

## NOTICE OF FILING

### Details of Filing

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File Title: R AND N HUNTER PTY LTD ATF THE HUNTER FAMILY  
SUPERANNUATION FUND v COUNT FINANCIAL LIMITED  
Registry: NEW SOUTH WALES REGISTRY - FEDERAL COURT OF AUSTRALIA



A handwritten signature in blue ink, reading "Sia Lagos".

Registrar

### Important Information

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

The date of the filing of the document is determined pursuant to the Court's Rules.



Form 17

Rule 8.05(1)(a)

## **Second Further Amended Statement of Claim**

No. VID565 of 2020

Federal Court of Australia

District Registry: Victoria

Division: General

### **R and N Hunter Pty Ltd (ACN 105 163 522) atf the Hunter Family Superannuation Fund**

Applicant

**Count Financial Limited (ACN 001 974 625)**

Respondent

### **Nature of Proceedings**

A. The Applicant brings this proceeding, pursuant to Part IVA of the *Federal Court of Australia Act 1976 (FCA)*, on their own behalf and on behalf of other persons who:

A.1 acquired, renewed or continued to hold Relevant Products (as that term is defined in paragraph 7 below) in respect of which Commissions (as that term is defined in paragraph 9 below) were paid from 21 August 2014;

A.2 received personal advice from a Representative (as that term is defined in paragraph 3 below);

A.3 are not a Justice, Registrar, District Registrar or Deputy District Registrar of the High Court of Australia or the Federal Court of Australia; and

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A.4 are not a Count Authorised Representative,

**(Group Members).**

B. For the purpose of this Further Amended Statement of Claim, the period from 21 August 2014 until 21 August 2020 inclusive is referred to as the “**Relevant Period**”.

C. As at the date of commencement, there are seven or more Group Members.

**A The Applicant**

1. The Applicant:

1.1 is a company duly incorporated in Australia and the trustee of the Hunter Family Superannuation Fund, and;

1.2 was during the Relevant Period, a retail client of the Respondent (**Count**) within the meaning of section 761G(1) of the *Corporations Act 2001* (Cth) (**the Act**).

**B Background facts – relevant to financial adviser and licensee claims**

2. During the Relevant Period, Count Financial Limited (**Count**):

2.1 was the holder of an Australian Financial Services License (**AFSL**);

2.2 was, until about October 2019 a subsidiary of the Commonwealth Bank of Australia (**CBA**);

2.3 carried on the business of providing financial services to clients (including the Applicant and Group Members), including:

(a) providing financial product advice within the meaning of s 766B(1) of the Act);

(b) providing personal advice within the meaning of s 766B(3) of the Act; and

(c) dealing in financial products, within the meaning of s 766C(2) of the Act.

3. During the Relevant Period:

3.1 Count operated a financial advice business by authorising self-employed **Member Firms** and individuals to provide financial services under Count's AFSL (**Representatives**);

3.2 Count did not employ any of its Representatives.

4. The financial services provided by the Representatives included, inter alia, advice about acquiring financial products issued by third parties, including CBA (**Relevant Products**, as that term is defined in paragraph 7 below).

5. The Representatives who provided financial services to the Applicant (and were authorised by Count to do so) were Centenary Financial Pty Ltd, Michael Williams, Arthur Duffield and Chad Hohnen (**Applicant's Representatives**).

6. Centenary Financial Pty Ltd employed Michael Williams, Arthur Duffield and Chad Hohnen.

7. The **Relevant Products**:

7.1 consist of policies of insurance and other financial products pursuant to which product issuer(s) agreed to pay Count initial and/or trail Commissions in relation to each of those products;

7.2 are each financial products within the meaning of s 764A(1) of the Act;

7.3 are comprised of three classes, being financial products, insurance products and platforms.

**Particulars**

(i) *The financial products are bank accounts, deposit products with financial institutions, commission paying securities and any other commission paying financial products;*

(ii) *The insurance products consisted of life insurance policies underwritten and issued by third parties including AMP Life and Commisure; and*

4.

(iii) *The platform products are any online platform and/or “wrap” style accounts allowing a client to view their investments online and purchase listed or other securities which paid Commissions.*

8. Prior to and during the Relevant Period, the Applicant acquired Relevant Products on advice from the Applicant’s Representatives, being:

8.1 in June 2003 the Applicant acquired a Macquarie Cash Management Account issued by Macquarie Bank Limited (**Macquarie CMA**) and the Applicant continued to hold the product until on or around 1 September 2015;

8.2 on 1 May 2009, the Applicant acquired a Total Care Plan product nominating Roslyn Hunter as the Insured with policy no. 1385978, issued by Mutual Life Assurance Society Limited and the Applicant continued to hold that product until at least 1 May 2020;

8.3 on 30 July 2009, the Applicant acquired a Total Care Plan product nominating Neal Hunter as the Insured with policy no. 1385467, issued by Mutual Life Assurance Society Limited and the Applicant continued to hold that product until at least 30 July 2020;

8.4 on 5 March 2018, the Applicant acquired an AMP Elevate Life Insurance Policy no. P811402855, issued by AMP Life Limited and the Applicant continued to hold that product until at least 19 February 2019.

(the Relevant Products acquired by the Applicant being the **Applicant’s Products**).

### **Particulars**

*The advice is pleaded at paragraphs 24 to 25 below.*

9. At all material times, the issuers of the Relevant Products had contractual arrangements with Count for the sale and distribution of the Relevant Products (**Distribution Agreements**) by which the issuer(s) agreed to pay Count:

9.1 initial and/or “trail” commissions in relation to the sale of the Relevant Product (**Commissions**); and

9.2 volume bonuses for the sale of some of the Relevant Products (**Rebates**).

### Particulars

*The Distribution Agreements for the Applicant's Products were the include agreements with Colonial, Macquarie; AMP and Comminsure, being COU.6000.0006.0047; COU.0006.0003.0020; COU.6000.0006.0013; RES.0001.0001.0073 and COU.6000.0006.0027 (together, the Applicant Products Distribution Agreements).*

9A. Under the terms of the Applicant Products Distribution Agreements ~~some or all of the Distribution Agreements~~, Count made one or more of the following promises:

9A.1 gave contractual undertakings to promote the Applicant's Products ~~Relevant Products~~:

9A.2 contractually promised to place the Applicant's Products ~~Relevant Products~~ on its APL (defined below at paragraph 13);

9A.3 contractually promised to require the Representatives to market and sell the Applicant's Products ~~Relevant Products~~ to their clients; and/or

9A.4 contractually promised to keep the terms of the agreement confidential, including from the Applicant ~~and Group Members~~.

### Particulars

(i) *Preferred Relationship Agreement with CommInsure and the words: "ensure that the CommInsure products listed in Part B of the Schedule and as amended from time to time are included on your APL": COU.6000.0006.0027 0028;*

(ii) *Cash Products Distribution Agreement between Macquarie Bank Limited and Count and the words "the Dealer Group promises to promote and distribute the Cash Products to its clients via the Authorised Representatives" ... "the issuer and the Dealer Group acknowledge and agree that the fees payable under clause 5 are confidential and will only be disclosed...": COU.6000.0006.0013.*

9AA. Under the terms of some or all of the Distribution Agreements, Count made one or more of the following promises:

9AA.1 gave contractual undertakings to promote the Relevant Products;

9AA.2 contractually promised to place the Relevant Products on its APL (defined below at paragraph 13);

9AA.3 contractually promised to require the Representatives to market and sell the Relevant Products to their clients; and/or

9AA.4 contractually promised to keep the terms of the agreement confidential, including from the Applicant and Group Members.

10. In relation to the Relevant Products, the Applicant and Group Members either paid:
- 10.1 Commissions directly to Count or the Representatives; or
  - 10.2 fees to Count or the Representatives, which were used to fund the payment of Commissions; ~~or~~
  - 10.3 premiums on insurance policies to life insurers, which were used to fund the payment of Commissions; or
  - 10.4 premiums or fees to product providers, which were used to fund the payment of Commissions.
11. Count received Commissions and/or Rebates from product providers in relation to the Relevant Products including the Applicant's Products.

#### **Particulars**

*The Applicant refers to the COMPAY spreadsheet recording Commissions paid: COU.0014.0001.0001.*

12. Count's revenue and business model was heavily reliant on receiving Rebates, Commissions and third-party payments from platform and product providers.

#### **Particulars**

- (i) *Member remuneration & Incentives Scheme, April 2016, CBA.0063.0631.7688;*

- (ii) *For FY2014, 64% of Count's revenue was derived from platform providers: CBA.0063.0586.2561;*
- (iii) *For FY2016, 41% of Count's revenue was derived from Rebates and Commissions: CBA.0063.0631.7688;*
- (iv) *Count's reliance on Rebates, Commissions and third-party payments is to be inferred from the total Commissions and rebate expenses paid out by Count during the Relevant Period of approximately \$345,000,000. The Applicant refers to the financial statements of Count Financial Limited during the Relevant Period and the description of commission expenses and rebate expenses therein.*
- (v) *The third-party payments are payments that are received by Count from third parties that are not adviser service fees, Commissions or Rebates. These are described as "commission stockbroking" and "other income" that are not incorporated into the definition of Rebates or Commissions: see, by way of example, CBA.0063.0631.7688 at CBA.0063.0631.7692.*

13. During the Relevant Period, Count maintained an Approved Product List (**APL**) containing life and risk insurance products, financial products and platforms that Representatives were authorised to recommend to clients without further approval steps.

#### *Count's Remuneration Model*

14. The Representatives were remunerated by Count passing on to them Commissions after deduction of any relevant licensee fee in respect of the Relevant Products.
15. The Commissions were a material component of each of the Representatives' annual remuneration.

#### **Particulars**

*In the case of the Applicant, Centenary received at least \$2,700,000 of Commissions during the Relevant Period, of which a large component were described as "ongoing or trail" Commissions.*

16. In addition to the payment of Commissions, Count also remunerated the Representatives through a points-based rewards system called the Contribution to Count (**CTC Program**) which provided benefits to the Representatives based on the



revenue they contributed to Count, as well as advice fees and Commissions paid by the Applicant and Group Members to Count (**Benefits**).

17. Count had different remuneration policies for Representatives that joined before and after 1 July 2013 (**Grandfathered Member Firms** joined before that date, **New Member Firms** joined after).

### **Particulars**

*The Applicant's Representatives were a Grandfathered Member Firm.*

18. Count's remuneration policy for Grandfathered Member Firms had the following features:
  - 18.1 remuneration was based on a rankings system with different tiers from "Abacus" to "All Star";
  - 18.2 the ranking attained depended on a calculation of the aggregate annual Gross Business Earnings (**GBE**) from adviser fees and Commissions;
  - 18.3 Count would deduct a specified percentage of Commissions and adviser service fees before passing them through to the Grandfathered Member Firm (**Splits**) and when calculating the Splits:
    - (a) Count did not take a Split on adviser service fees received for business placed on APL products (that is, all adviser service fees were passed through to the firm if the product was on the APL);
    - (b) When the Grandfathered Member Firm recommended a product outside the APL then Splits on adviser service fees were imposed by Count ranging from 12.5% to 30% (that is, Count retained 12.5% to 30% and the remainder was passed through to the firm);
    - (c) The Split imposed on Commissions was generally between 12.5% to 30% (that is, Count retained 12.5% to 30%).
  - 18.4 Only Grandfathered Member Firms were eligible to participate in the CTC Program.

**Particulars**

- (i) *Adviser Remuneration, October 2014, COU.2000.0397.1467.*
- (ii) *Count Remuneration Program, 15 December 2016, COU.2000.0435.1786.*
- (iii) *2014 Conflicted Remuneration: Team Briefings, 8 July 2014: CBA.0002.6466.4585.*

19. From on or around 1 July 2013 to on or around 1 July 2017 Count's remuneration policy for New Member Firms had the following features:

- 19.1 New Member Firms were not eligible to participate in the CTC Program;
- 19.2 Count would deduct a 15% Split on all financial planning revenue (that is, Count would retain 15% of all financial planning revenue);
- 19.3 Count would not pay any loyalty payments, cash rebates or performance rebates to New Member Firms;
- 19.4 In the event of Commissions being paid on a product that Count deemed to be conflicted remuneration, Count would not pass any of that revenue on to the New Member Firm and would retain the remuneration for itself.

**Particulars**

*New Member Firm – information and new process: COU.2000.0386.1476.*

20. On or around 1 July 2017, Count amended its remuneration policies for Grandfathered Member Firms and New Member Firms to:

- 20.1 adjust the Splits calculated on GBE;
- 20.2 pass on other fees and charges to Member Firms; and
- 20.3 adjust the scoring system for the CTC Program.

21. The effect of the 2017 changes referred to in paragraph 20 was to pass on additional fees and charges to Member Firms in order to improve Count's profitability but not to adjust the Commissions paid to Grandfathered Member Firms.

**Particulars**

(i) *Count Remuneration Policy, 1 July 2017, COU.0001.0001.4422.*

(ii) *Count Remuneration Policy, 1 July 2019, COU.0032.0012.0011.*

**C Facts relevant to adviser claims**

22. The Representatives, at all material times:

22.1 gave personal advice in relation to the Relevant Products; and

22.2 facilitated the sale of the Relevant Products to the Applicant and Group Members on behalf of Count.

23. The Applicant and Group Members were retail clients of Count during the Relevant Period within the meaning of s 761G(1) of the Act.

24. Between 20 May 2008 and 18 December 2013, the Applicant received personal advice from the Applicant's Representatives at a time which pre-dated the Relevant Period (**Pre-Relevant Period Advice**).

