- (b) ensuring that the duties to the beneficiaries are met despite any conflict with duties to and interests of other persons;
- (c) ensuring that the interests of the beneficiaries are not adversely affected by the conflict; and
- (d) complying with the prudential standards in relation to conflicts;

would have made the relevant ADA Transfers as soon as reasonably practicable.

### Particulars

- i. From its commencement on 1 July 2013, Prudential Standard SPS 521 - Conflicts of Interest (SPS 521) relevantly provided that a trustee that was an RSE Licensee was required to have frameworks, policies, controls and processes which, amongst other things, ensured that it:
  - a. took all reasonably practicable actions to ensure that all potential and actual conflicts in its business operations were avoided or prudently managed;
  - b. provided reasonable assurance that all conflicts were being clearly identified, avoided or prudently managed;
  - c. avoided conflicts where it was required to do so;
  - d. managed a conflict in accordance with the requirements to give priority to the duties to, and interests of, beneficiaries in sections 52(2)(d) of the SIS Act;
  - e. recorded in the minutes of Board, board committee and other relevant meetings details of each conflict identified and the action taken to avoid or manage this conflict.

74. In the circumstances of the Revenue Conflict, by its acts and omissions and in the circumstances set out in paragraphs 64 above, separately or in any combination, MLC Nominees failed to effect ADA Transfers as soon as reasonably practicable.

75. In the premises, MLC Nominees contravened the No Conflicts Covenant by failing to:

- (a) give priority to the duties to and interests of NAB ADA Members over the interests of the NAB Group and/or its own interests;
- (b) ensure that the duties to NAB ADA Members were met despite the Revenue Conflict;

(c) ensure that the interests of NAB ADA Members were not adversely affected by the Revenue Conflict; and/or

~~(b)~~(d) comply with the prudential standards that applied in the circumstances of the Revenue Conflict.

#### **Particulars**

i. The best particulars that the Plaintiffs can provide at present are:

a. to refer to and repeat the particulars at paragraph 73; and

b. that by no later than 30 June 2016, MLC Nominees had contravened the No Conflicts Covenant.

ii. Further particulars may be provided after discovery and expert evidence.

76. In the circumstances of the Revenue Conflict, by its acts and omissions and in the circumstances set out in paragraphs 66 above, separately or in any combination, NULIS failed to effect the ADA Transfers as soon as reasonably practicable.

77. In the premises, NULIS contravened the No Conflicts Covenant by failing to:

(a) give priority to the duties to and interests of NAB ADA Members over the interests of the NAB Group and/or its own interests;

(b) ensure that the duties to NAB ADA Members were met despite the Revenue Conflict; ~~and/or~~

(c) ensure that the interests of NAB ADA Members were not adversely affected by the Revenue Conflict; and/or

~~(e)~~(d) comply with the prudential standards that applied that applied in the circumstances of the Revenue Conflict.

#### **Particulars**

i. The best particulars that the Plaintiffs can provide at present are:

a. to refer to and repeat the particulars at paragraph 73; and

b. that by no later than 3 December 2016, NULIS had contravened the No Conflicts Covenant.

ii. Further particulars may be provided after discovery and expert evidence.

78. In the circumstances of the ~~Trailing~~-Commission Conflict, by its acts and omissions and in the circumstances set out in paragraphs 64 above, separately or in any combination, MLC Nominees failed to effect ADA Transfers as soon as reasonably practicable.
79. In the premises, MLC Nominees contravened the No Conflicts Covenant by failing to:
- (a) give priority to the duties to and interests of NAB ADA Members over the interests of the NAB Group, Conflicted Financial Advisers, NAB Conflicted Financial Advisers and/or its own interests;
  - (b) ensure that the duties to NAB ADA Members were met despite the ~~Trailing~~ Commission Conflict; ~~and/or~~
  - (c) ensure that the interests of NAB ADA Members were not adversely affected by the ~~Trailing~~-Commission Conflict; and/or
  - ~~(e)~~(d) comply with the prudential standards that applied in the circumstances of the Commission Conflict.

#### Particulars

- i. The best particulars that the Plaintiffs can provide at present are:
  - a. to refer to and repeat the particulars at paragraph 73; and
  - b. that by no later than 30 June 2016, MLC Nominees had contravened the No Conflicts Covenant.
- ii. Further particulars may be provided after discovery and expert evidence.

80. In the circumstances of the ~~Trailing~~-Commission Conflict, by its acts and omissions and in the circumstances set out in paragraphs 66 above, separately or in any combination, NULIS failed to effect ADA Transfers as soon as reasonably practicable.
81. In the premises, NULIS contravened the No Conflicts Covenant by failing to:
- (a) give priority to the duties to and interests of NAB ADA Members over the interests of the NAB Group, Conflicted Financial Advisers, NAB Conflicted Financial Advisers and/or its own interests;
  - (b) ensure that the duties to NAB ADA Members were met despite the ~~Trailing~~ Commission Conflict; ~~and/or~~
  - (c) ensure that the interests of NAB ADA Members were not adversely affected by the ~~Trailing~~-Commission Conflict; and/or

(e)(d) comply with the prudential standards that applied in the circumstances of the Commission Conflict.

**Particulars**

- i. The best particulars that the Plaintiffs can provide at present are:
  - a. to refer to and repeat the particulars at paragraph 73; and
  - b. that by no later than 3 December 2016, NULIS had contravened the No Conflicts Covenant.
- ii. Further particulars may be provided after discovery and expert evidence.

**R. BREACHES OF GENERAL LAW OBLIGATIONS**

82. Further or in the alternative, in respect of the contraventions of covenants set out in section Q above:

- (a) by engaging in conduct giving rise to any or all of the contraventions, MLC Nominees breached the Implied Terms of the TUSS Trust Deed;
- (b) by engaging in conduct giving rise to any or all of the contraventions, MLC Nominees breached the Best Interests Duty;
- (c) by engaging in conduct giving rise to any or all of the contraventions, MLC Nominees breached the Duty of Prudent Management;
- (d) by engaging in conduct giving rise to any or all of the contraventions of the No Conflicts Covenant, MLC Nominees breached the General Law Conflicts Duty; and/or

**Particulars**

- i. The best particulars that the Plaintiffs can provide at present are that by no later than 30 June 2016, MLC Nominees had contravened the general law obligations listed in 82(a) to (d) above.
- ii. Further particulars may be provided after discovery and expert evidence.

(e) by:

- (i) engaging in conduct giving rise to any or all of the contraventions, MLC Nominees has earned profits by charging higher fees than it otherwise would have;

**Particulars**

- i. The matters set out in paragraph 59 above.

- (ii) further or in the alternative, engaging in conduct giving rise to any or all of the contraventions, MLC Nominees has enabled the NAB Group to earn profits by reason of it and/or MLC Limited charging higher fees;

**Particulars**

- i. The relationship between MLC Nominees and the NAB Group as pleaded at paragraph 7 above.
- ii. The matters set out in paragraph 60 above.
- (iii) further or in the alternative, engaging in conduct giving rise to any or all of the contraventions, MLC Nominees has enabled Conflicted Financial Advisers, including NAB Conflicted Financial Advisers, to earn profits by receiving Conflicted Remuneration,

**Particulars**

- A. The matters set out in paragraph 61 above.

and thereby breached the General Law Profits Duty.

83. Further or in the alternative, in respect of the contraventions of covenants set out in section Q above:

- (a) by engaging in conduct giving rise to any or all of the contraventions, NULIS breached the Implied Terms of the MLC Super Trust Deed;
- (b) by engaging in conduct giving rise to any or all of the contraventions, NULIS breached the Best Interests Duty;
- (c) by engaging in conduct giving rise to any or all of the contraventions, NULIS breached the Duty of Prudent Management;
- (d) by engaging in conduct giving rise to any or all of the contraventions of the No Conflicts Covenant, NULIS breached the General Law Conflicts Duty; and/or

**Particulars**

- i. The best particulars that the Plaintiffs can provide at present are that by no later than 3 December 2016, NULIS had contravened the general law obligations listed in 83(a) to (d) above.
- ii. Further particulars may be provided after discovery and expert evidence.
- (e) by:

- (i) engaging in conduct giving rise to any or all of the contraventions, NULIS has earned profits by charging higher fees than it otherwise would have;

**Particulars**

- ii. The matters set out in paragraph 59 above.
- (ii) further or in the alternative, engaging in conduct giving rise to any or all of the contraventions, NULIS has enabled the NAB Group to earn profits by reason of it and/or MLC Limited and/or National Wealth Management Services Limited charging higher fees;

**Particulars**

- iii. The relationship between NULIS and the NAB Group as pleaded at paragraph 7 above.
- iv. The matters set out in paragraph 60 above.
- (iii) further or in the alternative, engaging in conduct giving rise to any or all of the contraventions, NULIS has enabled Conflicted Financial Advisers, including NAB Conflicted Financial Advisers, to earn profits by receiving Conflicted Remuneration,

**Particulars**

- A. The matters set out in paragraph 61 above.

and thereby breached the General Law Profits Duty.

**R1. CAUSATION OF LOSS AND DAMAGE**

83A. At all material times and for so long as they remained members of TUSS and/or the MLC Super Fund, NAB ADA Members each had:

- (a) the NAB ADA Rights in respect of their NAB ADA; and
- (b) the right to have MLC Nominees, prior to 1 July 2016, and NULIS, from 1 July 2016, deal with their NAB ADA consistently with the NAB ADA Obligations.

83B. At all material times from the date of the First ADA Transfer, NAB ADA Members who had their NAB ADAs transferred in the First ADA Transfer had, in addition to the rights set out in paragraph 83A above, the right to have NULIS deal with their NAB ADA consistently with the Conflicted Remuneration Obligation, the Beneficial MySuper Obligations, the MySuper Fee Obligations, the MySuper Investment Fee Obligations, and the MySuper Financial Interests Obligations.

83C. At all material times from the date of the Second ADA Transfer, NAB ADA Members who had their NAB ADAs transferred in the Second ADA Transfer had, in addition to the rights set out in paragraph 83A above, the right to have NULIS deal with their NAB ADA consistently with the Conflicted Remuneration Obligation, Beneficial MySuper Obligations, the MySuper Fee Obligations, the MySuper Investment Fee Obligations, and the MySuper Financial Interests Obligations.

83D. But for:

(a) one or more of the contraventions of trustee covenants alleged in Section Q above; and/or

(b) one or more of the breaches of general law duties alleged in Section R above,

NAB ADA Members would have had their NAB ADAs transferred to a MySuper product as soon as reasonably practicable and before the First ADA Transfer and the Second ADA Transfer.

83E. By reason of the failure to transfer the NAB ADAs as soon as reasonably practicable, NAB ADA Members whose NAB ADA was transferred in the First ADA Transfer were denied the right to have their NAB ADA dealt with by MLC Nominees, before 1 July 2016, and NULIS, from 1 July 2016, consistently with the Conflicted Remuneration Obligation, Beneficial MySuper Obligations, the MySuper Fee Obligations, the MySuper Investment Fee Obligations, and the MySuper Financial Interests Obligations, from the date on which the First ADA Transfer ought to have occurred until the date of the First ADA Transfer.

83F. By reason of the failure to transfer the NAB ADAs as soon as reasonably practicable, NAB ADA Members whose NAB ADA was transferred in the Second ADA Transfer were denied the right to have their NAB ADA dealt with by MLC Nominees, before 1 July 2016, and NULIS, from 1 July 2016, consistently with the Conflicted Remuneration Obligation, Beneficial MySuper Obligations, the MySuper Fee Obligations, the MySuper Investment Fee Obligations, and the MySuper Financial Interests Obligations, from the date on which the Second ADA Transfer ought to have occurred until the date of the Second ADA Transfer.

83G. The denial of rights referred to in paragraphs 83E and 83F above constituted loss and damage to the NAB ADA Members referred to in those paragraphs.

83H. Further, the denial of rights referred to in paragraphs 83E and 83F resulted in:

(a) additional fees and commissions being wrongly deducted from NAB ADA Members' NAB Accounts during the period in which MLC Nominees and NULIS failed, by reason

of one or more of the contraventions alleged in Sections Q and/or R above, to transfer the member's NAB ADA to a MySuper product (**Wrongful Delay Period**);

(b) lower investment returns being achieved in respect of NAB ADA Members' NAB Accounts during the Wrongful Delay Period; and

(c) loss or damage consequential to the loss or damage in paragraphs (a) and (b),

and therefore a reduction in the credits and an increase in the debits that MLC Nominees and/or NULIS attributed to each NAB Account and a consequent diminishment or depletion of the Fund which was there to meet such account balances.

### **Category 1 Group Members – Former NAB ADA Members**

83I. Group Members who were NAB ADA Members, and as at the date of judgment, were no longer a member of the MLC Super Fund and have received a payment in respect of the Group Member's interest attributable to a NAB ADA (**Category 1 Group Members**), suffered the loss and damage pleaded in paragraphs 83E to 83H

### **Category 2 Group Members – Current NAB ADA Members**

83J. Group Members who were NAB ADA Members, and as at the date of judgment, remain a member of the MLC Super Fund and have satisfied a Condition of Release with nil cashing restrictions (**Category 2 Group Members**), suffered the loss and damage pleaded in paragraphs 83E to 83H.

83K. Group Members who were NAB ADA Members, and as at the date of judgment, remain a member of the MLC Super Fund and have satisfied a Condition of Release (other than a Condition of Release with nil cashing restrictions) (also **Category 2 Group Members**), suffered the loss and damage pleaded in paragraphs 83E to 83H.