**Particulars**

*The Pre-Relevant Period Advice is recorded in a Statement of Advice and ten Records of Advice from 20 May 2008 to 18 December 2013.*

25. The Applicant received personal advice during the Relevant Period (**Relevant Period Advice**) as follows:

25.1 on or around 31 July 2015, from Centenary and Michael Williams which is partially documented in a File Note from Michael Williams and a Review Questionnaire of the same date, signed by Michael Williams;

25.2 on or around 4 August 2015, from Centenary and Michael Williams which is documented in a Record of Advice;

25.3 on or around 19 November 2015, from Centenary and Michael Williams which is documented in a Record of Advice;

- 25.4 on or around 19 ~~February~~ July 2016 2017, from Centenary and Michael Williams which is partially documented in a Review Questionnaire of the same date, signed by Michael Williams and a File Note;
- 25.5 on or around 19 July 2017, from Centenary and Michael Williams which is documented in a Record of Advice; and
- 25.6 on or around 5 March 2018, from Centenary and Chad Hohnen which is documented in a Statement of Advice.

### Particulars

- (i) *CEN.0001.0001.0240; CEN.0001.0001.0230; WIL.0001.0002.0007.*
  - (ii) *COU~~CEN~~.0005.0001.0933;*
  - (iii) *HUN.0001.0001.0512;*
  - (iv) *CEN~~COU~~.0001.0001.0324; HUN.0001.0001.0054;*
  - (v) *COU.0001.0001.3019;*
  - (vi) *COU.0005.0001.1266.*
26. The Relevant Period Advice referred to in paragraph 25 above did not disclose or contain, in any of the advice documents, emails or conversations (as recorded by the file notes):
- 26.1 that ongoing Commissions and Benefits were being received by the Applicant's Representatives in relation to the Applicant's Products;
  - 26.2 that the Applicant's Products would be materially cheaper if the Commissions were "dialled down" or "rebated";
  - 26.3 that the Applicant's Representatives could "dial down" or "rebate" those Commissions to the benefit of the Applicant, or that the Applicant's Representative's fees could be reduced by the amount of the Commissions and/or Benefits;
  - 26.4 the extent of a conflict arising as a result of the payment of Commissions and/or receipt of Benefits, including that:

12.

- (a) the Applicant's insurance products would be materially cheaper if the Commissions were "dialled down" or switched off;
- (b) the Contribution to Count program incentivised advisers to recommend products that promoted the interests of Count;
- (c) the Count remuneration policies incentivised advisers to only recommend products that were on the APL;
- (d) the Applicant's Representatives were ranked by Count on the revenue they generated for Count and financially rewarded for their revenue;
- (e) the Splits, and the variable remuneration received as a result of the Splits could give rise to a conflict.

26.5 the reason(s) for any recommendation to continue to pay Commissions or why that recommendation was in the Applicant's best interests;

26.6 that no additional benefits or services would be provided in exchange for the payment of Commissions;

26.7 any advice to stop paying the Commissions;

26.8 that it was possible to obtain the same products without paying Commissions;

26.9 that the adviser's advice was, or could reasonably be expected to be, influenced by the Commissions and/or Benefits;

26.10 that the Applicant's Products would attract a higher premium and/or cost than if the Commissions had been "dialled down", "switched off" or rebated to the Applicant; and

26.11 that the Applicant was paying Commissions in relation to the Applicant's Products in addition to ongoing service fees (as referred to in paragraph 37 below).

(together or severally, the **Advice Non-Disclosures**).

27. The personal advice received by the Applicant and some or all of the Group Members from the Representatives was deficient by reason of the Advice-Non Disclosures.
28. The Relevant Period Advice received by the Applicant and some or all of the Group Members contained:
- 28.1 An express recommendation to ~~continue to pay~~ or continue to pay Commissions; and/or
- 28.2 An implicit recommendation to pay or continue to pay Commissions; and/or-
- 28.3 an express or implicit recommendation to pay or continue to pay Commissions in addition to ongoing service fees (as referred to in paragraph 37 below).

### **Particulars**

- a. Macquarie CMA – the recommendation to continue paying Commissions is implied from:
- (i) The absence of any advice or recommendation in any of the Statements of Advice or Records of Advice post-acquisition to cease paying Commissions or consider a non-Commission paying alternative product in circumstances where Commissions were continuing to be charged;
  - (ii) The reference in the Record of Advice dated 4 August 2015 COU.0005.0001.0933 on page 2 to the advice being consistent with the Applicant’s needs, goals and objectives set out in a Statement of Advice dated 1 January 2007 (that is, before the Relevant Period); and
  - (iii) The reference in the Record of Advice dated 4 August 2015 COU.0005.0001.0933 on page 16 to the disclosure of fees and the Commissions applicable by reference to the Statement of Advice dated 01 Jan 2007.
- b. Total Care Plan 1385978 – the recommendation to continue paying Commissions is implied from:
- (i) The reference in the Record of Advice dated 4 August 2015 COU.0005.0001.0933 on page 2 to the Applicant’s desire to “review insurances given recent increases in

premiums” and the Scope of Advice as including “insurance planning” in circumstances where, at that time, the Total Care Plan 1385978 had been incepted;

- (ii) The conversations recorded in the file note dated on or around 31 July 2015 and the discussion of insurance therein;
- (iii) The insurance email and conversation recorded in the file note dated on or around 19 ~~February 2017~~ July 2016 and the discussion of insurance therein.

- c. Total Care Plan 1385467 – the recommendation to continue paying the Commissions is implied from the particulars concerning Total Care Plan 1385978.
- d. AMP Elevate Policy P811402855 – the recommendation to pay the Commissions and continue to pay the Commissions is express and/or implied from the Statement of Advice dated 5 March 2018 COU.0005.0001.1266 and the recommendation to acquire AMP Elevate Policy P811402855 on page 13 together with the Commission costs specified on page 16 (being trail Commission costs).

29. During the Relevant Period, Count had in place policies, licensee standards, corporate guidance documents and training that the Representatives were required to comply with **(Count Licensee Standards)**.

### **Particulars**

*In relation to the Applicant’s claim, the relevant licensee standards (at the time of the provision of the Relevant Period Advice) are: CBA.0015.0005.7479; CBA.0015.0005.8657; COU.0001.0001.2385; CBA.0015.0005.7479; CBA.0015.0005.8657; COU.0001.0001.2385; CBA.0015.0005.7516; CBA.0015.0005.8691; COU.0001.0001.2385; CBA.0015.0005.7516; CBA.0015.0005.8629; COU.0001.0001.2385.*

30. The Count Licensee Standards:

- 30.1 Identified Commissions and Benefits as payments which could reasonably be expected to influence personal advice;

- 30.2 Identified a potential conflict which existed when reviewing clients with grandfathered accounts due to the continued receipt of remuneration as a result of grandfathering that would otherwise be conflicted remuneration;
  - 30.3 Required Representatives to record in the Statement of Advice: the details of any conflict, the reason behind the recommendation, the benefits to the client, and why the recommendation was or is in the best interests of the client;
  - 30.4 Required any recommendation to continue to hold or invest additional funds into a grandfathered account to be supported by detailed records;
  - 30.5 Identified the Commissions and/or Benefits paid to the Applicant's Representatives as payments which might give rise to a conflict between the interests of the Applicant and those of the relevant Representative or the interests of the Client, requiring preference to be given to the Applicant's interests;
  - 30.6 Advised Representatives to disclose conflicts of interest;
  - 30.7 Advised Representatives to provide specific details of the service or advice affected by the conflict including any financial or other benefits which the Representatives or Client may receive if the advice is followed.
31. Prior to, and during the Relevant Period, the Applicant paid the following amounts in Commission to the Applicant's Representatives:
- 31.1 \$337.08 between 1 July 2012 to 1 September 2015 in relation to the Macquarie CMA;
  - 31.2 \$3,591.67 between 1 May 2013 to 1 May 2020 in relation to the Total Care Plan Policy No. 1385978;
  - 31.3 \$7,579.78 between 1 August 2012 to 1 August 2019 in relation to Total Care Plan Policy No. 1385467; and
  - 31.4 \$790.27 on 1 April 2018 in relation to the AMP Elevate – Life Policy No. P811402855.



32. The payment of the Commissions made the Relevant Products more expensive to acquire.

**Particulars**

- (i) *The Applicant refers to the PDS HUN.0001.0001.0062 issued by AMP (the product issuer) and the words “if you purchase an individual insurance policy from AMP through an AMP financial adviser, we will pay your financial adviser remuneration. The payment is already incorporated into your premium. Your financial adviser has the option to reduce their commissions, which in turn will reduce the premium.”*
- (ii) *Particulars of the Group Members will be provided following the initial trial.*
33. Further or alternatively to paragraph 30, “dialling down”, switching off or rebating the Commissions would have reduced the premiums and/or costs paid by the Applicant and Group Members in relation to the Relevant Products.

**Particulars**

*The Applicant and Group Members would have been able to obtain the identical Relevant Products for a materially cheaper premium if the Commissions had been dialled down, switched off or rebated. The Applicant refers to the PDS particularised at paragraph 32.*

*The Contract – Ongoing Service*

34. During the Relevant Period, Representatives promised to the Applicant and some Group Members that they would provide services on an ongoing fee basis that included:
- 34.1 A face-to-face interview periodically reporting on the portfolio’s performance, wealth protection, income needs, cash flow, budgetary position and tax position;
- 34.2 A portfolio report periodically; and
- 34.3 A copy of the Count Report periodically,
- (the **Ongoing Service Package**).

**Particulars**

*The periods were referred to in each relevant Ongoing Service Package.*

35. The Applicant and some Group Members accepted the offer from the Representatives to provide the Ongoing Service Package.

36. It was a term of the Ongoing Service Package that:

36.1 The Representative(s) would provide personal advice to the Applicant and Group Members periodically; ~~and~~

36.2 Any personal advice would comply with ss 961B and 961J of the Act; ~~and~~

~~36.3 The Representative(s) would exercise reasonable care and skill in providing services to the Applicant and Group Members through the Ongoing Service Package.~~

#### **Particulars**

(i) *The term in paragraph 36.1 is express and is found in the Ongoing Service Package(s); and*

(ii) *The term in paragraph 36.2 is implied by operation of law.*

37. The Applicant and Group Members paid ongoing service fees to Count during the Relevant Period for the Ongoing Service Package.

#### **Particulars**

*The Applicant paid approximately \$5,500 per annum.*

38. The Applicant and Group Members paid the ongoing service fees to Count in addition to paying the Commissions.

39. The Applicant and some Group Members were not provided with the ongoing service pursuant to the Ongoing Service Package on some (or all) of the periodic dates of the Ongoing Service Package.

#### **Particulars**

(i) *The Applicant was not provided with ongoing service in compliance with the terms of the Ongoing Service Package in 2014, 2015, 2016 and 2017, and was not provided with portfolio reviews*

or copies of the Court Report in the periods specified in the Ongoing Service Package.

(ii) Particulars of the Group Members will be provided following the initial trial.

41. In relation to the Applicant, Mr Williams gives evidence that he did not provide advice to the Applicant in:

41.1 2014, because the directors of the Applicant were uncertain as to what they wished to do with the Applicant's assets at the time; and

41.2 2016, because the directors of the Applicant were deliberating over the purchase of a property to be owned by the Applicant.

### **Particulars**

*Affidavit of Michael Williams affirmed on 18 June 2021 at [18]*

42. Despite the failure to give advice in 2014 and 2016, Centenary still received approximately \$5,500 per annum for the provision of advice under the Ongoing Service Package in addition to receiving further payments by way of Commissions.

43. At all material times:

43.1 The Applicant and some Group Members had a longstanding advice relationship with their Representatives;

43.2 The Representatives undertook to provide advice to the Applicant and Group Members, including by promising to provide ongoing advice (as the case may be);

43.3 The Representatives held themselves out as expert financial advisors and, in some cases, as expert accountants; and

43.4 The Applicant and Group Members relied on the advice of the Representatives and had a relationship of trust and confidence with their advisors.

### **Particulars**

- (i) *The Applicant's Representatives had a long-standing advice relationship with the Applicant, providing advice since 2008;*
- (ii) *The Applicant's Representatives contractually undertook to provide advice;*
- (iii) *The Applicant's Representatives held them out as expert financial advisors in the advice documents referred to above and, in some cases, as "Count Wealth Accountants".*
- (iv) *Count's Financial Services Guide, as updated from time to time;*
- (v) *Section 941B of the Corporations Act;*
- (vi) *Spurr Affidavit, LAY.001.001.1240 at [62].*

43A. In relation to some Group Members, but not the Applicant the terms of the Ongoing Service Package included (together or in any combination) the following services:

43A.1 an offer of a review of the Group Member's financial plan at least once per year;

43A.2 access to a Representative for assistance where reasonably required;

43A.3 administrative services;

43A.4 invitations to events and seminars;

43A.5 online access to a portal and periodic statements; and/or

43A.6 an offer of an estate planning review once per year.

#### **Particulars**

- (i) *Count pro-forma Ongoing Service Program Agreement CBA.0007.0006.1094;*
- (ii) *Defence of Count Financial dated 8 August 2023 at paragraphs [34] to [36].*

43B. The services referred to in paragraph 43A were not valuable services in the absence of the provision of any actual review (as opposed to "offers" of a review).

#### **D Facts relevant to licensee claim**

*What Count did and what Count knew – Count Licensee Standards*

44. During the Relevant Period, Count developed and/or implemented the Count Licensee Standards applicable to its Representatives.
45. Pursuant to agreements between the Representatives and Count, the Representatives were contractually bound to comply with the Count Licensee Standards.