83L. Group Members who were NAB ADA Members, and as at the date of judgment, remain a member of the MLC Super Fund and have not satisfied a Condition of Release (also **Category 2 Group Members**), suffered the loss and damage pleaded in paragraphs 83E to 83H.

### **Category 3 Group Members – Transferred unrestricted former NAB ADA Members**

83M. Group Members who were NAB ADA Members, and as at the date of judgment, no longer have an interest in the MLC Super Fund, having rolled over or transferred such interest into another superannuation fund and having satisfied a Condition of Release with nil cashing restrictions (**Category 3 Group Members**), suffered the loss and damage pleaded in paragraphs 83E to 83H.



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

83N. Group Members who were NAB ADA Members, and as at the date of judgment, no longer have an interest in the MLC Super Fund, having rolled over or transferred such interest into another superannuation fund and having satisfied a Condition of Release (other than a Condition of Release with nil cashing restrictions) (Category 4 Group Members), suffered the loss and damage pleaded in paragraphs 83E to 83H.

83O. Group Members who were NAB ADA Members, and as at the date of judgment, no longer have an interest in the MLC Super Fund, having rolled over or transferred such interest into another superannuation fund and have not satisfied a Condition of Release (also Category 4 Group Members), suffered the loss and damage pleaded in paragraphs 83E to 83H.

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

83P. The loss or damage pleaded at paragraphs 83I to 83O above was suffered by reason of one or more of the contraventions pleaded in Section Q, and/or one or more of the breaches of general law obligations pleaded in Section R.

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

83Q. Further, Group Members referred to in paragraph 3(b) above (Category 5 Group Members), suffered loss and damage by reason that the amount or interest which the Group Member received from the deceased NAB ADA Member on inheritance, was less than it would have been had the deceased NAB ADA Member, prior to their death, not suffered the loss and damage as set out in paragraphs 83E to 83H.

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

83R. Group Members referred to in paragraph 3(c) above who have satisfied a Condition of Release with nil cashing restrictions (Category 6 Group Members), suffered loss and damage by reason that the amount or interest which the Group Member received from the spousal NAB ADA Member on transfer under order, settlement or agreement under the Family Law Act, was less than it would have been had the spousal NAB ADA Member, prior to that transfer, not suffered the loss and damage as set out in paragraphs 83E to 83H.

83S. Group Members referred to in paragraph 3(c) above who have satisfied a Condition of Release (other than a Condition of Release with nil cashing restriction) (also Category 6 Group Members), suffered loss and damage by reason that the amount or interest which the Group Member received from the spousal NAB ADA Member on transfer under order, settlement or agreement under the Family Law Act, was less than it would have been had

the spousal NAB ADA Member, prior to that transfer, not suffered the loss and damage as set out in paragraphs 83E to 83H.

83T. Group Members referred to in paragraph 3(c) above who have not satisfied a Condition of Release (also **Category 6 Group Members**), suffered loss and damage by reason that the amount or interest which the Group Member received from the spousal NAB ADA Member on transfer under order, settlement or agreement under the Family Law Act, was less than it would have been had the spousal NAB ADA Member, prior to that transfer, not suffered the loss and damage as set out in paragraphs 83E to 83H.

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

83U. The loss or damage pleaded at paragraphs 83Q to 83T above was suffered by reason of one or more of the contraventions pleaded in Section Q, and/or one or more of the breaches of general law obligations pleaded in Section R.

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

### **Harm to the First Plaintiff**

84. The First Plaintiff:

- (a) was born on 6 November 1961;
- (b) from at least 1 July 2014, had a NAB ADA invested in the MLC Horizon 4 – Balanced Portfolio investment option;
- (c) from at least 30 June 2015, had a NAB ADA invested in a Transition Investment Option named TF Transition – MLC Horizon 4;
- (d) was from 1 July 2016, a member of the MLC Super Fund;
- (e) as at 1 July 2016, had a NAB ADA invested in a Transition Investment Option within the MLC Super Fund named TF Transition – MLC Horizon 4; and
- (f) did not, at any material time, provide a ~~direction~~ Investment Direction to MLC Nominees or NULIS as to the investment of his NAB ADA.

85. The First Plaintiff's NAB ADA was transferred as part of the First ADA Transfer or the Second ADA Transfer.

85A. By reason of the matters pleaded at paragraphs 84 and 85 above, the matters pleaded at paragraphs 83A and 83B or 83C above applied to the First Plaintiff as a NAB ADA Member and the First Plaintiff's ADA as an NAB ADA.

85B. But for:

(a) one or more of the contraventions of trustee covenants alleged in Section Q above; and/or

(b) one or more of the breaches of general law duties alleged in Section R above,

the First Plaintiff's ADA would have been transferred into a MySuper product soon as reasonably practicable and before the First ADA Transfer.

85C. By reason of the failure to transfer the First Plaintiff's ADA as soon as reasonably practicable, the First Plaintiff was denied the right to have the First Plaintiff's ADA dealt with by MLC Nominees, before 1 July 2016, and NULIS, from 1 July 2016, consistently with the Conflicted Remuneration Obligation, the Beneficial MySuper Obligations, the MySuper Fee Obligations, the MySuper Investment Fee Obligations, and the MySuper Financial Interests Obligations, from the date on which the First ADA Transfer ought to have occurred until the date of the First ADA Transfer.

85D. The denial of the rights referred to in paragraph 85C above constituted loss and damage to the First Plaintiff.

85E. The denial of rights referred to in paragraphs 85C and 85D also resulted in:

(a) additional fees and commissions being wrongfully deducted from, and/or lower investment returns being achieved in respect of, the First Plaintiff's NAB Account during the Wrongful Delay Period; and

(b) loss consequential on (a) above,

and therefore a reduction in the credits and an increase in the debits that MLC Nominees /or NULIS attributed to the First Plaintiff's ADA Account and a consequent diminishment or depletion of the Fund which was there to meet such account balance.

85F. From a date no later than 30 June 2017:

(a) the majority of the First Plaintiff's NAB ADA was and is comprised of unrestricted non-preserved benefits; and

(b) the remainder of the First Plaintiff's NAB ADA was and is comprised of preserved benefits.

**Particulars**

i. The First Plaintiff's MLC MasterKey superannuation statements dated July 2015, July 2016, September 2017, July 2018, July 2019 and July 2020, the balances of which appear in the table below.

<b><u>Year End</u></b>	<b><u>Preserved Benefits</u></b>	<b><u>Unrestricted non-preserved benefits</u></b>
<b><u>30 June 2015</u></b>	<u>\$154,570.69</u>	<u>Nil</u>
<b><u>30 June 2016</u></b>	<u>\$155,663.36</u>	<u>Nil</u>
<b><u>30 June 2017</u></b>	<u>\$1,392.54</u>	<u>\$168,384.74</u>
<b><u>30 June 2018</u></b>	<u>\$14,357.10</u>	<u>\$168,384.74</u>
<b><u>30 June 2019</u></b>	<u>\$30,323.08</u>	<u>\$168,384.74</u>
<b><u>30 June 2020</u></b>	<u>\$26,596.92</u>	<u>\$168,384.74</u>

85G. At all material times from a date no later than 30 June 2017, the First Plaintiff could have (but has not) cashed that part of his NAB ADA that was and is comprised of unrestricted non-preserved benefits.

85H. By reason of the matters alleged at paragraph 85G above, at all material times from a date no later than 30 June 2017, the First Plaintiff had and has a present right to receive payment in respect of that part of his NAB ADA that was comprised of unrestricted non-preserved benefits.

85I. By reason of the matters pleaded at paragraphs 85C to 85D above, and the consequences pleaded in paragraph 85E, the First Plaintiff suffered loss or damage.

86. In the premises, each of the contraventions of the SIS Act pleaded in section Q above, separately or in any combination, have caused and continue to cause the First Plaintiff, directly and consequentially, loss and damage.

**Particulars**

- ~~i. The contraventions set out in section Q above have caused:~~
- ~~a. the fees and commissions charged in respect of the Plaintiff's NAB ADA to have been higher;~~
  - ~~b. the amount of investment returns in respect of the Plaintiff's NAB ADA to have been lower;~~
  - ~~c. the Plaintiff to have suffered loss or damage consequential to the loss or damage particularised in paragraphs a and b above; and/or~~
  - ~~d. a reduction in the amount which the Plaintiff can expect to receive from his interest in TUSS and/or the MLC Super Fund.~~

87. Further or ~~alternatively~~ in the alternative to the matters pleaded at paragraph 86 above, each of the breaches of general law obligations by MLC Nominees and NULIS set out in section R above, separately or in any combination, have caused and continue to cause the First Plaintiff, directly and consequentially, loss and damage.

**Particulars**

- ~~i. The breaches set out in section R above have caused:~~
- ~~a. the fees and commissions charged in respect of the Plaintiff's NAB ADA to have been higher;~~
  - ~~b. the amount of investment returns in respect of the Plaintiff's NAB ADA to have been lower;~~
  - ~~c. the Plaintiff to have suffered loss or damage consequential to the loss or damage particularised in subparagraphs a and b above; and/or~~
  - ~~d. a reduction in the amount which the Plaintiff can expect to receive from his interest in TUSS and/or the MLC Super Fund.~~

87A. In the premises, the amount of loss or damage suffered by the First Plaintiff is the amount pleaded in subparagraphs 89A(a), (b) or (c) below (whichever is applicable at the time of determination of the First Plaintiff's claim).

**Harm to the Second Plaintiff**

87B. The Second Plaintiff

(a) was born on 4 January 1991;

- (b) from at least 30 June 2013, had a NAB ADA invested in the MLC Horizon 5 – Growth Portfolio investment option;
- (c) from at least 1 July 2015, had a NAB ADA invested in a Transition Investment Option named TF Transition – MLC Horizon 5;
- (d) was from 1 July 2016, a member of the MLC Super Fund;
- (e) as at 1 July 2016, had a NAB ADA invested in a Transition Investment Option within the MLC Super Fund named TF Transition – MLC Horizon 5; and
- (f) did not, at any material time, provide an Investment Direction to MLC Nominees or NULIS as to the investment of his NAB ADA.

87C. The Second Plaintiff's NAB ADA was transferred as part of the First ADA Transfer or the Second ADA Transfer.

87D. By reason of the matters pleaded at paragraphs 87B and 87C above, the matters pleaded at paragraphs 83A and 83B or 83C above applied to the Second Plaintiff as a NAB ADA Member and the Second Plaintiff's ADA as an NAB ADA.

87E. But for:

- (a) one or more of the contraventions of trustee covenants alleged in Section Q above; and/or
- (b) one or more of the breaches of general law duties alleged in Section R above,

the Second Plaintiff's ADA would have been transferred into a MySuper product as soon as reasonably practicable and before the First ADA Transfer and the Second ADA transfer.

85F. By reason of the failure to transfer the Second Plaintiff's ADA as soon as reasonably practicable, the Second Plaintiff was denied the right to have the Second Plaintiff's ADA dealt with by MLC Nominees, before 1 July 2016, and NULIS, from 1 July 2016, consistently with the Conflicted Remuneration Obligation, the Beneficial MySuper Obligations, the MySuper Fee Obligations, the MySuper Investment Fee Obligations, and the MySuper Financial Interests Obligations, from the date on which the First ADA Transfer and Second ADA Transfer ought to have occurred until the date of the First ADA Transfer or Second ADA Transfer.

87G. The denial of the rights referred to in paragraph 85F above constituted loss and damage to the Second Plaintiff.

87H. The denial of rights referred to in paragraphs 85F and 85G also resulted in:

- (a) additional fees and commissions being wrongfully deducted from, and/or lower investment returns being achieved in respect of, the Second Plaintiff's NAB Account during the Wrongful Delay Period; and
- (b) loss consequential on (a) above in that, during the period after the Second Plaintiff's NAB ADA had been transferred to MySuper, the Second Plaintiff had that much less funds than he ought to have had in the MySuper Product and earning the returns under that product,

and therefore a reduction in the credits and an increase in the debits that MLC Nominees /or NULIS attributed to the Second Plaintiff's ADA Account and a consequent diminishment or depletion of the Fund which was there to meet such account balance.

87I Since 6 December 2012 the Second Plaintiff's NAB ADA has been comprised of preserved benefits.

#### **Particulars**

- i. The Second Plaintiff's MLC MasterKey superannuation statements dated August 2013, August 2014, July 2015, July 2016, July 2017, July 2018, July 2019 and July 2020, the balances of which appear in the table below.

<b><u>Year End</u></b>	<b><u>Preserved Benefits</u></b>
<b><u>30 June 2013</u></b>	<b><u>\$9,622.98</u></b>
<b><u>30 June 2014</u></b>	<b><u>\$14,995.37</u></b>
<b><u>30 June 2015</u></b>	<b><u>\$21,004.93</u></b>
<b><u>30 June 2016</u></b>	<b><u>\$25,890.78</u></b>
<b><u>30 June 2017</u></b>	<b><u>\$33,884.05</u></b>
<b><u>30 June 2018</u></b>	<b><u>\$42,443.02</u></b>
<b><u>30 June 2019</u></b>	<b><u>\$51,628.65</u></b>
<b><u>30 June 2020</u></b>	<b><u>\$56,618.17</u></b>

87J By reason of the matters pleaded at paragraphs 87F to 87G above, and the consequences pleaded in paragraph 87H, the Second Plaintiff suffered loss or damage.

87K. In the premises, each of the contraventions of the SIS Act pleaded in section Q above, separately or in any combination, have caused and continue to cause the Second Plaintiff, directly and consequentially, loss and damage.