**Particulars**

*For the Applicant's Representatives see COU.0002.0001.0108;  
COU.0001.0001.3422; COU.0001.0001.0001; COU.0001.0001.3404;  
COU.0001.0001.3422; COU.0002.0001.0327.*

46. During the Relevant Period, none of the Count Licensee Standards:
  - 46.1 Instructed Representatives to “switch off” or dial down the Commissions; or
  - 46.2 Instructed Representatives to rebate to the Applicant and Group Members the Commissions and/or Benefits;
  - 46.3 Instructed the Representatives to reduce the Representative’s fee by the amount of the Commissions and/or Benefits;~~or~~
  - 46.4 Provided the instruction referred to in paragraph 47 below; or;
  - 46.5 Instructed the Representatives to disclose the matters referred to in paragraph 26, being the Advice Non-Disclosures.
47. By no later than 24 February 2020, licensee standards issued by CBA to its network of financial advisers (**CBA Licensee Standards**) instructed CBA financial advisers that:
  - 47.1 When giving personal advice to clients in relation to commissioned financial products a conflict exists due to the continued receipt of Commissions; and
  - 47.2 In the circumstances set out in paragraph 47.1 above, the adviser must dial down or reduce their advice fee by the amount of the Commissions to remove the conflict (the **CBA Rebate Decision**).

**Particulars**

*CBA Licensee Standard entitled “prioritising client’s interests”:  
COU.0013.0001.0085*

48. Further, and in the alternative to paragraph 47, during the Relevant Period, the Count Licensee Standards required the Representatives to record in the client's Statement of Advice, and to identify, those matters alleged in paragraph 30 above.

*What Count did and what Count knew – QAA process*

49. During the Relevant Period Count monitored and supervised the Representatives via its Quality Advice Assurance (**QAA**) process.

50. During the Relevant Period, Count employees conducting a file review as part of the QAA process were issued with standard question sets by Count to assist in the performance of the file review (**Question Sets**).

51. The Question Sets at a date in 2015 presently unknown to the Applicant:

51.1 Only identified the disclosure of Commissions as a necessary practice in Statements of Advice and/or Records of Advice;

51.2 Identified that an adviser cannot comply with the best interests duty and conflicts priority rule merely by disclosing a conflict or getting the client to consent to a conflict;

51.3 Did not identify recommending customers remain in Commission paying products as a matter that gave rise to a conflict;~~or~~

51.4 Did not identify related party product recommendations as a matter that gave rise to a conflict;or;

51.5 Did not identify a need to disclose the matters referred to in paragraph 26, being the Advice Non-Disclosures.

52. The Question Sets as at 1 November 2018:

52.1 Identified the disclosure of Commissions as a necessary practice in Statements of Advice and/or Records of Advice;

52.2 Identified that an adviser cannot comply with the best interests duty and conflicts priority rule merely by disclosing a conflict or getting the client to consent to a conflict; and

52.3 Identified the following as conflict situations;

- (a) Recommending insurance, more insurance or replacement insurance where that results in additional remuneration for the adviser than would otherwise be the case;
- (b) Recommending a CBA group product or platform;
- (c) Recommending a hold on a product paying grandfathered Commissions.

53. During 2020 the Question Sets identified the disclosure of Commissions as a necessary practice.

*What Count did and what Count knew – BAC Review and remuneration supervision*

54. From on or around October 2018 to the end of the Relevant Period (**BAC Period**), Count implemented a preventative audit and review control of financial planning advice files referred to as the Best Interest Duty Assessment and Coaching Review (**BAC Review**). As part of the BAC Review:

54.1 Count required some advisers to submit their advice files and/or proposed client Statement of Advice to a Count vetting team which would assess compliance with Count Licensee Standards and regulatory requirements (**pre-vet advice**);

54.2 Between October 2018 to January 2019 the rate of pre-vet advice rejection for Count was between 85% to 100%; and

54.3 As at 11 March 2019, Representatives pass rate for BAC Review was as low as 4.9%.

55. In the premise of paragraph 54, the BAC Review put Count on notice during the BAC Period that 95% of its advisers were failing to comply with the Best Interests Duty.

56. Prior to the BAC Period, Count did not:

56.1 Include in the Question Sets a requirement to test whether advisers were engaging in conflicts by recommending a CBA group product or platform or recommending a hold on a product paying grandfathered Commissions; or

- 56.2 Implement a process similar to the BAC Review to ensure compliance Count Licensee Standards earlier in the Relevant Period.
57. As at February 2019, the BAC Review Process for adviser files which had been audited revealed that:
- 57.1 57% did not identify their clients objectives, financial situation and needs;
- 57.2 62% did not identify the subject matter of the advice sought by the client and did not identify the client's relevant circumstances;
- 57.3 93% did not make reasonable enquiries to obtain complete and accurate information from their clients;
- 57.4 11% did not assess whether they had the expertise or accreditation to provide the advice;
- 57.5 46% when recommending a financial product, did not ensure that the recommendation was reasonable nor investigate and compare the client's existing and requested financial products against any recommended products;
- 57.6 57% did not base all judgements in the advice process and the final advice on the client's relevant circumstances; and
- 57.7 61% did not take any other step that was in their client's interests given the client's relevant circumstances.
58. By on or around 13 May 2019, the number of Count and Financial Wisdom advisers who had received a BAC Review was 29% (or 215 advisers out of 746).

### **Particulars**

*Count, adviser services update, 24 May 2019, CBA.1004.0362.7413 at CBA.1004.0362.7481 (which document does not differentiate between Count and Financial Wisdom advisers).*

59. During the Relevant Period, Count provided some guidance to its Member Firms by issuing the Count Licensee Standards but did not provide guidance on the remuneration



arrangements between a Representative employed or engaged by a Member Firm, and the Member Firm itself.

### **Particulars**

*CBA, solutions requirement document, 15 October 2015, COU.2000.0404.5599*

60. During the Relevant Period, Count:

60.1 engaged in some supervision of its Member Firms compliance with their statutory duties (including the duties in ss 961B and 961J); but

60.2 did not supervise the remuneration of employees and/or contractors of Member Firms who themselves were Representatives.

### **Particulars**

(i) *The supervision provided by Count was limited to providing information to Member Firms on conflicted remuneration.*

(ii) *The Applicant refers to COU.2000.0404.5599 at COU.2000.0404.5607 and the words “there are no systems or preventative/detective controls to be implemented which will control the payments made between Corporate Authorised Representative and adviser”;*

(iii) *COU.2000.0404.5609 and the words “Count are limited to providing guidance to Member Firms around what is and what isn’t allowed. The pass through of conflicted remuneration may be allowed at firm level but not be permissible to pass through to the adviser. Also Count does not pay bonuses to an AR, these are paid by the firm – again, we are restricted to providing guidance here.*

*What Count did and what Count knew – the BCC Tool*

61. During the Relevant Period, Count utilised a software known as the Ban on Conflicted Commission Tool (**Count BCC Tool**) as a key control to detect instances of the Representatives receiving conflicted remuneration in contravention of Division 4 of Part 7.7A of the Act.

62. The Count BCC Tool did not identify Commissions as conflicted remuneration necessitating further investigation or explanation from the Representative who received the payment.
63. In relation to paragraph 62, the Count BCC Tool:
- 63.1 from the date of its implementation until at least 1 September 2018 “did not confirm any transactions as being legitimately conflicted”;
- 63.2 excluded identification of conflicted remuneration where the arrangement with the product provider or platform provider was entered into before 1 July 2013 and the relevant customer account was opened before 1 July 2014 or the relevant customer product was acquired before 1 July 2014;
- 63.3 applied filters which excluded remuneration which was in fact conflicted remuneration; and
- 63.4 up until at least 27 September 2018, had not achieved its purpose of properly identifying conflicted remuneration.

### **Particulars**

- (i) *Conflicts monitoring and responsibilities, 27 September 2018: CBA.0002.6545.0235;*
- (ii) *CBA WM Advice – Ban on Commissions, June 2018: COU.2000.0396.7352;*
- (iii) *CBA, Standard Operating Procedure, 30 August 2018, CBA.0002.6544.7710;*
- (iv) *CBA, WM Advice – Ban on Commissions, April 2015, COU.2000.0395.3568.*

### *What Count did and what Count knew – the industry (except Count) ceases Commissions*

64. During the Relevant Period, Count knew and it was a fact that:
- 64.1 CFPL was proposing to cease retaining Commissions;
- 64.2 CFPL customers would benefit from its decision to cease retaining Commissions;

- 64.3 CFPL's decision was in line with similar initiatives announced by NAB, BT and Macquarie Bank;
- 64.4 CFPL's decision would aim to satisfy community expectations;
- 64.5 The CFPL board would implement the CBA Rebate Decision by instructing all product providers to turn off all Commissions as soon as practicable;
- 64.6 Financial advisers receiving Commissions created a conflict;
- 64.7 Turning off Commissions would make it simpler for CFPL to manage conflicts of interest;
- 64.8 Turning off Commissions would make it easier for CFPL financial advisers when considering products that are paying Commissions to meet: the duty of priority they owe to customers, their best interests duty and their appropriate advice obligations;
- 64.9 Turning off Commissions would make it easier for wealth management advice entities within the CBA group to: manage conflicts of interest, and assist advisers in meeting their best interests duty;
- 64.10 By 11 March 2019, CBA non-bank financial planners had been through the BAC Review with a failure rate of approximately 95%;
- 64.11 For the period between October 2018 to January 2019 the rate of pre-vet advice rejection for Count was between 85% to 100%;
- 64.12 The Best Interests Duty Quality Advice Assurance checks on Count showed a pass rate of only 4.9% as of 1 March 2019.

### **Particulars**

- (i) *Memorandum from Michael Venter to Matthew Comyn (CBA CEO), 6 September 2018: CBA.1004.0168.2909;*
- (ii) *CFPL Board Paper, September 2018: CBA.0063.0045.7089;*

- (iii) *Mr Comyn was the CEO of CBA at the time of the CBA Rebate Decision and the CBA Board of Directors had governance responsibility of the Count Board;*
- (iv) *Michael Venter was the COO of CBA Wealth Management and it is inferred that he would have told Count of the matters pleaded;*
- (v) *On or around June 2018 BT announced that it will stop its advisers from receiving Commissions on financial products and would rebate Commissions to around 140,000 customers;*
- (vi) *On or around July 2018, Macquarie Bank announced that it will scrap Commissions for selling financial products to its clients;*
- (vii) *On or around September 2018, National Australia Bank announced that it would no longer accept Commissions from the bank's wealth management and investment product providers.*

65. When making the CBA Rebate Decision, CBA:

65.1 Acknowledged the majority of Commissions received in its wealth management advice business were received by its self-employed advice firms including Count; and

65.2 In the premise of 65.1, still decided that it would not apply the CBA Rebate Decision to Count.

### **Particulars**

*Memorandum from Michael Venter to Matthew Comyn, 6 September 2018, CBA.1004.0168.2909*

66. At the time of making the CBA Rebate Decision:

66.1 It was in the interest of Count and/or CBA to keep receiving the Commissions; and

66.2 It was in the interests of the Applicant and Group Members to cease paying the Commissions.

67. The decision to not apply the CBA Rebate Decision to Count was:

67.1 Approved by CBA CEO, Matthew Comyn, on 9 September 2018; and

67.2 Motivated by a desire to protect Count's revenue from the adverse impact that the CBA Rebate Decision would have had on Count's revenue; and/or

67.3 Motivated by a desire to protect the revenue of Count's top Member Firms if the CBA Rebate Decision had applied to Count; and/or

67.4 Not motivated by the best interests of the Applicant and Group Members.

### **Particulars**

- (i) *Memorandum from Michael Venter to Matthew Comyn, 6 September 2018, CBA.1004.0168.2909;*
- (ii) *CFPL Board Paper, September 2018, CBA.0063.0045.7089;*
- (iii) *The motivation referred to is also inferred from the documents referred to in these particulars and from conversations between Count CEO David Lane and Executive General Manager of wealth management advice for CBA, Marianne Perkovic, concerning the decision to retain the CTC Program as referred to in CBA.0063.1383.1288.*

### *What Count did and what Count knew – the CTC Program*

68. During the Relevant Period, Count knew and it was a fact that:

68.1 The CTC Program was of greatest benefit to Member Firms that generated the most revenue for Count;

68.2 By July 2018 the CBA Group Audit and Assurance Function (**GAF**) found that the CTC Program may result in:

- (a) A perceived conflict of interest;
- (b) Poor customer outcomes; and
- (c) Reputational damage for Count (as the licensee),

requiring changes to be made to the CTC Program to remove any conflict of interest.

68.3 CTC Points were awarded to Member Firms “based entirely on earnings and did not contain sufficient measures relating to the quality of advice” provided by Member Firms;

68.4 The CTC Program may subject Count and CBA to “unwanted regulatory attention” at a future time; and

68.5 The design of the CTC Program had the implication that there were “potential conflicts of interest between the licensee and its members and the best interests of the customer, which may lead to poor customer outcomes and reputational damage for the licensee”.

#### **Particulars**

- (i) *Member Remuneration Workshop, 28 January 2016: CBA.0063.1383.1288;*
- (ii) *GAF Internal Audit, July 2018: CBA.0002.6362.2665 at CBA.0002.6362.2689;*
- (iii) *CTCs – Discussion Draft, 27 January 2016: CBA.0063.1383.1265;*
- (iv) *Count Risk Environment November/December 2016: COU.2000.0099.4339;*
- (v) *The quotation marks indicate that the words are direct quotes from the documents.*

69. Despite the matters referred to in paragraph 68, Count maintained the CTC Program during the Relevant Period to protect its revenue and to improve Member Firm retention.

#### **Particulars**

- (i) *Count was aware that any changes to the CTC Program would affect its top Member Firms: CBA.0063.1383.1265;*

- (ii) *Count considered that the biggest risk to discontinuing the CTC Program would be losing top Member Firms: CBA.0063.1383.1265;*
- (iii) *Senior Count executives had conversations with Marianne Perkovic (Wealth Management Executive at CBA) on the issue of discontinuing the CTC Program and it was agreed that the CTC Program should be retained as the impact on Member Firms if it was cancelled would potentially be very negative, particularly amongst Count's best Member Firms: CBA.0063.1383.1288;*
- (iv) *Had Count lost some of its biggest Member Firms it would impact Count's revenue as Count would no longer receive fees from those Member Firms.*

70. During the Relevant Period, Count:

70.1 designed the CTC Program to maximise the Rebates, Commissions and third-party payments from platform and product providers that Count would receive; and

70.2 did not design or modify the CTC Program in a manner that encouraged advisers to promote the best interests of the clients.

### **Particulars**

*CBA.0063.0631.7688 at CBA.0063.0631.7708 records a conclusion to retain a remuneration policy for Grandfathered Member Firms (being the CTC Program) on the basis that any change could impact the top Grandfathered Member Firms on Count thereby impacting retention which, by extension, would impact the revenue Count would receive.*

*What Count failed to do to supervise its advisers*

71. At no stage during the Relevant Period did Count advise or instruct its Representatives that:

71.1 Commissions and/or Benefits could reasonably be expected to influence personal advice; or

71.2 Commissions and/or Benefits are payments which could give rise to a conflict between the interests of the adviser and/or the licensee, and the interests of the client; or

71.3 Advisers should not accept Commissions, alternatively, they should “dial down”, switch off or reduce the adviser’s fees by the amount of the Commissions; ~~or~~

71.4 Additional benefits or services should be provided in return for the payment of Commissions and/or Benefits.

~~71.5 they were required to disclose the matters referred to in paragraph 26, being the Advice Non-Disclosures.~~

72. During the Relevant Period, Count did not take steps to:

72.1 Monitor the remuneration arrangements between Member Firms and employees and/or contractors of the Member Firms, who themselves were Representatives beyond the guidance alleged in paragraphs 59 and 60 above; or

72.2 Supervise the remuneration arrangements between Member Firms and employees and/or contractors of the Member Firms who themselves were Representatives beyond the guidance alleged in paragraphs 59 and 60 above;

72.3 Ensure that the remuneration arrangements between Member Firms and employees and/or contractors of the Member Firms who themselves were Representatives: complied with the Act, or ensured that the Representatives acted in the best interests of the Applicant and Group Members.

### **Particulars**

*In relation to sub-paragraph 72.3 Count did not take steps to ensure that the remuneration arrangements between Member Firms and employees and/or contractors of the Member Firms who themselves were Representatives complied with ss 961B, 961J, 963G of the Act.*

73. None of the Count Licensee Standards:

73.1 Instructed the Representatives not to accept Commissions and/or Benefits;



73.2 Provided guidance about how to manage the conflict created by the Commissions and/or Benefits;

73.3 Required the Representatives to provide additional services to the Applicant and Group Members in return for the payment of Commissions and/or Benefits.

**E The misleading conduct**

74. Throughout the Relevant Period, Count by itself or through the ~~Count Authorised~~ Representatives represented to the Applicant and some or all of the Group Members that:

74.1 Count:

- (a) had, and would have, adequate systems and processes in place to address and manage the risks in their advice business generated by the Commissions and/or Benefits and the conflicts associated with the Commissions and/or Benefits;
- (b) had taken, and would take, reasonable steps to ensure that the Count Authorised Representatives complied with their obligations to act in the best interests of the Applicant and Group Members in relation to personal advice by ensuring that:
  - (i) any Commissions that it received (or its Count Authorised Representatives received) would be received in return for the provision of services;
  - (ii) any life insurance arranged on a client's behalf would be structured to ensure that the client paid the cheapest premium possible for the same product, in addition to being suitable for a client's financial circumstances, objectives and needs;
  - (iii) any services provided to client's would be provided in consideration for remuneration that was fair and reasonable and would be in the client's best interests.

- (c) had taken, and would take, reasonable steps to ensure that the Count Authorised Representatives complied with their obligations and prioritised the interests of the Applicant and Group Members over their own interests when giving personal advice;
- (d) had preferred, and would continue to prefer, the clients' interests over its own in the event of a conflict between those interests; and
- (e) had, and would have, adequate systems and processes in place to ensure ongoing services were provided.

74.2 The Applicant and Group Members were required to pay the Commissions in order to acquire the Relevant Products;

74.3 The Commissions would be paid in exchange for benefits or services, or additional benefits or services; and

74.4 The Commissions were not a cost to the Applicant and Group Members, but were paid by the product providers to Count and/or the Representatives.

(Collectively, on their own, or in any combination, the **Representations**)

### **Particulars**

- (i) *the representation in subparagraph 74.1(a) was implied and/or conveyed by silence as a reasonable person in the position of the Applicant would, in the circumstance of the giving of personal advice and receipt of ongoing fees and Commissions reasonably have expected Count to disclose if they had not done the matters the subject of the representations.*
- (ii) *the representation in subparagraph 74.1(b)(i) was implied. The Applicant refers to statements made in advice documents throughout the Relevant Period. Namely, COU.0005.0001.1266 at COU.0005.0001.1280 and the words "costs and other important information. This section summarises the upfront and ongoing costs you will pay for the preparation and implementation of my advice as well as the associated product fees". Those costs included Commissions. Further, COU.0005.0001.1266 at COU.0005.0001.1281 and the words "the insurance policy Commissions paid to Count from the*

*premiums you pay”, and “estimated ongoing product costs” at COU.0005.0001.1280 (which includes Commissions). HUN.0001.0001.0454512 and the words “please read this document in conjunction with your previous Statement of Advice and subsequent advice documents” and, from those previous advice documents (being incorporated by reference into HUN.0001.0001.0512 and also COU.0001.0001.3019), the various statements concerning the payment of fees and Commissions. Further the representation is implied from the fiduciary relationship.*

- (iii) *The representation in subparagraph 74.1(b)(ii) was implied. The Applicant refers to the following statements made in the advice documents throughout the Relevant Period: COU.0005.0001.1266 (alongside a recommendation to acquire a life insurance product that paid Commissions) “this statement of advice is based on our discussions about your current financial situation and your goals. My advice and recommendations are outlined in this Statement of Advice along with the reasons why I believe they are suitable”: COU.0005.0001.1266 at COU.0005.0001.1274 and the words “this section summarises our discussion of the recommendations that have been made to meet your needs and goals”. Further, the Applicant refers to conversations between Michael Williams and Neal and Ros Hunter at a review meeting held on or around 31 July 2015 to the effect that any life insurance obtained was for the cheapest possible cost, in addition to being suitable for the Applicant’s financial circumstances, objectives and needs and in a further conversation held on or around 19 February 2017 between Michael Williams and Ros Hunter. Evidence of the conversations is documented at CEN.0001.0001.0240 and CEN.0001.0001.0324.*
- (iv) *The representation in subparagraph 74.1(b)(iii) was implied and/or conveyed by silence as a reasonable person in the position of the Applicant would, in the circumstance of the giving of personal advice, the receipt of ongoing fees and Commissions and the fiduciary relationship alleged, reasonably have expected to disclose if they had not done the matters the subject of the representations (that is, if the remuneration was not fair and reasonable or otherwise in the client’s best interests).*
- (v) *The representation in subparagraph 74.1(c) was implied from Count holding the Representatives out as Representatives and*

*“Count Wealth Accountants”*: see COU.0005.0001.1266. Further, the representation is implied from the fiduciary relationship alleged.

- (vi) *The representation in subparagraph 74.1(d) was implied from Count holding the Representatives out as Count Authorised Representatives and, in some cases, “Count Wealth Accountants”*: see COU.0005.0001.1266. The representation was further implied from statements made in the advice documents provided to the Applicant and Group Members during the Relevant Period namely, that the Representatives were providing advice to the Applicant consistent with its objectives, goals and needs, and that the Representative had considered such objectives, goals and needs when providing the personal advice.
- (vii) *The representation in subparagraph 74.1(e) was implied and/or conveyed by silence as a reasonable person in the position of the Applicant would, in the circumstances of the giving of personal advice, the receipt of ongoing fees and Commissions and the fiduciary relationship alleged, reasonably have expected Count to disclose if they had not done the matters the subject of the Representations (that is if Count did, and would not, have adequate systems and processes in place to ensure ongoing services were provided).*
- (viii) *The representation in subparagraph 74.2 was implied from statements made in advice documents during the Relevant Period and/or conveyed by silence. In relation to the Applicant’s claim, the Applicant refers to (by way of example) the words “this section summarises the upfront and ongoing costs you will pay for the preparation and implementation of my advice as well as the associated product fees ... payments received from product providers ... the insurance policy commissions paid to Count from the premiums you pay as shown in the table below”: COU.0005.0001.1281. A reasonable person in the position of the Applicant would, in the circumstances of the giving of the personal advice, reasonably have expected the Representative to disclose if the Applicant had the option to elect to not pay the Commissions;*
- (ix) *The representation in subparagraph 74.3 was implied and/or conveyed by silence as a reasonable person in the position of the Applicant would, in the circumstances of the giving of personal advice, the receipt of ongoing fees and Commissions and the fiduciary relationship alleged reasonably have expected Count to*

disclose if they had not done the matters the subject of the Representation (that is, if no benefits or services, or no additional benefits or services would be provided in exchange for the Commissions). Further, a reasonable person in the position of the Applicant would expect the Representative to disclose if the Commissions were a payment in return for no service or no ongoing service”;

- (x) The representation in subparagraph 74.4 was express, implied and/or conveyed by silence. Insofar as it was express, the Applicant refers to (by way of example) the Statement of Advice dated 5 March 2018: COU.0005.0001.1267 and the words “your policy cost is the sum of your policy fee, stamp duty and premium associated with the policy” ... “payments received from product providers, the insurance policy commissions paid to Count from the premiums you pay as shown in the table below”. Insofar as it was implied and/or conveyed by silence, a reasonable person in the position of the Applicant would, in the circumstances of the giving of the personal advice, reasonably have expected the Representative to disclose if the Applicant had the option to elect to not pay the Commissions and/or if the Commissions were paid for by the Applicant, and not by the product provider.

75. During the Relevant Period, it was a fact that:

- 75.1 Representatives were permitted by Count (including through Count Licensee Standards) to continue to receive Commissions, even in circumstances of a conflict of interest;
- 75.2 Count did not require its Representatives (in any of its Count Licensee Standards, training or guidance) to:
- (a) provide any service in exchange for the Commissions;
  - (b) dial down, switch off or rebate Commissions on Relevant Products in circumstances where doing so would have made the product significantly cheaper for the client;
  - (c) charge Commissions or an ongoing service fee, rather than both or a combination of both;

- 75.3 Count permitted and incentivised (including through its remuneration arrangements) Grandfathered Member Firms to receive Commissions and/or Benefits;
- 75.4 Count instructed its Representatives that any conflict of interest could be managed by disclosure and did not do anything to unwind or ameliorate the effect of the conflict created by the receipt of the Commissions because it did not instruct its Representatives not to receive them and/or did not instruct its Representatives to “dial down”, rebate or switch off the Commissions, or to reduce the representatives fee by the amount of the Commissions or to avoid the conflict altogether.
- 75.5 Count:
- (a) For most of the Relevant Period, did not have any systems at all in place to monitor Representatives compliance with the terms of the Ongoing Service Package(s); ~~and~~
  - (b) Had widespread failings in its advice business relating to “fees for no service” conduct during the Relevant Period, with CBA announcing a remediation provision during the Relevant Period to address those failings which has escalated to \$520 million; and
  - (c) During the Relevant Period, permitted the advice given by the Representatives to be affected by the Advice Non-Disclosures by:
    - (i) not developing Question Sets that tested for the Advice Non-Disclosures; and
    - (ii) reason of the matters alleged in paragraphs 46, 73 and 75.1 to 75.4 above.

- 75.6 The Applicant and Group Members were not required to pay the Commissions in order to acquire the Relevant Products;
- 75.7 The Commissions were not paid in exchange for benefits or services, or additional benefits or services;
- 75.8 The Commissions were a cost to the Applicant and Group Members, but were paid by the product providers to Count and/or the Representatives;
- 75.9 By the Applicant Products Distribution Agreements ~~Distribution Agreements~~, Count had contractually promised to promote, market and sell the Applicant's Products ~~Relevant Products~~ in the premises referred to in paragraph 9A above;
- 75.10 By the Distribution Agreements, Count had contractually promised to promote, market and sell the Group Members' Relevant Products in the premises referred to in paragraph 9AA above;

(jointly and severally the **True Position**).

76. Further or alternatively to paragraph 75, Count knew each of the matters comprising the True Position from the time that each of the Representations were made.