87L. Further or in the alternative to the matters pleaded at paragraph 87E above, each of the breaches of general law obligations by MLC Nominees and NULIS set out in section R above, separately or in any combination, have caused and continue to cause the Second Plaintiff, directly and consequentially, loss and damage.

87M. In the premises, the amount of loss or damage suffered by the Second Plaintiff is the amount pleaded in subparagraphs 89A(a), (b) or (c) below (whichever is applicable at the time of determination of the First Plaintiff's claim).

### **Harm to Group Members**

87N. By reason of the matters pleaded at paragraph 3 above, each Group Member either:

(a) was a NAB ADA Member and had a NAB ADA at the time of the contraventions of the SIS Act pleaded in section Q above and the general law breaches pleaded in section R above; or

(b) in the circumstances set out in paragraphs 3(b) or (c) above, received a payment or transfer from a NAB ADA Member who, at the time of the contraventions of the SIS Act pleaded in section Q above and the general law breaches pleaded in section R above, had a NAB ADA.

87O. Each NAB ADA that a Group Member had an interest in or now derives an interest from in the manner pleaded in paragraph 87N above, was affected by the matters and in the manner pleaded at paragraphs 83A to 83U above.

87P. Each NAB ADA Member whose NAB ADA is referred to in paragraph 87O above was affected by the matters and in the manner pleaded at paragraphs 83A to 83U above.

87Q. In the premises:

(a) each Group Member who was a NAB ADA Member at the time of the contraventions of the SIS Act pleaded in section Q above and the general law breaches pleaded in section R above, was affected by the matters and in the manner pleaded at paragraphs 83A to 83P above; and

(b) each Group Member who received a payment or transfer or inheritance from a NAB ADA Member who, at the time of the contraventions of the SIS Act pleaded in section



Q above and the general law breaches pleaded in section R above, had a NAB ADA, was affected by the matters and in the manner pleaded at paragraphs 83A to 83U above, by reason that the money transferred to or received by that Group Member from the NAB Account relating to the NAB ADA was less than it would have been but for the contraventions and/or breaches or combinations of them.

88. By reason of the matters pleaded at paragraph 87Q above, Eeach of the contraventions of the SIS Act pleaded at in-section Q above, separately or in any combination, have caused, and continue to cause, the each Group Members, directly and consequentially, the following loss and or damage:-

Category 1 Group Members

- (a) in the case of a Group Member who, as at the date of judgment, is no longer a member of the MLC Super Fund and has received payment in respect of the member's interest attributable to a NAB ADA, the amount by which the Group Member's receipt had been diminished and such consequential loss as the Group Member suffered thereafter;

Category 2 Group Members

- (b) in the case of a Group Member who was a NAB ADA Member and who, as at the date of judgment, remains a member in the MLC Super Fund and:
- (i) has satisfied a Condition of Release with nil cashing restrictions; or
  - (ii) has satisfied a Condition of Release (other than a Condition of Release with nil cashing restrictions); or
  - (iii) has not satisfied any Condition of Release,

the amount by which that Group Member's interest in the MLC Super Fund has been diminished as at the date of judgment;

Category 3 and Category 4 Group Members

- (c) in the case of a Group Member who was a NAB ADA Member, but who, at the date of judgment, no longer has an interest in the MLC Super Fund, having rolled over or transferred such interest into another superannuation fund, and:
- (i) has satisfied a Condition of Release with nil cashing restrictions; or
  - (ii) has satisfied a Condition of Release (other than a Condition of Release with nil cashing restrictions); or

(iii) has not satisfied any Condition of Release,

the amount by which that Group Member's interest in the other superannuation fund has been diminished as at the date of judgment;

Category 5 Group Members

(d) in the case of a Group Member who was not NAB ADA Member and who received a payment from a deceased NAB ADA Member as referred to at paragraph 3(b) above, the amount by which the Group Member's receipt has been diminished and such consequential loss as the Group Member suffered thereafter;

Category 6 Group Members

(e) in the case of a Group Member who was not a NAB ADA Member and who received a transfer from a spousal NAB ADA Member as referred to at paragraph 3(c) above and, as at the date of judgment:

(i) has satisfied a Condition of Release with nil cashing restrictions; or

(ii) has satisfied a Condition of Release (other than a Condition of Release with nil cashing restrictions); or

(iii) has not satisfied any Condition of Release,

the amount by which that Group Member's transfer has been diminished and such consequential loss as the Group Member suffered thereafter.

**Particulars**

- ~~i. The contraventions set out in section Q above have caused and/or continue to cause:~~
- ~~a. the fees and commissions charged in respect of most NAB ADAs to have been higher;~~
  - ~~b. the investment returns in respect of most NAB ADAs to have been lower;~~
  - ~~c. Group Members to have suffered, and continue to suffer, loss or damage consequential to the loss or damage particularised in subparagraphs a and b above; and/or~~
  - ~~d. a reduction in the amount which Group Members have received or can expect to receive from TUSS and/or the MLC Super Fund.~~

89. Further or alternatively, by reason of the matters pleaded at paragraph 87Q above, each of the breaches of general law obligations set out in section R above, separately or in any combination, have caused, and continue to cause, the Group Members, directly and consequentially, the following loss and damage:-

Category 1 Group Members

(a) in the case of a Group Member who, as at the date of judgment, is no longer a member of the MLC Super Fund and has received payment in respect of the member's interest attributable to a NAB ADA, the amount by which the Group Member's receipt had been diminished and such consequential loss as the Group Member suffered thereafter;

Category 2 Group Members

(b) in the case of a Group Member who was a NAB ADA Member and who, as at the date of judgment, remains a member in the MLC Super Fund and:

(i) has satisfied a Condition of Release with nil cashing restrictions; or

(ii) has satisfied a Condition of Release (other than a Condition of Release with nil cashing restrictions); or

(iii) has not satisfied any Condition of Release,

the amount by which that Group Member's interest in the MLC Super Fund has been diminished as at the date of judgment;

Category 3 and Category 4 Group Members

(c) in the case of a Group Member who was a NAB ADA Member, but who, at the date of judgment, no longer has an interest in the MLC Super Fund, having rolled over or transferred such interest into another superannuation fund, and:

(i) has satisfied a Condition of Release with nil cashing restrictions; or

(ii) has satisfied a Condition of Release (other than a Condition of Release with nil cashing restrictions); or

(iii) has not satisfied any Condition of Release,

the amount by which that Group Member's interest in the other superannuation fund has been diminished as at the date of judgment;

Category 5 Group Members

(d) in the case of a Group Member who was not NAB ADA Member and who received a payment from a deceased NAB ADA Member as referred to at paragraph 3(b) above, the amount by which the Group Member's receipt has been diminished and such consequential loss as the Group Member suffered thereafter;

Category 6 Group Members

(e) in the case of a Group Member who was not a NAB ADA Member and who received a transfer from a spousal NAB ADA Member as referred to at paragraph 3(c) above and, as at the date of judgment:

(i) has satisfied a Condition of Release with nil cashing restrictions; or

(ii) has satisfied a Condition of Release (other than a Condition of Release with nil cashing restrictions); or

(iii) has not satisfied any Condition of Release.

the amount by which that Group Member's transfer has been diminished and such consequential loss as the Group Member suffered thereafter.