### **Particulars**

*Count's knowledge is inferred from the fact that it:*

- (i) *Developed, published and distributed its own Count Licensee Standards (and so would have understood the contents of them);*
- (ii) *By reason of (i), it knew that its own Count Licensee Standards did not require its Representatives to do any of the matters in paragraph 75.2;*
- (iii) *It developed and implemented its own remuneration arrangements including (as alleged above) different arrangements for Grandfathered Member Firms (who were permitted to obtain Commissions and/or Benefits) and New Member Firms. Further, it designed its remuneration policies to maximise the amount of Commissions and/or Benefits that would be received (as identified below);*
- (iv) *Some of its Count Licensee Standards explicitly instructed its Representatives that any conflict of interest could be managed by disclosure;*

- (v) *Its former parent company (CBA) has made, and continues to make, public statements concerning widespread failings in its advice business relating to “fees for no service” conduct during the Relevant Period (including by way of announcement to the ASX).*

77. The Applicant and some Group Members relied on the Representations in deciding to:

77.1 acquire one or more of the Relevant Products;

77.2 continue to hold and/or renew one or more of the Relevant Products including at the price or premium that they paid; and/or

77.3 enter into or renew the Ongoing Service Package.

78. The Representations were:

78.1 made in relation to a financial product;

78.2 made in trade or commerce;

78.3 with respect to a future matter or matters.

## **F Contraventions**

79. In relation to the Applicant, the Pre-Relevant Period Advice included advice to acquire, renew or continue to hold most of the Applicant’s Products.

### **Particulars**

*That is, all the Applicant’s Products with the exception of the AMP Elevate Policy*

80. The Relevant Period Advice included advice to acquire the AMP Elevate Policy.

81. The Relevant Period Advice at paragraphs 25.2 (Macquarie CMA), 25.1, 25.2, 25.4 and 25.5 (Total Care Plans) contained advice to renew or continue to hold most of the Applicant’s Products.

### **Particulars**

- (i) *In relation to the Macquarie CMA, the advice to renew or continue to hold it is inferred from the facts matters and circumstances contained in*



*the personal advice including the record of advice dated 4 August 2015 (COU.0005.0001.0933) that expressly refers to the Pre-Relevant Period Advice which itself refers to the Macquarie CMT and recommends that cash be kept in that product (and, by extension, that it should continue to be held). The Pre-Relevant Period Advice must be examined because it is expressly referred to in the Relevant Period Advice.*

- (ii) *In relation to the Total Care Plan no. 1385978, the advice to renew or continue to hold it is inferred from the facts, matters and circumstances contained in the personal advice including the discussions concerning “insurance” between Michael Williams and the Applicant (with such discussions occurring at a time post the acquisition of Total Care Plan no. 1385978) including “discussed insurance ... happy to keep the current set up”, the extract of Commissions at COU.0014.0001.0001, the fact that Michael Williams effected the insurance cover on the Applicant’s behalf with Comminsure (including by renewal during the Relevant Period), the reference to the “goals and objectives” in the record of advice dated 4 August 2015 (COU.0005.0001.0933) including “wants to review insurances given recent increases in premiums” and the scope of advice which included “insurance planning”, and in the record of advice dated 19 July 2017 (COU.0001.0001.3019) the reference to the “scope of advice” including superannuation planning and retirement planning which, by extension, would have included insurance then held by the Applicant.*
- (iii) *In relation to Total Care Plan no. 1385467, the advice to renew or continue to hold it is inferred from the facts, matters and circumstances referred to in particular (ii).*

## **F.1 Breach of Contract – Ongoing Advice**

- 82. By reason of the matters pleaded at paragraphs 34, 35 and 37 Representatives including the Applicant’s Representatives owed a contractual obligation to provide ongoing advice to the Applicant and some Group Members.

83. By reason of the matters pleaded at paragraph 37, the Representatives did not comply with their contractual obligation to provide ongoing advice to the Applicant and some Group Members on some (or all) of the periodic dates of the Ongoing Service Package.

~~83A. The Representatives breached the contractual obligation pleaded at paragraph 36 by:~~

~~83A.1 failing to provide any benefit or service in consideration for the ongoing receipt of Commissions;~~

~~83A.2 failing to advise the Applicant and Group Members of the matters the subject of the Advice Non-Disclosures (referred to at paragraph 26) in breach of the obligation to exercise reasonable care and skill.~~

**Particulars**

~~*The Applicant was paying \$5,500 per annum as an ongoing service fee and further amounts in initial and trail Commissions but did not receive any service in consideration for paying the Commissions.*~~

85. The explanations provided by Mr Williams (as summarised at paragraph 41 above) for not complying with the contractual obligations are (if accepted):

85.1 not a defence to the claim for breach of contract; and

85.2 not a reason for Mr Williams and/or Centenary and/or Count to keep the fee it received for a service it did not provide.

86. In the premises of paragraphs 82 to 83:

86.1 the Representatives breached their contractual obligation to provide ongoing advice to the Applicant and some Group Members;

86.2 the Applicant and some Group Members claim damages from Count by reason of the breach alleged in paragraph 86.1, as the person responsible for the conduct of the Representatives in accordance with ss 917B and 917E of the Act.

## **F.2 Benchmark – the scope of the duties owed**

87. By reason of the matters pleaded at paragraphs 2 to 4, the Representatives owed a statutory obligation to the Applicant and Group Members to:

87.1 Act in the best interests of the Applicant and Group Members in relation to the personal advice under section 961B(1) of the Act (the **Best Interests Duty**);

87.2 Give priority to the interests of the Applicant and Group Members when giving personal advice in circumstances where the Representatives knew, or ought to have known, of the conflict between the interests of the Applicant, on the one hand, and the Representative's own interests and the interests of Count on the other under s 961J(1) of the Act (the **Conflicts Priority Rule**).

88. By reason of the matters pleaded at paragraphs 2 to 4, the Representatives owed a statutory obligation on and from 1 January 2020 to the end of the Relevant Period to comply with the FASEA Code of Ethics.

### **Particulars**

#### Section 921E of the Act

89. The benchmark of the steps to be taken by a reasonably competent financial adviser in relation to personal advice provided to a retail client during the Relevant Period (including the personal advice provided to the Applicant and Group Members) was as follows:

89.1 A reasonably competent financial adviser would have treated Commissions and Benefits as conflicted remuneration within the definition of s 963A of the Act (subject to any carveouts);

89.2 A reasonably competent financial adviser would have understood that Commissions could be dialled down, switched off or rebated back to the client;

- 89.3 A reasonably competent financial adviser would have complied with their legislative and professional obligations being the Corporations Act, Best Interests Duty, Appropriate Advice Duty, Conflicts Priority Rules, FASEA Code of Ethics and, if applicable and a member, the FPA Code of Professional practice;
- 89.4 A reasonably competent financial adviser would have complied with each of the duties in paragraph 89.3 in relation to Commissions, whether or not the Commissions were “grandfathered” or otherwise exempted from the ban in s 963 of the Act.
- 89.5 A reasonably competent financial adviser would have complied with licensee standards issued by the relevant licensee in relation to the payment of Commissions and/or Benefits.

(the **Benchmark**).

#### **Particulars**

- (i) *Expert Report of Paul Green dated 5 November 2021 (First Green Report) at 4.2.4 and 4.2.5;*
  - (ii) *First Green Report at 4.3.3;*
  - (iii) *First Green Report at 4.2.10 and the periods identified at paragraph 4.2.7;*
  - (iv) *First Green Report at 2.2.28, 2.2.29, 4.3.11 and 4.4.10;*
  - (v) *First Green Report at 4.9.1.*
90. Compliance with the Best Interests Duty in s 961B(1) of the Act required the following:
- 90.1 an adviser was required to put the financial interests of their client first in relation to any advice;
- 90.2 one of the ways an adviser can satisfy their Best Interests Duty is by reference to the “safe harbour steps” in s 961B(2) of the Act with the onus of proof demonstrating compliance with those steps resting on the adviser;

- 90.3 if the adviser was receiving Commissions, Benefits (or an ongoing service fee) and they were not providing a valuable service in exchange for these Commissions, Benefits (or ongoing service fees), then the financial adviser was required to refund the fee and/or terminate the ongoing service arrangement if it was no longer required or they weren't delivering the service;
- 90.4 where there was a conflict brought about by the existence of the ongoing Commissions, such a fee may impact upon the adviser's ability to meet the Best Interests Duty, including preferring no advice, where such advice may result in the continuation of an ongoing Commission (grandfathered or otherwise) rather than recommending a more appropriate product where such Commissions would not be received;
- 90.5 prior to the provision of advice (at the pre-engagement) level, the adviser would ensure that the client understands (at a minimum) the services available, the services to be provided, the method of remuneration and any conflicts of interest;
- 90.6 the adviser to understand that Commissions, including trailing Commissions, are not fees for no service. Financial advisers receiving ongoing trail Commissions continue to have an obligation to ensure the appropriateness of the product and the best interests of the client whilst they are in receipt of those Commissions. In the event that the financial adviser is not providing this service, then this should be clearly communicated to the client and the ongoing Commissions turned off, dialled down or rebated to the client;
- 90.7 records should be kept on file for the provision of advice including as a minimum: statements of advice/records of advice, detailed file notes, comprehensive fact-finding documents, emails and other correspondence, research and any other documents used in the provision of adviser recommendations to a client;

- 90.8 in the provision of personal advice, the adviser must outline in detail, through a written document (preferably an SOA) the remuneration, Commissions and other Benefits received by the adviser and other associated entities (or that they expect to receive). This should also include the reasoning why the adviser considers the advice (to either hold, retain, move or cease) to be appropriate for and in the best interests of the client; and
- 90.9 complying with the Benchmark.

### **Particulars**

- (i) *First Green Report at 2.2.17; 4.8.10;*
  - (ii) *First Green Report at 4.3.13;*
  - (iii) *First Green Report at 4.3.14;*
  - (iv) *First Green Report at 4.7.3;*
  - (v) *First Green Report at 4.7.4;*
  - (vi) *First Green Report at 4.8.5;*
  - (vii) *First Green Report at 4.8.13;*
  - (viii) *First Green Report at 4.8.14.*
91. Compliance with the Conflicts Priority Rule required the following:
- 91.1 in order to comply with s 961J an advice provider must first identify what interests they or their related parties have. An advice provider should not act to further their interests or those of one of their related parties over those of the client when giving the client advice. Where an advice provider is unable to prioritise the client's interests, the advice provider must not provide advice to the client;
- 91.2 the advice and recommendations to which the Commissions and/or Benefits apply are required to comply with s 961J of the Act, even if an exemption to the ban on conflicted remuneration applies;

- 91.3 an advice provider must not act to further their interests or those of one of their related parties over the client's interests when giving advice to the client;
- 91.4 in complying with this obligation, a financial adviser would identify what interests they or one of their related parties have and consider how a reasonable financial adviser without a conflict of interest would proceed;
- 91.5 the more material the conflict of interest is for the adviser or their related party, the more priority should be given to a client's interests;
- 91.6 if an adviser with a conflict of interest is unable to prioritise the interests of the client, the client should be notified that there is a conflict and decline to provide the advice or receive payment of Commissions;
- 91.7 an advice provider cannot comply with the Conflicts Priority Rule by disclosing a conflict of interest or getting the client to consent to a conflict;
- 91.8 Complying with the Benchmark.

#### **Particulars**

- (i) *First Green Report at 2.2.4; 2.2.5;*
  - (ii) *First Green Report at 4.3.11;*
  - (iii) *First Green Report at 4.4.5;*
  - (iv) *First Green Report at 4.4.6; 4.4.8 and 4.4.9.*
92. On and from 1 January 2020, the FASEA Code of Ethics as applied to a reasonably competent financial adviser operated in the following way and/or contained the following obligations:
- 92.1 Standard 3 of the FASEA Code provides that an adviser must not advise, refer or act in any other manner where the adviser has a conflict of interest or duty;
  - 92.2 Standard 7 of the FASEA Code provides that the client must give free, prior and informed consent to all benefits the adviser and their principal will receive in connection with acting for the client, including any fees for services that may be charged;

- 92.3 Except where expressly permitted by the Act, the advisor may not receive any benefits, in connection with acting for a client, that derives from a third party other than their principal;
- 92.4 The FASEA Code incorporates and expands upon the Best Interests Duty and the Conflicts Priority Rule. The FASEA Code advances the Conflicts Priority Rule by making it compulsory to refuse to act when there is a conflict of interest. This includes the obligation to cease the receipt of any conflicted remuneration and that the consideration of conflicted remuneration is essential to the continuance of the client/adviser relationship and must be considered, disclosed and removed;
- 92.5 Standard 3 of the FASEA Code provides no discretion to an adviser. After disclosing a conflict an adviser must not advise, refer or act in any other manner where there is a conflict of interest or duty. An adviser must satisfy themselves that any fees and charges that the client must pay to the adviser and/or the principal, and any Benefits that the adviser and/or principal receive, in connection with acting for the client are fair and reasonable and represent value for money for the client.

### **Particulars**

- (i) *First Green Report at 2.2.37;*
  - (ii) *First Green Report at 2.2.38;*
  - (iii) *First Green Report at 2.4.6, 4.3.15 and 4.4.17;*
  - (iv) *First Green Report at 4.4.16.*
93. Professional bodies and organisations (such as the Financial Planning Association or **FPA**) imposed professional obligations on financial advisers which give content to and inform the obligations in s 961B and 961J of the Act in the following way:
- 93.1 Effective from 1 July 2012 FPA members were banned from receiving Commissions and conflicted remuneration. If the relevant product does not permit the Commission to be switched off the members should consider rebating the Commissions to the client and charging a fee for service for the advice;



- 93.2 Each member has a fiduciary duty to their clients. The member must identify and act in accordance with his or her fiduciary duty to his or her client, giving effect to the duty of loyalty and the ‘not to profit without informed consent’ rule;
- 93.3 Each member must identify where his or her interests and duties conflict and where a duty may conflict with other duties. The members duty to his or her client is paramount and must prevail in the event of a conflict. The members must avoid or manage situations and relationships which create conflicts between interest and duty, or conflict between interest and duty. Some situations and relationships cannot be managed by disclosure, but must be avoided as a matter of integrity.

### **Particulars**

- (i) *The FPA is the most influential and appropriate guidance as stated in the First Green Report for the reasons given at paragraphs 2.3.1, 2.3.2, 2.3.3, 2.3.4, 2.3.5, 2.3.6, 2.3.12 and 4.2.1;*
  - (ii) *First Green Report at 2.3.8;*
  - (iii) *First Green Report at 2.3.10;*
  - (iv) *First Green Report at 2.4.7;*
  - (v) *First Green Report at 2.4.7.*
94. Financial advisers (including the Representatives) owed the obligation to comply with the Bests Interests Duty in the following circumstances:
- 94.1 in relation to the provision of personal advice;
  - 94.2 when receiving Commissions;
  - 94.3 when offering to provide ongoing personal advice or contractually promising to provide personal advice;
  - 94.4 when providing personal advice; and
  - 94.5 when holding themselves out as being the ‘adviser’ to the Applicant and Group Members in statements and correspondence.

### Particulars

*On its proper construction, each of the acts pleaded in this paragraph are acts “in relation to the advice” within the meaning of s 961B(1) of the Act.*

#### F.3 Fiduciary duty

95. By reason of the matters pleaded at paragraph 43, Count and the Representatives:
- 95.1 undertook to provide the Applicant and ~~some~~ Group Members with financial advice during the Relevant Period;
- 95.2 held out to the Applicant and Group Members that the Representatives had expertise in providing financial advice; and
- 95.3 were able to control the flow of information to the Applicant and ~~some~~ Group Members in relation to the Relevant Products.
96. By reason of the matters pleaded at paragraphs 2, 22, 23 and 43, the Applicant and all or some Group Members were dependent on the financial advice given to them by the Representatives on behalf of Count in deciding what Relevant Products to acquire, renew or continue to hold.
97. During the Relevant Period, there was an actual conflict between the interests of the Applicant and ~~some~~ Group Members on the one hand, and Count’s own interests and the interests of the Representatives on the other.

### Particulars

- (i) *It was in the interests of the Applicant for the payment of Commissions payable on Relevant Products to be reduced or cease;*
- (ii) *It was in Count’s own interests to maximise the ~~continue to receive as many~~ Commissions, Rebates and other benefits it earned (pursuant to the Applicant’s Products Distribution Agreements or otherwise) by reason of the sale of the Applicant’s Products to the Applicant ~~Relevant Products to Group Members~~;*

- (iiA) It was in Count's own interests to maximise the Commissions, Rebates and other benefits it earned (pursuant to Distribution Agreements or otherwise) by reason of the sale of the Relevant Products to Group Members;
- (iii) *It was in the interests of the Representatives to continue to receive as many Commissions as possible and/or the various payments made or Benefits received under the CTC Program;*
- (iv) It was in the Representative's interests to recommend products on the APL and in Count's interests for the Representatives to recommend products on the APL and for the Representatives to persuade the Group Members to accept their recommendations;
- (v) Count and the Representatives therefore had a personal financial interest in the Representatives' recommendation of products on the APL being accepted by the Group Members to whom personal advice was given;
- (vi) *The Applicant otherwise refers to the affidavit of Michael Thomas Williams affirmed on 18 June 2021 at paragraphs [43] to [48] and the Count Licensee Standards (which acknowledge the conflict of interest) referred to at paragraph 29 above, being CBA.0015.0005.7479; CBA.0015.0005.8657; CBA.0015.0005.7516; CBA.0015.0005.8691; CBA.0015.0005.8629.*

98. By reason of the matters at paragraphs 43, 95 , and 96, Count and/or the Representatives owed a fiduciary duty to the Applicant and all or some Group Members:

98.1 to avoid the real or substantial possibility of conflicts between the interests of the Applicant, on the one hand, and their own interests and the interests of Count, on the other as referred to in paragraph 97; and

98.2 not to improperly use their position to gain an advantage for themselves and/or Count.

99. Count breached its fiduciary duty owed to the Applicant and Group Members by:

99.1 Failing to avoid the conflict referred to in paragraph 98.1; and/or

- 99.2 Improperly using their position to gain a benefit for themselves; and/or
- 99.3 Continuing to permit the pursuit and receipt of Commissions by the Representatives; and/or
- 99.4 Not extending the CBA Rebate Decision to Count; and/or
- 99.5 Continuing to pursue the receipt of Commissions, Rebates and third-party payments from platform and product providers by Count; and/or
- 99.6 Designing its remuneration policies to maximise Rebates, Commissions and third-party payments from platform and product providers that Count would receive.

**Particulars**

*The benefit to Count was the receipt of the Commissions, Rebates and Benefits (or some of them).*

- 100. Further or alternatively to paragraph 99, the Representative's breached their fiduciary duty owed to the Applicant and Group Members by:
  - 100.1 Failing to avoid the conflict referred to in paragraph 98.1; and/or
  - 100.2 Improperly using their position to gain a benefit for themselves and/or Count.

**Particulars**

*The benefit to the Representatives was the receipt of the Commissions and Benefits*

**F.4 Statutory contraventions – breach of ss 961B and 961J**

- 101. The Representatives failed to meet the Benchmark (including the obligations in paragraph 89.3 to comply with the Best Interests Duty and the Conflict Priority Rule) during the Relevant Period on the basis that the:
  - 101.1 advice provided was defective by reason of the Advice Non-Disclosures;
  - 101.2 Representatives failed to “dial down”, switch off, rebate or otherwise turn off the Commissions;

- 101.3 Representatives failed to reduce the ongoing service fees paid pursuant to the Ongoing Service Package by the amount of the Commissions;
- 101.4 Representatives continued to receive Commissions in circumstances where:
- (a) no extra benefits or services were being provided in exchange for the Commissions;
  - (b) in relation to the Applicant and some Group Members the Ongoing Service Package was being paid for in consideration for benefits or services; and
  - (c) there was an ongoing conflict by reason of the receipt of the Commissions.
- 101.5 Relevant Products acquired by the Applicant and Group Members were more expensive because of the Commissions; ~~and~~
- 101.6 Representatives failed to comply with Count's Licensee Standards as alleged below; and
- 101.7 ongoing service fees were being received, and retained, in relation to some Group Members (but not the Applicant) in circumstances where an "offer" of a review had been made to a Group Member, but not subsequently accepted through rejection or acquiescence of that offer by the Group Member.

### **Particulars**

- (i) *Paragraph 101.1 contravened the Benchmark as the advice referred to (with the Advice Non-Disclosures) did not meet the standard referred to in paragraphs 90.1, 90.2, 90.3, 90.4, 90.5, 90.6, 90.7, 90.8 (961B), 91.1, 91.3, 91.4, 91.6, 91.7 (961J) and 93 (FPA).*
- (ii) *Paragraph 101.2 contravened the Benchmark as the failure to remove the Commissions did not meet the standard referred to in paragraphs 90.1, 90.2, 90.3, 90.6 (961B), 91.3, 91.6 (961J), 92 (FASEA), 93 (FPA).*

- (iii) *Paragraph 101.3 contravened the Benchmark as the failure to reduce ongoing service fees by the amount of the Commissions did not meet the standard referred to in paragraphs 90.1, 90.3, 90.4, 90.6 (961B), 91.3, 91.5, 91.6, 91.7 (961J), 92 (FASEA), 93 (FPA).*
- (iv) *Paragraph 101.4 contravened the Benchmark as the continued receipt of Commissions in those circumstances did not meet the standard referred to in paragraphs 90.1, 90.3, 90.6 (961B), 91.3, 91.6, 91.7, 92 (FASEA), 93 (FPA).*
- (v) *Paragraph 101.5 contravened the Benchmark as the acquisition of a higher cost product (because of Commissions) did not meet the standard referred to in 90.1, 90.2, 90.4 (961B), 91.1, 91.3 (961J) 92 (FASEA), 93 (FPA).*
- (vi) *Paragraph 101.6 contravened the Benchmark as the failure to comply with the licensee standards referred to at paragraph 29 above was a failure to meet the Benchmark referred to in paragraph 89.5.*
- (vii) *Paragraph 101.7 contravened the Benchmark (including the obligation referred to in paragraph 90.3) by the Representative and/or Count retaining ongoing service fees in circumstances where no valuable service was being provided, as an “offer” of a review without an actual review is not a valuable service as alleged in paragraph 43B.*
102. The Relevant Period Advice to the Applicant was deficient by reason of the Advice Non-Disclosures referred to at paragraph 26 above.
103. Each of the matters in paragraphs 101 and 102 was a breach of the Benchmark.
104. Each of the matters in paragraphs 101 and 102 was a breach of the obligations in ss 961B and 961J.
105. The Relevant Period Advice breached Count’s Licensee Standards referred to at paragraph 29 above in the following ways (as pleaded in paragraphs 106 to 113 below).
106. The Record of Advice dated 4 August 2015 was deficient by reason of the Advice Non-Disclosures referred to at paragraph 26 above.

107. Further to paragraph 106, the Record of Advice dated 4 August 2015 only disclosed Commissions by reference to a Statement of Advice dated 1 January 2007 which did not exist and, if it did, was 8 years old (being the Pre-Relevant Period Advice).
108. The personal advice provided on or around 31 July 2015 was deficient by reason of the Advice Non-Disclosures and did not contain any disclosure of the Commissions.
109. The Record of Advice dated 19 November 2015 was deficient by reason of the Advice Non-Disclosures and:
  - 109.1 Did not contain any disclosure of the Commissions;
  - 109.2 Contained an express representation that there were no new benefits or other conflicts of interest other than those previously disclosed in the SOA dated 20 May 2008 (being the Pre-Relevant Period Advice) when, in truth, the continued receipt of Commissions was a conflict of interest that had not been previously disclosed.
110. The personal advice provided on or around 19 February 2017 was deficient by reason of the Advice Non-Disclosures and did not contain any disclosure of the Commissions.
111. The Record of Advice dated 19 July 2017 was deficient by reason of the Advice Non-Disclosures and did not contain any disclosure of the Commissions.
112. The Record of Advice dated 5 March 2018 was deficient by reason of the Advice Non-Disclosures.
113. Each of the matters in paragraphs 106 to 112 was a breach of the Benchmark.
114. Each of the matters in paragraphs 106 to 112 was a breach of the obligations in ss 961B and 961J.

**F.5 Causation – adviser claims**

115. If the Representatives had complied with their statutory duties under ss 961B and 961J of the Act, they would have:

- 115.1 Advised the Applicant to stop paying the Commissions and/or that the Commissions and/or Benefits could be “dialled down”, “switched off” or rebated to the client, or that the adviser’s fee could be reduced by the amount of the Commissions and/or Benefits;
- 115.2 Dialled down, switched off or rebated the Commissions to the Applicant throughout the Relevant Period;
- 115.3 Disclosed to the Applicant that there was a conflict arising as a result of the payment of Commissions and that the adviser’s advice was, or could reasonably be expected to be, influenced by the Commissions and/or Benefits;
- 115.4 Told the Applicant and Group Members that Relevant Products acquired by them could be obtained without paying Commissions and that the Commissions increased the premiums and/or costs they would pay;
- 115.5 Maintained a record of: (i) the reason behind any recommendation to pay or continue to pay the Commissions; (ii) the benefits to the client of paying or continuing to pay Commissions; and (iii) why any recommendation to pay or continue paying the Commissions is in the best interests of the client;
- 115.6 identified and acted in accordance with the adviser’s general law fiduciary duty to their client, by not accepting Commissions in circumstances of a conflict of interest; and
- 115.7 ~~instructed the Representatives to~~ disclosed the matters the subject of paragraph 26, being the Advice Non-Disclosures.

### **Particulars**

- (i) *First Green Report at 4.3.4;*
- (ii) *First Green Report at 4.3.11, 4.10.2;*
- (iii) *First Green Report at 4.4.2;*
- (iv) *First Green Report at 4.4.14, 4.4.15;*
- (v) *First Green Report at 2.4.7.*



116. Count is and was at all material times responsible for the conduct of the Representatives and liable to the Applicant and Group Members in respect of the loss or damage suffered by the Applicant and Group Members as a result of the conduct of the Representatives, pursuant to ss 917B and 917E of the Act, as:

116.1 In acting as pleaded in this Second Further Amended Statement of Claim, the Representatives were engaging in conduct on which the Applicant could reasonably be expected to rely within the meaning of s 917A(1)(b) of the Act; and

116.2 The Applicant and Group Members relied in good faith upon the conduct of the Representatives within the meaning of s 917A(1)(c) of the Act.

117. By reason of the matters pleaded in paragraph 116, the Applicant and Group Members have the same remedies pleaded in this Second Further Amended Statement of Claim against Count as they have against the Representatives, by reason of s 917F of the Act.

#### **F.6 Statutory contraventions – breach of s 961L by Count**

118. Count was required by s 961L of the Act to take reasonable steps to ensure that its Representatives complied with ss 961B and 961J of the Act.

120. Section 961L of the Act required the following steps to be taken by a reasonably competent financial services licensee in the Relevant Period:

120.1 A licensee should have been aware of the FASEA Code and ensured that its advisers complied with the FASEA Code to the extent that it was operational during the Relevant Period;

120.2 A licensee would have understood that:

- (a) The carve out of life insurance products from the FOFA reforms (that is, grandfathering) had no bearing on the obligations under s 961L of the Act during the Relevant Period;
- (b) The obligations under s 961L are triggered in relation to Commissions and/or Benefits that were not characterised as conflicted remuneration during the Relevant Period;

- (c) Grandfathered or exempted Commissions and/or Benefits were reasonably capable of influencing the provision of personal advice;
- (d) Grandfathered or exempted Commissions and/or Benefits gave rise to conflicts of interests.