**Particulars**

i. — The breaches set out in section R above have caused:

a. ~~the fees and commissions charged in respect of most NAB ADAs to have been higher;~~

b. ~~the amount of investment returns in respect of the most NAB ADAs to have been lower;~~

c. ~~most Group Members' to have suffered loss or damage consequential to the loss or damage particularised in subparagraphs a and b above; and/or~~

~~a reduction in any amount which the Group Members have received or can expect to receive from TUSS and/or the MLC Super Fund.~~

89A. The amount of loss or damage suffered by each Group Member:

Category 1 Group Members

(a) who is no longer a member of the MLC Super Fund and has received payment in respect of the Group Member's interest in the MLC Super Fund, is the difference between the amount of their receipt and amount that they would have received as at the date of their

receipt but for the contraventions alleged in Section Q, separately or in any combination, or the breaches alleged in Section R, separately or in any combination, together with such consequential loss as they suffered thereafter by reason that the money received by the Group Member, for such use as they put it, was less than it would have been but for the contraventions or breaches or combinations of them, grossed up to the extent necessary to account for the application of taxation laws;

Category 2 Group Members

(b) who was a NAB ADA Member and who, as at the date of judgment, holds an interest in the MLC Super Fund, is the difference between the value of their interest in the MLC Super Fund as at the date of judgment and the value that their interest in the MLC Super Fund would have had as at that date but for the contraventions alleged in Section Q, separately or in any combination, or the breaches alleged in Section R, separately or in any combination, grossed up to the extent necessary to account for the application of taxation laws;

Category 3 and 4 Group Members

(c) who was a NAB ADA Member and who, as at the date of judgment, no longer has an interest in the MLC Super Fund, having rolled over or transferred such interest into another superannuation fund, is the difference between the value of their interest in the other superannuation fund as at the date of judgment and the value that their interest in that other superannuation fund would have had as at that date but for the contraventions alleged in Section Q, separately or in any combination, or the breaches alleged in Section R, separately or in any combination, grossed up to the extent necessary to account for the application of taxation laws; and

Category 5 and Category 6 Group Members

(d) who was not a NAB ADA Member and who received a payment or transfer from a NAB ADA Member, is the difference between the amount transferred to or received by that Group Member and the amount that would have been so transferred to or received by that Group Member but for the contraventions alleged in Section Q, separately or in any combination, or the breaches alleged in Section R, separately or in any combination, together with such consequential loss as they suffered thereafter by reason that the money so transferred to or received by the Group Member, for such use as they put it, was less than it would have been but for the contraventions or breaches or combinations of them, grossed up to the extent necessary to account for the application of taxation laws.

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

90. The questions of law or fact common to the claims of the Plaintiffs and the Group Members are:
- (a) Whether MLC Nominees' conduct pleaded in the Amended Statement of Claim contravened a covenant or covenants contained or taken to be contained in the Governing Rules of TUSS.
  - (b) Whether NULIS' conduct pleaded in the Amended Statement of Claim contravened a covenant or covenants contained or taken to be contained in the Governing Rules of the MLC Super Fund.
  - (c) If the answer to question (a) or question (b) is yes, whether the Plaintiffs and Group Members suffered loss or damage by or resulting from each such contravention.
  - (d) Whether MLC Nominees breached the general law duties owed by it to the beneficiaries of TUSS.
  - (e) Whether NULIS breached the general law duties owed by it to the beneficiaries of the MLC Super Fund.
  - (f) If the answer to question (d) or question (e) is yes, whether the Plaintiffs and Group Members suffered loss or damage by or resulting from the breach or breaches of general law duties.
  - (g) Whether the covenants set out in s 52 of the SIS Act are implied terms of the TUSS Trust Deed.
  - (h) Whether the covenants set out in s 52 of the SIS Act are implied terms of the MLC Super Trust Deed.
  - (i) Whether equitable compensation is available for breach of the covenants set out in s 52 of the SIS Act as implied terms of the Trust Deed.
  - (j) What principles are to be applied in assessing any statutory compensation to be paid to the Plaintiffs or Group Members in these proceedings.
  - (k) What principles are to be applied in assessing any equitable compensation to be paid to the Plaintiffs or Group Members in these proceedings.

~~(k)~~(l) Whether an award of damages in an aggregate amount pursuant to s33Z(1)(e) or s33Z(1)(f) of the *Supreme Court Act 1986* (Vic) ought be made, and in what amount.

**AND THE PLAINTIFFS CLAIMS on ~~his~~ their own behalf and on behalf of the Group Members:**

- A. Declarations that MLC Nominees and/or NULIS engaged in each of the contraventions of the SIS Act alleged in section Q of Further the Amended Statement of Claim (**SIS Act Contraventions**).
- B. Declarations that MLC Nominees and/or NULIS engaged in each of the breaches of duties at general law alleged in section R of the Further Amended Statement of Claim (**General Law Breaches**).

**SIS Act Relief**

Recovery of loss and damage – Group Members who are/were NAB ADA Members (Group Member Categories 1 to 4)

C1. Orders, pursuant to and for the purposes of s 55(3) of the SIS Act:

- (a) for the assessment of the amounts of loss and damage as a result of the SIS Act Contraventions suffered by each of the Plaintiffs and Group Members who are or were at any time NAB ADA Members, being:
- (i) additional fees wrongly deducted from NAB ADA Members' NAB Accounts during the Wrongful Delay Period; and/or
- (ii) lower investment returns achieved in respect of NAB ADA Members' NAB Accounts during such Wrongful Delay Period; and
- (iii) loss consequential on (i) and (ii) above in that, during the period after the NAB ADA Member's NAB ADA had been transferred to a MLC MySuper product, the NAB ADA Member had less funds than he or she ought to have had in the MLC MySuper product and earning the returns under that product, such loss to be accounted for by award of pre-judgment interest from the date of such of the ADA Transfers as is applicable to the NAB ADA Member until judgment in these proceeding (or such earlier date as the person ceased to be a member of the MLC Super Fund) or such other measure as the Court considers appropriate; and
- (iv) such additional loss as the person may suffer by application of the taxation laws to any order for compensation or reinstatement of the NAB ADA Member's account balance, to be accounted for by grossing up any such order by such other measure as the Court considers appropriate.

(b) for the recovery of the amounts duly assessed under (a) above by the relevant Group Member from MLC Nominees and/or NULIS by MLC Nominees and/or NULIS paying the amount of loss or damage so assessed in the following manner:

Category 1 Group Members

(i) in respect of any Group Member who, as at the date of judgment, no longer remains a member of the MLC Super Fund, and who, on exiting the MLC Super Fund received his or her benefits in cash, by payment in cash to those Group Members grossed up as per prayer C1(a)(iv) above if appropriate;

Category 2 Group Members

(ii) in respect of any Group Member who remains at the date of judgment a member of the MLC Super Fund, by payment in cash to those Group Members grossed up as per prayer C1(a)(iv) above if appropriate or alternatively, reinstatement of the Group Member's account balance and benefits in the MLC Super Fund grossed up as per prayer C1(a)(iv) above if appropriate;

Category 3 Group Members

(iii) in respect of any Group Member who, as at the date of judgment, no longer remains a member of the MLC Super Fund, and who, on exiting the MLC Super Fund rolled over or transferred his or her benefits to another superannuation fund, and who has received his or her benefits from that other fund (or a subsequent fund) in cash, by payment in cash to those Group Members grossed up as per prayer C1(a)(iv) above if appropriate;

Category 4 Group Members

(iv) in respect of any Group Member who as at the date of judgment no longer remains a member of the MLC Super Fund, who on exiting the MLC Super Fund rolled over or transferred his or her benefits to another superannuation fund, by payment in cash to those Group Members grossed up as per prayer C1(a)(iv) above if appropriate or alternatively, creation of a new account for the Group Member in the MLC Super Fund with an appropriate account balance and benefits grossed up as per prayer C1(a)(iv) above if appropriate.

Recovery of loss and damage – Other Group Members (Group Member Categories 5 and 6)



C2. Orders, pursuant to and for the purposes of s 55(3) of the SIS Act:

- (a) for the assessment of the amounts of loss and damage as a result of the SIS Act Contraventions suffered by each of the Group Members described in paragraph 3(b) above, by reason that the amount which the Group Member received from the deceased NAB ADA Member on inheritance was less than it would have been had the deceased NAB ADA Member, prior to their death, not suffered the loss or damage as set out in prayers C1(a)(i) – (iii) above;
- (b) for the assessment of the amounts of loss or damage as a result of the SIS Act Contraventions suffered by each of the Group Members described in paragraph 3(c) above, by reason that the amount or interest which the Group Member received from the spousal NAB ADA Member on transfer under order, settlement or agreement under the Family Law Act was less than it would have been had the spousal NAB ADA Member, prior to that transfer, not suffered the loss or damage as set out in prayers C1(a)(i) – (iii), together with such additional loss as the Group Member suffers as set out in prayer C1(a)(iv);
- (c) for the recovery of the amounts duly assessed under (a) and (b) by the relevant Group Members from MLC Nominees and/or NULIS by MLC Nominees and/or NULIS paying the amount of loss or damage so assess in the following manner:
  - i. in respect of Group Members described in paragraph 3(b) above, by payment in cash to the Group Member, grossed up as per prayer C1(a)(iv) if appropriate;
  - ii. in respect of Group Members described in paragraph 3(c) above, in such manners set out in prayer C1(b)(i) – (iv) as is appropriate to the circumstances of the case.

~~B.C. An order for statutory compensation pursuant to s 55(3) of the SIS Act that MLC Nominees and/or NULIS pay to the Plaintiff and the Group Members the amount of the loss or damage suffered by them as a result of contraventions of s 55(1) (as in force prior to its repeal on 6 April 2019) or s 54B(1) of the SIS Act by the SIS Act Contraventions.~~

Other SIS Act Relief – All Group Members

C3. Alternatively, or in addition to prayers C1 and C2 above, injunctions pursuant to s 315(1) and s 315(2) of the SIS Act:

- (a) restraining MLC Nominees and/or NULIS from engaging in the SIS Act Contraventions; and

(b) requiring MLC Nominees and/or NULIS to pay the amount of the loss or damage assessed in accordance with prayers C1(a)(i) – (iv) and C2(a) and (b) to the Plaintiffs and Group Members in such of the manners set out in prayers C1(b)(i) – (iv) and C2(c) (i) – (ii) as is appropriate to the circumstances of the case.

C4. Alternatively or in addition to prayers C1, C2 and C3 above, an order that MLC Nominees and/or NULIS pay damages to the Plaintiffs and Group Members in respect of the loss or damage assessed in accordance with prayers C1(a)(i) – (iv) and C2(a) and (b) for contraventions of s 55(1) or 54B(1) by the SIS Act Contraventions pursuant to s 315(11) of the SIS Act; such damages to be paid to the Plaintiffs and Group Members in such of the manners set out in prayers C1(b)(i) – (iv) and C2(c) (i) – (ii) as is appropriate to the circumstances of the case.

### **Equitable Relief**

D. Alternatively to prayers C1 to C4 above, an order in the equitable jurisdiction of the Court: that MLC Nominees and/or NULIS pay the Plaintiff and Group Members equitable compensation for the General Law Breaches.

(a) An order for an account to be taken of the amounts which, by reason of the General Law Breaches, MLC Nominees and/or NULIS wrongly debited or failed to credit to the account balances and benefits of each of the Plaintiffs and Group Members who are or were at any time NAB ADA Members during the Wrongful Delay Period in each of the ways set out in prayers C1(a)(i) – (iv) above;

(b) further or alternatively to (a), an order for an assessment of the loss or damage as a result of the General Law Breaches suffered by each of the Plaintiffs and Group Members who are or were at any time NAB ADA Members, by reason of the matters set out in prayers C1(a)(i) – (iv) above;

(c) an injunction or order for equitable compensation requiring MLC Nominees and/or NULIS to pay such an amount as may be due and owing to the Plaintiffs and Group Members on the taking of the said account, and/or the amount of such loss or damage so assessed, to be paid in the following manner:

#### Category 1 Group Members

(i) in respect of the Group Members who as at the date of judgment no longer remain a member of the MLC Super Fund, and who on exiting the MLC Super Fund received his or her benefits in cash, by payment in cash to the Group Members grossed up as per prayer C1(a)(iv) above if appropriate;

#### Category 2 Group Members

(ii) in respect of any Group Member who remains at the date of judgment a member of the MLC Super Fund, by payment in cash to those Group Members grossed up as per prayer C1(a)(iv) above if appropriate or alternatively, reinstatement of the Group Member's account balance and benefits in the MLC Super Fund grossed up as per prayer C1(a)(iv) above if appropriate;

Category 3 Group Members

(iii) in respect of any Group Member who, as at the date of judgment, no longer remains a member of the MLC Super Fund, and who, on exiting the MLC Super Fund rolled over or transferred his or her benefits to another superannuation fund, and who has received his or her benefits from that other fund (or a subsequent fund) in cash, by payment in cash to those Group Members grossed up as per prayer C1(a)(iv) above if appropriate;

Category 4 Group Members

(iv) in respect of any Group Member who as at the date of judgment no longer remains a member of the MLC Super Fund, who on exiting the MLC Super Fund rolled over or transferred his or her benefits to another superannuation fund, by payment in cash to those Group Members grossed up as per prayer C1(a)(iv) above if appropriate or alternatively, creation of a new account for the Group Member in the MLC Super Fund with an appropriate account balance and benefits grossed up as per prayer C1(a)(iv) above if appropriate.