120.3 A licensee would have understood that:

- (a) The way in which the adviser receives Commissions and Benefits has no bearing on an adviser's statutory obligation to their clients;
- (b) Those obligations are not reduced or qualified in any way because the receipt of the Commissions and/or Benefits is made through a party other than their client
- (c) The same principle applies equally to the licensee and their section 961L obligations;
- (d) The fact that the licensee received Commissions and/or Benefits from the product provider and then pass them on to their advisers (directly or through a Corporate Authorised Representative) does not affect their s 961L obligations.

120.4 A reasonably competent financial services licensee would have given the following instructions or guidance to its advisers:

- (a) It would have identified the Commissions and/or Benefits as payments which could reasonably be expected to influence personal advice;
- (b) It would have identified the Commissions and/or Benefits as payments which could give rise to a conflict between the interests of the advisers and/or the licensee, and the interests of the client;
- (c) It would have given guidance as to how its advisers should ensure that they acted in the best interests of clients in relation to the receipt of Commissions and/or Benefits;

- (d) It would have given guidance as to how to manage any conflict created by the Commissions and/or Benefits;
- (e) In its licensee standards:
  - (1) it would have clearly identified and explained the influence and conflict issues in a way which conformed with the standard set out in the legislation and ASIC Guidance;
  - (2) later versions of the licensee standards should have included references to the FASEA Code, to the extent that it was in force during the Relevant Period, and how the FASEA Code should be read in conjunction with the licensee standards.
  - (3) would have explained:
    - (A) How its advisers should ensure that they acted in the best interests of clients in relation to the receipt of Commissions and/or Benefits;
    - (B) How to manage the conflict created by the Commissions and/or Benefits;
    - (C) Any conflicts created by the APLs, the presence of products issued by related parties on that list, or any financial incentive to recommend products on the APLs;
    - (D) That Commissions and/or Benefits were payments which could reasonably be expected to influence personal advice;
    - (E) that the receipt of ongoing service fees was not permitted where no services were provided;
    - (F) Disclosure and consent did not resolve any conflict of interest arising as a result of the payment of the Commissions and/or Benefits; and

(G) That Commissions and/or Benefits should not be accepted, dialled down, switched off, rebated or that the adviser's fees should be reduced by the amount of the Commissions.

(f) A licensee would have understood that ASIC reports and regulatory guides as well as other industry guidance and submissions to parliamentary inquiries and committees (including the PJC Inquiry and Royal Commission) would have provided useful guidance to licensees in relation to their obligations to comply with regulatory requirements and that a licensee would have considered regulatory reforms and ASIC guidance as part of monitoring compliance with instructions or guidance given to its advisers.

120.5 A licensee would have regularly trained, monitored and supervised its advisers in relation to the best interests of clients and how to manage any conflicts created by Commissions and/or Benefits with such monitoring to include auditing adviser files and pre-vetting, Corporate Governance, monitoring the media, engaging external specialist consultants, monitoring commission rates, lapse rates and churning, monitoring adviser's commission earnings, loyalty programs, monitoring and benchmarking APLs, ensuring the licensee has an appropriate ratio of trained and qualified staff to provide guidance to advisers and complaints monitoring;

120.6 A licensee would regularly review the products on its APL and:

(a) consider whether it is still appropriate that advisers recommend these products and regularly benchmark these products and run commissions reports which would inform the licensee of the dominant products into which advisers are placing business;

(b) designed its APL with a focus on products that were suitable for its customers' goals, needs and objectives without the influence of Commissions, Rebates and third-party payments from platforms; and

- (c) designed its APL in a manner that encouraged advisers to promote the best interests of clients absent the influence of the Rebates, Commissions and third-party payments.

120.7 A licensee would have actively monitored and supervised the payment of Commissions and/or Benefits to all advisers and Authorised Representatives as part of their remuneration model;

120.8 A licensee would have ensured that it controls the conflicts caused by Commissions and/or Benefits in its remuneration model by ensuring that it does not enter into arrangements with product providers which pay Commissions and/or Benefits (and by not doing so irrespective of any grandfathered status);

120.9 A licensee would have avoided the conflict by switching Commissions and/or Benefits off at the product provider level, licensee level or adviser level and in doing so lower the costs of the client's financial products;

120.10 A licensee would have regularly monitored compliance with its licensee standards;

120.11 A licensee would have identified via its instructions and guidance that ongoing fees cannot be taken for services not rendered and that, if that occurs, they must be remediated.

120.12 A licensee should have:

- (a) Applied the same remuneration policy to all of its Representatives
- (b) Informed itself of the remuneration arrangements of its Representatives (including Corporate Authorised Representatives and any of their financial advisers);
- (c) Supervised how Corporate Authorised Representatives remunerated any of their financial advisers by way of Commissions and/or Benefits.

**(961L Benchmark).**

## **Particulars**

- (i) *Expert Report of Mr Rhett Das dated 5 November 2021 (**First Das Report**) at 166.*
- (ii) *First Das Report at 185.*
- (iii) *First Das Report at 75; Expert report of Mr Bardy relied on by Count (**Bardy Report**) at 88(bb)(iii).*
- (iv) *Bardy Report at 112.*
- (v) *Bardy Report at 120 and 121.*
- (vi) *First Das Report at 215.*
- (vii) *First Das Report at 201.*
- (viii) *First Das Report at 245.3; Bardy Report at 115(h) and 125(g).*
- (ix) *First Das Report at 76, 151, 166, 226; Bardy Report at 60(a)-(e).*
- (x) *First Das Report at 28;*
- (xi) *First Das Report at 301 and 302;*
- (xii) *First Das Report at 362;*
- (xiii) *First Das Report at 285, 286, 287;*
- (xiv) *First Das Report at 265;*
- (xv) *First Das Report at 355.*
- (xvi) *In relation to subparagraphs 120.4(e)(1) and 120.4(f) the ASIC Guidance, ASIC reports, regulatory guides, other industry guidance and submissions to parliamentary inquiries and committees and regulatory reforms are those referred to in the First Das Report, a copy of which will be provided upon request.*

121. In the premises of subparagraphs 121.1 to 121.6 below, Count's systems and processes failed to meet the s 961L Benchmark on the basis that:

121.1 The QAA process failed to meet the 961L Benchmark by reason of the defects in paragraph 122 below.

- 121.2 The BAC Review process failed to meet the 961L Benchmark by reason of it only applying to a sub-set of advisers and not being implemented earlier (paragraphs 123 and 124).
- 121.3 The APL failed to meet the 961L Benchmark by reason of its design as referred to in paragraph 128 below.
- 121.4 The remuneration policies failed to meet the 961L Benchmark by reason of their content and the pass-through of Commissions to Grandfathered Member Firms (paragraphs 131 to 133).
- 121.5 The Count Licensee Standards failed to meet the 961L Benchmark by permitting the pursuit and receipt of Commissions, Rebates and third-party payments, and not explaining the pleaded matters (paragraphs 136 and 137).
- 121.6 The monitoring of the Count Licensee Standards failed to meet the 961L Benchmark by reason of the high failure rates uncovered as part of the BAC Review process and otherwise (138).

***Particulars***

- (i) *Count's systems and processes identified in paragraphs 121.1 to 121.6 (and as pleaded in paragraphs 122 to 138) did not reflect the 961L Benchmark as Count should have done each of the things pleaded in paragraphs 124 (BAC Review), 129 (APL), 134 (Remuneration), 136 (licensee standards) and 139 (ongoing advice) which are required by the 961L Benchmark at 120.5, 120.6, 120.7, 120.8, 120.9, 120.10 and 120.11.*

***QAA process***

122. The QAA process referred to at paragraphs 49 and 50 suffered from a number of control gaps being:
- 122.1 There was little control over Member Firms by any head office staff owing to the structure of Count;
- 122.2 Count practice development managers did not perform supervision and monitoring of Representatives;

122.3 There was no consistent or formal collation of data from available sources such as paraplanning, compliance and member services; and

122.4 For most of the Relevant Period:

- (a) the QAA process and pre-vet file review were the only source of supervision and monitoring;
- (b) pre-vet file review was suspended for part of the Relevant Period pending implementation of the BAC Review.

#### **Particulars**

- (i) *Count, "control gap assessment", 19 November 2014, COU.2000.0389.6242;*
- (ii) *Count "key risk indicators", May 2018, CBA.0002.6652.1341.*

#### *BAC Review process*

123. The BAC Review process:

123.1 During the Relevant Period, only subjected a number less than 29% of Representatives to a file review; and

123.2 In the premise of the low rates above, uncovered high instances of a failure to comply with s 961B of the Act when a file was reviewed.

#### **Particulars**

- (i) *The Applicant does not presently know what percentage of Representatives were subject to a file review (as opposed to Count and Financial Wisdom Representatives combined).*
- (ii) *Count, Board Paper, 11 March 2019, CBA.1004.0362.2541 at CBA.1004.0362.2600 and 2612.*

124. Count should have implemented a similar process to the BAC Review:

124.1 At the start of the Relevant Period;

124.2 That assessed 100%, or close to 100%, of Representatives; and



124.3 That used the Question Sets in force from November 2018.

125. If Count implemented a similar process to the BAC Review:

125.1 At the start of the Relevant Period;

125.2 That assessed 100% of Representatives; and

125.3 That used the Question Sets in force from November 2018,

then Count would have uncovered from on or around the beginning of the Relevant Period high rates of a failure to comply with Count Licensee Standards across its business.

### **Particulars**

*It follows, as a matter of logic, that Count would have uncovered high rates of a failure to comply because, of less than 29% of Representatives that were subject to a BAC review (as referred to in paragraph 123), approximately 95% failed the review.*

126. The particular deficiencies that Count would have uncovered pursuant to paragraph 125 (adopting the Question Sets in force from November 2018) are:

126.1 A failure to comply with the best interests duty and conflicts priority rule, by advisers disclosing conflicts or getting the clients to consent to a conflict (rather than avoiding it altogether); and/or

126.2 A failure to identify the matters at paragraphs 52.3(a) and 52.3(c) as conflict situations.

127. If Count had taken the steps at paragraph 125 then Count would not have made some or all of the profits from the Commissions paid by the Applicant and Group Members.

### **Particulars**

*As it applies to the Applicant, a BAC Review in accordance with paragraph 125 would have uncovered that the Representatives' recommendation to acquire Relevant Products would have resulted in more remuneration for them (by way of Commissions), and a higher insurance premium to the Applicant, in circumstances where the Applicant was already paying ongoing services fees (on top of Commissions).*

*APL Process*

128. Count:

128.1 Designed its APL to maximise the Rebates, Commission and third-party payments from platform and product providers that Count would receive;

128.2 Designed its remuneration policies to maximise the Rebates, Commissions and third-party payments from platform and product providers that Count would receive;

128.3 Did not design the APL in a manner that encouraged advisers to promote the best interests of clients; and

128.4 Did not design the remuneration policies in a manner that encouraged advisers to promote the best interests of clients.

**Particulars**

(i) *Count, member remuneration & incentives, 6 April 2015, CBA.0063.0631.7688 at CBA.0063.0631.7703 and the words "current REM system not designed for non-APL use";*

(ii) *CBA, solutions requirement document, 20 August 2015, COU.2000.0401.1292 at COU.2000.0401.1298 and the description of pass-through revenues therein and COU.2000.0401.1292 at COU.2000.0401.1299 which has a "business objective" to "identify and document opportunities to utilise existing pre-01/07/13 arrangements to maximise benefits payable to new advisers after 01/07/13";*

129. Count should have:

- 129.1 Designed its APL with a focus on products that were suitable for the Applicant and Group Members goals, needs and objectives without the influence of Commissions, Rebates and third-party payments from platforms; and
- 129.2 Designed its APL in a manner that encouraged advisers to promote the best interests of clients absent the influence of the Rebates, Commissions and third-party payments.
130. If Count had designed its APL in accordance with paragraph 129 then Count would not have made some or all of the profits from the Commissions paid by the Applicant and Group Members.

*Remuneration policies*

131. During the Relevant Period, Member Firms had different remuneration policies applicable to Representatives that were employed by the Member Firm.

**Particulars**

*In respect of the Applicant, employees of Centenary could receive a bonus of up to 30% of any upfront Commissions that had been written across superannuation and insurance products. Centenary also received trail Commissions which were retained by Centenary. The Applicant further refers to the affidavit of Mr Williams affirmed on 18 June 2021 at paragraphs [42] to [48.]*

132. During the Relevant Period, Count's remuneration policies for Grandfathered Member Firms and New Member Firms:
- 132.1 Did not link remuneration to the quality of financial advice;
- 132.2 Linked remuneration to the volume of business written;
- 132.3 Relied on a volume-based system of remuneration calculated on GBE which included adviser fees and Commissions (irrespective of any grandfathered arrangements); and
- 132.4 Encouraged the inflation of CTC Points for Grandfathered Member Firms given their volume-based nature.