~~C.E.~~ Alternatively to prayers C and D above, an order in the equitable jurisdiction of the Court that MLC Nominees and/or NULIS pay equitable compensation for the General Law Breaches by  
i. restoring the MLC Super Fund.

Other Equitable relief – Assets of the MLC Super Fund

E1. An order in the equitable jurisdiction of the Court, to the extent necessary to ensure that relief granted under any of paragraphs C1, C2, C3, C4 or D is efficacious, that MLC Nominees and/or NULIS take all necessary steps to ensure that any reinstatement of a Group Member's account balance and benefits in the MLC Super Fund, and any new account created for a Group Member in the MLC Super Fund with an appropriate account balance and benefits pursuant to one or more of prayers C1, C2, C3, C4 or D above, is backed by assets of the MLC Super Fund sufficient to support any such account balance and benefits.

~~D.F.~~ To the extent not otherwise awarded pursuant to one or more of the prayers for relief above, interest pursuant to statute or in the Court's equitable jurisdiction; and

~~E.G.~~ Costs.

Dated: 18 May 2022

*Maurice Blackburn lawyers*

Maurice Blackburn Pty Limited

Lawyer for the Plaintiffs

## SCHEDULE A – Defined Terms

Part 1 – terms defined in this document

<b>Defined term</b>	<b>Definition contained in paragraph</b>
ADA	3(a)
ADA Notice	55
ADA Transfer	20(i)(e)(i)
ADA Transfer Election	19
Adequacy of Scale Determination	33
AFSL	5(d)
APRA	19
Authority	20
<u>Beneficial MySuper Obligations</u>	<u>19B</u>
Best Interests Covenant	13(b)
Best Interests Duty	18(b)
Care and Skill Covenant	13(a)
<u>Category 1 Group Members</u>	<u>83I</u>
<u>Category 2 Group Members</u>	<u>83J, 83K, 83L</u>
<u>Category 3 Group Members</u>	<u>83M</u>
<u>Category 4 Group Members</u>	<u>83N, 83O</u>
<u>Category 5 Group Members</u>	<u>83Q</u>
<u>Category 6 Group Members</u>	<u>83R, 83S, 83T</u>
<u>Commission Conflict</u>	<u>72</u>
<u>Condition of Release</u>	<u>10C</u>
Conflicted Financial Advisers	25
<u>Conflicted Remuneration Obligation</u>	<u>19A</u>
Corporations Act	5(a)
Corporations Regs	21
Default Investment Options	22
Default Member	24
Duty of Prudent Management	18(c)
Duty to Perform the Trust Terms	18(a)
<u>Family Law Act</u>	<u>3(c)</u>
Fees and Costs	21(e)

<b>Defined term</b>	<b>Definition contained in paragraph</b>
First ADA Transfer	56
Fund	8, 9
General Law Breaches	(B), page 54
General Law Conflicts Duty	18(d)
General Law Profits Duty	18(e)
Group Members	3
Implied Terms	17
Investment Direction	<u>10F(a)</u>
Investment Risk	21(d)
MasterKey	3(a)
MLC MySuper	31(a)
MLC Nominees	5
<u>MLC Super Fund Amending Deed Poll</u>	<u>10E(c)(i)</u>
MLC Super Trust Deed	9(a)
MySuper Application	19
MySuper Dashboard	21
<u>MySuper Fee Obligations</u>	<u>19C</u>
<u>MySuper Financial Interest Obligations</u>	<u>19E</u>
<u>MySuper Investment Fee Obligation</u>	<u>19D</u>
NAB	7
NAB ADA	3(a)
<u>NAB Accounts</u>	<u>10E(c)</u>
NAB ADA Member	3(a)
<u>NAB ADA Obligations</u>	<u>10E</u>
<u>NAB ADA Rights</u>	<u>10F</u>
<u>NAB ADA Transfer</u>	<u>10F(d)</u>
NAB Conflicted Financial Advisors	26
NAB Group	7
No Conflicts Covenant	13(c)
NULIS	3
NULIS MySuper	51(a)
<u>Plaintiffs</u>	2
Pre-2013 Best Interests Covenant	12(b)

<b>Defined term</b>	<b>Definition contained in paragraph</b>
Pre-2013 Care and Skill Covenant	12(a)
Pre-2013 Implied Terms	16
Promotion of Financial Interests Determination	20 <del>(e)</del> (d)(ii)
Retention Direction	24(d)
Return	2121(b)
Return Comparison	2121(c)
Return Target	2121(a)
Revenue Conflict	71
Royal Commission	1(b)
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SIS Act	5(c)
SIS Act Contraventions	(A), page 54
<u>SIS Regulations</u>	<u>10B(a)</u>
SPS 410	20
Successor Fund Transfer	44
Suitability Determination	20 <del>(e)</del> (d)(i)
<del>Trailing Commission Conflict</del>	<del>72</del>
Transition Investment Options	40
Transition Plan	20(b)
TUSS	3(a)
<u>TUSS Amending Deed Poll</u>	8(b)
TUSS Trust Deed	8(a)
<u>Wrongful Delay Period</u>	<u>83H(a)</u>

Part 2 – terms defined in relevant legislation

A term in Column 1 used in this <u>Further</u> Amended Statement of Claim means the term within the meaning of the section stated in Column 2 of the Act or Regulations stated in Column 3.		
<b>Column 1</b>	<b>Column 2</b>	<b>Column 3</b>
Accrued Default Amount	20B	SIS Act
Associate	12	SIS Act
Authorised Representative	916A	Corporations Act

Choice Product	10	SIS Act
Conflicted Remuneration	963A	Corporations Act
Financial Services Licensee	761A	Corporations Act
Governing Rules	10	SIS Act
Holding Company	9	Corporations Act
Ultimate Holding Company	9	Corporations Act
Public Offer Superannuation Fund	18	SIS Act
MySuper Product	10	SIS Act
Registrable Superannuation Entity <u>(RSE)</u>	10	SIS Act
Regulated Superannuation Fund	19	SIS Act
Related Body Corporate	50	Corporations Act
RSE Licence	10	SIS Act
RSE Licensee	10	SIS Act
Subsidiary	46	Corporations Act
Superannuation Entity	10	SIS Act
Superannuation Fund	10	SIS Act



**SCHEDULE OF PARTIES**

**DAVID SHIMSHON**

Plaintiff

~~-and-~~

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

First Defendant

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

Second Defendant