**Particulars**

*Count, member remuneration and incentives scheme, 30 April 2015, CBA.0063.0586.2561.*

133. During the Relevant Period, Count's remuneration policies for Grandfathered Member Firms:

133.1 Incentivised their Member Firms to recommend products on Count's APL;

133.2 Discouraged their Member Firms from recommending products that were not on Count's APL; and

133.3 Financially rewarded their Member Firms for recommending products on Count's APL.

**Particulars**

*The Applicant refers to the Splits payable for the recommendation of products that were on Count's APL and the higher Splits payable for the recommendation of products that were not on Count's APL.*

134. Count should have:

134.1 Applied the same remuneration policy to all of its Representatives, including those that were employees of Member Firms;

134.2 Applied the New Member Firm policy for all Representatives including Grandfathered Member Firms;

134.3 Informed itself of the remuneration arrangements of its Representatives (including Corporate Authorised Representatives and any of their financial advisers);

134.4 Supervised how Corporate Authorised Representatives remunerated any of their financial advisers by way of Commissions and/or Benefits.

**Particulars**

(i) *First Das Report at 361 to 364.*

(ii) *Bardy Report at 186(a) and 186(b).*

135. If Count had done the matters referred to in paragraph 134 then:

135.1 The Applicant and Group Members would not have paid the Commissions, or the Commissions would have been rebated to the Applicant and Group Members;

135.2 The Representatives would not have received the Commissions or they would have rebated them to the Applicant and Group Members;

135.3 The Applicant would have acquired the identical Relevant Products for a materially cheaper cost.

*Count Licensee Standards*

136. Count's Licensee Standards should have explained:

136.1 How its advisers should ensure that they acted in the best interests of clients in relation to the receipt of Commissions and/or Benefits;

136.2 How to manage the conflict created by the Commissions and/or Benefits;

136.3 Any conflicts created by the APLs, the presence of products issued by related parties on that list, or any financial incentive to recommend products on the APLs;

136.4 That Commissions and/or Benefits were payments which could reasonably be expected to influence personal advice;

136.5 The identification that the receipt of ongoing service fees was not permitted where no services were provided;

136.6 Disclosure and consent did not resolve any conflict of interest arising as a result of the payment of the Commissions and/or Benefits; and

136.7 That Commissions and/or Benefits should not be accepted, dialled down, switched off, rebated or that the adviser's fees should be reduced by the amount of the Commissions.

**Particulars**

- (i) *First Das Report at 262, 264; Bardy Report at 179(e).*
- (ii) *Bardy Report at 179(a),(c),(d).*
- (iii) *First Das Report at 19.*

137. Throughout the Relevant Period, Count did not take reasonable steps to ensure that the Representatives were complying with Count Licensee Standards as:

137.1 the personal advice provided to the Applicant and Group Members during the Relevant Period was not in compliance with Count Licensee Standards by reason of the matters pleaded in paragraphs 105 to 112;

137.2 during the Relevant Period there was minimal (if any) review, correction, modification or amendment by Count of any of the personal advice received by the Applicant and Group Members; and

137.3 in relation to the Applicant, Michael Williams was identified by Count as a Representative who failed to comply with Count Licensee Standards but no sanctions were imposed by Count for non-compliance.

**Particulars**

- (i) *Count, monthly quality advice meeting, 13 September 2018;*
- (ii) *Email from Linda Bainbridge to Belinda Light, 23 September 2019, COU.2000.0272.2941;*
- (iii) *Email from Michael Spurr to Linda Bainbridge and others, 26 September 2019: COU.2000.0273.2582.*

138. Further, during the Relevant Period Count did not take reasonable steps to ensure that the Representatives were complying with Count Licensee Standards as:

138.1 The tools used by Count to detect conflicted remuneration did not detect the payment of Commissions and/or Benefits;

138.2 The Count BCC Tool suffered from a number of deficiencies as referred to in paragraphs 61 to 63;

138.3 During the Relevant Period there were the following gaps in Count's conflicted remuneration training program:

- (a) The induction training in place covering conflicted and alternative remuneration was not mandatory for practice development managers to attend;
- (b) The group-wide conflicts of interest online learning focussed on conflicts of interest as they arise more generally but did not outline specific requirements on conflicted and alternative remuneration;
- (c) There was no ongoing training program in place for advisers and practice development managers of Count.

138.4 By 11 March 2019, CBA non-bank financial planners (including Count) had been through the Best Interests Duty and Coaching Review with a failure rate of approximately 95%;

138.5 For the period between October 2018 to January 2019 the rate of pre-vet advice rejection for Count was between 85% to 100%;

138.6 Count did not ensure that the Representatives provided fee disclosure statements to the Applicant and Group Members during the Relevant Period as required by s 962S (1) of the Act.

#### *Ongoing advice*

139. Count should have:

139.1 Identified that the receipt of ongoing service fees was not permitted where no services were provided;

139.2 Provided instructions and guidance to that effect to its advisers about providing personal advice to retail clients which constituted, or included, advice to acquire, renew or continue to hold products that attracted Commissions and/or Benefits.

#### **Particulars**

*First Das Report at 349; Bardy Report at 170.*

140. Each of the matters in paragraphs 121, 122, 123, 128, 131, 136, 137, 138 and 139 was a breach of the 961L Benchmark.
141. Each of the matters in paragraphs 121, 122, 123, 128, 131, 136, 137, 138 and 139 was a breach of the obligation in s 961L of the Act.

#### **F.7 Causation**

142. If Count had taken reasonable steps to ensure that its Representatives complied with ss 961B and 961J of the Act, it would have from the start of the Relevant Period:
- 142.1 Instructed its Representatives (through Count Licensee Standards or otherwise) that Commissions should not be received where no services were being provided in exchange for those Commissions;
- 142.2 Developed tools and processes to ensure that its Representatives were complying with Count Licensee Standards; and
- 142.3 Implemented remuneration arrangements that prohibited the pursuit and receipt of Commissions to Member Firms and Representatives that were employees and/or contractors of Member Firms.
143. If Count had taken the steps in paragraph ~~142~~ 169 then Count would not have made some or all of the profits from the Commissions paid by the Applicant and Group Members.

#### **F.8 Misleading Conduct**

144. The Representations were continuing representations throughout the Relevant Period.
145. By reason of the True Position ~~and/or Count's knowledge of the True Position and/or Count's failure to disclose the True Position,~~ the Representations were:
- 145.1 Misleading or deceptive, or likely to mislead or deceive, in contravention of s 18(1) of the ACL;
- 145.2 Misleading or deceptive, or likely to mislead or deceive, ~~in~~ in contravention of s 12DA(1) of the ACL;



145.3 In relation to a financial product or a financial service that was misleading or deceptive, or likely to mislead or deceive, in contravention of s 1041H of the Act;

145.4 Representations with respect to a future matter or matters which lacked reasonable grounds contrary to s 769C of the Act.

145A. Further and in the alternative, by reason of Count's failure to disclose the True Position to the Applicant, Count engaged in conduct that was:

145A.1 Misleading or deceptive, or likely to mislead or deceive, in contravention of s 18(1) of the ACL;

145A.2 Misleading or deceptive, or likely to mislead or deceive, in contravention of s 12DA(1) of the ACL;

145A.3 In relation to a financial product or a financial service that was misleading or deceptive, or likely to mislead or deceive, on contravention of s 1041H of the Act.

145AA. Further and in the alternative, by reason of Count's failure to disclose the True Position to Group Members, Count engaged in conduct that was:

145AA.1 Misleading or deceptive, or likely to mislead or deceive, in contravention of s 18(1) of the ACL;

145AA.2 Misleading or deceptive, or likely to mislead or deceive, in contravention of s 12DA(1) of the ACL;

145AA.3 In relation to a financial product or a financial service that was misleading or deceptive, or likely to mislead or deceive, on contravention of s 1041H of the Act.

146. By paying the ongoing fees and Commissions, the Applicant and some or all of the Group Members each suffered loss as a result of the contraventions pleaded in paragraph 145 above.

146A. Had Count disclosed the matters the subject of the True Position to the Applicant, and some or all of the Group Members the Applicant would not have paid the Commissions and/or ongoing fees.

146AA. Had Count disclosed the matters the subject of the True Position to some or all Group Members, those Group Members would not have paid the Commissions and/or ongoing fees.

147. By reason of the matters in paragraphs 144 to 0A, Count is liable to compensate the Applicant and some or all of the Group Members for the loss or damage suffered by reason of the misleading conduct.

#### **Particulars**

*Section 1041I(1) of the Act, section 12GF(1) of the ASIC Act and section 236(1) of the ACL.*

148. The Applicant and Group Members suffered loss or damage by reason of the breaches of ss 961B, 961J and 961L alleged above.

149. Count is liable to compensate the Applicant and Group Members for the loss or damage suffered by reason of the statutory contraventions, including profits.

#### **Particulars**

*Section 961M of the Corporations Act*

150. The Applicant and Group Member suffered loss or damage by reason of the breaches of fiduciary duty.

151. Count is liable to compensate the Applicant and Group Members for the loss or damage suffered by reason of the breach of fiduciary duty, including an account of profits if so elected.

152. The Applicant and some Group Members claim damages for breach of contract from Count as alleged in paragraph 86.2.

**Particulars**

The loss for breach of contract includes:

- (i) the whole of the fees paid or payable under the contract;
- (ii) alternatively, part of the fees paid or payable under the contract;
- (iii) any other fees charged by the Representative or Count that are referable to the provision of advice services (including the licensee advice fee);
- (iv) the Commissions.

**G Receipt of Conflicted Remuneration**

153. On and from 1 July 2013, Count and the Authorised Representatives were prohibited from accepting conflicted remuneration.

**Particulars**

*Sections 963(1), 963E and 963G(1) of the Act*

154. During the Relevant Period, conflicted remuneration was defined by s 963A(1) of the Act to mean any benefit, whether monetary or otherwise, given to a financial services licensee, or a representative of a financial services licensee, who provides financial product advice to persons as retail clients that, because of the nature of the benefit or circumstance in which it is given:
- 154.1 Could reasonably be expected to influence the choice of financial product recommended by the licensee or representative to retail clients; or
  - 154.2 Could reasonably be expected to influence the financial product advice given to retail clients by the licensee or representative.
155. During the Relevant Period, the prohibition on accepting conflicted remuneration was subject to certain grandfathering provisions as set out in:
- 155.1 Chapter 7, Division 4 of the Act;
  - 155.2 Section 1528(1) of the Act; and
  - 155.3 The Corporations Regulations (2001) (Cth),

**(Grandfathering Provision(s)).**

156. The effect of the Grandfathering Provisions in force during the Relevant Period was that conflicted remuneration could continue to be received by Count and/or the Authorised Representatives (subject to any other statutory or other duties) in one or more circumstances set out in the Grandfathering Provisions.
157. In the premises, the Authorised Representatives and/or Count were prohibited from accepting conflicted remuneration unless a Grandfathering Provision applies (subject to any other statutory or other duties).
158. During the Relevant Period, Count incorrectly advised its Authorised Representatives that conflicted remuneration could continue to be paid on arrangements entered into between an Authorised Representative and the client where the arrangement was entered into prior to 1 July 2014.

**Particulars**

*2014 Conflicted Remuneration: Team Briefings, 8 July 2014, CBA.0002.6466.4585 and the description of the situation “from 1 July 2013 to 30 June 2014”; the reference to Commissions being conflicted remuneration if paid on products after 1 July 2014 at CBA.0002.6466.4589; the reference to “client account set up before 1 July 2014” at CBA.0002.6466.4591; the words “Count can continue to receive VBB, but only where ... payment is in respect of accounts opened prior to 1 July 2014”.*

159. During the Relevant Period, the Authorised Representatives received conflicted remuneration in the circumstances alleged in paragraph 158.

**Particulars**

*The Authorised Representatives received conflicted remuneration where the arrangement with the client was entered into prior to 1 July 2014.*

160. In the premise, the Authorised Representatives who received conflicted remuneration in the circumstances alleged in paragraph 158 breached s 963G(1) of the Act.

161. During the Relevant Period, any conflicted remuneration received by Count on behalf of New Member Firms and/or unadvised clients was retained by Count in full pursuant to the remuneration policies pleaded above.

**Particulars**

*The Applicant refers to COU.2000.0386.1476 and the words “all (non-conflicted) revenue is to be passed onto the new Member Firm at an 85/15 split and must be passed through Head Office for processing. All banned/conflicted commissions will be retained by Head Office i.e no split – Count gets 100%”.*

162. In the premise of paragraph 161, the receipt by Count of conflicted remuneration on behalf of New Member Firms was a breach of s 963E of the Act.
163. During the Relevant Period, Count was required to take reasonable steps to ensure that its Authorised Representatives did not accept conflicted remuneration pursuant to s 963F(1) of the Act.
164. During the Relevant Period Count failed to take reasonable steps to ensure that its Authorised Representatives did not accept conflicted remuneration by providing the incorrect advice to its Authorised Representatives as alleged in paragraph 158 above.
165. Some Group Members suffered loss or damage by reason of the matters alleged in paragraphs 153 to 164 above.
166. By reason of the matters alleged in paragraphs 153 to 164 Count is liable to compensate some Group Members for the loss or damage suffered by reason of the receipt of conflicted remuneration.



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Signed by Martin del Gallego, Partner

Lawyer for the Applicant

This pleading was prepared by Piper Alderman, Thomas Bagley and Blake O'Connor (counsel), settled by ~~Jan Pike SC~~ Christopher Withers SC.

**Certificate of lawyer**

I Martin del Gallego certify to the Court that, in relation to the statement of claim filed on behalf of the Applicant, the factual and legal material available to me at present provides a proper basis for each allegation in the pleading.

Date: 12 March 2024

A handwritten signature in blue ink, consisting of a stylized 'M' followed by a long horizontal stroke that curves upwards at the end.

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Signed by Martin del Gallego

Lawyer for the Applicant